UNITED STATES REPORTS

VOLUME 365

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1960

JANUARY 23 THROUGH APRIL 17, 1961

WALTER WYATT
REPORTER OF DECISIONS

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.*

EARL WARREN, Chief Justice.
HUGO L. BLACK, Associate Justice.
FELIX FRANKFURTER, Associate Justice.
WILLIAM O. DOUGLAS, Associate Justice.
TOM C. CLARK, Associate Justice.
JOHN M. HARLAN, Associate Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
CHARLES E. WHITTAKER, Associate Justice.
POTTER STEWART, Associate Justice.

RETIRED

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

ROBERT F. KENNEDY, Attorney General.[1]
ARCHIBALD COX, Solicitor General.[2]
JAMES R. BROWNING, Clerk.
WALTER WYATT, Reporter of Decisions.
T. PERRY LIPPITT, Marshal.
HELEN NEWMAN, Librarian.

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*Notes on p. iv.

NOTES.

[1] The Honorable Robert F. Kennedy, of Massachusetts, was nominated to be Attorney General by President Kennedy on January 20, 1961; the nomination was confirmed by the Senate on January 21, 1961, and he was commissioned and took the oath of office on the same day. He was presented to the Court on February 20, 1961. (See *post,* p. VII.) He succeeded The Honorable William P. Rogers, who resigned effective January 20, 1961.

[2] The Honorable Archibald Cox, of Massachusetts, was nominated by President Kennedy to be Solicitor General on January 21, 1961; the nomination was confirmed by the Senate on January 23, 1961, and he was commissioned and took the oath of office on January 24, 1961. He was presented to the Court on February 20, 1961. (See *post,* p. VII.) He succeeded The Honorable J. Lee Rankin, who resigned effective January 23, 1961.

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.)

PRESENTATION OF THE ATTORNEY GENERAL AND THE SOLICITOR GENERAL.

SUPREME COURT OF THE UNITED STATES.

MONDAY, FEBRUARY 20, 1961.

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

Mr. Oscar H. Davis, First Assistant Solicitor General, presented *The Honorable Archibald Cox,* of Massachusetts, Solicitor General of the United States.

THE CHIEF JUSTICE said:

"Mr. Solicitor General, the Court welcomes you to the performance of the important duty with which you are specially charged, the duty of representing the Government at the Bar of this Court in all cases in which it asserts an interest. Your commission will be recorded by the Clerk."

Solicitor General Cox presented *The Honorable Robert F. Kennedy,* Attorney General of the United States.

THE CHIEF JUSTICE said:

"Mr. Attorney General, the Court welcomes you to the performance of the important duties which devolve upon you as the chief law officer of the Government, and as an officer of this Court. Your commission will be recorded by the Clerk."

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1960.

FEDERAL POWER COMMISSION *v.* TRANSCONTINENTAL GAS PIPE LINE CORP. ET AL.

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

No. 45. Argued November 15, 1960.—Decided January 23, 1961.*

A public utility company in New York City contracted for the direct purchase of natural gas from producers in Texas, not for resale but for consumption under its own boilers, and it arranged with a pipeline company for transportation of the gas to New York City. The pipeline company applied to the Federal Power Commission for a certificate of public convenience and necessity under § 7 (e) of the Natural Gas Act and offered proof, which was not challenged, that its application met all the conventional tests. The Commission denied the certificate after considering, *inter alia,* the desirability of the particular end use to which this gas would be put, the possibility of pre-emption of pipeline capacity and gas reserves by sales to industrial users, the price agreed upon, and the effect of this and similar future transactions on the price and availability of natural gas generally. *Held:* The Commission did not exceed its authority or abuse its discretion in denying the certificate on the basis of these considerations. Pp. 3–31.

(a) The desirability of the use to which the gas would be put and the possibility of pre-emption of pipeline capacity and gas

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*Together with No. 46, *National Coal Association et al.* v. *Transcontinental Gas Pipe Line Corp. et al.,* also on certiorari to the same court.

reserves by sales to industrial users were properly of concern to the Commission in passing on this application. Pp. 8–22.

(b) In considering this application, it was proper for the Commission to consider the effect which the high price charged in the sale here involved would have on future field prices for natural gas. Pp. 23–28.

(c) The Commission did not err by taking cognizance of considerations *dehors* the record in concluding that widespread direct sales at high prices probably would result in price increases. Pp. 28–30.

(d) It cannot be said that the Commission acted irrationally in concluding that the evidence offered by the purchaser was insufficient to establish that its use of the gas was justified by the need to reduce air pollution. P. 30.

271 F. 2d 942, reversed.

Solicitor General Rankin argued the cause for petitioner in No. 45. With him on the briefs were *Assistant Attorney General Doub, Alan S. Rosenthal, Anthony L. Mondello, John C. Mason, Howard E. Wahrenbrock, Robert L. Russell, David J. Bardin, Samuel D. Slade* and *Willard W. Gatchell.*

Jerome J. McGrath argued the cause for petitioners in No. 46. With him on the brief were *Robert M. Landis, Robert E. Lee Hall* and *Welly K. Hopkins.*

Randall J. LeBoeuf, Jr. and *Richard J. Connor* argued the cause for respondents. With them on the briefs were *John T. Miller, Jr., James B. Henderson, William N. Bonner, Jr., Thomas F. Brosnan, Seymour B. Quel* and *Francis I. Howley.*

Briefs of *amici curiae,* urging reversal in No. 45, were filed by *William M. Bennett* for the State of California et al.; *T. J. Reynolds, L. T. Rice, Henry F. Lippitt II, Milford Springer, Joseph R. Rensch, W. James MacIntosh, J. David Mann, Jr.* and *William W. Ross* for the Southern California Gas Co. et al.; *Paul L. Adams,* Attorney General of Michigan, *Samuel J. Torina,* Solicitor

General, and *A. C. Stoddard,* Assistant Attorney General, for the Michigan Public Service Commission; and *John W. Reynolds,* Attorney General of Wisconsin, and *William E. Torkelson* for the State of Wisconsin et al.

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

The question in these cases is whether the Federal Power Commission has gone beyond the scope of its delegated authority in denying a certificate of public convenience and necessity under § 7 (e) of the Natural Gas Act of 1938, 52 Stat. 821, as amended, 15 U. S. C. § 717 *et seq.*[1] The principal respondents [2] are Transcontinental Gas Pipe Line Corp. (Transco), a pipeline company

[1] Section 7 (e), 15 U. S. C. § 717f (e), provides:

"(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

[2] In addition to the petitioning Federal Power Commission and respondents Transco and Con. Ed., several other parties have been involved in this litigation. The City of New York is a named respondent and the petitioners in No. 46 include the National Coal Association, the United Mine Workers of America, and the Fuels Research Council, Inc. Several parties have filed briefs as *amici curiae* in this Court, including the regulatory commissions of California, Michigan, and Wisconsin. These state commissions have argued in support of the Federal Power Commission's position.

engaged in transporting natural gas in interstate commerce, and Consolidated Edison Co. (Con. Ed.), a public utility in New York City which uses gas under its boilers and also sells gas to domestic consumers. In 1957 Con. Ed. contracted to purchase gas from producers in the Normanna and Sejita fields in Texas at 19¼ cents per Mcf., the contracts of sale containing a prohibition on resale of the gas by Con. Ed. This transaction is commonly labeled a "direct" sale and, because it does not entail a sale for resale in interstate commerce, is not subject to the Commission's jurisdiction except insofar as § 7 requires the Commission to certificate the transportation of gas pursuant to the sale.

Con. Ed. then arranged with Transco for what is called in the record "X–20" service. Under the contract, Transco agreed to transport 50,000 Mcf. daily to Con. Ed. in New York for use under Con. Ed.'s boilers, principally two boilers at Con. Ed.'s Waterside station which were then being fired by coal. Additionally, during a 60-day peak period, Transco agreed to sell 50,000 Mcf. to Con. Ed. from Transco's own reserves without restrictions as to resale. This 60-day supply was designed for use by Con. Ed.'s customers during the winter period when heating demands were at their highest. Transco sought a certificate of public convenience and necessity for the proposed X–20 service in connection with its plan to conduct a major expansion of its pipeline capacity and storage facilities.

Before the hearing examiner, Transco's application was opposed by the FPC staff and groups representing the coal industry. Con. Ed. intervened in favor of Transco's proposal. Transco offered proof that its application met all the conventional tests—adequate gas reserves, pipeline facilities and market for the gas—and this showing, with one immaterial exception, has never been challenged. However, the FPC's staff argued vigor-

ously that the public interest would suffer were Transco's petition granted. Among the grounds advanced were that the gas was to be transported for use under industrial boilers, this disposition being an "inferior" use from the standpoint of conserving a valuable natural resource; that authorization of this and similar direct sales to major industrial users would result in pre-emption of pipeline capacity and gas reserves to the detriment of domestic consumers competing for gas supply; and that the effect of this sale, as well as the resulting increase in direct sales, would effect a general rise in field prices. These contentions were presented as "policy" arguments and no testimony was taken in support. Con. Ed. contended in return that certification was in the public interest, principally because a firm supply of natural gas under the Waterside boilers would reduce the air pollution problem then being aggravated by fly-ash and sulphur dioxide emissions from these boilers. The Waterside station is located near the headquarters building of the United Nations, and Con. Ed. introduced expert testimony indicating that the Waterside boilers were major contributors to the air pollution problem in the area. Respondents also contended that the factors propounded by the FPC's staff were not open for consideration in a § 7 proceeding. The hearing examiner agreed with respondents that his determination was limited to conventional factors and consequently recommended certification. He qualified his recommendation, however, with a statement that, if he were authorized to consider the policy argument related to the end use of the gas advanced by the FPC staff, he would come to the opposite conclusion. He indicated that respondents' proof concerning the air pollution problem was not sufficienty compelling to overcome this contrary argument.

On review before the full FPC, the Commission held that the broad considerations advanced by its staff

were cognizable in a § 7 proceeding. The Commission agreed with respondents that the "idea of ameliorating a smoke condition found unpleasant and annoying . . . is an attractive one" but concluded that "more weighty considerations compel the denial of the grant." 21 F. P. C. 138, 142. Respondents sought a rehearing before the Commission and, upon denial of that petition, 21 F. P. C. 399, appealed to the Court of Appeals. The Court of Appeals reinstated the conclusion of the hearing examiner that the policy considerations advanced by the FPC were outside the scope of a § 7 proceeding. The court relied principally on § 1 (b) of the Natural Gas Act, 15 U. S. C. § 717 (b), which provides:

> "The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

The court also expressed sympathy with respondents' contention that the Commission had given inadequate weight to the air pollution factor; but the holding below does not appear to be based on that ground. 271 F. 2d 942.

The principal question before this Court, then, is whether Congress intended to preclude the Commission from denying certification on the basis of the policy considerations advanced by its staff. For purposes of analysis, the litigants have grouped these factors into two broad categories. The first has been labeled the "end use" factor and reflects the Commission's concern that Con. Ed.'s

proposed "inferior" use of gas under its industrial boilers would be wasteful of gas committed to the Commission's jurisdiction and, by the same token, would pre-empt space in pipelines that might otherwise be used for transportation of gas for superior uses. The second may be called the "price" consideration and involves the Commission's fear that this sale—which was executed at a price higher than the maximum fixed by the Commission in the producing districts here involved—would increase the price of natural gas in the field, thus triggering a rise in the price provisions in other contracts.

In light of what this Court has said on prior occasions concerning the term "public convenience and necessity" in analogous statutes, the ready inference is that the Commission has the power to consider the "end use" and "price" factors. For example, in *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U. S. 236, 241, the Court concluded that:

> "The Commission is the guardian of the public interest in determining whether certificates of convenience and necessity shall be granted. For the performance of that function the Commission has been entrusted with a wide range of discretionary authority. *Interstate Commerce Commission* v. *Parker,* 326 U. S. 60. Its function is not only to appraise the facts and to draw inferences from them but also to bring to bear upon the problem an expert judgment and to determine from its analysis of the total situation on which side of the controversy the public interest lies. Its doubt that the public interest will be adequately served if resumption of service is left to existing carriers is entitled to the same respect as its expert judgment on other complicated transportation problems. . . ." See *Interstate Commerce Comm'n* v. *Railway Labor Executives Assn.,* 315 U. S. 373, 376–377.

In fact, in interpreting this very section, we said that "§ 7 (e) requires the Commission to evaluate *all* factors bearing on the public interest." *Atlantic Refining Co.* v. *Public Service Comm'n,* 360 U. S. 378, 391. (Emphasis added.) However, respondents correctly point out that Congress, in enacting the Natural Gas Act, did not give the Commission comprehensive powers over every incident of gas production, transportation and sale. Rather, Congress was "meticulous" only to invest the Commission with authority over certain aspects of this field, leaving the residue for state regulation. *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm'n,* 332 U. S. 507. Therefore, it is necessary to consider with care whether, despite the accepted meaning of the term "public convenience and necessity," the Commission has trod on forbidden ground in making its decision.

End use. No one disputes that natural gas is a wasting resource and that the necessity for conserving it is paramount.[3] As we see it, the question in this case is whether the Commission, through its certification power, may prevent the waste of gas committed to its jurisdiction. One apparent method of preventing waste of gas is to limit the uses to which it may be put, uses for which another, more abundant fuel may serve equally well. Thus the Commission in this case, as it often has in the past,[4] has declared that the use of gas under industrial boilers is an "inferior" use, the assumption being that other fuels, particularly coal, are an adequate substitute[5] in areas

[3] See F. P. C., Natural Gas Investigation (1948), Docket G–580, Olds-Draper Report, pp. 6–14.

[4] The cases in which the Commission has considered the end-use factor are collected in the Court of Appeals' opinion. 271 F. 2d, at 949, n. 27.

[5] The Commission's long-standing conclusion that the use of gas under industrial boilers is an inferior use is amply supported by authority. See, *e. g.,* Blachly and Oatman, Natural Gas and the Public Interest, 142.

where such other fuels abound. However, respondents, while conceding the premise that gas may be wasted where coal is readily available, argue that Congress has not awarded the Commission *any* powers over conservation; rather, this authority has been reserved to the States. This contention is based on the legislative history of the Natural Gas Act.

When Congress initially enacted the Natural Gas Act in 1938, all the indications were that Congress intended the States to be the primary arbiters of conservation problems. The 1938 Act was based on a 1936 report rendered by the Federal Trade Commission [6] and the section in that report devoted to conservation stresses the powers of state bodies to adopt corrective measures. The final recommendation of the Federal Trade Commission in regard to conservation contemplated primary state authority, with federal agencies being relegated to a reporting function. This recommendation formed the basis for § 11 of the Act as ultimately passed and that section reveals a secondary role for the Commission in this regard.[7]

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[6] Federal Trade Commission, Final Report to the Senate of the United States, S. Doc. No. 92, 70th Cong., 1st Sess., Part 84–A. Section 1 (a) of the Act, 15 U. S. C. § 717 (a), refers explicitly to this report.

[7] Section 11 of the Act, 15 U. S. C. § 717j, provides:

"(a) In case two or more States propose to the Congress compacts dealing with the conservation, production, transportation, or distribution of natural gas it shall be the duty of the Commission to assemble pertinent information relative to the matters covered in any such proposed compact, to make public and to report to the Congress information so obtained, together with such recommendations for further legislation as may appear to be appropriate or necessary to carry out the purposes of such proposed compact and to aid in the conservation of natural-gas resources within the United States and in the orderly, equitable, and economic production, transportation, and distribution of natural gas.

"(b) It shall be the duty of the Commission to assemble and keep current pertinent information relative to the effect and operation

However, in 1940, the Commission reported its dissatisfaction with the limited scope of § 7. The 1938 version of § 7 restricted the Commission's jurisdiction to certification of transportation into areas where the market was already being served by another natural gas company; if a pipeline wished to extend service into virgin territory, the Commission had no power to act. The Commission felt that this limitation barred it from considering "the broad social and economic effect of the use of various fuels" in a § 7 proceeding, *Kansas Pipe Line & Gas Co.*, 2 F. P. C. 29, 57, and, in its 1940 Annual Report, the Commission urged that the restriction be deleted in order that conservation considerations might be weighed. The language used by the Commission is particularly relevant to this case:

> "The Natural Gas Act as presently drafted does not enable the Commission to treat fully the serious implications of such a problem. The question should be raised as to whether the proposed use of natural gas would not result in displacing a less valuable fuel

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of any compact between two or more States heretofore or hereafter approved by the Congress, to make such information public, and to report to the Congress, from time to time, the information so obtained, together with such recommendations as may appear to be appropriate or necessary to promote the purposes of such compact.

"(c) In carrying out the purposes of this chapter, the Commission shall, so far as practicable, avail itself of the services, records, reports, and information of the executive departments and other agencies of the Government, and the President may, from time to time, direct that such services and facilities be made available to the Commission."

Other indications that Congress initially contemplated state control over conservation are found in the remarks of Congressman Mapes, a member of the committee reporting the bill that became the Natural Gas Act, 81 Cong. Rec. 6726, and Col. Chantland, counsel representing the Federal Trade Commission before Congress, Hearings before a Subcommittee of the House Committee on Interstate and Foreign Commerce on H. R. 11662, 74th Cong., 2d Sess. 66–67.

> and create hardships in the industry already supplying the market, while at the same time rapidly depleting the country's natural-gas reserves. Although, for a period of perhaps 20 years, the natural gas could be so priced as to appear to offer an apparent saving in fuel costs, this would mean simply that social costs which must eventually be paid had been ignored.
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> "Careful study of the entire problem may lead to the conclusion that use of natural gas should be restricted by functions rather than by areas. Thus, it is especially adapted to space and water heating in urban homes and other buildings and to the various industrial heat processes which require concentration of heat, flexibility of control, and uniformity of results. Industrial uses to which it appears particularly adapted include the treating and annealing of metals, the operation of kilns in the ceramic, cement, and lime industries, the manufacture of glass in its various forms, and use as a raw material in the chemical industry. General use of natural gas under boilers for the production of steam is, however, under most circumstances of very questionable social economy." 20 F. P. C. Ann. Rep. 79 (1940).

The Commission implemented its recommendation by submitting to Congress a proposed amendment to § 7 with the restrictive language eliminated, and an amendment substantially similar to the one drafted by the Commission was enacted in 1942.[8] During the course of the

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[8] Section 7 (c) of the Act, as originally enacted in 1938, provided, in part, that:

"(c) No natural-gas company shall undertake the construction or extension of any facilities for the transportation of natural gas to a market in which natural gas is already being served by another natural-gas company, or acquire or operate any such facilities or extensions thereof, or engage in transportation by means of any new

hearings on the amendment, the Commission reiterated the position it had taken in its 1940 report, Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 5249, 77th Cong., 1st Sess. 82, and the language used by the Committees reporting the bill indicates that the amendment was framed in response to the Commission's complaint. H. R. Rep. No. 1290, 77th Cong., 1st Sess. 3; S. Rep. No. 948, 77th Cong., 2d Sess. 1–2.

It is true, of course, that the Committee reports do not set out the Commission's position *in haec verba*. For

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or additional facilities, or sell natural gas in any such market, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require such new construction or operation of any such facilities or extensions thereof . . . ." 52 Stat. 825.

The Commission's proposed amendment was first introduced as H. R. 4819, 87 Cong. Rec. 4301, and later resubmitted as H. R. 5249. The bill, as proposed by the Commission, insofar as here pertinent read:

"No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations . . . ." Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 5249, 77th Cong., 1st Sess. 1.

This section, as finally enacted, reads:

"(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations . . . ."

example, the pertinent language of the House Committee Report states that:

> "The bill, as amended, eliminates the objections to the present section 7 (c) above mentioned. By this legislation, the present jurisdictional disputes are eliminated, and the door is opened to the consideration by the Commission of the effect of construction and extensions upon the interests of producers of competing fuels and competitive transportation interests. This result is accomplished, moreover, without undue disturbance of existing operating arrangements of natural-gas companies."[9] H. R. Rep. No. 1290, *supra*.

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[9] S. Rep. No. 948 states that:

"The bill (H. R. 5249) would require a certificate from the Federal Power Commission to engage in the transportation or sale of natural gas or the construction, extension, or operation of natural-gas facilities subject to the jurisdiction of the Federal Power Commission. At the present time the Natural Gas Act requires a certificate of public convenience, only for the extension of construction or extension of service 'to a market in which natural gas is already being served by another natural-gas company.' The terms of this limitation are not defined by the act. Long preliminary investigations are required to determine whether or not the Federal Power Commission has jurisdiction to grant or to deny a certificate. Too, the Commission has held in the case of an extension by a gas company to a market already served by a competing company that the views or interests of competing fuel companies cannot be considered.

"Provisions of the Natural Gas Act empower the Commission to prevent uneconomic extensions and waste, but it can so regulate such powers only when the extension is to 'a market in which natural gas is already being served by another natural-gas company.' Thus the possibilities of waste, uneconomic and uncontrolled extensions are multiple and tremendous. The present bill would correct this glaring inadequacy of the act. It would also authorize the Commission to examine costs, finances, necessity, feasibility, and adequacy of proposed services. The characteristics of their rate structure could be studied. Obviously these are powers that Federal Power Commission should have and should exercise in the public interest."

Consequently, respondents argue that Congress only authorized the Commission to look at one side of the coin—the health of the coal industry—because that is the only point mentioned explicitly. However, this contention does not take adequate account of the position the Commission had consistently pressed upon Congress both prior to and during the hearings on the amendment—that the use of gas for purposes adequately served by other fuels was undesirable not only because it injured the competing industry but, what is more important, because it was wasteful to use a fuel in short supply in place of an abundant fuel. See 20 F. P. C. Ann. Rep. 79 (1940). The history of the amendment reveals no voice raised in opposition to the Commission's position and there is no other indication that Congress was unwilling to give the chief proponent of the amendment anything less than it sought. Thus, it would be curious were we to infer such an intent from the language of the House Committee Report quoted above. Rather, we think it plain the Congress acquiesced in the Commission's position and the excerpted language signifies acquiescence. It should be noted that this is not the first time this Court has addressed itself to the effect of the 1942 amendment to § 7. See *Federal Power Comm'n* v. *Hope Natural Gas Co.*, 320 U. S. 591, 617, n. 30, and *Federal Power Comm'n* v. *East Ohio Gas Co.*, 338 U. S. 464, 468–469. And, while it must be conceded that the language pertinent here was not necessary to the decision in either *Hope* or *East Ohio*, the clear conclusion of the Court in those cases is directly opposed to respondents' present argument.

Respondents, however, vigorously contend that, subsequent to the 1942 amendment, the Commission itself has made statements on occasion which are inconsistent with the Commission's position in this case. In particular, respondents point to an excerpt from the Commission's

1944 Report to Congress, entitled The First Five Years Under the Natural Gas Act, where the Commission stated:

> "In its hearings on certificate cases, under section 7 (c) of the act, as amended, the Commission has freely permitted the intervention of representatives of coal, railroad, labor, and other interests concerned with the production or transportation of competing fuels. These interests have presented extensive evidence on the economic, sociological, and technological aspects of fuel competition, and their representatives have strongly urged the Commission either to deny certificates on the general grounds of conservation or to attach restrictions which would severely limit the uses for which natural gas might be sold.
>
> "It has been the unanimous view of the Commission that, inasmuch as the Congress had not given it comprehensive powers to deal with the end uses for which natural gas is consumed, and had granted the Commission no authority to regulate rates for the direct sales of natural gas to industry, it was the duty of the Commission not to seek to exercise such authority until the Congress amended the Natural Gas Act to confer on the Commission such specific powers as Congress desired it to exercise." F. P. C., The First Five Years Under the Natural Gas Act 15.

This statement was relied on heavily by the Court of Appeals and it would be idle to contend that the report is irrelevant to the present inquiry. However, it is necessary to note the precise limit of the Commission's admissions. The Commission said that it had not been given "comprehensive" authority to deal with "the end uses for which natural gas is consumed" and that it would not

deny certification on that ground alone.[10] The Commission did *not* say that it had no authority over the use to which certificated gas might be put nor did it say that end use was a factor beyond its power of notice. In view of contemporaneous statements by the Commission which would be inconsistent with the reading respondents press upon us,[11] we think that the 1944 report

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[10] The passage excerpted and relied upon by the Court of Appeals should be read with reference to the footnote appended thereto. In this footnote, the Commission stated:

"In its Opinion No. 93–A, which accompanied its order of September 24, 1943, issuing a certificate of public convenience and necessity to Tennessee Gas & Transmission Co. for the construction and operation of a natural-gas pipe line from Texas to West Virginia, the commission stated:

" 'Interveners representing coal operators, labor unions, and railroads, having a vital stake in the coal industry in the Appalachian area, oppose the granting of a certificate for the construction of applicant's proposed natural-gas pipe line principally on the ground that the present and future fuel needs of that area can be adequately met by coal. It is contended that the use of natural gas for industrial and space-heating purposes constitutes a dissipation of the natural-gas resources, and threatens the coal industry with ruinous competition. Considerable evidence was adduced by these interveners for the purpose of supporting such contentions.

" 'We recognize the force of these arguments and are not unmindful of the economic and social aspects of the problem posed by these interveners. We are not authorized, however, to regulate rates for natural gas sold directly to industrial consumers, which class of gas sales furnishes the keenest competition to the coal industry. Nor does our power to suspend rates extend to indirect sales of natural gas for industrial purposes. It appears, therefore, that the Natural Gas Act does not vest this Commission with *complete and comprehensive authority* which would permit us to act as arbiter over the end uses of natural gas.' " F. P. C., The First Five Years Under the Natural Gas Act 15, n. 14. (Emphasis added.)

[11] See the Commission's statement reproduced in S. Rep. No. 1234, 78th Cong., 2d Sess. 3–6. The Senate Committee itself recognized that, following the 1942 amendment to the Act, the Commission was directly concerned with conservation problems. *Id.*, at 1–2.

should be construed as admitting only a lack of comprehensive power to formulate a flat rule against direct sales for use under industrial boilers.

In this connection, it must be realized that the Commission's powers under § 7 are, by definition, limited. See Koplin, Conservation and Regulation: The Natural Gas Allocation Policy of the Federal Power Commission, 64 Yale L. J. 840, 862. The Commission cannot order a natural gas company to sell gas to users that it favors; [12] it can only exercise a veto power over proposed transportation and it can only do this when a balance of *all* the circumstances weighs against certification. Moreover, the Commission has no authority over intrastate sales under any section of the Act and, since a large percentage of the gas sold for so-called "inferior" uses is sold within the producing States,[13] this restriction further curtails the Commission's power over conservation. In light of this, the Commission's position since the 1942 amendment is both consistent and rational. On the one hand, the Commission has stated that it does have power to consider end use in a § 7 proceeding. On the other hand, the Commission has sought, but has not been awarded, comprehensive authority over all aspects of gas conservation. A most striking example of the Commission's thinking is revealed by its reasons for *opposition* to H. R. 982, a bill proposed in 1949 which would have declared that:

> ". . . the public interest requires the establishment of, and adherence to, a policy with respect to the

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[12] Under § 7 (a) of the Act, 15 U. S. C. § 717f (a), the Commission has authority to compel extensions, though not enlargements, of a natural gas company's transportation facilities unless "to do so would impair its ability to render adequate service to its customers."

[13] See Hearings before a Subcommittee of the House Committee on Interstate and Foreign Commerce on H. R. 79, H. R. 1758, and H. R. 982, 81st Cong., 1st Sess. 165.

transportation of natural gas and the sale thereof in interstate commerce, which will—

"(1) promote and safeguard, so far as possible, the national defense;

"(2) conserve the reserves of natural gas for utilization which affords the highest social benefits to the public, consistent with reasonable rates and adequate service." [14]

The Commission argued against passage on, among others, the following ground:

"The 10-point policy would—

. . . . . .

"(2) Conserve the reserves of natural gas for utilization which affords the highest social benefits to the public, consistent with reasonable rates and adequate service;

"This, of course, proposes a limitation on the purposes for which gas may be utilized. In order to be fully effective it would be necessary to extend the Commission's jurisdiction to intrastate sales because the great bulk of gas sold for so-called inferior industrial uses is either sold in the field or by distributing companies over which the Commission does not have jurisdiction. The Commission, however, is aware of the problem and in certificate cases it does give consideration to the proposed uses of the gas in question. The Commission believes that, under the present act, it may give proper consideration to this matter in certificate proceedings." [15]

In light of this language, it is clear that the Commission fully realizes the distinction between the power it enjoys

[14] *Id.*, at 3.

[15] *Id.*, at 165.

under § 7 and complete allocation power.[16] And we feel that this distinction entirely disposes of those contentions of respondents based on the Commission's purported ambivalent behavior.

There is a broader principle here which also stands in opposition to respondents' contentions. When Congress enacted the Natural Gas Act, it was motivated by a desire "to protect consumers against exploitation at the hands of natural gas companies." *Sunray Mid-Continent Oil Co.* v. *Federal Power Comm'n,* 364 U. S. 137, 147. To that end, Congress "meant to create a comprehensive and effective regulatory scheme." *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm'n,* 332 U. S. 507, 520. See *Public Utilities Comm'n* v. *United Fuel Gas Co.,* 317 U. S. 456, 467. It is true, of course, that Congress did not desire comprehensive *federal* regulation; much authority was reserved for the States. But, it is equally clear that Congress did not desire that an important aspect of this field be left unregulated. See *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm'n, supra.* Therefore, when a dispute arises over whether a given transaction is within the scope of federal or state regulatory authority, we are not inclined to approach the problem negatively, thus raising the possibility that a "no man's land" will be created. Compare *Guss* v. *Utah Labor Board,* 353 U. S. 1. That is to say, in a borderline case where congressional authority is not explicit we must ask whether state authority can practicably regulate a given area and, if we

[16] During the course of hearings held in 1947 on proposed amendments to the Natural Gas Act, Commissioner Smith summed up the position of the Commission and explained the language used in the 1944 report along substantially the same lines as we have pursued. Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 2185, H. R. 2235, H. R. 2292, H. R. 2569, and H. R. 2956, 80th Cong., 1st Sess. 685–686.

find that it cannot, then we are impelled to decide that federal authority governs.

In this case, the dispute is over the "economic" waste of gas which has been committed to transportation in interstate commerce outside the producing State. The Commission has not attempted to exert its influence over such "physically" wasteful practices as improper well spacing and the flaring of unused gas which result in the entire loss of gas and are properly of concern to the producing State; nor has the Commission attempted to regulate the "economic" aspects of gas used within the producing State. Respondents contend that, even in this posture, the Commission has usurped the functions of state regulating bodies but we cannot agree.

In the 1936 Federal Trade Commission Report, upon which respondents so heavily rely, there was some mention of control of the end use of gas and, as we have said, this report was strongly oriented towards state regulation. However, as the Court of Appeals pointed out, the primary emphasis was on physical waste of gas within the producing State and the reference to end use probably contemplated the use of gas in gasoline extraction and the manufacture of carbon black. 271 F. 2d, at 947. There is no indication that the Federal Trade Commission or Congress was thinking in terms of state-controlled "economic" conservation of gas committed to interstate commerce. Moreover, it is questionable whether any State could be expected to take the initiative in enforcing this type of "economic" conservation. A producing State might wish to prolong its gas reserves for as long as possible but producing States have no control over the use to which gas is put in another State. See *Michigan-Wisconsin Pipe Line Co.* v. *Calvert,* 347 U. S. 157; *Pennsylvania* v. *West Virginia,* 262 U. S. 553; *Oklahoma* v. *Kansas Natural Gas Co.,* 221 U. S. 229. Consuming States may control the end use of gas, *Panhandle Eastern*

Pipe Line Co. v. *Michigan Public Service Comm'n,* 341 U. S. 329, but the deficiencies of this system in the present context are apparent—unless all States cooperate in enforcing a common regulation, the producer may pick a State which is sufficiently anxious for this scarce resource that it will take gas irrespective of the use.[17] Therefore,

[17] The helplessness of a consuming State in this regard is dramatically illustrated by the opinion of the New York Public Service Commission in *In re Cabot Gas Corp.*, 16 P. U. R. (N. S.) 443 (1936). The language used by the Chairman of the Commission is particularly relevant in this context:

"There can be but one opinion among those who believe in the conservation of natural resources. They should be developed not to benefit a few individuals but in the interests of public welfare present and future. Our natural gas resources ought to be conserved and there is probably no field where the Federal government acting in the interests of the entire country and to protect the welfare of the future could accomplish more than in the natural gas industry. From a conservation viewpoint, I thoroughly agree with Commissioner Burritt, and if I could see how a denial of the present petition would work to this end, I would vote to refuse the application; but will such denial produce the desired results?

"The field from which gas is to be taken by the petitioner is in northern Pennsylvania and southern New York. Apparently, far more of the gas will come from Pennsylvania than from New York and over the extraction of gas in the state of Pennsylvania, this Commission has practically no control. It is possible for Pennsylvania companies to take all of the gas from this field unless the New York companies remove the gas before the field is exhausted.

"Further, the Public Service Commission has been given no adequate authority to determine how the natural gas resources of this state, to say nothing of the resources of Pennsylvania, shall be developed. We have no powers directly to control the amount of gas that is taken from any field and our indirect powers are so limited that it is doubtful if much could be accomplished. The state of New York receives far more gas from sources located beyond its boundaries than it exports to any adjoining state and the conservation of natural gas resources in the various states cannot be properly brought about except through voluntary action of the states or by the Federal government. Neither one is yet operative and while

it appears that, consistent with the congressional purpose of leaving no "attractive gap" in regulation, we must conclude that the "end-use" factor was properly of concern to the Commission.

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attention has been given to electric interstate commerce, no effective steps have been taken to conserve or regulate the distribution of natural gas, where it is so urgently needed.

"In view of the lack of authority conferred upon this Commission to conserve natural resources, the question becomes primarily what will be gained to consumers in the state of New York if the petition is denied. It is stated that about 80 or 90 per cent of the gas furnished by the petitioner will be used for industrial purposes and that only from 10 to 20 per cent will go to the general public, the inference being that the saving to the companies purchasing the gas will go to enrich a few stockholders. Let us assume such are the facts. Who will gain if those benefited by the petition are deprived of their profits or advantages by a denial of the petition? This Commission does not control the use that will be made of the gas from the field tapped by the petitioner. There are many other companies tapping the supply and we have no means of determining where, when, or to whom the gas will be sold. If restriction is imposed on the use of it in New York, it may go to Pennsylvania; and if the petitioner is not allowed to supply the areas which it is proposed to serve, the gas will go to other areas and there is no assurance that it will be used any more beneficially from a public viewpoint than it will be if the petition is granted.

"As stated, I am heartily in favor of the conservation of natural gas as well as other natural resources; but in this specific case, will the granting or the denial of the petition work to the benefit of the people of New York? The benefit to the area to be supplied by the petitioner is definite, it is known, it is sure. But if the petition is denied, who will be benefited? There is no assurance upon this point. The answer is speculative and uncertain. There is nothing to assure us that the denial of the petition would conserve the gas supply. Is it not likely that the benefits would merely be diverted from one group or one locality to another?"

It might be argued that this attitude is out of date since the Commissioner was speaking prior to the enactment of § 11 of the Natural Gas Act. See note 7, *supra*. However, the success of § 11 can be measured by examination of the Olds-Draper Report, note 3, *supra,* at pp. 75–78.

Price. As we read the opinion, the Commission's second objection to certification was based on its forecast that this and similar direct sales of gas at unregulated prices higher than those allowed in sales for resale [18] would attract gas to the high-bidding direct purchasers and thus lever upwards field prices both in direct sales and sales for resale.

Respondents claim that this "policy" consideration masks the Commission's true purpose in this proceeding, which, according to respondents, is to bar direct sales absolutely, thus forcing all gas transactions into regulated channels. And respondents argue that such an absolute bar runs contrary to the intent of Congress as expressed in § 1 (b) of the Natural Gas Act quoted *supra,* the section which limits the FPC's jurisdiction to sales *for resale* in interstate commerce.

Were respondents correct in their interpretation of the Commission's action in this case, we would be forced to agree that the Commission had overstepped its bounds. Certainly such action would be contrary to our previous statements that the term "public convenience and necessity" connotes a flexible balancing process, in the course of which all the factors are weighed prior to final determination. *United States* v. *Detroit & Cleveland Navigation Co., supra.*[19] Indeed, as respondents argue, such a flat rule would be doubly objectionable here because

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[18] The Commission has recently set field prices for sales for resale in the area where this gas was bought at 18 cents per Mcf. See 25 Fed. Reg. 9578. The sales price to Con. Ed. in this direct sale was 1¼ cents per Mcf. over the line at which the Commission is trying to hold field prices. Any reading of the Commission's opinion which does not keep this fact in mind is, we believe, bound to be incomplete.

[19] Compare the cases which have held that it was error for the Commission to refuse to consider certain factors within its power of notice. *E. g., City of Pittsburgh* v. *Federal Power Comm'n,* 237 F. 2d 741.

Congress has not given the Commission jurisdiction over direct sales. However, we cannot agree that the Commission propounded an absolute rule in this case. Examination of the opinion reveals recurrent reference to the absence of any one controlling factor; as the Commission stated, "countervailing factors suffice to *tip the balance* against the grant of the authority requested by Transco." 21 F. P. C., at 141. (Emphasis added.) It is difficult to find any indication of the flat rule mentioned by respondents in language such as this. Furthermore, if there were any lingering doubt on this point, it is dispelled by the fact that the Commission has, on many occasions, held that transportation of gas sold directly to the consumer *is* in the public interest when the reasons advanced by the applicant have been sufficiently strong. See, *e. g., Houston Texas Gas & Oil Corp.,* 16 F. P. C. 118. On this point, the Commission's actions speak louder than respondents' unsupported allegations. See *Northern Natural Gas Co.,* 15 F. P. C. 1634.[20]

Respondents also argue that the Commission is opposed to this transaction merely because the underlying sale is a direct sale not subject to the Commission's primary jurisdiction. However, a fair reading of the Commission's opinion as a whole reveals that the Commission did not exalt form over substance in an attempt to aggrandize the scope of its jurisdiction; rather, whenever the Commission discussed the nonjurisdictional nature of this sale, it tied this discussion into an analysis of one or

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[20] Many of the cases in which the Commission has certificated the transportation of gas pursuant to direct sales are listed in Brief for Respondent Michigan Consolidated Gas Co. in Opposition to the Petition for Certiorari, pp. 24–30, *Panhandle Eastern Pipe Line Co.* v. *Federal Power Comm'n,* No. 369, 1956 Term.

the other of the substantive evils it was seeking to prevent—"inferior" use or increased prices to consumers generally.[21]

The question for consideration in this section, therefore, is whether in a § 7 proceeding the Commission may consider sales price or, more accurately, the effect the inflated price charged in one sale will have on future field prices. We have recently answered this question in favor of the Commission's jurisdiction. See *Atlantic Refining Co.* v. *Public Service Comm'n, supra,* at 391, where we stated that the Commission could decide whether:

> "[T]he proposed price is not in keeping with the public interest because it is out of line or because its approval might result in a triggering of general price rises . . . ."

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[21] The Court of Appeals agreed with respondents that certain language used by the Commission indicated that the Commission was *per se* opposed to direct sales. The Court concentrated on the passage in which the Commission stated that certification would have the adverse effect of:

"[M]aking it more difficult to meet the requirements of smaller purchasers in the event arrangements of this type become widespread." 21 F. P. C., at 399–400.

and it felt that this was tantamount to saying that:

"[O]nly pipe lines should purchase gas for only they engage in interstate transportation and thereby come under authority of the Commission." 271 F. 2d, at 953.

However, the thrust of the Commission's reasoning on this point can be better grasped by reviewing the proposition as it was argued to the Commission by its staff. The Commission's staff contended that:

"The purchase of natural gas by and transportation for the ultimate consumer, as proposed herein, may make it difficult for pipe line companies to purchase gas at *reasonable prices* for resale to other customers who require the gas for *superior domestic and commercial uses* and thus may be contrary to the public interest." (Emphasis added.)

However, respondents point out that the underlying sale in that case was a sale for resale and thus independently subject to the Commission's jurisdiction. Where such independent jurisdiction does not exist because of the bar in § 1 (b), respondents claim that the Commission's power of notice is curtailed.

This Court has never been faced with precisely this problem, but on several occasions we have been called upon to consider arguments very similar to the one advanced here. For example, in *Colorado Interstate Gas Co.* v. *Federal Power Comm'n*, 324 U. S. 581, it was held that, in fixing a rate base for the measurement of interstate wholesale rates, the Commission might take into account the value of the pipeline company's production and gathering facilities, even though the Commission had no direct jurisdiction over these facilities because of the bar in § 1 (b). The contention which was rejected in *Colorado Interstate* has a familiar ring in the present context: According to the unsuccessful litigant, when the FPC includes production and gathering facilities in a rate base, "it regulates the production and gathering of natural gas contrary to the provisions of § 1 (b) of the Act." *Id.*, at 600. Similarly, in *Panhandle Eastern Pipe Line Co.* v. *Federal Power Comm'n*, 324 U. S. 635, 646, it was said in dictum that:

> "The Commission, while it lacks authority to fix rates for direct industrial sales, may take those rates into consideration when it fixes the rates for interstate wholesale sales which are subject to its jurisdiction."

These cases, while not in themselves controlling, indicate at least that respondents' argument is overly broad. However, to decide a particular case we must return to the consideration discussed in the previous section—the Act contemplates comprehensive regulation in the public

interest and the critical inquiry is whether Congress intended state or federal authority to govern.

In the present case, the Commission was concerned with the effects this certification might have in the future on field prices generally. The Commission was attempting to consider not only the interests of consumers in New York but those in all States. To be compared with the problem before the Commission are the determinations that a consuming state commission may properly make in exercising authority over a direct sale. Certainly, the consuming State can regulate retail rates at which gas can be sold within the State. *E. g., Panhandle Eastern Pipe Line Co.* v. *Public Service Comm'n,* 332 U. S. 507. This power was recognized at the time the Act was passed, see Powell, Note, Physics and Law—Commerce in Gas and Electricity, 58 Harv. L. Rev. 1072, and it is clear that Congress excepted federal regulation of direct sales precisely for this reason. See H. R. Rep. No. 709, 75th Cong., 1st Sess. 1–2. But, in this case the Commission has not objected to the retail rate and we need not decide whether there are limits on the Commission's power in this hypothetical situation. The very nature of the present problem, entailing as it does considerations that overstep the bounds of any one State, illustrates the improbability that state commissions could or would attempt to deal with it; it seems clear that considerations of this sort are uniquely fitted for federal scrutiny. Particularly relevant in this connection is this Court's decision in *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm'n,* 332 U. S. 507. In that case, it was held that a state commission may regulate retail sales, even though the gas was brought from out-of-state sources. The pipeline company argued that conflicting regulations enforced by different state bodies, particularly regulations concerned with interruption of service, might place it in an

untenable position. The Court answered this argument by stating that:

> "There is no evidence thus far of substantial conflict in either respect and we do not see that the probability of serious conflict is so strong as to outweigh the vital local interests to which we have referred requiring regulation by the states. *Moreover, if such conflict should develop, the matter of interrupting service is one largely related, as appellees say, to transportation and thus within the jurisdiction of the Federal Power Commission to control, in accommodation of any conflicting interests among various states.*" *Id.*, at 523. (Emphasis added.)

The point is, as we have stated, that Congress did not desire an "attractive gap" in its regulatory scheme; rather, Congress intended to impose a comprehensive regulatory system on the transportation, production, and sale of this valuable natural resource. Therefore, when we are presented with an attempt by the federal authority to control a problem that is not, by its very nature, one with which state regulatory commissions can be expected to deal, the conclusion is irresistible that Congress desired regulation by federal authority rather than nonregulation. See *Panhandle Eastern Pipe Line Co.* v. *Federal Power Comm'n*, 232 F. 2d 467.

Respondents' final argument on this point is that the Commission abused its discretion in denying certification because it took cognizance of facts *dehors* the record and because it did not pay sufficient attention to the recorded testimony of respondents' expert concerning air pollution. The first objection—that the Commission erred in going outside the record—was rejected by the Court of Appeals and we concur in that conclusion. According to the statute, the Commission is required to determine whether certification is in the "present or *future* public conven-

ience and necessity." (Emphasis added.) Obedient to this command, the Commission did forecast the future and concluded that widespread direct sales at high prices would probably result in price increases. Respondents appear to be claiming that the Commission should have adduced testimonial and documentary evidence to the effect that this forecast would come true. However, we do not think that the Commission is so limited in its formulation of policy considerations. Rather, we think that a forecast of the direction in which future public interest lies necessarily involves deductions based on the expert knowledge of the agency. See *Atlantic Refining Co.* v. *Public Service Comm'n, supra,* at 391.[22] It should also be noted that there has been a considerable showing made by the petitioners and state regulatory commissions appearing as *amici curiae* to the effect that the Commission's forecast is well founded.[23] Moreover,

[22] Cf. *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U. S. 236, 241, where the Court upheld the Interstate Commerce Commission's forecast of the future public convenience and necessity over an objection that there was no absolute showing that the forecast would come true.

[23] The *amicus* briefs of two California public utilities, Southern California Gas and Southern Counties Gas, reveal that the competitive bidding of California Edison Co., a large industrial user, for direct purchases in the field has already forced up the prices to domestic consumers in California. Brief *Amici Curiae* of the Southern California Gas Co. and the Southern Counties Gas Co. of California, pp. 13–14. Several other industrial users are also contemplating taking advantage of an X–20 type service. See Reply Brief for the Federal Power Commission, pp. 4–5. In fact, the record reveals that Transco has suggested the possibility of providing X–20 service to its other customers, R. 71a, and several of these customers are negotiating for such service. R. 63a–71a. It is interesting to note that an Assistant to the Vice President of Con. Ed. testified that the producers sold the gas directly to Con. Ed. with a limitation on resale because "they (the producers) were allergic to proceedings before the Federal Power Commission." R. 108a.

as a matter of common sense, it would seem difficult to deny that the channeling of vast quantities of a wasting resource into unregulated transactions at a high price will result in scarcity to other consumers and a general price increase. Cf. *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm'n,* 332 U. S. 507, 521, n. 19.

Respondents' last point is that insufficient weight was afforded the evidence concerning air pollution. Concededly, the testimony of Con. Ed.'s expert witness, the Commissioner of the Department of Air Pollution Control in New York City, was entitled to great weight. However, as the New York Commissioner himself admitted, it was not possible for him to establish a definite relation between injury to health and the stack emissions at the Waterside station.[24] More importantly, it was not shown that other methods—particularly the use of gas presently available to Con. Ed. under other forms of service [25]—could not be used to solve the problem. Consequently, we cannot say that the Commission acted irrationally in concluding that Con. Ed.'s proof was insufficient. See *Charleston & Western Carolina R. Co.* v. *Federal Power Comm'n,* 98 U. S. App. D. C. 241, 234 F. 2d 62.

Neither this Court nor the Commission holds in this case that sales to pipelines are generally more in accord with the public interest than other sales; nor do we authorize the elimination of direct sales of gas under appropriate circumstances nor the denial of a certificate

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[24] R. 48a, 111a.

[25] At the time certification for the X–20 service was sought, Con. Ed. was using gas on an interruptible basis at a rate that averaged 78,578 Mcf. per day. A substantial amount of this gas was fired under Con. Ed.'s boilers, although not under the boilers at the Waterside station. No reason appears in the record why Con. Ed. could not have used the gas it was then receiving under its Waterside boilers to alleviate, if not solve, the air pollution problem. See R. 89a–92a.

to any arbitrarily chosen group of purchasers. All we hold is that the Commission did not abuse its discretion in considering, among other factors, those of end use, pre-emption of pipeline facilities and price in deciding that the public convenience and necessity did not require the issuance of the certificate requested. The judgment of the Court of Appeals must be

Reversed.

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

The Commission's denial of a certificate for the transportation of this natural gas rested on a combination of three determinations: (1) the inferior "end use" of the gas, that is its use for the alleviation of air pollution resulting from the burning of coal in the Waterside Plant of Consolidated Edison in New York City; (2) the effect of purchases such as this in enhancing future field prices of natural gas; and (3) the likely pre-emption of future pipeline transportation capacity resulting from such purchases.

Though I regard the matter as less clear than the Court does, I agree that the legislative history of the 1942 amendments to the Natural Gas Act supports the Commission's power to consider inferior end use as a factor in denying Transco a transportation certificate for the gas in question. However, I cannot agree that the premises on which the Commission rested its conclusions as to field prices and the pre-emption of transportation capacity are adequate to justify affirmance of its denial of a certificate.

As will be shown, those conclusions were bottomed almost entirely on the proposition that most, if not all, *direct* purchases, at least those of substantial magnitude, would be against the public interest. Since I believe that

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the denial of a certificate in this case had to be premised on factors present in *this particular* transaction, I think the proper course is to remand the case to the Commission for further consideration on proper postulates.

At the outset, it is important to note the procedural context of our review. In denying a petition for rehearing, the Commission made clear that the "end use" factor was neither of "decisive" nor of "determinative" importance; inferiority of end use was but one of several factors which together, and not individually, justified denial of this certificate in the Commission's view. These other factors failing, as they do in my opinion, the denial of the certificate cannot stand.

I.

PREMISES OF THE COMMISSION'S DENIAL.

I think it manifest that the Commission weighed against certification the fact that the sale to Consolidated Edison was direct to a consumer and hence not subject to normal Commission regulation of sales to pipeline companies for resale.[1] The Trial Examiner referred to "The Staff's opposition" as based, among other reasons, on the fact that:

> "The proposal is obviously an attempt to evade the jurisdiction of the Commission over the sale of nat-

[1] The basic reach of the Natural Gas Act, 15 U. S. C. § 717 *et seq.*, is set forth in § 1 (b), 15 U. S. C. § 717 (b):

"The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

> ural gas for use in the large consuming centers of the country and thus may be contrary to the public interest; . . ."

And the Examiner referred to the Staff's argument "that this sort of non-jurisdictional activity by Consolidated Edison should be halted as an example to others who may similarly attempt to avoid regulation in this way." The same argument was repeated to the Commission itself.

That the Commission adopted this approach of viewing this particular sale as but a facet of the broader direct-sale problem is clear from the reasons it states, 21 F. P. C. 138, as weighing towards denial of the certificate. Each of the considerations of effect on field prices and distribution of field supply is worded in the plural. The Commission throughout its report speaks as if it is presently forbidding access to the producer in the field by any one except pipelines purchasing for resale. That it is not restricting itself to the denial of the particular transportation involved in the X–20 service but is instead only denying that service because of the adverse effects that would result from committing itself to regularly allowing direct purchases in the field by nonpipelines, is apparent from the following:

> "[I]f we were to grant this request we would soon be confronted with many requests of the same general character . . . .
>
> . . . . .
>
> "How much more serious is that impact [of large demand on limited supply] when it is in the form of multiple bidders . . . .
>
> "And how long the pipeline can continue to buy in competition with nonjurisdictional, large volume purchasers . . . is at least a question." *Id.*, p. 141.

In its denial of a rehearing [2] the Commission acknowledged that it considered the "adverse effects on the public" of granting this "and similar such authorizations" including "the effect of stimulating increased purchases of gas in the field by distributing companies in substitution for the present, prevalent types of interstate natural-gas services involving purchases and resales by natural-gas pipeline companies . . . ." *Id.*, p. 399.[3]

It is clear, then, that the Commission was concerned with the adverse effects it felt characterized most sales to distributing companies or consumers, rather than with anything offensive about this particular sale (excepting of course the proposed end use). What were these adverse effects of all direct sales? Two are central to the

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[2] 21 F. P. C. 399.

[3] If there can be any doubt on this score, it is dissipated by the position taken by the Commission in the "Summary of Argument" in its brief in this Court:

"The threat posed by the X–20 type of arrangement to the small consumer, the person for whom the protections of the Natural Gas Act were designed, lies in its potential to establish a new, unregulated, interstate market for natural gas—by the large industrial consumer purchasing directly from the producer—which will compete for new gas supplies with the regulated market over which the Commission currently exercises jurisdiction. . . .

. . . . . .

"In the Commission's view, the new market which this and further X–20 transactions would establish (1) portends definite and lasting inflationary impact on gas prices generally, (2) would probably be devoted to end-uses inappropriate to the Act's purposes, (3) would disrupt patterns of industry growth carefully evolved during 20 years of congressionally-directed regulation, and (4) would be beyond effective state regulation.

"On the basis of its judgment that these damaging probable effects outweighed both (1) Con Edison's need for the gas, and (2) the inadequately shown contribution which burning the gas as boiler fuel might make to local air pollution control, the Commission denied Transco's application for a certificate as not being required by the present or future public convenience and necessity."

Commission's opinion. First, "the authorization of this and like proposals would pre-empt for this usage capacity which would otherwise be available to meet more urgent and widely beneficial public needs . . . ." 21 F. P. C., at 141.[4] Second, there is the effect on field prices:

> "The impact of large demand on relatively limited supply is certain enough to raise rates and field prices if only one bidder is bringing that demand to bear on the supply. How much more serious is that impact when it is in the form of multiple bidders, each attempting to reserve to itself a firm supply. Inevitably, there would be upward pressure on rate levels in the fields. We do not believe we ought to encourage such when it is unnecessary. . . ." *Ibid.*

Thus, the Commission has quite evidently asserted a power to frown upon any transaction which does not take the form of a sale to a pipeline for resale. On that basis, it was in this case, and would hereafter be, unnecessary for the Commission to decide whether a particular sale to a consumer or distributing company results in a waste of jurisdictional resources or an unwarranted boosting of field prices. Since, in the Commission's view, sales not to pipelines, as a class, generally have these unfortunate characteristics, it is sufficient that the particular transaction is one of that class. The Commission has made clear that it was the harms inherent in the form this sale took that weighed against the issuance of a transportation certificate, not the unfortunate effects of the transaction itself. I cannot agree that the Commission had discretion to adopt this position when it had available to it far less drastic alternatives.

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[4] I agree with the Court of Appeals that this consideration ultimately depends upon the inferiority of the proposed "end use," only now the end use is to be considered in the context of limited pipeline capacity rather than limited supply of gas.

II.

POSTULATES ON WHICH THE COMMISSION SHOULD HAVE PROCEEDED.

Without purporting to exhaust the full reach of its discretion, the premises on which the Commission, in my view, should have proceeded will be now indicated. Basically, I think it was open to the Commission to decide whether the particular transportation service before it would tend to waste gas, unduly pre-empt pipeline capacity, or raise field prices. I think the Commission can properly assert this more limited power as an incident of its transportation certificating powers.[5] It is quite true of course that Consolidated Edison need not have resorted to the Federal Power Commission if the purchase transaction had been possible without the interstate transportation of the gas in jurisdictional pipelines, since this was not a purchase of natural gas for resale. Note 1, *supra*. However, it does not follow that the Commission had to blind itself to the effects of the purchase and use of the gas when its authority to certificate the transportation of the gas was invoked. To recognize that the transaction was, as a practical matter, impossible without the use of jurisdictional facilities for the interstate trans-

[5] Section 7 (e), 15 U. S. C. § 717f (e), provides:

"(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. . . ."

portation of the purchased gas is to acknowledge that this transportation is as integral a part of the transaction as was the sale itself. Whether the adverse effect of the transaction be a waste of a scarce resource, or pre-emption of pipeline capacity, or a substantial boosting of field prices, the transportation is as responsible for the effects as is the original sale. I see no reason why the Commission must certify, as in accord with the "public convenience and necessity," transportation which tends materially to further such undesirable results which are within the area of the Commission's legitimate concern when it is considering the public convenience and necessity of certificating a jurisdictional sale.

Assuming that it is results only made possible by jurisdictional transportation that the Commission wishes to consider, an attempted distinction between transportation and sale certification proceedings simply obscures the important question: what undesirable results are envisioned by § 1 (b) to be the concern of the States and not the concern of the Federal Power Commission? We hold in this case that the economic waste of natural gas that might otherwise be available for jurisdictional transactions ending in superior uses is such a legitimate concern. Similar considerations pertain to the pre-emption of pipeline capacity. Note 4, *supra.* Finally, we have held in *Atlantic Refining Co.* v. *Public Service Comm'n,* 360 U. S. 378, that the Commission must consider the effect on field prices for future jurisdictional sales of an excessive purchase price. Asserting power to consider these effects does not involve assuming jurisdiction over matters that Congress has reserved to the States in § 1 (b), for it does not involve protecting citizens of either the producing or consuming State against harms that local regulatory bodies have the power to prevent. These effects being the legitimate concern of the Federal Power Commission, they are no less so in a certification proceeding for trans-

portation than in such a proceeding for the sale of natural gas. Each of these effects, if materially furthered by the transportation being considered, can properly be relied upon, on a case-by-case basis, in the denial of a transportation certificate.

III.

DEFICIENCIES OF THE COMMISSION'S REPORT.

If, as I have argued, the Commission has power to decide on an adequate record to deny a transportation certificate in part because the gas to be transported is to be used for inferior purposes or because that gas was purchased at a price adversely affecting the prices of later jurisdictional sales, I do not think there is any basis for the Commission's further claim of authority to consider as an adverse factor the mere fact that the sale was direct to a consumer or distributor. As to inferior end use or pre-emption of pipeline capacity, the latter being another aspect of the former, the invalidity of the Commission's claim is easily established. Once the Commission has weighed against the grant of the certificate the fact that it results in economic waste there is nothing added by the circumstance that it is also a direct sale to a consumer and the Commission's belief that most of such sales result in economic waste.

The Commission's consideration of the impact on field prices is more refined, although no more solidly grounded. The Commission did not merely consider that the price of these sales would be unregulatable and argue that therefore all sales to consumers or distributors must be forbidden. So it is not a complete answer to repeat what has just been said about the Commission's consideration of inferior "end use" and pipeline pre-emption—that those factors can be fully considered on a case-by-case basis. The Commission passed beyond the possible problem of

unregulatable prices to an economic argument, namely, that increasing even the number of theoretically regulatable bidders for gas in the field must, as a practical matter, create a difficult-to-control-and-regulate upward pressure on field prices. I consider reasonable the economics of the Commission's position,[6] but unreasonable its finding of statutory authority for the Draconian solution it proposes.

In my opinion the Commission cannot attempt to protect its legitimate interest in lower field prices by denying sale or transportation certificates to any arbitrarily chosen group of purchasers. Such whimsy is not contemplated by the statute. Is there, then, a justifying basis for discriminating against purchasers other than pipelines purchasing for resale? It cannot be the fact that the use these purchasers propose is often inferior, for the Commission can consider this factor when the occasion arises. It cannot be the fact that the effect on field prices is worse, for prices paid by both pipelines and other purchasers can be considered by the Commission when passing upon the public interest either in a sale-for-resale or in a transportation certificate proceeding. I can find no justifying basis for the distinction sought to be drawn by the Commission between pipelines and others.

To the contrary, the discrimination against nonpipeline purchasers flouts the statutory structure by permitting

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[6] That a greater number of bidders representing the same total demand as a smaller number of bidders would exert greater upward pressure on prices is a basic hypothesis of the antitrust laws which therefore forbid buyers to group together in dealing with a seller. Just as competition is stifled and price affected by competing sellers agreeing to sell through a single agent (and therefore at a single price), price is also affected by similar action by competing buyers. The Commission conclusion on this subfactor needed no supporting evidence.

the Commission to exercise greater regulatory power over transactions with one nonjurisdictional aspect (the direct sale) than the Commission has over transactions of which both aspects (sale-for-resale and transportation) are jurisdictional. Moreover, to recognize the discrimination against direct sales that the Commission proposes in order to reduce the upward price pressure resulting from increased numbers of bidders, is to ignore the fact that the statute contemplates and provides regulation for the use of pipelines both as wholly transportation or carrier facilities. There is no indication that this "carrier" function of pipelines was to be limited to carrying for producers who would then sell in the State of destination. It also properly extends to carrying for and to wholesalers or consumers in the State of destination.[7]

These, then, in my opinion are the considerations which require a holding that it was an abuse of discretion for the Commission to hold sales to pipelines generally more in accord with the public interest than other sales. There is absolutely no rational basis, as I see it, for selecting distributing companies and consumers as the group of bidders to be sacrificed and eliminated in order to reduce the pressure toward higher field prices. There is no harmful characteristic of these bidders that is not fully shared by pipeline purchasers. Even worse, the purpose-

[7] Furthermore, viewing the matter realistically, the Commission must object as strenuously to a producer selling in the State of ultimate consumption as to a distributor or consumer buying in the State of production, for whether the direct sale between a producer and consumer takes place before or after the transportation of the gas is a matter easily manipulated by the parties and a matter which has no effect on the Commission's policy considerations. The upward pressure on field prices created by increasing the total number of bidders is the same whether the producer finds additional bidders in the consuming State or allows them to come to him in the field.

ful elimination of this entire class of prospective purchasers clashes with the structure of a statute that was largely motivated by a desire to reduce the power of the pipeline companies.

This conflict is most clearly manifested in the violence that the Commission's proposal does to the statute's provisions for regulation of a wholly carrier function of the pipelines, for a wholly carrier function can only be served on behalf of either producers which have already sold directly to nonpipelines or on behalf of nonpipelines which have already purchased directly from the producers. It is inescapable that forbidding all transactions involving direct sales between producers and nonpipelines eliminates any wholly carrier function for the pipelines, *i. e.*, eliminates one entire facet of the Commission's statutory jurisdiction. This statutory amputation—resulting in greater regulatory power over transactions with some nonjurisdictional aspects than there is over transactions all aspects of which are jurisdictional—is clearly outside the discretion of the Federal Power Commission.

Since the Commission regarded as necessary to its decision factors beyond its discretion to consider, the proceeding should be remanded to that agency for reconsideration. We cannot order the certificate granted, for there are results of this particular transportation which the Commission can and should properly consider but which were left unconsidered because of the erroneous broader grounds of the denial. On remand the Commission should not only consider and support with adequate fact findings the particular effects of *this* transaction on field prices and on Transco's future capacity to expand its pipeline services, but the way should be left open for it to give more careful consideration to the "end use" factor in its decision. I must say that its previous consideration of this aspect of the matter seems to me to leave much to be

desired, doubtless because of the over-all mistaken premises on which the Commission proceeded. In a reconsideration of the case upon correct premises, the air-pollution problem may take on a different significance, and whatever conclusions the Commission may reach on this score should in any event be accompanied with more convincing particularized findings.

For the foregoing reasons I would vacate the judgment of the Court of Appeals and remand the case to the Commission for further proceedings.

TIMES FILM CORP. *v.* CITY OF CHICAGO ET AL.

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

No. 34. Argued October 19–20, 1960.—Decided January 23, 1961.

The Municipal Code of Chicago, § 155–4, requires submission of all motion pictures for examination or censorship prior to their public exhibition and forbids their exhibition unless they meet certain standards. Petitioner applied for a permit to exhibit a certain motion picture and tendered the required license fee; but the permit was denied, solely because petitioner refused to submit the film for examination. Petitioner sued in a Federal District Court for injunctive relief ordering issuance of the permit without submission of the film and restraining the city officials from interfering with its exhibition. It did not submit the film to the court or offer any evidence as to its content. The District Court dismissed the complaint on the ground, *inter alia*, that neither a substantial federal question nor a justiciable controversy was presented. *Held:* The provision requiring submission of motion pictures for examination or censorship prior to their public exhibition is not void on its face as violative of the First and Fourteenth Amendments, and the judgment of dismissal is affirmed. Pp. 44–50.

(a) This case presents a justiciable controversy. Pp. 45–46.

(b) Petitioner's narrow attack on the ordinance does not require that any consideration be given to the validity of the standards set out therein, since they are not challenged and are not before this Court. Pp. 46–47.

(c) It has never been held that liberty of speech is absolute or that all prior restraints on speech are invalid. Pp. 47–49.

(d) Although motion pictures are included within the free speech and free press guaranties of the First and Fourteenth Amendments, there is no absolute freedom to exhibit publicly, at least once, every kind of motion picture. Pp. 46, 49–50.

272 F. 2d 90, affirmed.

Felix J. Bilgrey and *Abner J. Mikva* argued the cause and filed a brief for petitioner.

Robert J. Collins and *Sydney R. Drebin* argued the cause for respondents. With them on the brief was *John C. Melaniphy.*

MR. JUSTICE CLARK delivered the opinion of the Court.

Petitioner challenges on constitutional grounds the validity on its face of that portion of § 155–4 [1] of the Municipal Code of the City of Chicago which requires submission of all motion pictures for examination prior to their public exhibition. Petitioner is a New York corporation owning the exclusive right to publicly exhibit in Chicago the film known as "Don Juan." It applied for a permit, as Chicago's ordinance required, and tendered the license fee but refused to submit the film for examination. The appropriate city official refused to issue the permit and his order was made final on appeal to the Mayor. The sole ground for denial was petitioner's refusal to submit the film for examination as required. Petitioner then brought this suit seeking injunctive relief ordering the issuance of the permit without submission of the film and restraining the city officials from interfering with the exhibition of the picture. Its sole ground is that the provision of the ordinance requiring submission of the film constitutes, on its face, a prior restraint within the prohibition of the First and Fourteenth Amendments. The District Court dismissed the complaint on the grounds, *inter alia,* that neither a substantial federal question nor even a justiciable controversy was presented. 180 F. Supp. 843. The Court of Appeals affirmed, finding that the case presented merely an abstract question of law since neither the film nor evidence of its content was submitted. 272 F. 2d 90. The precise question at issue here never hav-

[1] The portion of the section here under attack is as follows:

"Such permit shall be granted only after the motion picture film for which said permit is requested has been produced at the office of the commissioner of police for examination or censorship. . . ."

ing been specifically decided by this Court, we granted certiorari, 362 U. S. 917 (1960).

We are satisfied that a justiciable controversy exists. The section of Chicago's ordinance in controversy specifically provides that a permit for the public exhibition of a motion picture must be obtained; that such "permit shall be granted only after the motion picture film for which said permit is requested has been produced at the office of the commissioner of police for examination"; that the commissioner shall refuse the permit if the picture does not meet certain standards; [2] and that in the event of such refusal the applicant may appeal to the mayor for a *de novo* hearing and his action shall be final. Violation of the ordinance carries certain punishments. The petitioner complied with the requirements of the ordinance, save for the production of the film for examination. The claim is that this concrete and specific statutory require-

[2] That portion of § 155–4 of the Code providing standards is as follows:

"If a picture or series of pictures, for the showing or exhibition of which an application for a permit is made, is immoral or obscene, or portrays depravity, criminality, or lack of virtue of a class of citizens of any race, color, creed, or religion and exposes them to contempt, derision, or obloquy, or tends to produce a breach of the peace or riots, or purports to represent any hanging, lynching, or burning of a human being, it shall be the duty of the commissioner of police to refuse such permit; otherwise it shall be his duty to grant such permit.

"In case the commissioner of police shall refuse to grant a permit as hereinbefore provided, the applicant for the same may appeal to the mayor. Such appeal shall be presented in the same manner as the original application to the commissioner of police. The action of the mayor on any application for a permit shall be final."

It should be noted that the Supreme Court of Illinois, in an opinion by Schaefer, C. J., has already considered and rejected an argument against the same Chicago ordinance, similar to the claim advanced here by petitioner. The same court also sustained certain of the standards set out above. *American Civil Liberties Union* v. *City of Chicago,* 3 Ill. 2d 334, 121 N. E. 2d 585 (1954).

ment, the production of the film at the office of the Commissioner for examination, is invalid as a previous restraint on freedom of speech. In *Joseph Burstyn, Inc.*, v. *Wilson*, 343 U. S. 495, 502 (1952), we held that motion pictures are included "within the free speech and free press guaranty of the First and Fourteenth Amendments." Admittedly, the challenged section of the ordinance imposes a previous restraint, and the broad justiciable issue is therefore present as to whether the ambit of constitutional protection includes complete and absolute freedom to exhibit, at least once, any and every kind of motion picture. It is that question alone which we decide. We have concluded that § 155–4 of Chicago's ordinance requiring the submission of films prior to their public exhibition is not, on the grounds set forth, void on its face.

Petitioner's narrow attack upon the ordinance does not require that any consideration be given to the validity of the standards set out therein. They are not challenged and are not before us. Prior motion picture censorship cases which reached this Court involved questions of standards.[3] The films had all been submitted to the authorities and permits for their exhibition were refused because of their content. Obviously, whether a particular statute is "clearly drawn," or "vague," or "indefinite," or whether a clear standard is in fact met by a film are different questions involving other constitutional challenges to be tested by considerations not here involved.

Moreover, there is not a word in the record as to the nature and content of "Don Juan." We are left entirely

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[3] *Joseph Burstyn, Inc.*, v. *Wilson, supra* ("sacrilegious"); *Gelling* v. *Texas*, 343 U. S. 960 (1952) ("prejudicial to the best interests of the people of said City"); *Commercial Pictures Corp.* v. *Regents*, 346 U. S. 587 (1954) ("immoral"); *Superior Films, Inc.*, v. *Department of Education*, 346 U. S. 587 (1954) ("harmful"); *Kingsley International Pictures Corp.* v. *Regents*, 360 U. S. 684 (1959) ("sexual immorality").

in the dark in this regard, as were the city officials and the other reviewing courts. Petitioner claims that the nature of the film is irrelevant, and that even if this film contains the basest type of pornography, or incitement to riot, or forceful overthrow of orderly government, it may nonetheless be shown without prior submission for examination. The challenge here is to the censor's basic authority; it does not go to any statutory standards employed by the censor or procedural requirements as to the submission of the film.

In this perspective we consider the prior decisions of this Court touching on the problem. Beginning over a third of a century ago in *Gitlow* v. *New York,* 268 U. S. 652 (1925), they have consistently reserved for future decision possible situations in which the claimed First Amendment privilege might have to give way to the necessities of the public welfare. It has never been held that liberty of speech is absolute. Nor has it been suggested that all previous restraints on speech are invalid. On the contrary, in *Near* v. *Minnesota,* 283 U. S. 697, 715–716 (1931), Chief Justice Hughes, in discussing the classic legal statements concerning the immunity of the press from censorship, observed that the principle forbidding previous restraint "is stated too broadly, if every such restraint is deemed to be prohibited. . . . [T]he protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases." These included, the Chief Justice found, utterances creating "a hindrance" to the Government's war effort, and "actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops." In addition, the Court said that "the primary requirements of decency may be enforced against obscene publications" and the "security of the community life may be protected against incitements to acts of violence and the overthrow by force

of orderly government." Some years later, a unanimous Court, speaking through Mr. Justice Murphy, in *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 571–572 (1942), held that there were "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." Thereafter, as we have mentioned, in *Joseph Burstyn, Inc.,* v. *Wilson, supra,* we found motion pictures to be within the guarantees of the First and Fourteenth Amendments, but we added that this was "not the end of our problem. It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places." At p. 502. Five years later, in *Roth* v. *United States,* 354 U. S. 476, 483 (1957), we held that "in light of . . . history, it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance." Even those in dissent there found that "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." *Id.,* at 514. And, during the same Term, in *Kingsley Books, Inc.,* v. *Brown,* 354 U. S. 436, 441 (1957), after characterizing *Near* v. *Minnesota, supra,* as "one of the landmark opinions" in its area, we took notice that *Near* "left no doubts that 'Liberty of speech, and of the press, is also not an absolute right . . . the protection even as to previous restraint is not absolutely unlimited.' . . . The judicial angle of vision," we said there, "in testing the validity of a statute like § 22–a [New York's injunctive remedy against certain forms of obscenity] is 'the operation and effect of the statute in substance.' " And as if to emphasize the point involved

here, we added that "The phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test." Even as recently as our last Term we again observed the principle, albeit in an allied area, that the State possesses some measure of power "to prevent the distribution of obscene matter." *Smith* v. *California,* 361 U. S. 147, 155 (1959).

Petitioner would have us hold that the public exhibition of motion pictures must be allowed under any circumstances. The State's sole remedy, it says, is the invocation of criminal process under the Illinois pornography statute, Ill. Rev. Stat. (1959), c. 38, § 470, and then only after a transgression. But this position, as we have seen, is founded upon the claim of absolute privilege against prior restraint under the First Amendment—a claim without sanction in our cases. To illustrate its fallacy, we need only point to one of the "exceptional cases" which Chief Justice Hughes enumerated in *Near* v. *Minnesota, supra,* namely, "the primary requirements of decency [that] may be enforced against obscene publications." Moreover, we later held specifically "that obscenity is not within the area of constitutionally protected speech or press." *Roth* v. *United States,* 354 U. S. 476, 485 (1957). Chicago emphasizes here its duty to protect its people against the dangers of obscenity in the public exhibition of motion pictures. To this argument petitioner's only answer is that regardless of the capacity for, or extent of, such an evil, previous restraint cannot be justified. With this we cannot agree. We recognized in *Burstyn, supra,* that "capacity for evil . . . may be relevant in determining the permissible scope of community control," at p. 502, and that motion pictures were not "necessarily subject to the precise rules governing any other particular method of expression. Each method," we said, "tends to present its own peculiar problems." At p. 503. Certainly petitioner's broadside

attack does not warrant, nor could it justify on the record here, our saying that—aside from any consideration of the other "exceptional cases" mentioned in our decisions—the State is stripped of all constitutional power to prevent, in the most effective fashion, the utterance of this class of speech. It is not for this Court to limit the State in its selection of the remedy it deems most effective to cope with such a problem, absent, of course, a showing of unreasonable strictures on individual liberty resulting from its application in particular circumstances. *Kingsley Books, Inc.*, v. *Brown, supra,* at p. 441. We, of course, are not holding that city officials may be granted the power to prevent the showing of any motion picture they deem unworthy of a license. *Joseph Burstyn, Inc.*, v. *Wilson, supra,* at 504–505.

As to what may be decided when a concrete case involving a specific standard provided by this ordinance is presented, we intimate no opinion. The petitioner has not challenged all—or for that matter any—of the ordinance's standards. Naturally we could not say that every one of the standards, including those which Illinois' highest court has found sufficient, is so vague on its face that the entire ordinance is void. At this time we say no more than this—that we are dealing only with motion pictures and, even as to them, only in the context of the broadside attack presented on this record.

Affirmed.

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

I cannot agree either with the conclusion reached by the Court or with the reasons advanced for its support. To me, this case clearly presents the question of our approval of unlimited censorship of motion pictures before exhibition through a system of administrative

licensing. Moreover, the decision presents a real danger of eventual censorship for every form of communication, be it newspapers, journals, books, magazines, television, radio or public speeches. The Court purports to leave these questions for another day, but I am aware of no constitutional principle which permits us to hold that the communication of ideas through one medium may be censored while other media are immune. Of course each medium presents its own peculiar problems, but they are not of the kind which would authorize the censorship of one form of communication and not others. I submit that in arriving at its decision the Court has interpreted our cases contrary to the intention at the time of their rendition and, in exalting the censor of motion pictures, has endangered the First and Fourteenth Amendment rights of all others engaged in the dissemination of ideas.

Near v. *Minnesota,* 283 U. S. 697, was a landmark opinion in this area. It was there that Chief Justice Hughes said for the Court "that liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship." *Id.,* at 716. The dissenters in *Near* sought to uphold the Minnesota statute, struck down by the Court, on the ground that the statute did "not authorize administrative control in advance such as was formerly exercised by the licensers and censors. . . ." *Id.,* at 735. Thus, three decades ago, the Constitution's abhorrence of licensing or censorship was first clearly articulated by this Court.

This was not a tenet seldom considered or soon forgotten. Five years later, a unanimous Court observed:

> "As early as 1644, John Milton, in an 'Appeal for the Liberty of Unlicensed Printing,' assailed an act of Parliament which had just been passed providing for censorship of the press previous to publication. He vigorously defended the right of every man to

> make public his honest views 'without previous censure'; and declared the impossibility of finding any man base enough to accept the office of censor and at the same time good enough to be allowed to perform its duties." *Grosjean* v. *American Press Co.*, 297 U. S. 233, 245–246.

Shortly thereafter, a unanimous Court once more recalled that the "struggle for the freedom of the press was primarily directed against the power of the licensor." *Lovell* v. *Griffin*, 303 U. S. 444, 451. And two years after this, the Court firmly announced in *Schneider* v. *State*, 308 U. S. 147:

> "[T]he ordinance imposes censorship, abuse of which engendered the struggle in England which eventuated in the establishment of the doctrine of the freedom of the press embodied in our Constitution. To require a censorship through license which makes impossible the free and unhampered distribution of pamphlets strikes at the very heart of the constitutional guarantees." *Id.*, at 164.

Just twenty years ago, in the oft-cited case of *Cantwell* v. *Connecticut*, 310 U. S. 296, the Court, again without dissent, decided:

> "[T]he availability of a judicial remedy for abuses in the system of licensing still leaves that system one of previous restraint which, in the field of free speech and press, we have held inadmissible. A statute authorizing previous restraint upon the exercise of the guaranteed freedom by judicial decision after trial is as obnoxious to the Constitution as one providing for like restraint by administrative action." *Id.*, at 306.

This doctrine, which was fully explored and which was the focus of this Court's attention on numerous occasions, had become an established principle of constitutional law.

It is not to be disputed that this Court has stated that the protection afforded First Amendment liberties from previous restraint is not absolutely unlimited. *Near* v. *Minnesota, supra.* But, licensing or censorship was not, at any point, considered within the "exceptional cases" discussed in the opinion in *Near*. *Id.*, at 715–716. And, only a few Terms ago, the Court, speaking through MR. JUSTICE FRANKFURTER, in *Kingsley Books, Inc.*, v. *Brown,* 354 U. S. 436, reaffirmed that "the limitation is the exception; it is to be closely confined so as to preclude what may fairly be deemed *licensing* or *censorship.*" *Id.*, at 441. (Emphasis added.)

The vice of censorship through licensing and, more generally, the particular evil of previous restraint on the right of free speech have many times been recognized when this Court has carefully distinguished between laws establishing sundry systems of previous restraint on the right of free speech and penal laws imposing subsequent punishment on utterances and activities not within the ambit of the First Amendment's protection. See *Near* v. *Minnesota, supra,* at pp. 718–719; *Schneider* v. *State, supra,* at p. 164; *Cantwell* v. *Connecticut, supra,* at p. 306; *Niemotko* v. *Maryland,* 340 U. S. 268, 282 (concurring opinion); *Kunz* v. *New York,* 340 U. S. 290, 294–295.

Examination of the background and circumstances leading to the adoption of the First Amendment reveals the basis for the Court's steadfast observance of the proscription of licensing, censorship and previous restraint of speech. Such inquiry often begins with Blackstone's assertion: "The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraint upon publications, and not in freedom from censure for criminal matter when published." 4 Bl. Comm. (Cooley, 4th ed. 1899) 151. Blackstone probably here referred to the common law's definition of freedom

of the press; [1] he probably spoke of the situation existing in England after the disappearance of the licensing systems but during the existence of the law of crown libels. There has been general criticism of the theory that Blackstone's statement was embodied in the First Amendment, the objection being " 'that the mere exemption from previous restraints cannot be all that is secured by the constitutional provisions'; and that 'the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a by-word, if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications.' 2 Cooley, Const. Lim., 8th ed., p. 885." *Near* v. *Minnesota, supra,* at p. 715; *Grosjean* v. *American Press Co., supra,* at p. 248. The objection has been that Blackstone's definition is too narrow; it had been generally conceded that the protection of the First Amendment extends *at least* to the interdiction of licensing and censorship and to the previous restraint of free speech. *Near* v. *Minnesota, supra,* at p. 715; *Grosjean* v. *American Press Co., supra,* at p. 246; Chafee, Free Speech in the United States, 18.

On June 24, 1957, in *Kingsley Books, Inc.,* v. *Brown, supra,* the Court turned a corner from the landmark opinion in *Near* and from one of the bases of the First Amendment. Today it falls into full retreat.

I hesitate to disagree with the Court's formulation of the issue before us, but, with all deference, I must insist

[1] The following charge to the grand jury by Chief Justice Hutchinson of Massachusetts in 1767 defines the common-law notion of freedom of the press:

"The Liberty of the Press is doubtless a very great Blessing; but this Liberty means no more than a Freedom for every Thing to pass from the Press without a License." Quincy, Reports of Cases Argued and Adjudged in the Superior Court of Judicature of the Province of Massachusetts Bay, Between 1761 and 1772, 244.

that the question presented in this case is *not* whether a motion picture exhibitor has a constitutionally protected, "complete and absolute freedom to exhibit, at least once, any and every kind of motion picture." *Ante,* p. 46. Surely, the Court is not bound by the petitioner's conception of the issue or by the more extreme positions that petitioner may have argued at one time in the case. The question here presented is whether the City of Chicago—or, for that matter, any city, any State or the Federal Government—may require all motion picture exhibitors to submit all films to a police chief, mayor or other administrative official, for licensing and censorship prior to public exhibition within the jurisdiction.

The Court does not even have before it an attempt by the city to restrain the exhibition of an allegedly "obscene" film, see *Roth* v. *United States,* 354 U. S. 476. Nor does the city contend that it is seeking to prohibit the showing of a film which will impair the "security of the community life" because it acts as an incitement to "violence and the overthrow by force of orderly government." See *Near* v. *Minnesota, supra,* at p. 716. The problem before us is not whether the city may forbid the exhibition of a motion picture, which, by its very showing, might in some way "inflict injury or tend to incite an immediate breach of the peace." See *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 572.

Let it be completely clear what the Court's decision does. It gives official license to the censor, approving a grant of power to city officials to prevent the showing of any moving picture these officials deem unworthy of a license. It thus gives formal sanction to censorship in its purest and most far-reaching form,[2] to a classical plan of

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[2] Professor Thomas I. Emerson has stated:

"There is, at present, no common understanding as to what constitutes 'prior restraint.' The term is used loosely to embrace a

licensing that, in our country, most closely approaches the English licensing laws of the seventeenth century which were commonly used to suppress dissent in the mother country and in the colonies. Emerson, The Doctrine of Prior Restraint, 20 Law & Contemp. Prob., 648, 667. The Court treats motion pictures, food for the mind, held to be within the shield of the First Amendment, *Joseph Burstyn, Inc.*, v. *Wilson*, 343 U. S. 495, little differently than it would treat edibles. See *Smith* v. *California*, 361 U. S. 147, 152.[3] Only a few days ago, the Court, speaking through MR. JUSTICE STEWART, noted in *Shelton* v. *Tucker*, 364 U. S. 479, 488:

> "In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose."

Here, the Court ignores this considered principle and indiscriminately casts the net of control too broadly. See

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variety of different situations. Upon analysis, certain broad categories seem to be discernible:

"The clearest form of prior restraint arises in those situations where the government limitation, expressed in statute, regulation, or otherwise, undertakes to prevent future publication or other communication without advance approval of an executive official." Emerson, The Doctrine of Prior Restraint, 20 Law & Contemp. Prob., 648, 655.

See also *Brattle Films, Inc.*, v. *Commissioner of Public Safety*, 333 Mass. 58, 127 N. E. 2d 891.

[3] In *Smith*, we pointed out that although a "strict liability penal ordinance" which does not require scienter may be valid when applied to the distributors of food or drugs, it is invalid when applied to booksellers, distributors of ideas. *Id.*, at 152–153.

Niemotko v. *Maryland, supra,* at p. 282 (concurring opinion). By its decision, the Court gives its assent to unlimited censorship of moving pictures through a licensing system, despite the fact that Chicago has chosen this most objectionable course to attain its goals without any apparent attempt to devise other means so as not to intrude on the constitutionally protected liberties of speech and press.

Perhaps the most striking demonstration of how far the Court departs from its holdings in *Near* and subsequent cases may be made by examining the various schemes that it has previously determined to be violative of the First and Fourteenth Amendments' guaranty.

A remarkable parallel to the censorship plan now before the Court, although one less offensive to the First Amendment, is found in the *Near* case itself. The Minnesota statute there under attack did not require that *all* publications be approved before distribution. That statute only provided that a person may be enjoined by a court from publishing a newspaper which was "malicious, scandalous and defamatory." *Id.,* at 702. The injunction in that case was issued only after Near had allegedly published nine such newspapers. The statute permitted issuance of an injunction only on proof that, within the prior three months, such an offensive newspaper had already been published. Near was not prevented "from operating a newspaper in harmony with the public welfare." *Ibid.* If the state court found that Near's subsequent publication conformed to this standard, Near would not have been held in contempt. But, the Court there found that this system of censorship by a state court, used only after it had already been determined that the publisher had previously violated the standard, had to fall before the First and the Fourteenth Amendments. It would seem that, *a fortiori,* the present system must also fall.

The case of *Grosjean* v. *American Press Co., supra,* provides another forceful illustration. The Court held there that a license tax of two percent on the gross receipts from advertising of newspapers and periodicals having a circulation of over 20,000 a week was a form of prior restraint and therefore invalid. Certainly this would seem much less an infringement on the liberties of speech and press protected by the First and Fourteenth Amendments than the classic system of censorship we now have before us. It was held, in *Grosjean,* that the imposition of the tax would curtail the amount of revenue realized from advertising and therefore operate as a restraint on publication. The license tax in *Grosjean* is analogous to the license fee in the case at bar, a fee to which petitioner raises no objection. It was also held, in *Grosjean,* that the tax had a "direct *tendency* . . . to restrict circulation," *id.,* at 244–245 (emphasis added), because it was imposed only on publications with a weekly circulation of 20,000 or more; that "if it were increased to a high degree . . . it *might well result* in destroying both advertising and circulation." *Id.,* at 245. (Emphasis added.) These were the evils calling for reversal in *Grosjean.* I should think that these evils are of minor import in comparison to the evils consequent to the licensing system which the Court here approves.

In *Hague* v. *C. I. O.,* 307 U. S. 496, a city ordinance required that a permit be obtained for public parades or public assembly. The permit could "only be refused for the purpose of preventing riots, disturbances or disorderly assemblage." *Id.,* at 502. Mr. Justice Roberts' opinion said of the ordinance:

> "It enables the Director of Safety to refuse a permit on his mere opinion that such refusal will prevent 'riots, disturbances or disorderly assemblage.' It can thus, as the record discloses, be made the instrument

> of arbitrary suppression of free expression of views on national affairs, for the prohibition of all speaking will undoubtedly 'prevent' such eventualities." *Id.*, at 516.

May anything less be said of Chicago's movie censorship plan?

The question before the Court in *Schneider* v. *State, supra,* concerned the constitutional validity of a town ordinance requiring a license for the distribution of circulars. The police chief was permitted to refuse the license if the application for it or further investigation showed "that the canvasser is not of good character or is canvassing for a project not free from fraud. . . ." *Id.*, at 158. The Court said of that ordinance:

> "It bans unlicensed communication of any views or the advocacy of any cause from door to door, and permits canvassing only subject to the power of a police officer to determine, as a censor, what literature may be distributed from house to house and who may distribute it. The applicant must submit to that officer's judgment evidence as to his good character and as to the absence of fraud in the 'project' he proposes to promote or the literature he intends to distribute, and must undergo a burdensome and inquisitorial examination, including photographing and fingerprinting. In the end, his liberty to communicate with the residents of the town at their homes depends upon the exercise of the officer's discretion." *Id.*, at 163–164.

I believe that the licensing plan at bar is fatally defective because of this precise objection.

A study of the opinion in *Cantwell* v. *Connecticut, supra,* further reveals the Court's sharp divergence today from seriously deliberated precedent. The statute in

Cantwell forbade solicitation for any alleged religious, charitable or philanthropic cause unless the secretary of the public welfare council determined that the "cause [was] a religious one or [was] a bona fide object of charity or philanthropy and conform[ed] to reasonable standards of efficiency and integrity. . . ." *Id.*, at 302. Speaking of the secretary of the public welfare council, the Court held:

> "If he finds that the cause is not that of religion, to solicit for it becomes a crime. He is not to issue a certificate as a matter of course. His decision to issue or refuse it involves appraisal of facts, the exercise of judgment, and the formation of an opinion. He is authorized to withhold his approval if he determines that the cause is not a religious one. Such a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth." *Id.*, at 305.

Does the Court today wish to distinguish between the protection accorded to religion by the First and Fourteenth Amendments and the protection accorded to speech by those same provisions? I cannot perceive the distinction between this case and *Cantwell.* Chicago says that it faces a problem—obscene and incendious films. Connecticut faced the problem of fraudulent solicitation. Constitutionally, is there a difference? See also *Largent* v. *Texas,* 318 U. S. 418.

In *Thomas* v. *Collins,* 323 U. S. 516, this Court held that a state statute requiring a labor union organizer to obtain an organizer's card was incompatible with the free speech and free assembly mandates of the First and Fourteenth Amendments. The statute demanded nothing more than that the labor union organizer register, stating his name,

his union affiliations and describing his credentials. This information having been filed, the issuance of the organizer's card was subject to no further conditions. The State's obvious interest in acquiring this pertinent information was felt not to constitute an exceptional circumstance to justify the restraint imposed by the statute. It seems clear to me that the Chicago ordinance in this case presents a greater danger of stifling speech.

The two sound truck cases are further poignant examples of what had been this Court's steadfast adherence to the opposition of previous restraints on First Amendment liberties. In *Saia* v. *New York,* 334 U. S. 558, it was held that a city ordinance which forbade the use of sound amplification devices in public places without the permission of the Chief of Police was unconstitutionally void on its face since it imposed a previous restraint on public speech. Two years later, the Court upheld a different city's ordinance making unlawful the use of "any instrument of any kind or character which emits therefrom loud and raucous noises and is attached to and upon any vehicle operated or standing upon . . . streets or public places. . . ." *Kovacs* v. *Cooper,* 336 U. S. 77, 78. One of the grounds by which the opinion of Mr. Justice Reed distinguished *Saia* was that the *Kovacs* ordinance imposed no previous restraint. *Id.*, at 82. Mr. Justice Jackson chose to differentiate sound trucks from the *"moving picture screen,* the radio, the newspaper, the handbill . . . and the street corner orator. . . ." *Id.,* at 97 (concurring opinion). (Emphasis added.) He further stated that "No violation of the Due Process Clause of the Fourteenth Amendment by reason of infringement of free speech arises unless such regulation or prohibition undertakes to censor the contents of the broadcasting." *Ibid.* Needless to repeat, this is the violation the Court sanctions today.

Another extremely similar, but again less objectionable, situation was brought to the Court in *Kunz* v. *New York*, 340 U. S. 290. There, a city ordinance proscribed the right of citizens to speak on religious matters in the city streets without an annual permit. Kunz had previously had his permit revoked because "he had ridiculed and denounced other religious beliefs in his meetings." *Id.*, at 292.[4] Kunz was arrested for subsequently speaking in the city streets without a permit. The Court reversed Kunz' conviction holding:

> "We have here, then, an ordinance which gives an administrative official discretionary power to control in advance the right of citizens to speak on religious matters on the streets of New York. As such, the ordinance is clearly invalid as a prior restraint on the exercise of First Amendment rights." *Id.*, at 293.

The Chicago censorship and licensing plan is effectively no different. The only meaningful distinction between *Kunz* and the case at bar appears to be in the disposition of them by the Court.

The ordinance before us in *Staub* v. *City of Baxley*, 355 U. S. 313, made unlawful the solicitation, without a permit, of members for an organization which requires the payment of membership dues. The ordinance stated that "In passing upon such application the Mayor and Council shall consider the character of the applicant, the nature of the business of the organization for which members are desired to be solicited, and its effects upon the general welfare of citizens of the City of Baxley." *Id.*, at 315. MR. JUSTICE WHITTAKER, speaking for the Court, stated "that the ordinance is invalid on its face because it makes enjoyment of the constitutionally guaranteed freedom of speech contingent upon the will of the Mayor

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[4] For the particularly provocative statements made by Kunz, see the dissent of Mr. Justice Jackson. *Id.*, at 296–297.

and Council of the City and thereby constitutes a prior restraint upon, and abridges, that freedom." *Id.*, at 321. In *Staub*, the ordinance required a permit for solicitation; in the case decided today, the ordinance requires a permit for the exhibition of movies. If this is a valid distinction, it has not been so revealed. In *Staub*, the permit was to be granted on the basis of certain indefinite standards; in the case decided today, nothing different may be said.

As the Court recalls, in *Joseph Burstyn, Inc.*, v. *Wilson*, 343 U. S. 495, 502, it was held that motion pictures come "within the free speech and free press guaranty of the First and Fourteenth Amendments." Although the Court found it unnecessary to decide "whether a state may censor motion pictures under a clearly drawn statute designed and applied to prevent the showing of obscene films," *id.*, at 506, MR. JUSTICE CLARK stated, in the Court's opinion, quite accurately:

> "But the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles, as they have frequently been enunciated by this Court, make freedom of expression the rule. There is no justification in this case for making an exception to that rule.
>
> "The statute involved here does not seek to punish, as a past offense, speech or writing falling within the permissible scope of subsequent punishment. On the contrary, New York requires that permission to communicate ideas be obtained in advance from state officials who judge the content of the words and picture sought to be communicated. This Court recognized many years ago that such a previous restraint is a form of infringement upon freedom of expression to be especially condemned. *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697 (1931). The Court there recounted the history which indicates that a major purpose of the First Amendment

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> guaranty of a free press was to prevent prior restraints upon publication, although it was carefully pointed out that the liberty of the press is not limited to that protection. It was further stated that 'the protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases.' *Id.*, at 716. In the light of the First Amendment's history and of the *Near* decision, the State has a heavy burden to demonstrate that the limitation challenged here presents such an exceptional case." *Id.*, at 503–504.

Here, once more, the Court recognized that the First Amendment's rejection of prior censorship through licensing and previous restraint is an inherent and basic principle of freedom of speech and the press. Now, the Court strays from that principle; it strikes down that tenet without requiring any demonstration that this is an "exceptional case," whatever that might be, and without any indication that Chicago has sustained the "heavy burden" which was supposed to have been placed upon it. Clearly, this is neither an exceptional case nor has Chicago sustained *any* burden.

Perhaps today's surrender was forecast by *Kingsley Books, Inc.*, v. *Brown, supra.* But, that was obviously not this case, and accepting *arguendo* the correctness of that decision, I believe that it leads to a result contrary to that reached today. The statute in *Kingsley* authorized "the chief executive, or legal officer, of a municipality to invoke a 'limited injunctive remedy,' under closely defined procedural safeguards, against the sale and distribution of written and printed matter found after due trial [by a court] to be obscene. . . ." *Id.*, at 437. The Chicago scheme has no procedural safeguards; there is no trial of the issue before the blanket injunction against exhibition becomes effective. In *Kingsley,* the grounds for the restraint were that the written or printed matter

was "obscene, lewd, lascivious, filthy, indecent, or disgusting . . . or immoral. . . ." *Id.*, at 438. The Chicago objective is to capture much more. The *Kingsley* statute required the existence of some cause to believe that the publication was obscene before the publication was put on trial. The Chicago ordinance requires no such showing.

The booklets enjoined from distribution in *Kingsley* were concededly obscene.[5] There is no indication that this is true of the moving picture here. This was treated as a particularly crucial distinction. Thus, the Court has suggested that, in times of national emergency, the Government might impose a prior restraint upon "the publication of the sailing dates of transports or the number and location of troops." *Near* v. *Minnesota, supra,* p. 716; cf. *Ex parte Milligan,* 71 U. S. 2. But, surely this is not to suggest that the Government might require that all newspapers be submitted to a censor in order to assist it in preventing such information from reaching print. Yet in this case the Court gives its blessing to the censorship of all motion pictures in order to prevent the exhibition of those it feels to be constitutionally unprotected.

The statute in *Kingsley* specified that the person sought to be enjoined was to be entitled to a trial of the issues within one day after joinder and a decision was to be rendered by the court within two days of the conclusion of the trial. The Chicago plan makes no provi-

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[5] Judge Stanley H. Fuld rightly observed:

"Whatever might be said of a scheme of advance censorship directed against all *possibly* obscene writings, the case before us concerns a regulatory measure of far narrower impact, of a kind neither entailing the grave dangers of general censorship nor productive of the abuses which gave rise to the constitutional guarantees. (Cf. Pound, Equitable Relief Against Defamation and Injuries to Personality, 29 Harv. L. Rev. 640, 650–51.)" *Brown* v. *Kingsley Books, Inc.,* 1 N. Y. 2d 177, 185, 134 N. E. 2d 461, 465.

sion for prompt judicial determination. In *Kingsley,* the person enjoined had available the defense that the written or printed matter was not obscene if an attempt was made to punish him for disobedience of the injunction. The Chicago ordinance admits no defense in a prosecution for failure to procure a license other than that the motion picture was submitted to the censor and a license was obtained.

Finally, the Court in *Kingsley* painstakingly attempted to establish that that statute, in its effective operation, was no more a previous restraint on, or interference with, the liberty of speech and press than a statute imposing criminal punishment for the publication of pornography. In each situation, it contended, the publication may have passed into the hands of the public. Of course, this argument is inadmissible in this case and the Court does not purport to advance it.

It would seem idle to suppose that the Court today is unaware of the evils of the censor's basic authority, of the mischief of the system against which so many great men have waged stubborn and often precarious warfare for centuries, see *Grosjean* v. *American Press Co., supra,* at p. 247, of the scheme that impedes all communication by hanging threateningly over creative thought.[6] But the Court dismisses all of this simply by opining that "the phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test." *Ante,* p. 49. I must insist that "a pragmatic assessment of its operation,"

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[6] Tolstoy once wrote:

"You would not believe how, from the very commencement of my activity, that horrible Censor question has tormented me! I wanted to write what I felt; but all the same time it occurred to me that what I wrote would not be permitted, and involuntarily I had to abandon the work. I abandoned, and went on abandoning, and meanwhile the years passed away." Quoted by Chafee, *supra,* at p. 241.

Kingsley Books, Inc., v. *Brown, supra,* at p. 442, lucidly portrays that the system that the Court sanctions today is inherently bad. One need not disagree with the Court that Chicago has chosen the most effective means of suppressing obscenity. Censorship has been so recognized for centuries. But, this is not to say that the Chicago plan, the old, abhorrent English system of censorship through licensing, is a permissible *form* of prohibiting unprotected speech. The inquiry, as stated by the Court but never resolved, is whether this form of prohibition results in "unreasonable strictures on individual liberty," *ante,* p. 50; [7] whether licensing, as a prerequisite to exhibition, is barred by the First and Fourteenth Amendments.

A most distinguished antagonist of censorship, in "a plea for unlicensed printing," has said:

> "If he [the censor] be of such worth as behoovs him, there cannot be a more tedious and unpleasing Journey-work, a greater loss of time levied upon his head, then to be made the perpetuall reader of unchosen books and pamphlets . . . we may easily forsee what kind of licensers we are to expect hereafter, either ignorant, imperious, and remisse, or basely pecuniary." Areopagitica, in the Complete Poetry and Selected Prose of John Milton (Modern Library College Ed. 1950), 677, at 700.

There is no sign that Milton's fear of the censor would be dispelled in twentieth century America. The censor is beholden to those who sponsored the creation of his office,

[7] In *Smith* v. *California, supra,* we noted that "Our decisions furnish examples of legal devices and doctrines, in most applications consistent with the Constitution, 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." *Id.,* at 150–151. See *Shelton* v. *Tucker, supra.* Forty-six of our States currently see fit to rely on traditional criminal punishment for the protection of their citizens.

to those who are most radically preoccupied with the suppression of communication. The censor's function is to restrict and to restrain; his decisions are insulated from the pressures that might be brought to bear by public sentiment if the public were given an opportunity to see that which the censor has curbed.

The censor performs free from all of the procedural safeguards afforded litigants in a court of law. See *Kingsley Books, Inc.*, v. *Brown, supra,* at p. 437; cf. *Near* v. *Minnesota, supra,* at p. 713; *Cantwell* v. *Connecticut, supra,* at p. 306. The likelihood of a fair and impartial trial disappears when the censor is both prosecutor and judge. There is a complete absence of rules of evidence; the fact is that there is usually no evidence at all as the system at bar vividly illustrates.[8] How different from a judicial proceeding where a full case is presented by the litigants. The inexistence of a jury to determine con-

[8] Although the Chicago ordinance designates the Commissioner of Police as the censor, counsel for the city explained that the task is delegated to a group of people, often women. The procedure before Chicago's censor board was found to be as follows according to the testimony of the "commanding officer of the censor unit":

"Q. Am I to understand that the procedure is that only these six people are in the room, and perhaps you, at the time the film is shown?

"A. Yes.

"Q. Does the distributor ever get a chance to present his views on the picture?

"A. No, sir.

"Q. Are other people's views invited, such as drama critics or movie reviewers or writers or artists of some kind; or are they ever asked to comment on the film before the censor board makes its decision?

"A. No, sir.

"Q. In other words, it is these six people plus yourself in a relationship that we have not as yet defined who decide whether the picture conforms to the standards set up in the ordinance?

"A. Yes, sir." Transcript of Record, p. 51, *Times Film Corp.* v. *City of Chicago,* 244 F. 2d 432.

temporary community standards is a vital flaw.[9] See *Kingsley Books, Inc.*, v. *Brown, supra,* at pp. 447–448 (dissenting opinion).

A revelation of the extent to which censorship has recently been used in this country is indeed astonishing. The Chicago licensors have banned newsreel films of Chicago policemen shooting at labor pickets and have ordered the deletion of a scene depicting the birth of a buffalo in Walt Disney's *Vanishing Prairie.* Gavzer, Who Censors Our Movies? Chicago Magazine, Feb. 1956, pp. 35, 39. Before World War II, the Chicago censor denied licenses to a number of films portraying and criticizing life in Nazi Germany including the March of Time's *Inside Nazi Germany.* Editorials, Chicago Daily Times, Jan. 20, Nov. 18, 1938. Recently, Chicago refused to issue a permit for the exhibition of the motion picture *Anatomy of a Murder* based upon the best-selling novel of the same title, because it found the use of the words "rape" and "contraceptive" to be objectionable. *Columbia Pictures Corp.* v. *City of Chicago* (D. C. N. D. Ill.), 59 C. 1058 (1959) (unreported). The Chicago censor bureau excised a scene in *Street With No Name* in which a girl was slapped

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[9] Cf. Chafee, *supra:*

"A jury is none too well fitted to pass on the injurious nature of opinions, but at least it consists of twelve men who represent the general views and the common sense of the community and often appreciate the motives of the speaker or writer whose punishment is sought. A censor, on the contrary, is a single individual with a professionalized and partisan point of view. His interest lies in perpetuating the power of the group which employs him, and any bitter criticism of the group smacks to him of incitement to bloody revolution." *Id.,* at 314.

"On the other hand, a mayor and a police commissioner are not ordinarily selected on the basis of wide reading and literary judgment. They have other duties, which require other qualities. They may lack the training of the permanent censor, and yet run the same risk of being arbitrary and bureaucratic." *Id.,* at 533.

because this was thought to be a "too violent" episode. Life, Oct. 25, 1948, p. 60. *It Happened in Europe* was severely cut by the Ohio censors who deleted scenes of war orphans resorting to violence. The moral theme of the picture was that such children could even then be saved by love, affection and satisfaction of their basic needs for food. Levy, Case Against Film Censorship, Films in Review, Apr. 1950, p. 40 (published by National Board of Review of Motion Pictures, Inc.). The Memphis censors banned *The Southerner* which dealt with poverty among tenant farmers because "it reflects on the south." *Brewster's Millions,* an innocuous comedy of fifty years ago, was recently forbidden in Memphis because the radio and film character Rochester, a Negro, was deemed "too familiar." See Velie, You Can't See That Movie: Censorship in Action, Collier's, May 6, 1950, pp. 11, 66. Maryland censors restricted a Polish documentary film on the basis that it failed to present a true picture of modern Poland. Levy, Case Against Film Censorship, Films in Review, *supra,* p. 41. *No Way Out,* the story of a Negro doctor's struggle against race prejudice, was banned by the Chicago censor on the ground that "there's a possibility it could cause trouble." The principal objection to the film was that the conclusion showed no reconciliation between blacks and whites. The ban was lifted after a storm of protest and later deletion of a scene showing Negroes and whites arming for a gang fight. N. Y. Times, Aug. 24, 1950, p. 31, col. 3; Aug. 31, 1950, p. 20, col. 8. Memphis banned *Curley* because it contained scenes of white and Negro children in school together. Kupferman and O'Brien, Motion Picture Censorship—The Memphis Blues, 36 Cornell L. J. 273, 276–278. Atlanta barred *Lost Boundaries,* the story of a Negro physician and his family who "passed" for white, on the ground that the exhibition of said picture "will adversely affect the peace, morals and good order" in the

city. N. Y. Times, Feb. 5, 1950, § 2, p. 5, col. 7. See generally Kupferman and O'Brien, *supra;* Note, 60 Yale L. J. 696 *et seq.;* Brief for American Civil Liberties Union as *amicus curiae,* pp. 14–15. *Witchcraft,* a study of superstition through the ages, was suppressed for years because it depicted the devil as a genial rake with amorous leanings, and because it was feared that certain historical scenes, portraying the excesses of religious fanatics, might offend religion. *Scarface,* thought by some as the best of the gangster films, was held up for months; then it was so badly mutilated that retakes costing a hundred thousand dollars were required to preserve continuity. The New York censors banned *Damaged Lives,* a film dealing with venereal disease, although it treated a difficult theme with dignity and had the sponsorship of the American Social Hygiene Society. The picture of Lenin's tomb bearing the inscription "Religion is the opiate of the people" was excised from *Potemkin.* From *Joan of Arc* the Maryland board eliminated Joan's exclamation as she stood at the stake: "Oh, God, why hast thou forsaken me?" and from *Idiot's Delight,* the sentence: "We, the workers of the world, will take care of that." *Professor Mamlock* was produced in Russia and portrayed the persecution of the Jews by Nazis. The Ohio censors condemned it as "harmful" and calculated to "stir up hatred and ill will and gain nothing." It was released only after substantial deletions were made. The police refused to permit its showing in Providence, Rhode Island, on the ground that it was communistic propaganda. *Millions of Us,* a strong union propaganda film, encountered trouble in a number of jurisdictions. *Spanish Earth,* a pro-Loyalist documentary picture, was banned by the board in Pennsylvania. Ernst and Lindey, The Censor Marches On, 96–97, 102–103, 108–111. During the year ending June 30, 1938, the New York board censored, in one way or another, over five percent of the

moving pictures it reviewed. *Id.*, at 81. Charlie Chaplin's satire on Hitler, *The Great Dictator*, was banned in Chicago, apparently out of deference to its large German population. Chafee, *supra*, at p. 541. Ohio and Kansas banned newsreels considered pro labor. Kansas ordered a speech by Senator Wheeler opposing the bill for enlarging the Supreme Court to be cut from the *March of Time* as "partisan and biased." *Id.*, at 542. An early version of *Carmen* was condemned on several different grounds. The Ohio censor objected because cigarette-girls smoked cigarettes in public. The Pennsylvania censor disapproved the duration of a kiss. *Id.*, at 543. The New York censors forbade the discussion in films of pregnancy, venereal disease, eugenics, birth control, abortion, illegitimacy, prostitution, miscegenation and divorce. Ernst and Lindey, *supra*, at p. 83. A member of the Chicago censor board explained that she rejected a film because "it was immoral, corrupt, indecent, against my . . . religious principles." Transcript of Record, p. 172. *Times Film Corp.* v. *City of Chicago*, 244 F. 2d 432. A police sergeant attached to the censor board explained, "Coarse language or anything that would be derogatory to the government—propaganda" is ruled out of foreign films. "Nothing pink or red is allowed," he added. Chicago Daily News, Apr. 7, 1959, p. 3, cols. 7–8. The police sergeant in charge of the censor unit has said: "Children should be allowed to see any movie that plays in Chicago. If a picture is objectionable for a child, it is objectionable period." Chicago Tribune, May 24, 1959, p. 8. col. 3. And this is but a smattering produced from limited research. Perhaps the most powerful indictment of Chicago's licensing device is found in the fact that between the Court's decision in 1952 in *Joseph Burstyn, Inc.*, v. *Wilson*, *supra*, and the filing of the petition for certiorari in 1960 in the present case, not once have the state courts upheld the censor

when the exhibitor elected to appeal. Brief of American Civil Liberties Union as *amicus curiae,* pp. 13–14.

This is the regimen to which the Court holds that all films must be submitted. It officially unleashes the censor and permits him to roam at will, limited only by an ordinance which contains some standards that, although concededly not before us in this case, are patently imprecise. The Chicago ordinance commands the censor to reject films that are "immoral," see *Commercial Pictures Corp.* v. *Regents,* 346 U. S. 587; *Kingsley International Pictures Corp.* v. *Regents,* 360 U. S. 684; or those that portray "depravity, criminality, or lack of virtue of a class of citizens of any race, color, creed, or religion and [expose] them to contempt, derision or obloquy, or [tend] to produce a breach of the peace or riots, or [purport] to represent any hanging, lynching, or burning of a human being." May it not be said that almost every censored motion picture that was cited above could also be rejected, under the ordinance, by the Chicago censors? It does not require an active imagination to conceive of the quantum of ideas that will surely be suppressed.

If the censor denies rights protected by the First and Fourteenth Amendments, the courts might be called upon to correct the abuse if the exhibitor decides to pursue judicial remedies. But, this is not a satisfactory answer as emphasized by this very case. The delays in adjudication may well result in irreparable damage, both to the litigants and to the public. Vindication by the courts of *The Miracle* was not had until five years after the Chicago censor refused to license it. And then the picture was never shown in Chicago. Brief for Petitioner, p. 17. The instant litigation has now consumed almost three years. This is the delay occasioned by the censor; this is the injury done to the free communication of ideas. This damage is not inflicted by the ordinary criminal penalties.

The threat of these penalties, intelligently applied, will ordinarily be sufficient to deter the exhibition of obscenity. However, if the exhibitor believes that his film is constitutionally protected, he will show the film, and, if prosecuted under criminal statute, will have ready that defense. The perniciousness of a system of censorship is that the exhibitor's belief that his film is constitutionally protected is irrelevant. Once the censor has made his estimation that the film is "bad" and has refused to issue a permit, there is ordinarily no defense to a prosecution [10] for showing the film without a license.[11] Thus, the film is not shown, perhaps not for years and sometimes not ever. Simply a talismanic test or self-wielding sword? I think not.

Moreover, more likely than not, the exhibitor will not pursue judicial remedies. See *Schneider* v. *State, supra,* at p. 164; Ernst and Lindey, *supra,* at p. 80. His inclination may well be simply to capitulate rather than initiate a lengthy and costly litigation.[12] In such case, the liberty

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[10] That portion of the Chicago ordinance dealing with penalties is as follows:

"Any person exhibiting any pictures or series of pictures without a permit having been obtained therefor shall be fined not less than fifty dollars nor more than one hundred dollars for each offense. A separate and distinct offense shall be regarded as having been committed for each day's exhibition of each picture or series of pictures without a permit."

[11] Professor Paul A. Freund has affirmed that this situation "does indeed have a chilling effect (on freedom of communication) beyond that of a criminal statute." Freund, The Supreme Court and Civil Liberties, 4 Vand. L. Rev. 533, 539.

[12] A particularly frightening illustration is found in the operation of a Detroit book censorship plan. One publisher simply submitted his unprinted manuscripts to the censor and deleted everything "objectionable" before publication. From 1950 to 1952, more than 100 titles of books were disapproved by the censor board. Every book banned was withheld from circulation. The censor board, in addition to finding books "objectionable," listed a group of books not

of speech and press, and the public, which benefits from the shielding of that liberty, are, in effect, at the mercy of the censor's whim. This powerful tendency to restrict the free dissemination of ideas calls for reversal. See *Grosjean* v. *American Press Co., supra,* at 245.

Freedom of speech and freedom of the press are further endangered by this "most effective" means for confinement of ideas. It is axiomatic that the stroke of the censor's pen or the cut of his scissors will be a less contemplated decision than will be the prosecutor's determination to prepare a criminal indictment. The standards of proof, the judicial safeguards afforded a criminal defendant and the consequences of bringing such charges will all provoke the mature deliberation of the prosecutor. None of these hinder the quick judgment of the censor, the speedy determination to suppress. Finally, the fear of the censor by the composer of ideas acts as a substantial deterrent to the creation of new thoughts. See Tolstoy's declaration, note 6, *supra.* This is especially true of motion pictures due to the large financial burden that must be assumed by their producers. The censor's sword pierces deeply into the heart of free expression.

It seems to me that the Court's opinion comes perilously close to holding that not only may motion pictures be censored but that a licensing scheme may also be applied to newspapers, books and periodicals, radio, television, public speeches, and every other medium of expression. The Court suggests that its decision today is limited to motion pictures by asserting that they are not "necessarily subject to the precise rules governing any other particular method of expression. Each method . . .

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suitable for criminal prosecution as "partially objectionable." Most booksellers were also afraid to handle these. Lockhart and McClure, Literature, The Law of Obscenity, and the Constitution, 38 Minn. L. Rev. 295, 314–316.

tends to present its own peculiar problems." *Ante,* p. 49. But, this, I believe, is the invocation of a talismanic phrase. The Court, in no way, explains why moving pictures should be treated differently than any other form of expression, why moving pictures should be denied the protection against censorship—"a form of infringement upon freedom of expression to be *especially* condemned." *Joseph Burstyn, Inc.,* v. *Wilson, supra,* at p. 503. (Emphasis added.) When pressed during oral argument, counsel for the city could make no meaningful distinction between the censorship of newspapers and motion pictures. In fact, the percentage of motion pictures dealing with social and political issues is steadily rising.[13] The Chicago ordinance makes no exception for newsreels, documentaries, instructional and educational films or the like. All must undergo the censor's inquisition. Nor may it be suggested that motion pictures may be treated differently from newspapers because many movies are produced essentially for purposes of entertainment. As the Court said in *Winters* v. *New York,* 333 U. S. 507, 510:

> "We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine." See *Thomas* v. *Collins, supra,* at p. 531.[14]

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[13] See Note, 60 Yale L. J. 696, 706, n. 25.

[14] "The evils to be prevented were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens." 2 Cooley, Const. Lim. (8th ed.), p. 886.

The contention may be advanced that the impact of motion pictures is such that a licensing system of prior censorship is permissible. There are several answers to this, the first of which I think is the Constitution itself. Although it is an open question whether the impact of motion pictures is greater or less than that of other media, there is not much doubt that the exposure of television far exceeds that of the motion picture. See S. Rep. No. 1466, 84th Cong., 2d Sess. 5. But, even if the impact of the motion picture is greater than that of some other media, that fact constitutes no basis for the argument that motion pictures should be subject to greater suppression. This is the traditional argument made in the censor's behalf; this is the argument advanced against newspapers at the time of the invention of the printing press. The argument was ultimately rejected in England, and has consistently been held to be contrary to our Constitution. No compelling reason has been predicated for accepting the contention now.

It is true that "each method [of expression] tends to present its own peculiar problems." *Joseph Burstyn, Inc.*, v. *Wilson, supra,* at p. 503. The Court has addressed itself on several occasions to these problems. In *Schneider* v. *State, supra,* at pp. 160–161, the Court stated, in reference to speaking in public, that "a person could not exercise this liberty by taking his stand in the middle of a crowded street, contrary to traffic regulations, and maintain his position to the stoppage of all traffic; a group of distributors could not insist upon a constitutional right to form a cordon across the street and to allow no pedestrian to pass who did not accept a tendered leaflet; nor does the guarantee of freedom of speech or of the press deprive a municipality of power to enact regulations against throwing literature broadcast in the streets." The Court recognized that sound trucks call for particu-

larized consideration when it said in *Saia* v. *New York, supra,* at p. 562, "Noise can be regulated by regulating decibels. The hours and place of public discussion can be controlled. . . . Any abuses which loud-speakers create can be controlled by narrowly drawn statutes." But, the Court's decision today does not follow from this. Our prior decisions do not deal with the *content* of the speech; they deal only with the conditions surrounding its delivery. *These* conditions "tend to present the problems peculiar to each method of expression." Here the Court uses this magical phrase to cripple a basic principle of the Constitution.

The Court, not the petitioner, makes the "broadside attack." I would reverse the decision below.

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

My view that censorship of movies is unconstitutional because it is a prior restraint and violative of the First Amendment has been expressed on prior occasions. *Superior Films* v. *Department of Education,* 346 U. S. 587, 588–589 (concurring opinion); *Kingsley Pictures Corp.* v. *Regents,* 360 U. S. 684, 697 (concurring opinion).

While the problem of movie censorship is relatively new, the censorship device is an ancient one. It was recently stated, "There is a law of action and reaction in the decline and resurgence of censorship and control. Whenever liberty is in the ascendant, a social group will begin to resist it; and when the reverse is true, a similar resistance in favor of liberty will occur." Haney, Comstockery in America (1960), pp. 11–12.

Whether or not that statement of history is accurate, censorship has had many champions throughout time.

Socrates: "And shall we just carelessly allow children to hear any casual tales which may be devised by casual per-

sons, and to receive into their minds ideas for the most part the very opposite of those which we should wish them to have when they are grown up?"

Glaucon: "We can not."

Socrates: "Then the first thing will be to establish a censorship of the writers of fiction, and let the censors receive any tale of fiction which is good, and reject the bad; and we will desire mothers and nurses to tell their children the authorized ones only. Let them fashion the mind with such tales, even more fondly than they mould the body with their hands; but most of those which are now in use must be discarded." Plato, Republic (The Dialogues of Plato, Jowett trans., Ox. Univ. Press, 1953) vol. 2, p. 221.

Hobbes was the censor's proponent: ". . . it is annexed to the sovereignty, to be judge of what opinions and doctrines are averse, and what conducing to peace; and consequently, on what occasions, how far, and what men are to be trusted withal, in speaking to multitudes of people; and who shall examine the doctrines of all books before they be published. For the actions of men proceed from their opinions; and in the well-governing of opinions, consisteth the well-governing of men's actions, in order to their peace, and concord." Leviathan (Oakeshott ed. 1947), p. 116.

Regimes of censorship are common in the world today. Every dictator has one; every Communist regime finds it indispensable.[1] One shield against world opinion that colonial powers have used was the censor, as dramatized by France in North Africa. Even England has a vestige of censorship in the Lord Chamberlain (32 Halsbury's Laws of England (2d ed. 1939), p. 68) who presides over the stage—a system that in origin was concerned with the

[1] "Nowhere have the Communists become simply a vote-getting party. They are organized around ideas and they care about ideas. They are the great heresy hunters of the modern world." Ways, Beyond Survival (1959), p. 199.

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barbs of political satire.[2] But the concern with political satire shifted to a concern with atheism and with sexual morality—the last being the concern evident in Chicago's system now before us.

The problems of the wayward mind concern the clerics, the psychiatrists, and the philosophers. Few groups have hesitated to create the political pressures that translate into secular law their notions of morality. Pfeffer, Creeds in Competition (1958), pp. 103–109. No more powerful weapon for sectarian control can be imagined than governmental censorship. Yet in this country the state is not the secular arm of any religious school of thought, as in some nations; nor is the church an instrument of the state. Whether—as here—city officials or—as in Russia—a political party lays claim to the power of governmental censorship, whether the pressures are for a conformist moral code or for a conformist political ideology, no such regime is permitted by the First Amendment.

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[2] Ivor Brown in a recent summary of the work of the Lord Chamberlain states: "The licensing of plays was imposed not to protect the morals of the British public but to safeguard the reputation of politicians. This happened in 1737 when the Prime Minister, Sir Robert Walpole, infuriated by the stage lampoons of Henry Fielding and others, determined to silence these much enjoyed exposures of his alleged corruption and incompetence. This had the curiously beneficial result of driving Fielding away from the stage. He then became an excellent magistrate and a major creator of the English novel. But in the puritanical atmosphere of the nineteenth century the discipline was applied to the moral content of plays and applied so rigorously that the dramatists were barred from serious treatment of 'straight sex,' as well as the abnormalities. The prissiness of respectable Victorian society was such that legs were hardly to be mentioned, let alone seen, and Charles Dickens wrote cumbrously of 'unmentionables' when he meant trousers." N. Y. Times, Jan. 1, 1961, § 2, p. X3. And see Knowles, The Censor, The Drama, and The Film (1934). As to British censorship of movies see 15 & 16 Geo. 6 & 1 Eliz. 2, c. 68.

The forces that build up demands for censorship are heterogeneous.

> "The comstocks are not merely people with intellectual theories who might be convinced by more persuasive theories; nor are they pragmatists who will be guided by the balance of power among pressure groups. Many of them are so emotionally involved in the condemnation of what they find objectionable that they find rational arguments irrelevant. They *must* suppress what is offensive in order to stabilize their own tremulous values and consciences. Panic rules them, and they cannot be calmed by discussions of legal rights, literary integrity, or artistic merit." Haney, *op. cit. supra,* pp. 176–177.

Yet as long as the First Amendment survives, the censor, no matter how respectable his cause, cannot have the support of government. It is not for government to pick and choose according to the standards of any religious, political, or philosophical group. It is not permissible, as I read the Constitution, for government to release one movie and refuse to release another because of an official's concept of the prevailing need or the public good. The Court in *Near* v. *Minnesota,* 283 U. S. 697, 713, said that the "chief purpose" of the First Amendment's guarantee of freedom of press was "to prevent previous restraints upon publication."

A noted Jesuit has recently stated one reason against government censorship:

> "The freedom toward which the American people are fundamentally orientated is a freedom under God, a freedom that knows itself to be bound by the imperatives of the moral law. Antecedently it is presumed that a man will make morally and socially responsible use of his freedom of expression; hence there is to be no prior restraint on it. However, if

> his use of freedom is irresponsible, he is summoned after the fact to responsibility before the judgment of the law. There are indeed other reasons why prior restraint on communications is outlawed; but none are more fundamental than this." Murray, We Hold These Truths (1960), pp. 164–165.

Experience shows other evils of "prior restraint." The regime of the censor is deadening. One who writes cannot afford entanglements with the man whose pencil can keep his production from the market. The result is a pattern of conformity. Milton made the point long ago: "For though a licenser should happen to be judicious more than ordinarily, which will be a great jeopardy of the next succession, yet his very office, and his commission enjoins him to let pass nothing but what is vulgarly received already." Areopagitica, 3 Harvard Classics (1909), p. 212.

Another evil of censorship is the ease with which the censor can erode liberty of expression. One stroke of the pen is all that is needed. Under a censor's regime the weights are cast against freedom.[3] If, however, gov-

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[3] John Galsworthy wrote in opposition to the British censorship of plays: "In this country the tongue and pen are subject to the law; so may it ever be! But in this country neither tongue nor pen are in any other instance subject to the despotic judgments of a single man. The protest is not aimed at the single man who holds this office. He may be the wisest man in England, the best fitted for his despotic office. It is not he; it is the office that offends. It offends the decent pride and self-respect of an entire profession. To those who are surprised that dramatic authors should take themselves so seriously we say, What workman worthy of his tools does not believe in the honour of his craft? In this appeal for common justice we dramatists, one little branch of the sacred tree of letters, appeal to our brother branches. We appeal to the whole knighthood of the pen—scientists, historians, novelists, journalists. The history of the health of nations is the history of the freedom—not the licence—of the tongue and pen. We are claiming the freedom—not the licence—of our pens. Let those hold back in helping us who would tamely

ernment must proceed against an illegal publication in a prosecution, then the advantages are on the other side. All the protections of the Bill of Rights come into play. The presumption of innocence, the right to jury trial, proof of guilt beyond a reasonable doubt—these become barriers in the path of officials who want to impose their standard of morality on the author or producer. The advantage a censor enjoys while working as a supreme bureaucracy disappears. The public trial to which a person is entitled who violates the law gives a hearing on the merits, airs the grievance, and brings the community judgment to bear upon it. If a court sits in review of a censor's ruling, its function is limited. There is leeway left the censor, who like any agency and its *expertise*, is given a presumption of being correct.[4] That advantage

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suffer their own pens to be warped and split as ours are before we take them up." London Times, Nov. 1, 1907, p. 7. And see the testimony of George Bernard Shaw in Report, Joint Select Committee of the House of Lords and the House of Commons on the Stage Plays (Censorship) (1909), p. 46 *et seq.* Shaw, three of whose plays had been suppressed, caused a contemporary sensation by asking, and being refused, permission to file with the Committee an attack on censorship that he had prepared. Shaw's version of the story and the rejected statement can be found as his preface to The Shewing-Up of Blanco Posnet. He says in his statement: "Any journalist may publish an article, any demagogue may deliver a speech without giving notice to the government or obtaining its license. The risk of such freedom is great; but as it is the price of our political liberty, we think it worth paying. We may abrogate it in emergencies . . . just as we stop the traffic in a street during a fire or shoot thieves on sight after an earthquake. But when the emergency is past, liberty is restored everywhere except in the theatre. [Censorship is] a permanent proclamation of martial law with a single official substituted for a court martial." The Shewing-Up of Blanco Posnet (Brentano's, 1913), p. 36.

[4] See Note, 71 Harv. L. Rev. 326, 331. Cf. *Glanzman* v. *Christenberry,* 175 F. Supp. 485, with *Grove Press, Inc.,* v. *Christenberry,* 175 F. Supp. 488, as to the weight given to post-office determinations of nonmailability.

disappears when the government must wait until a publication is made and then prove its case in the accepted manner before a jury in a public trial. All of this is anathema to the censor who prefers to work in secret, perhaps because, as Milton said, he is "either ignorant, imperious, and remiss, or basely pecuniary." Areopagitica, *supra*, p. 210.

The First Amendment was designed to enlarge, not to limit, freedom in literature and in the arts as well as in politics, economics, law, and other fields. *Hannegan* v. *Esquire, Inc.*, 327 U. S. 146, 151–159; *Kingsley Pictures Corp.* v. *Regents, supra.* Its aim was to unlock all ideas for argument, debate, and dissemination. No more potent force in defeat of that freedom could be designed than censorship. It is a weapon that no minority or majority group, acting through government, should be allowed to wield over any of us.[5]

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[5] "First, within the larger pluralist society each minority group has the right to censor for its own members, if it so chooses, the content of the various media of communication, and to protect them, by means of its own choosing, from materials considered harmful according to its own standards.

"Second, in a pluralist society no minority group has the right to demand that government should impose a general censorship, affecting all the citizenry, upon any medium of communication, with a view to punishing the communication of materials that are judged to be harmful according to the special standards held within one group.

"Third, any minority group has the right to work toward the elevation of standards of public morality in the pluralist society, through the use of the methods of persuasion and pacific argument.

"Fourth, in a pluralist society no minority group has the right to impose its own religious or moral views on other groups, through the use of the methods of force, coercion, or violence." Murray, We Hold These Truths (1960), p. 168.

CAMPBELL ET AL. *v.* UNITED STATES.

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

No. 53. Argued December 6, 1960.—Decided January 23, 1961.

During a trial in a Federal District Court at which petitioners were convicted of a federal crime, a government witness testified on cross-examination that, while being interviewed by a federal agent, he had made and signed a statement which had been written down by the agent. On motion of petitioners under the so-called Jencks Act, 18 U. S. C. § 3500, the Court directed the Government to produce the document. Government counsel denied possession of such a document, but admitted possession of a report written by a federal agent summarizing an interview with that witness. The trial judge held an inquiry in the jury's absence, at the conclusion of which he refused to order the Government to deliver the agent's report to petitioners and also denied their motion to strike the testimony of the witness. He showed the report to the witness, who denied that it was his statement, and he refused to call as a witness the agent who made the report, though he said that the defendants could do so if they wished. *Held:*

1. Because of errors in the conduct of the inquiry, petitioners are entitled to a re-examination of their motion for production of the witness' pretrial statements and their motion to strike his testimony. Pp. 86–98.

(a) The circumstances of this case required that the judge, of his own motion, call the agent who signed the report or require the Government to do so, since the agent was readily available and could explain where he got the information and what had become of the original writing. Pp. 94–96.

(b) The judge erred in relying upon the witness to supply the information he sought, since the very question to be determined was whether the defense should have the document for use in cross-examining the witness and possibly impeaching his testimony. Pp. 96–98.

(c) Failure of the judge to call for the testimony of the agent who signed the report foreclosed a proper determination of petitioners' motion to strike the testimony of the witness. P. 98.

(d) The record affords this Court no opportunity to decide the important question as to the construction and application of 18 U. S. C. § 3500 (d), since it does not show whether such a paper as that described by the witness existed and was destroyed, or the circumstances of its destruction, nor can it be known without the benefit of the testimony of the agent who interviewed the witness and prepared the report. P. 98.

2. The judgment of the Court of Appeals affirming the conviction is vacated and the case is remanded to the District Court for further proceedings. Pp. 98–99.

(a) The District Court is directed to hold a new inquiry consistent with this opinion, to supplement the record with new findings and to enter a new final judgment of conviction, if it concludes to reaffirm its former rulings. Pp. 98–99.

(b) If the District Court concludes that the Government should have been required to deliver the report or other statement to petitioners, or that it should have granted their motion to strike the witness' testimony, it will vacate the judgment of conviction and grant petitioners a new trial. P. 99.

269 F. 2d 688, judgment vacated and cause remanded.

Melvin S. Louison and *Lawrence F. O'Donnell* argued the cause for petitioners. With them on the brief was *Leonard Louison.*

Roger G. Connor argued the cause for the United States. On the brief were *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Kirby W. Patterson.*

Mr. Justice Brennan delivered the opinion of the Court.

After a government witness testifies on direct examination in a federal criminal prosecution the trial court is required, under the so-called Jencks Act,[1] on motion of

[1] 18 U. S. C. § 3500. *Demands for production of statements and reports of witnesses.*

"(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which

the defendant, to order the United States to produce, for impeachment purposes, defined pretrial statements of the witness, or parts of such statements as determined under subsection (c), which relate to the subject matter of his trial testimony and are in the possession of the United States. The conviction of the petitioners in the District Court for the District of Massachusetts for bank robbery in violation of 18 U. S. C. § 2113 was sustained by the Court of Appeals for the First Circuit. 269 F. 2d 688. During the trial the court ordered the Government to produce a document described on cross-examination by one of its witnesses in terms which satisfy the definition of a "statement" under the Act. The Government denied having possession of such a document. It did, however,

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was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

"(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

"(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be

admit possession of an Interview Report of an interview by an FBI agent with that witness, but contended that this report fell outside the statute. The trial judge held an inquiry without the jury present, at the conclusion of which he refused to order the United States to deliver the Interview Report to the petitioners, and also denied their motion to strike the testimony of the witness. The procedure at that inquiry raises questions important in the administration of the Jencks Act, and we granted certiorari limited to the review of those questions. 362 U. S. 909.

The government witness was Dominic Staula, a depositor who was in the bank at the time of the robbery. On direct examination he identified the petitioner Lester as

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preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

"(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

"(e) The term 'statement,' as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

"(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

"(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement." Added by Pub. L. 85–269, Sept. 2, 1957, 71 Stat. 595.

one of the robbers. When asked on cross-examination whether he made any statements to government agents before the trial, he said that an agent of the Federal Bureau of Investigation who interviewed him during the week following the robbery wrote down such a statement. His recollection of what occurred at the interview was not entirely clear,[2] but the trial judge ruled that he had made a statement satisfying the requirements of the Jencks Act and ordered the United States to produce it. The Assist-

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[2] The pertinent parts of his testimony are as follows:

"XQ. Now, Mr. Witness, when you said you had a conversation with the FBI some time less than a week after July 18, 1957, did they write down what you had to say to them?

"The COURT: If you know.

"The WITNESS: Yes.

"XQ. And did they read it back to you, sir? A. Yes.

"XQ. And did they ask you if that was essentially what you had just related to them? A. Yes.

"XQ. And did you tell them yes? A. Yes.

. . . . . .

"The COURT: I will order it produced. There is a foundation laid for it.

. . . . . .

"The WITNESS: . . . He didn't actually ask me questions. I mean, at first I told him the story, and then when I got through he asked me a few questions.

"The COURT: Well, did he read it back to you?

"The WITNESS: I believe he did.

"The COURT: What is your best memory of it?

"The WITNESS: I am pretty sure he did.

"The COURT: Is your memory such as to enable you to say that what was read back to you was an accurate statement of what you told him?

"The WITNESS: Yes.

. . . . . .

"The WITNESS: If you will excuse me, I am trying to rack my brain to think about what happened. I think they wrote down what I said, and then I think they gave it back to me to read over, to make sure that it was right. And I think I had to sign it. Now, I am not sure. I couldn't remember before—"

ant United States Attorney presenting the Government's case stated that he had no such paper as the witness described. He stated further that the only document in the possession of the prosecution was not a "statement" within the statute, but a typed Interview Report [3] of FBI Special Agent Toomey prepared and transcribed after the interview at a time unknown to the Assistant. The Assistant refused to deliver the report to petitioners' counsel but delivered it to the judge for his inspec-

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[3] The District Court sealed the Interview Report for the Court of Appeals. The Court of Appeals released it and it is in the record here. The full text is as follows:

"Federal Bureau of Investigation Interview Report

"Mr. Dominic Staula, home address 259 Island Street, Stoughton, Massachusetts, a customer at the victim bank, advised that he arrived at the Norfolk County Trust Company in Canton, Massachusetts, to transact some business at approximately 10:15 A. M., July 18, 1957. Mr. Staula stated that he was driving a truck and parked it beside the Canton Depot in the parking area located between the railroad depot and the bank. He stated that he noted nothing unusual when he entered this parking area nor did he notice anything unusual in walking from where he parked his vehicle to the bank.

"It was stated by Mr. Staula that he went to the teller's window which is served by Mr. Kennedy and while standing in line at this window, but before being waited upon by Mr. Kennedy, he heard somebody state from behind him 'Over against the wall.'

"Mr. Staula stated that he looked around and observed a man whom he described as being a negro, wearing gray chino pants, standing in the center of the lobby and holding a gun. Staula stated that he immediately realized that the bank was being held up and at once took his deposits which consisted of cash and slid them into his side trouser pocket.

"Mr. Staula went on to state that he only observed the man standing in the center of the lobby for an instant and could give no further description of him because he turned toward the front of the bank and observed another man standing there holding a gun. Staula stated that he looked at this man for a short period of time and described him as follows: [*Footnote 3 continued on p. 91.*]

tion. To the court's question whether the Government possessed "any statement that was copied by an FBI Agent which in any way would reflect a statement that this witness made and which he substantially adopted

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"Property of FBI.—This report is loaned to you by the FBI, and neither it nor its contents are to be distributed outside the agency to which loaned.

Sex	Male.
Race	Negro.
Age	Approximately 30 years.
Height	5′ 10″.
Weight	165 pounds.
Complexion	Very dark.
Build	Slender.
Face	Round.
Clothing	Dark blue suit.
	Blue snap brim hat.
	White shirt.

"Mr. Staula stated that he did not observe a third man in the bank—

"It was stated by Mr. Staula that he did not know what type of gun was carried by these two individuals whom he observed but believed that they could have been 45 caliber automatics.

"Mr. Staula stated that after taking a look at the individual wearing the blue suit he faced the wall as previously ordered and observed these individuals no further.

"He stated that after he stood with his face to the wall for approximately 10 minutes one of the robbers ordered him and the other people who were standing on either side of him to walk into the vault. He stated that he does not recall which of the robbers issued this order but that he did enter the vault as directed and observed these individuals no further.

"Mr. Staula stated that one of the robbers, closed the door of the vault he issued some order to the effect that the people locked inside should not leave and that they stayed there for 5 or 10 minutes until the vault door was opened by Sergeant Ruane of the Canton, Massachusetts, Police Department."

"Interview with Dominic Staula, File # 91–952, on July 19, 1957, at Canton, Massachusetts, by Special Agent John F. Toomey, Jr., bjp."

as the statement," the Assistant replied "No, your Honor, we don't." To the further question whether "the United States [has] in its possession any notes that were taken down by the FBI Agent at the time this witness was interviewed," the Assistant answered, "I do not have them in my possession and I do not know whether they ever existed."

The Jencks Act limits access by defendants to such government papers as fit the Act's definition of "statements" which relate to the subject matter as to which the witness has testified, *Palermo* v. *United States,* 360 U. S. 343. However, the statute requires that the judge *shall,* on motion of the defendant, after a witness called by the United States has testified on direct examination, order the United States, for impeachment purposes, to produce any such "statements." To that extent, as the legislative history makes clear, the Jencks Act "reaffirms" our holding in *Jencks* v. *United States,* 353 U. S. 657, that the defendant on trial in a federal criminal prosecution is entitled, for impeachment purposes, to relevant and competent statements of a government witness in possession of the Government touching the events or activities as to which the witness has testified at the trial. S. Rep. No. 981, 85th Cong., 1st Sess., p. 3. And see H. R. Rep. No. 700, 85th Cong., 1st Sess., pp. 3–4. The command of the statute is thus designed to further the fair and just administration of criminal justice, a goal of which the judiciary is the special guardian.

After an overnight recess the trial judge conducted an inquiry without the jury present to take testimony and hear argument of counsel. Plainly enough this was a proper, even a required, proceeding in the circumstances. Determination of the question whether the Government should be ordered to produce government papers could not be made from a mere inspection of the Interview Report, but only with the help of extrinsic evidence. The

situation was different from that governed by subsection (c), in which the Government admits that a document in its possession is a "statement" but submits the paper for the judge's *in camera* inspection to delete matter which the Government contends does not relate to the subject matter of the testimony of the witness. The situation was similar to that in *Palermo,* where the Government also contended that a paper in its possession was not a "statement." We there approved the procedure of taking extrinsic testimony out of the presence of the jury to assist the judge in reaching his determination whether to order production of the paper. We said, at 354–355, "It is also the function of the trial judge to decide, in light of the circumstances of each case, what, if any, evidence extrinsic to the statement itself may or must be offered to prove the nature of the statement."

In this case the aid of extrinsic evidence was required to answer the following questions bearing on the petitioners' motions:

> Did Toomey write down what Staula told him at the interview? If so, did Toomey give Staula the paper "to read over, to make sure that it was right," and did Staula sign it?
>
> Was the Interview Report the paper Staula described, or a copy of that paper? In either case, as the trial judge ruled, the Interview Report would be a producible "statement" under subsection (e) (1). "Statements" under that subsection are not limited to such as the witness has himself set down on paper. They include also a statement written down by another which the witness "signed or otherwise adopted or approved" as a statement "made by said witness." True, the report does not bear Staula's signature and the witness testified "I think I had to sign" the original paper. However, if the paper was otherwise adopted or approved by the witness,

his signature was not essential. See *Bergman* v. *United States,* 253 F. 2d 933, 935, note 1; *United States* v. *Tomaiolo,* 280 F. 2d 411, 413.

If the Interview Report was not the original or a copy of the paper Staula described, what became of the paper?

In any event, even if the Interview Report was not the original or a copy of the paper Staula described, had Staula read over and approved the Interview Report? In such case the report would be producible under subsection (e)(1) although not related to the paper Staula described. Or was the Interview Report a substantially verbatim recital of an oral statement which the agent had recorded contemporaneously? If extrinsic evidence established this, the report would be producible under subsection (e)(2). *Palermo* v. *United States,* at 351–352.

The obvious witness to call was Special Agent Toomey who, the parties agreed, was readily available. Defense counsel suggested that the agent be called "to explain where he got the . . . [Interview Report]," and also because "Mr. Toomey could easily say what he has done with the original writing." Defense counsel were not in a position also to appreciate the significance of Toomey's testimony to the possible producibility of the Interview Report itself. Consistent with our admonition in *Palermo,* 360 U. S., at 354, that "It would indeed defeat this design [to limit defense access to government papers] to hold that the defense may see statements in order to argue whether it should be allowed to see them," neither the Government nor the judge permitted them to inspect it. From his own inspection, however, the judge was aware of the significance which Toomey's evidence might have on the judge's determination whether he should order the Government to turn over the Interview Report to the

defense. The Interview Report resembles the statement Staula described and the judge indicated that he would order its production if it was that statement or a copy of it, or although not the original or a copy, if Staula had read and approved it, or if it was a contemporaneously recorded substantially verbatim recital of Staula's oral statement. Nevertheless, the judge ruled that it was for the petitioners to subpoena Toomey as "their witness" if they believed his testimony would support their motions, and that he would not of his own motion summon Toomey to testify, or require the Government to produce him. We think that this ruling was erroneous.

The inquiry being conducted by the judge was not an adversary proceeding in the nature of a trial controlled by rules governing the allocation between the parties of the burdens of proof or persuasion. The inquiry was simply a proceeding necessary to aid the judge to discharge the responsibility laid upon him to enforce the statute. The function of prosecution and defense at the inquiry was not so much a function of their adversary positions in the trial proper, as it was a function of their duty to come forward with relevant evidence which might assist the judge in the making of his determination. These considerations standing alone suggest that the emphasis on the petitioners' burden to produce the evidence was misplaced. The statute says nothing of burdens of producing evidence. Rather it implies the duty in the trial judge affirmatively to administer the statute in such way as can best secure relevant and available evidence necessary to decide between the directly opposed interests protected by the statute—the interest of the Government in safeguarding government papers from disclosure, and the interest of the accused in having the Government produce "statements" which the statute requires to be produced.

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The circumstances of this case clearly required that the judge call Toomey of his own motion or require the Government to produce him. Not only did the Government have the advantage over the defense of knowing the contents of the Interview Report but it also had the advantage of having Toomey in its employ and presumably knew, or could readily ascertain from him, the facts about the interview. In addition to the consideration that the interest of the United States in a criminal prosecution ". . . is not that it shall win a case, but that justice shall be done, . . ." *Berger* v. *United States,* 295 U. S. 78, 88, the ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary. *United States* v. *New York, N. H. & H. R. Co.,* 355 U. S. 253, 256, note 5. Moreover, the petitioners' cross-examination of Staula had shown a *prima facie* case of their entitlement to a statement, and, at the least, the judge should have required the Government to come forward with evidence to answer that case. Cf. *United States* v. *Costello,* 145 F. Supp. 892, 894–895, note 13. Since the Interview Report was not, and under *Palermo* could not be, made available to the petitioners, and they thus had no way of knowing the significance of its contents to the question the judge was to determine, it saddled an unfairly severe burden on them to require them to subpoena Toomey as "their witness." In the role of petitioners' witness, they would be groping in the dark in questioning him, and they might be bound by his answers. As a witness called by the Government or even as the court's witness, they would have a latitude in cross-examination to which the circumstances entitled them.

Instead of calling Toomey or having the Government call him, the trial judge fell into further error by relying upon Staula to supply the information he sought. Over the objection of government counsel that the Interview

Report had not been "recorded contemporaneously with the making of such oral statement," and over the objection of the petitioners that "If this man now reads that statement it loses its effect for purposes of impeachment," the judge directed Staula to read the Interview Report and say whether he was familiar with it. The witness said that he had never seen the report. The judge then asked Staula ". . . is that a substantially verbatim recital of what you told Agent Toomey?" The witness replied, "That's not written up just the way the story is." "There are things in there turned around." It was after this testimony was elicited from Staula that the judge ruled he would not order the delivery of the Interview Report to the petitioners, and denied their motion to strike the witness' testimony.

Reliance upon the testimony of the witness based upon his inspection of the controverted document must be improper in almost any circumstances. The very question being determined was whether the defense should have the document for use in cross-examining the witness. Under *Palermo,* the trial judge was not to allow the defense to inspect the Interview Report "in order to argue whether it should be allowed to see" it, since to do so would be inconsistent with the congressional purpose to limit access to government papers. Similarly, Staula should not have been allowed to inspect the Interview Report, since there necessarily inhered in the witness' inspection of the paper the obvious hazard that his self-interest might defeat the statutory design of requiring the Government to produce papers which are "statements" within the statute. For example, the Interview Report states that Staula was unable to give any description of one of the robbers. This is in sharp contrast to his positive identification of Lester made on direct examination. Experienced trial judges and lawyers will readily understand the value of the use of the report on cross-examina-

tion of the witness. But the petitioners were deprived of the opportunity to make use of the report by the obviously self-serving declarations of the witness that it did not accurately record what he told the agent.

Moreover, failure of the judge to call for Toomey's testimony foreclosed a proper determination of the petitioners' motion to strike the witness' testimony. If the Interview Report was not the original or a copy of the paper Staula described, and that paper was destroyed, the petitioners might have been denied a statement to which they were entitled under the statute. Thus, even if the Interview Report itself were producible, a situation might have arisen calling for decision whether subsection (d) of the statute required the striking of the testimony of the witness. The parties argue whether destruction may be regarded as the equivalent of noncompliance with an order to produce under that subsection. The Government contends that only destruction for improper motives or in bad faith should be so regarded. The petitioners contend that destruction without regard to the circumstances should be so regarded. However, this record affords us no opportunity to decide this important question of the construction of subsection (d). We do not yet know that such a paper existed, and was destroyed, or the circumstances of its destruction, nor can we know without the benefit at least of Toomey's testimony.

We conclude that because of these errors in the conduct of the inquiry the petitioners are entitled to a redetermination of their motion for the production of Staula's pretrial statements, and of their motion to strike his testimony. However, we do not think that this Court should vacate their conviction and order a new trial. The petitioners' rights can be fully protected by a remand to the trial court with direction to hold a new inquiry consistent with this opinion. See *United States* v. *Shotwell*

Mfg. Co., 355 U. S. 233. The District Court will supplement the record with new findings and enter a new final judgment of conviction if the court concludes upon the new inquiry to reaffirm its former rulings. This will preserve to the petitioners the right to seek further appellate review on the augmented record. On the other hand, if the court concludes that the Government should have been required to deliver the Interview Report or other statement to the petitioners, or that it should have granted their motion to strike Staula's testimony, the court will vacate the judgment of conviction and accord the petitioners a new trial.

The judgment of the Court of Appeals is therefore vacated and the case is remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

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

What is this case? In the course of a prosecution for violation of the Federal Bank Robbery Act, 18 U. S. C. § 2113, Dominic Staula, a government witness, identified defendant Lester as one of three men whom he had observed committing the alleged offense. Upon cross-examination, he disclosed that, on one occasion at local police headquarters, he had been interviewed by at least two FBI agents. He stated that he did not sign any statements, but only signed "a piece of paper saying I was in the bank." On the basis of this testimony the defense requested "the statement of this man" under the Jencks Act, 18 U. S. C. § 3500, which requires that the court order the Government to produce "any statement . . . of the witness in the possession of the United

States which relates to the subject matter as to which the witness has testified." The trial judge denied this request on the ground that the defense had "laid no foundation for it" since "this man said nothing was ever read back to him." No exception was taken to this ruling. In the continuing cross-examination that followed, Staula changed his testimony by recalling that the agents had written down what he had told them, that "it" was read back to him, and that he had told the agents "it" was "essentially what [he] . . . had just related to them." The judge then held *sua sponte* that a foundation had been laid for an order to the Government to produce the described document, and ordered the document produced. A colloquy at the bench followed, in the course of which Staula explained to the judge that since his earlier testimony he had recollected what had taken place; that he "believed" or was "pretty sure" that "it" had been read back to him; that what was read back was an accurate statement of what he had told the agents; that he thought they gave "it" back to him to read over and that he had to sign it, although he was not "sure." Government counsel stated at the bench that the only document in their possession was a "summary of the result of the interview" which represented the FBI agent's "interpretation of what happened." The judge then asked whether the Government possessed "any statement that was copied by an FBI Agent which in any way would reflect a statement that this witness made and which he substantially adopted as the statement," to which government counsel replied "No, your Honor, we don't." A moment later the judge again asked, "Has the United States in its possession any notes that were taken down by the FBI Agent at the time this witness was interviewed?" Government counsel answered "I do not have them in my possession and I do not know whether they ever existed." The judge then asked for and received the FBI agent's report referred

to by the United States Attorney, and the case was adjourned for the day.

The following morning during a conference held in the judge's chambers the Government again asserted that the agent's report was not a copy of the original notes, and that the notes were no longer in existence. A long discussion ensued concerning the producibility of the agent's report. Defense counsel suggested that the FBI agent (Toomey) be called into chambers "to explain where he got the document," and to "say what he has done with the original writing." This the judge denied, but suggested that the defendants were free to subpoena the agent, or, more simply, could ask the Government to have the agent made available for examination. The judge then proposed to ask Staula, out of the presence of the jury, whether the report was a substantially verbatim recital of what he had told the agent, and, if the answer were affirmative, the report would be given to defendants for impeachment purposes. Both sides opposed this move. The Government argued that in any event the report had not been "recorded contemporaneously with the making of such oral statement," and defendants' counsel objected because the impeachment value of the report would be negated by having the witness see the document and himself decide whether it conformed to what he had told the FBI. But Staula was shown the document. He denied that it was a "substantially verbatim recital of what [he] . . . told Agent Toomey," and the judge thereupon denied the defense access to the document for purposes of impeachment. Thereupon defendants moved that, in accordance with the Act, Staula's entire testimony be stricken because the Government had failed to produce "the original document." This motion was denied.

The case presents two entirely separate questions under the Jencks Act, and they should be kept apart. First, what

are the procedural requirements, under the Jencks statute, when counsel for the United States announces that he cannot produce documents for which a foundation has been laid because he does not possess them and does not know of their existence? Secondly, was the FBI agent's available report producible under the Act?

I.

Title 18 U. S. C. § 3500 requires the trial judge, upon a motion by the defendant, to "order the United States to produce any statement . . . of the witness in the possession of the United States" which is relevant to the direct testimony of the government witness. Nothing in the legislative history of the Act remotely suggests that Congress' intent was to require the Government, with penalizing consequences, to preserve all records and notes taken during the countless interviews that are connected with criminal investigation by the various branches of the Government. The legislation narrowed the application of our decision in *Jencks* v. *United States,* 353 U. S. 657, as construed by some of the lower courts, partly by having the relevancy of the material determined by the district judge prior to its production. S. Rep. No. 981, 85th Cong., 1st Sess., p. 2.

Petitioners' contention that the words "in the possession of" must be interpreted as meaning "possession at any prior or present time" must be rejected. Congress surely did not intend to initiate a game of chance whereby the admission of a witness' testimony is made to depend upon a file clerk's accuracy or care. Senator O'Mahoney, the sponsor of the bill, in illustrating that his measure approved the essential basis of the *Jencks* case, interpreted *Jencks* to apply only where the Government "had at the same time in its files a statement" pertinent to a witness' testimony. 103 Cong. Rec. 10120. See also S. Rep. No.

981, 85th Cong., 1st Sess., p. 5; H. R. Rep. No. 700, 85th Cong., 1st Sess., p. 5.[1]

Here government counsel told the court that he did not possess and did not know the whereabouts of the documents which Staula had described. The Court today holds that it fell upon the district judge to conduct a further investigation as to the disposition of the documents, whereby it becomes his duty to call and question the FBI agent who signed the subsequent summary. Defendants did not question the truth or accuracy of the responses of the United States Attorney as to the nonexistence of the original notes. Defendants were represented by two competent lawyers who were alert to protect their clients' interest through all available trial procedures and tactics. It surely is not the duty of a district judge to investigate a response by one who is an officer of the court as well as of the United States on the assumption that he has intentionally or irresponsibly violated his responsibility to the court and the Government in conducting the Government's case in a manner consistent with basic legal ethics and professional care.

How does the court's duty regarding a claim by defense under the Jencks statute differ from any other claim for the production of a document? We are told that because Agent Toomey was readily available, it devolved on the judge instead of on the defendants to seek whatever light could be thrown on the matter. Is it now the duty of the district judge to do all that a competent defense counsel would do, or would choose, as a matter of trial judgment, not to do? The procedure now suggested places the judge in the position of a voluntary defender for defendants

[1] The Court's opinion implies that the defendant is entitled to statements which the Government does not now possess, *ante*, p. 98. The Act plainly speaks only to a "statement . . . of the witness in the possession of the United States."

already adequately represented. This seems only the more questionable since it may well be that counsel here were satisfied that the documents had been disposed of in a bona fide manner. It is not the duty of this Court to invent hypothetical situations in which independent action by the district judge might have revealed unexpected facts. There was no suggestion, not a hint—either before the trial court, or below, or upon argument here—that the Government's representation of the nonexistence of the documents was not bona fide, was a piece of chicane and as such a fraud upon the court bringing into action the court's protection of its dignity and honor, or a manifestation of professional inadequacy as to call for the court's safeguarding action.

II.

The other issue presented by the case is the producibility of the FBI agent's report which had been put into possession of the court. Subsection (e) of the Jencks Act thus defines the papers in the Government's possession that are subject to production:

> "(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or
>
> "(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

The plain differentiation between the two clauses is that the former relates to statements written by a witness, while the latter encompasses his oral statements recorded and transcribed by another. As to the statements that

the witness had himself set down on paper, Congress desired that his signature or some other form of approval be shown to assure authenticity. The required approval would also quiet any doubts that the witness had an adequate opportunity to scrutinize for verification the document which he had prepared. These are appropriate safeguards for the use of these documents as a basis for impeaching the witness' testimony on the stand. As to oral statements, the statute prescribes that their content be "a substantially verbatim recital" of the witness' words, recorded contemporaneously. "Clearly this provision allows the production of mechanical or stenographic recordings of oral statements, even though later transcribed." *Palermo* v. *United States,* 360 U. S. 343, 351–352. Producibility, for purpose of impeachment, of a statement drawn up in the third person by an agent requires that the whole oral statement be contemporaneously recorded. Under this standard, a summarization by an agent of selective portions of testimony by the witness would not fall within the scope of the Act. "[B]eyond mechanical or stenographic statements . . . a very restrictive standard is to be applied" in defining what is a "statement" under the statutory language. *Palermo* v. *United States, supra,* at 360. Under subsection (2), it makes no difference whether these agent summaries are signed or approved by the witness; "the legislation was designed to eliminate the danger of distortion and misrepresentation inherent in a report which merely selects portions, albeit accurately, from a lengthy oral recital." *Palermo* v. *United States, supra,* at 352. As the bill originally came out of the House Judiciary Committee, 103 Cong. Rec. 16125, such summaries when approved by the witness would have been subject to production. H. R. Rep. No. 700, 85th Cong., 1st Sess., p. 6. However, the subsequent revision of the bill as finally enacted makes

clear that those statements of a witness given orally to the Government must meet the standard of "substantially verbatim" in order to be produced for purposes of impeachment.[2] See Appendix B, *Palermo* v. *United States, supra,* at 358–360.

In *Palermo,* we approved of the district judge's holding proceedings *in camera* to determine whether questionable documents constituted statutory "statements." 360 U. S., at 354. It needed no explicitness to establish that the "substantially verbatim" test was to be made by extrinsic proof, not by asking the witness himself whether the document in question substantially conformed to what he had told the federal agents. We agree with the Court that the procedure in which the trial judge indulged was erroneous. The witness might deny the accuracy of the document in order to avoid impeachment; even if produced, the document loses much of its potentiality for impeachment if the witness has already examined its contents.

But the trial judge's error in submitting, out of hearing of the jury, the Interview Report for Staula's determination of its accuracy would not warrant reversal if that report proves itself, on its face, not to be a statutory "statement." In *Palermo,* the document was a 600-word summary of a 3½-hour conference, which we held was clearly not a virtually verbatim transcript. 360 U. S., at 355, n. 12. The Interview Report here comes to slightly over 500 words. But the record is silent as to the duration of the interview. Nor does it disclose

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[2] Insofar as the Court's opinion suggests that, had Staula signed the Interview Report, it would conclusively have been producible, we disagree. Under the statutory language, it still would have been necessary to find that the report was "a substantially verbatim recital" of that which Staula told the agents. Section 3500 (e)(1) is inapplicable.

whether the interview was contemporaneously recorded,[3] or how any such recording was transcribed. However doubtful it may seem, it may be the fact that the interview was very brief, not more than a few minutes, and that the conversation as an entirety was faithfully recorded and constituted an accurate account of all that transpired.

It is the responsibility of counsel for defendants, as has been elucidated, to pursue ascertainment of the correctness of the Government's claim that documents which are demandable for production under the Jencks Act are no longer in existence, and for no reprehensible reason chargeable to the Government. That is an issue like any other issue of appropriate evidentiary demand. It is not for the court to question that the foundation for production—here, the existence of a document—is wanting, if counsel for defendants do not question the Government's explanation for non-production. A very different issue is presented in determining the legal significance of a document like the FBI report under the Jencks Act, which is produced for the confidential inspection of the court and not shown to the defense. Here the responsibility for resolving the issue rests with the court, and it is the court that must pursue appropriate means for ascertaining the facts relevant to judgment.

The district judge should and easily could have probed these matters, vital to ascertainment of the Jencks Act

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[3] Aside from Staula's conflicting testimony that the agent took notes.

During the proceedings in chambers, the Government repeatedly asserted that the report was not in existence at the time Staula was interviewed. Assuming this to be true, it is irrelevant; the question is whether there was a contemporaneous recording from which the transcription was later made. See *Palermo* v. *United States, supra,* at 351–352.

quality of the report, by interrogating counsel, or, as the Court suggests, examining Agent Toomey on the circumstances of the interview.[4] Since on this record we cannot say that the report was patently not producible under the Act, we have no recourse but to remand the matter to the District Court for determination whether the report meets the requirements of subsection (e)(2).

[4] Calling Agent Toomey for this purpose is a very different thing from requiring the judge to call him in order to controvert the Government's assertion that no other notes or documents were in their possession. That was for the defense to deal with.

McNEAL *v.* CULVER, STATE PRISON CUSTODIAN.

CERTIORARI TO THE SUPREME COURT OF FLORIDA.

No. 52. Argued December 6, 1960.—Decided January 23, 1961.

Upon an information charging "Assault to Murder in the First Degree," petitioner was tried without counsel before a jury in a Florida court, convicted of "Assault to Murder in the Second Degree" and sentenced to imprisonment for 20 years. He did not appeal; but he petitioned the State Supreme Court for a writ of habeas corpus, alleging that he had been denied due process of law, because he was an indigent, ignorant and mentally ill Negro, incapable of conducting his own defense, and that he had requested, but was denied, counsel. The Court issued a provisional writ; but, after considering respondent's return and without any hearing on petitioner's allegations, discharged the writ and remanded petitioner to custody. The record contained much to support petitioner's allegations, including abundant evidence of his ignorance and his inability to question witnesses and otherwise conduct his own defense. It also contained facts which would have suggested to counsel that petitioner might have a good insanity defense, which was not raised or considered. Moreover, the record and the relevant Florida statutes disclose that the case involved a number of highly complex legal questions beyond the comprehension of almost any layman. *Held:* Due process of law required that petitioner have the assistance of counsel, if the facts alleged in his petition are true, and it was incumbent on the Florida Court to grant petitioner a hearing to determine what the true facts were. Pp. 110–117.

113 So. 2d 381, reversed.

Sam Daniels, acting under appointment by the Court, 362 U. S. 946, argued the cause and filed a brief for petitioner.

Odis M. Henderson, Assistant Attorney General of Florida, argued the cause for respondent. With him on the brief was *Richard W. Ervin,* Attorney General.

MR. JUSTICE WHITTAKER delivered the opinion of the Court.

Upon an information charging "Assault to Murder in the First Degree," petitioner was put to trial, without counsel, before a jury in a Florida court, was convicted of "Assault to Murder in the Second Degree" and sentenced to imprisonment for a term of 20 years which he is now serving. No appeal was taken, but within a year from his conviction petitioner filed a petition for a writ of habeas corpus in the Supreme Court of Florida.

In that rather inartfully drawn petition, prepared in the penitentiary, at least the following allegations were made with reasonable clarity: When brought before the court for trial, petitioner, an indigent, ignorant and mentally ill Negro then 29 years of age, advised the court that he was without, and unable to obtain, counsel to conduct his defense and asked that counsel be appointed to represent him. The judge declined to do so, saying (1) "[S]ince this is not a capital offence you are not entitled to a court appointed attorney," and (2) "you won't need a Lawyer in this case." Immediately, a jury was impaneled, the trial began, and petitioner was left to conduct his own defense. But, having "never before appeared in any court on a felony, and . . . not understand[ing] court procedure or know[ing] how to defend himself," petitioner was unable effectively to conduct and present his defense, and, in consequence, the court's denial of his request for counsel deprived him of due process of law guaranteed by both the Florida and the United States Constitutions.

The Florida Supreme Court issued a provisional writ of habeas corpus directing respondent to make a proper return. Respondent's return denied that "petitioner's constitutional rights were violated by the court's alleged refusal to appoint counsel in his behalf," attached a copy of (1) a partial transcript of proceedings at the trial,

(2) the judgment of conviction and sentence, and (3) the commitment, and asserted that petitioner was being lawfully imprisoned under the latter document. Finding nothing "in this record of the trial to show whether or not any request was made of the trial judge to appoint counsel to aid the petitioner in his defense," and believing "that the issues were [not] so complex, or [that] the petitioner was [not] so young, ignorant and inexperienced, as to bring into play the exception to the rule requiring appointment of counsel only in capital cases and to require further inquiry into the procedure culminating in his conviction and sentence," the Florida Supreme Court, without any hearing upon petitioner's allegations, discharged the writ and remanded petitioner to custody. 113 So. 2d 381. We granted certiorari to determine whether the allegations in the habeas corpus petition, as supplemented by other portions of the record, are such as entitled him to a full hearing thereon, and, if so and if those allegations be found true, whether petitioner was denied due process of law guaranteed by the Fourteenth Amendment of the United States Constitution. 362 U. S. 910.

It is thoroughly settled that:

> " 'Where the gravity of the crime and other factors—such as the age and education of the defendant, the conduct of the court or the prosecuting officials, and the complicated nature of the offense charged and the possible defenses thereto—render criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair,' the Constitution requires that the accused must have legal assistance at his trial." *Cash* v. *Culver,* 358 U. S. 633, 637, and cases cited.[1]

[1] Such is the rule, in those circumstances, whether or not the accused requested the appointment of counsel. *Uveges* v. *Pennsylvania,* 335 U. S. 437, 441.

The record shows that petitioner was involved in a minor altercation with the proprietors—two men named Scurry—of what is referred to as a "jook," called the "Blue Chip," located in the "colored quarters" of Lake Wales, Florida, during the evening of December 10, 1957, and was ordered to leave the place, which he did. Soon afterward, petitioner, "without shirt or shoes" and armed with a shotgun, approached the "Blue Chip" and, although a number of persons, including one of the Scurrys, were standing on the sidewalk, petitioner fired the gun in their direction. Some of the pellets struck the lower legs of four persons, but Scurry was not hit. City police officers immediately arrested petitioner. They stated that, in the course of transporting him to jail, petitioner said that "he was sorry he shot these other boys, he intended to kill Scurry." On this premise, petitioner was charged with and tried for "Assault to Murder in the First Degree."

Although the record does not disclose the extent of petitioner's education, there is abundant evidence that it was slight.[2] Moreover, the record shows that he suffered head injuries in the Army in 1952, and ever since has been subject to "blackout spells" when excited. For a period of months following April 8, 1956, he underwent treatment for his mental condition in the Veterans Hospital at Bay Pines, Florida, and during four months of that period he was detained in the psychopathic ward. In October 1956, he was released, apparently to his mother as his guardian,[3] but he continued to return to the hospital to "get pills."

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[2] The following statements, made by petitioner at his trial, are clear evidence of his lack of education: "when I gets excited, I blacks out"; "I had it because I throwed it down myself"; ". . . without no shirt and no shoes"; "I goes and gets pills."

[3] On this score petitioner testified:

"When I was in the hospital, I stayed over there four months locked in the ward, psycho part of it; and the four months I was

The record shows that petitioner was incapable of questioning witnesses and otherwise unable to conduct his defense. The State produced four witnesses—the complaining witness, Ellix Scurry, and three police officers. Petitioner asked two questions of the witness Scurry and obtained answers thereto. His third "question" was precluded by the judge, although not objected to by the State, because "that is testifying and it isn't time for you to testify." Petitioner asked no further questions of Scurry, did not cross-examine the other three witnesses, nor did he make a single objection during the trial. When the State rested, the judge said to petitioner: "All right, now, Elijah, that is the State's case. If you want to, you can take the stand and tell your side of it. If you don't want to, you don't have to . . . ." Petitioner then took the stand and, after mentioning his head injury, "blackout spells" and hospital treatment for his mental illness, testified that he must have suffered a "blackout spell" preceding and during the shooting incident as "that part is a complete blank," but that he is sure he did not "intend to kill anybody." He then attempted to put in evidence a doctor's statement which he said verified his claim of suffering "blackout spells." Although the State did not object, the judge said "This statement would not be admissible. You could put the doctor on and have him testify; but we cannot admit any statement like this," and the statement was not received in evidence. At the conclusion of petitioner's testimony, the judge said to petitioner: "Now, Lige, if you had an attorney, he would

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over there, I had to stay in there locked up all the time. Mama was the only one that could come and see me. And, well, about the latter part of the four months he give me a weekend pass. He was trying me to see if I would come back.

"And I went home and I come back on time. And I asked mama to come and sign for me as that was the only way I could get back. I had to have a guardian to sign. And she come over there that day and begged the doctor to let me go home."

argue the case before the jury" and advised petitioner that, if he desired, he could "plead [his] case." Petitioner replied: "Well, sir, I don't quite understand the meaning of that," and he did not make any argument to the jury.

These facts tend strongly to show that petitioner's ignorance, coupled with his mental illness and complete unfamiliarity with the law and court procedures, and the scant, if any, help he received from the court, made the trial fundamentally unfair.

In addition to this showing of petitioner's lack of education and mental illness and his consequent inability to defend himself, the record at least implicitly discloses a number of highly complex legal questions, beyond the comprehension of almost any layman.

The Florida assault law appears to be replete with distinctions and degrees. Mayhem, bare assault, assault and battery, aggravated assault and assault *with intent* to commit felony are all statutory offenses.[4] Assault *with intent* to commit felony—apparently the crime intended to be charged against petitioner—incorporates by reference all Florida felonies and the degrees thereof.[5] The Florida homicide statutes appear to create four separate offenses—manslaughter,[6] and murder in the first, second and third degrees.[7] In considering the interplay between homicide and assault with intent to commit felony, the

[4] 2 Fla. Stat. 1957, p. 2800, §§ 784.01–784.06.

[5] 2 Fla. Stat. 1957, p. 2800, § 784.06, which provides:

"ASSAULT WITH INTENT TO COMMIT FELONY.—Whoever commits an assault on another, with intent to commit any felony punishable with death or imprisonment for life, shall be punished by imprisonment in the state prison not exceeding twenty years. An assault with intent to commit any other felony shall be punished to an extent not exceeding one-half the punishment which could have been inflicted had the crime been committed."

[6] 2 Fla. Stat. 1957, p. 2798, § 782.07.

[7] 2 Fla. Stat. 1957, p. 2797, § 782.04.

Florida courts have held that, although one may be guilty of assault with intent to commit manslaughter, *Lassiter* v. *State,* 98 Fla. 370, 123 So. 735, there is no such thing as assault with intent to commit murder in the second or third degree because—inasmuch as those crimes do not require a finding of "intent"—such would be "an assault with *intent* to commit an act *without intent.*" *Tillman* v. *State,* 81 Fla. 558, 564, 88 So. 377, 380.

To establish the requisite "intent" to commit any of the grades or degrees of unlawful homicide "it will not be sufficient to show that the killing, had it occurred, would have been unlawful and a felony, but it must be found that the accused committed the assault with intent to take life, for although an unintentional or involuntary killing may in some cases be unlawful and a felony, no man can intentionally do an unintentional act; and without the intent the assault can not be punished under this statute, even though the killing, had it been committed, would have amounted to a felony. . . ." *Williams* v. *State,* 41 Fla. 295, 298, 26 So. 184, 185.

If, in firing the gun, petitioner did not have this felonious "intent to kill," his greatest possible crime would have been "Aggravated Assault"—an assault "with a deadly weapon, without intent to kill." [8] This is not an academic distinction, for 15 years' difference in punishment is involved.[9] The only testimony in this record of "intent to kill" was that of the police officers who testified that while transporting him to jail on the night of the occurrence, petitioner stated that he "intended to kill Scurry." That testimony appears to have been admitted without the slightest inquiry as to whether the statement was freely and voluntarily made by peti-

[8] 2 Fla. Stat. 1957, p. 2800, § 784.04.

[9] Five years is the maximum sentence for aggravated assault under § 784.04, whereas a 20-year sentence may be imposed for assault with intent to commit felony under § 784.06.

tioner. Admission of that crucial evidence, in those circumstances, shows a patent violation of the Florida law which renders inadmissible all admissions made to law officers by an accused while under arrest unless the State *affirmatively shows* that they were freely and voluntarily made. *Louette* v. *State,* 152 Fla. 495, 12 So. 2d 168; *Thomas* v. *State* (Fla. 1957), 92 So. 2d 621; *Williams* v. *State* (Fla. 1954), 74 So. 2d 797. These complex and intricate legal questions were obviously "beyond the ken of a layman." *Cash* v. *Culver, supra,* at 638.

Indeed, it is questionable whether such a crime as the one upon which petitioner was charged, tried and convicted—"Assault to Murder," not "Assault *with Intent* to Commit Felony"—actually exists under the Florida law, *Williams* v. *State, supra,* and it is equally uncertain whether the verdict, convicting petitioner of "Assault to Murder in the Second Degree," is sufficient to support the judgment in the light of 2 Fla. Stat. 1957, p. 2957, § 921.03, which contains the provision that "no judgment of guilty shall be rendered on a verdict unless the jurors clearly express in it a finding against the defendant upon the issue." See also *French* v. *State,* 96 Fla. 657, 118 So. 815.

Moreover, the record contains facts which would have instantly suggested to counsel that petitioner might have a good insanity defense. "[W]hen there is testimony of insanity sufficient to present a reasonable doubt of sanity the presumption [of sanity] vanishes. The defendant is then entitled to an acquittal if the state does not overcome the reasonable doubt." *Farrell* v. *State* (Fla. 1958), 101 So. 2d 130, 133. It is too much to expect this mentally ill petitioner effectively to raise and establish the defense of his own insanity, and, so far as this record shows, neither the prosecutor nor the trial court took any notice of the matter.

The question treated in the separate concurring opinion only lurks in the record, as it was not raised, briefed or argued here, and therefore we do not reach or express any views upon it.

For the totality of the reasons reviewed, due process of law required that petitioner have the assistance of counsel at the trial of this case, if the facts and circumstances alleged in his habeas corpus petition are true. On the present record it is not possible to determine their truth. But the allegations themselves made it incumbent on the Florida court to grant petitioner a hearing and to determine what the true facts are.

Reversed.

MR. JUSTICE DOUGLAS, whom MR. JUSTICE BRENNAN joins, concurring.

While I join the opinion of the Court, I rest also on another ground for reversal.

Nearly 19 years ago the Court held in *Betts* v. *Brady,* 316 U. S. 455, that a state court in a criminal case need not appoint counsel to represent an indigent defendant, unless the failure to furnish counsel results in a conviction lacking in "fundamental fairness." *Id.,* 473. That decision was by a divided Court; and six Justices now sit on the Court who had no hand in fashioning the rule.

I cannot believe that a majority of the present Court would agree to *Betts* v. *Brady* were it here *de novo,* especially in light of our unanimous decision in *Chandler* v. *Fretag,* 348 U. S. 3, 9, where we held that the right of a defendant in a state criminal trial "to be heard through his own counsel" is "unqualified." In that case an accused requested a continuance so that he could obtain a lawyer. We held it was reversible error for a state court to deny the request and to put the defendant to trial without counsel. We said that right to counsel

turned, not on the nature of the crime charged, but on the importance of the presence of counsel to an accused's right to a hearing. We relied on *Powell* v. *Alabama,* 287 U. S. 45, 68–69:

> "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him." [1]

The result of our decisions is to refuse a State the power to force a person into a criminal trial without a lawyer if he wants one and can afford to hire one, but to deny the same protection to an accused who is too poor to retain counsel. This draws a line between rich and poor that is repugnant to due process. The need of counsel is the same, whatever the economic status of the accused. If due process requires that a rich man who wants a lawyer be allowed the opportunity to obtain one before he is tried, why should not due process give the same protection to the accused who is indigent? Even penniless vagrants [2] are at times caught in a tangle of laws that only an astute lawyer can resolve, as our own decisions show. *Edwards* v. *California,* 314 U. S. 160; *Edelman* v. *California,* 344 U. S. 357; *Thompson* v. *Louisville,* 362 U. S. 199.

[1] For a scholarly account of an attempt in a contemporary society to abolish procedural safeguards and provide "simple" judicial systems see Hazard, Settling Disputes in Soviet Society (1960).

[2] The manner of administration of vagrancy laws and their harshness, due in part to the denial to the drifters in our midst of the procedural protections which others obtain, is vividly shown in Foote, Vagrancy-Type Law and Its Administration, 104 U. of Pa. L. Rev. 603.

Betts v. *Brady* requires the indigent, when convicted in a trial where he has no counsel, to show that there was fundamental unfairness. We have set aside a number of convictions so obtained, as our recent decision in *Cash* v. *Culver,* 358 U. S. 633, 636, n. 6, shows. Yet this is a heavy burden to carry, especially for an accused who has no lawyer and who cannot afford to hire one. It is a burden placed on an accused solely by reason of his poverty. Its only sanction is *Betts* v. *Brady* which is so at war with our concept of equal justice under law that it should be overruled.[3] Are we to wait to overrule it until a case arises where the indigent is unable to make a convincing demonstration that the absence of counsel prejudiced him?

APPENDIX TO OPINION OF MR. JUSTICE DOUGLAS.

In 1942, MR. JUSTICE BLACK appended to his dissenting opinion in *Betts* v. *Brady,* 316 U. S. 455, 477, a compilation of the laws of the States regarding the right to appointment of counsel. This Appendix brings the classification down to date. Thirty-five States provide for appointment of counsel as of course on behalf of an indigent in any felony case; 15 States either make no

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[3] In *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, Mr. Justice Brandeis, writing for the Court, overruled *Swift* v. *Tyson,* 16 Pet. 1. Mr. Justice Butler, speaking for himself and Mr. Justice McReynolds, strenuously objected, pointing out that the question had never been raised or argued, 304 U. S., at 82, 87, and asking that, before *Swift* v. *Tyson* was overruled, the case be put down for reargument. "It may not justly be assumed that the labor and argument of counsel for the parties would not disclose the right conclusion and aid the Court in the statement of reasons to support it." 304 U. S., at 88. But the problems created under the regime of *Swift* v. *Tyson* were as abundantly clear to the Court from its screening of hundreds of cases as are those which *Betts* v. *Brady* has spawned.

explicit provision for appointment of counsel or make provision therefor only in capital cases or leave appointment of counsel to the discretion of the trial judge.

A. *Appointment of counsel for indigents in all felony cases, as of course, by force of the State Constitution, statutes, court rule, or judicial decision.*

Alaska: Rules of Criminal Procedure, Rule 39 (b).
Arizona: Rules of Criminal Procedure, Rule 163.
Arkansas: Ark. Stat. § 43–1203.
California: Calif. Penal Code § 987.
Connecticut: Gen. Stat. of Conn. (1958 Rev.) § 54–80. See *State* v. *Reid,* 146 Conn. 227, 149 A. 2d 698.
Georgia: Ga. Const., Art. I, § I, Par. V (Ga. Code Ann. § 2–105). See *Bibb County* v. *Hancock,* 211 Ga. 429, 86 S. E. 2d 511.
Idaho: Idaho Code Ann. §§ 19–1512, 19–1513.
Illinois: Ill. Supreme Court Rules, Rule 26 (2), Ill. Rev. Stat. (1959), c. 110, § 101.26 (2).
Indiana: Ind. Const., Art. I, § 13. See *State ex rel. Grecco* v. *Allen Circuit Court,* 238 Ind. 571, 153 N. E. 2d 914.
Iowa: Iowa Code Ann. § 775.4.
Kansas: Gen. Stat. of Kansas (1959 Supp.) § 62–1304.
Kentucky: Ky. Const., § 11. See *Calhoun* v. *Commonwealth,* 301 Ky. 789, 193 S. W. 2d 420.
Louisiana: La. Rev. Stat. § 15–143.
Massachusetts: Rule 10, General Rules of the Supreme Judicial Court of Massachusetts, 337 Mass. 813; Ann. Laws of Mass., c. 277, § 47.
Minnesota: Minn. Stat., 1957, § 611.07, as amended by Minn. Laws 1959, c. 383.
Missouri: Mo. Rev. Stat., 1949, § 545.820.
Montana: Rev. Code of Montana § 94–6512.
Nebraska: Rev. Stat. of Nebraska (1943) § 29–1803, as amended by Laws 1957, c. 104, § 1, c. 107, § 6.

Nevada: Nev. Rev. Stat. § 174.120.
New Jersey: N. J. Const., Art. I, ¶ 10; Rev. Rules, § 1:12–9.
New Mexico: N. M. Stat. Ann. (1953 Comp.) § 41–11–2. Cf. Const., Art. II, § 14; see *State* v. *Garcia,* 47 N. M. 319, 142 P. 2d 552.
New York: N. Y. Code of Criminal Procedure § 308.
North Dakota: N. D. Century Code § 29–01–27.
Ohio: Ohio Rev. Code § 2941.50.
Oklahoma: 22 Okla. Stat. § 464.
Oregon: Ore. Rev. Stat. § 135.320.
South Dakota: S. D. Code § 34.3506; S. D. Code (1960 Supp.) § 34.1901.
Tennessee: Tenn. Code §§ 40–2002, 40–2003.
Texas: Vernon's Texas Code of Criminal Procedure § 494, as amended by Acts 1959, 56th Leg., p. 1061, c. 484, § 1.
Utah: Utah Code Ann. § 77–22–12.
Virginia: Code of Va. § 19.1–241.
Washington: Rev. Code of Wash. § 10.01.110.
West Virginia: Rules of Practice for Trial Courts, Rule IV.
Wisconsin: *Carpenter* v. *Dane County,* 9 Wis. 274. See Wis. Stat. Ann. § 957.26.
Wyoming: Wyo. Stat. § 7–7.

B. *States not making provision for appointment of counsel for indigents in all felony cases.*

Alabama: Code of Ala., Tit. 15, § 318 (capital cases). See *Gilchrist* v. *State,* 234 Ala. 73, 173 So. 651.
Colorado: Colo. Rev. Stat. § 39–7–29. See *Kelley* v. *People,* 120 Colo. 1, 206 P. 2d 337.
Delaware: Superior Court Rules—Criminal Rule 44 (capital cases and "any other case in which the court deems it appropriate").
Florida: Fla. Stat. § 909.21 (capital cases). See *Watson* v. *State,* 142 Fla. 218, 194 So. 640.

Hawaii: Rev. Laws of Hawaii (1955) § 253–5, as amended by Laws 1957, Act 239 (in force after statehood, see Const., Art. XVI, § 2).

Maine: Me. Rev. Stat., c. 148, § 11 (capital cases and where sentence of life imprisonment may be imposed, otherwise permissive).

Maryland: Md. Rules of Procedure, Criminal Causes, Rule 723, § b (in all capital cases and other "serious cases").

Michigan: Mich. Comp. Laws, 1948, § 775.16, as amended by Public Acts 1957, No. 256. See *People* v. *Williams,* 225 Mich. 133, 195 N. W. 818.

Mississippi: Miss. Code Ann. (rec. 1956) § 2505 ("capital crime").

New Hampshire: N. H. Rev. Stat. §§ 604:1, 604:2 (capital crimes or other cases where "injustice may be done if provision is not made therefor").

North Carolina: N. C. Gen. Stat. § 15–4.1. See *State* v. *Davis,* 248 N. C. 318, 103 S. E. 2d 289.

Pennsylvania: Purdon's Pa. Stat., Tit. 19, §§ 783, 784 (capital cases).

Rhode Island: Gen. Laws of Rhode Island § 12–15–3. See *State* v. *Hudson,* 55 R. I. 141, 179 A. 130; *Lee* v. *Kindelan,* 80 R. I. 212, 95 A. 2d 51.

South Carolina: S. C. Code of Laws § 17–507 (capital cases). See *State* v. *Hollman,* 232 S. C. 489, 102 S. E. 2d 873.

Vermont: 13 Vt. Stat. Ann. § 6503. See *State* v. *Gomez,* 89 Vt. 490, 96 A. 190.

Per Curiam.

NATIONAL LABOR RELATIONS BOARD *v.* MATTISON MACHINE WORKS.

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

No. 74. Argued January 9, 1961.—Decided January 23, 1961.

The Court of Appeals erred in refusing to enforce an order of the National Labor Relations Board in a representation election solely because its notices of election contained a minor and unconfusing mistake in the employer's corporate name. Pp. 123–124.

274 F. 2d 347, reversed and cause remanded.

Norton J. Come argued the cause for petitioner. With him on the brief were *Solicitor General Rankin, Stuart Rothman, Dominick L. Manoli* and *Allan I. Mendelsohn.*

J. Warren McCaffrey argued the cause for respondent. With him on the brief was *Charles B. Cannon.*

Harold A. Katz and *Irving M. Friedman* filed a brief for the United Automobile, Aircraft & Agricultural Implement Workers of America, as *amicus curiae,* urging reversal.

PER CURIAM.

The judgment of the Court of Appeals is reversed and the case remanded to that court for the entry of a decree enforcing the Board's order. The refusal of the Court of Appeals to enforce that order because the Board's notices of election contained a minor and unconfusing mistake in the employer's corporate name, was plain error. It was well within the Board's province to find, as it did, upon the record before it that this occurrence had not affected the fairness of the representation election, particularly in the absence of any contrary showing

by the employer, upon whom the burden of proof rested in this respect. That finding should have been accepted by the Court of Appeals. In the absence of proof by the employer that there has been prejudice to the fairness of the election such trivial irregularities of administrative procedure do not afford a basis for denying enforcement to an otherwise valid Board order.

UNITED STATES *v.* PARKE, DAVIS & CO.

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

No. 526. Decided January 23, 1961.

Holding that the Government's proofs were sufficient to show that respondent had violated the Sherman Act, this Court reversed the District Court's judgment dismissing the complaint and remanded this case with directions to afford respondent a further opportunity to submit evidence to refute the Government's right to injunctive relief. 362 U. S. 29. On remand, respondent introduced evidence, not to rebut the Government's proof as to violation but only to show that it had abandoned its illegal sales policy and that, therefore, an injunction was not necessary. The District Court entered an order denying not only injunctive relief but also an adjudication that respondent had violated the law. *Held:* The Government is entitled to a judgment on the merits, and the District Court should retain the case on the docket for future action if the Government applies for further relief from an alleged resumption by respondent of illegal activity. Pp. 125–126.

—— F. Supp. ——, judgment vacated and cause remanded.

Solicitor General Rankin, Assistant Attorney General Bicks, Daniel M. Friedman and *Richard A. Solomon* for the United States.

Gerhard A. Gesell, Edward S. Reid, Jr. and *Roberts B. Owen* for appellee.

PER CURIAM.

When this case was last here we held that the Government's proofs were sufficient to show that Parke Davis violated the Sherman Act. However, in reversing the District Court's judgment we remanded the case with direction to afford Parke Davis a further opportunity to submit evidence in defense in order to refute the Government's right to injunctive relief. *United States* v.

Parke, Davis & Co., 362 U. S. 29, 49. On remand, Parke Davis introduced evidence not to rebut the Government's proof as to violation but only to show that it had abandoned its illegal sales policy, and that therefore an injunction, being unnecessary, should not issue. On that record the District Court entered an order denying not only the injunctive relief sought by the Government, but also an adjudication that Parke Davis had violated the law. The present appeal is not from the provision which denies injunctive relief, but from the omission of a provision adjudging that Parke Davis violated the Act. We have examined the record as supplemented on the remand and hold that under our prior order the Government is entitled to a judgment on the merits, as prayed in paragraph 1 of the section of the Complaint captioned "Prayer." We also hold that the District Court should retain the case on the docket for future action in the event the Government applies for further relief from an alleged resumption by Parke Davis of illegal activity. The order of the District Court filed July 18, 1960, is therefore vacated and the case is remanded to the District Court with direction to enter judgment accordingly.

It is so ordered.

MR. JUSTICE HARLAN, with whom MR. JUSTICE FRANKFURTER agrees, would place this case on the summary calendar for argument, postponing to the merits consideration of the question of jurisdiction raised by the respondent.

EASTERN RAILROAD PRESIDENTS CONFERENCE ET AL. *v.* NOERR MOTOR FREIGHT, INC., ET AL.

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

No. 50. Argued December 12–13, 1960.—Decided February 20, 1961.

A group of trucking companies and their trade association sued under § 4 of the Clayton Act for treble damages and injunctive relief against a group of railroads, a railroad association and a public relations firm, charging that the defendants had conspired to restrain trade in, and monopolize, the long-distance freight business, in violation of §§ 1 and 2 of the Sherman Act. They alleged, *inter alia,* that the railroads had engaged the public relations firm to conduct a publicity campaign against the truckers designed to foster the adoption and retention of laws and law enforcement practices destructive of the trucking business, to create an atmosphere of distaste for the truckers among the general public and to impair the relationships existing between the truckers and their customers. After a trial, the District Court entered a judgment awarding damages to the plaintiffs and enjoining the practices complained of. *Held:* The judgment is reversed. Pp. 128–145.

(a) No violation of the Sherman Act can be predicated upon mere attempts to influence the passage or enforcement of laws. Pp. 135–136.

(b) The Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or monopoly; and it does not apply to the activities of these railroads, at least insofar as those activities comprised mere solicitation of governmental action with respect to the passage and enforcement of laws. Pp. 136–138.

(c) At least insofar as the railroads' campaign was directed toward obtaining governmental action, it was not made violative of the Sherman Act by any anticompetitive purpose it may have had, such as a purpose to destroy the truckers as competitors for the long-distance freight business. Pp. 138–140.

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(d) Nor was the railroads' campaign made violative of the Sherman Act by their use of the so-called third-party technique, whereby propaganda actually circulated by a party in interest is given the appearance of being the spontaneously expressed views of independent persons and civic groups. Pp. 140–142.

(e) A different conclusion is not required by the finding of the District Court that the railroads' campaign was intended to, and did in fact, injure the truckers in their relationships with the public and with their customers. Pp. 142–145.

273 F. 2d 218, reversed.

Philip Price and *Hugh B. Cox* argued the cause for petitioners. With them on the briefs were *C. Brewster Rhoads, Gerald E. Dwyer, Arthur Littleton, Henry S. Drinker, Charles J. Biddle, Harry E. Sprogell, Lewis M. Stevens, T. W. Pomeroy, Jr., Paul Maloney, Carl E. Glock, R. Sturgis Ingersoll, Powell Pierpoint* and *Cornelius C. O'Brien, Jr.*

Harold E. Kohn argued the cause for respondents. With him on the brief was *Aaron M. Fine.*

MR. JUSTICE BLACK delivered the opinion of the Court.

American railroads have always largely depended upon income from the long-distance transportation of heavy freight for economic survival. During the early years of their existence, they had virtually no competition in this aspect of their business, but, as early as the 1920's, the growth of the trucking industry in this country began to bring about changes in this situation. For the truckers found, just as the railroads had learned earlier, that a very profitable part of the transportation business was the long hauling of heavy freight. As the trucking industry became more and more powerful, the competition between it and the railroads for this business became increasingly intense until, during the period following the conclusion of World War II, at least the railroads, if not both of the competing groups, came to view the struggle

as one of economic life or death for their method of transportation. The present litigation is an outgrowth of one part of that struggle.

The case was commenced by a complaint filed in the United States District Court in Pennsylvania on behalf of 41 Pennsylvania truck operators and their trade association, the Pennsylvania Motor Truck Association. This complaint, which named as defendants 24 Eastern railroads, an association of the presidents of those railroads known as the Eastern Railroad Presidents Conference, and a public relations firm, Carl Byoir & Associates, Inc., charged that the defendants had conspired to restrain trade in and monopolize the long-distance freight business in violation of §§ 1[1] and 2[2] of the Sherman Act. The gist of the conspiracy alleged was that the railroads had engaged Byoir to conduct a publicity campaign against the truckers designed to foster the adoption and retention of laws and law enforcement practices destructive of the trucking business, to create an atmosphere of distaste for the truckers among the general public, and to impair the relationships existing between the truckers and their customers. The campaign so conducted was described in the complaint as "vicious, corrupt, and fraudulent," first, in that the sole motivation behind it was the desire on the part of the railroads to injure the truckers and eventually to destroy them as competitors in the long-distance freight business, and, secondly, in that the defendants utilized the

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[1] "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ." 15 U. S. C. § 1.

[2] "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . . ." 15 U. S. C. § 2.

so-called third-party technique, that is, the publicity matter circulated in the campaign was made to appear as spontaneously expressed views of independent persons and civic groups when, in fact, it was largely prepared and produced by Byoir and paid for by the railroads.[3] The complaint then went on to supplement these more or less general allegations with specific charges as to particular instances in which the railroads had attempted to influence legislation by means of their publicity campaign. One of several such charges was that the defendants had succeeded in persuading the Governor of Pennsylvania to veto a measure known as the "Fair Truck Bill," [4] which would have permitted truckers to carry heavier loads over Pennsylvania roads.

The prayer of the complaint was for treble damages under § 4 of the Clayton Act [5] and an injunction restraining the defendants from further acts in pursuance of the conspiracy. Insofar as the prayer for damages was concerned, a stipulation was entered that the only damages suffered by the individual truck operators was the loss of business that resulted from the veto of the "Fair Truck Bill" by the Governor of Pennsylvania, and accordingly the claim for damages was limited to an amount based upon the loss of profits as a result of this veto plus the expenses incurred by the truckers' trade association

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[3] For a discussion of the mechanics of this technique and the purposes generally underlying its use by public relations firms, see Ross, The Image Merchants, at 118, 226–227 and 266–267.

[4] The "Fair Truck Bill" referred to was introduced in the Pennsylvania Legislature in May 1951, as Senate bill 615.

[5] "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U. S. C. § 15.

for the purpose of combatting the railroads' publicity campaign. The prayer for injunctive relief was much broader, however, asking that the defendants be restrained from disseminating any disparaging information about the truckers without disclosing railroad participation, from attempting to exert any pressure upon the legislature or Governor of Pennsylvania through the medium of front organizations, from paying any private or public organizations to propagate the arguments of the railroads against the truckers or their business, and from doing "any other act or thing to further . . . the objects and purposes" of the conspiracy.

In their answer to this complaint, the railroads admitted that they had conducted a publicity campaign designed to influence the passage of state laws relating to truck weight limits and tax rates on heavy trucks, and to encourage a more rigid enforcement of state laws penalizing trucks for overweight loads and other traffic violations, but they denied that their campaign was motivated either by a desire to destroy the trucking business as a competitor or to interfere with the relationships between the truckers and their customers. Rather, they insisted, the campaign was conducted in furtherance of their rights "to inform the public and the legislatures of the several states of the truth with regard to the enormous damage done to the roads by the operators of heavy and especially of overweight trucks, with regard to their repeated and deliberate violations of the law limiting the weight and speed of big trucks, with regard to their failure to pay their fair share of the cost of constructing, maintaining and repairing the roads, and with regard to the driving hazards they create . . . ." Such a campaign, the defendants maintained, did not constitute a violation of the Sherman Act, presumably because that Act could not properly be interpreted to apply either to restraints of trade or monopolizations that result from the passage or enforcement of laws

or to efforts of individuals to bring about the passage or enforcement of laws.[6]

Subsequently, defendants broadened the scope of the litigation by filing a counterclaim in which they charged that the truckers had themselves violated §§ 1 and 2 of the Sherman Act by conspiring to destroy the railroads' competition in the long-distance freight business and to monopolize that business for heavy trucks. The means of the conspiracy alleged in the counterclaim were much the same as those with which the truckers had charged the railroads in the original complaint, including allegations of the conduct of a malicious publicity campaign designed to destroy the railroads' business by law, to create an atmosphere hostile to the railroads among the general public, and to interfere with relationships existing between the railroads and their customers. The prayer for relief of the counterclaim, like that of the truckers' original complaint, was for treble damages and an injunction restraining continuance of the allegedly unlawful practices. In their reply to this counterclaim, the truckers denied each of the allegations that charged a violation of the Sherman Act and, in addition, interposed a number of affirmative defenses, none of which are relevant here.

In this posture, the case went to trial. After hearings, the trial court entered a judgment, based upon extensive findings of fact and conclusions of law, that the railroads'

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[6] The answer to the truckers' complaint also interposed a number of other defenses, including the contention that the activities complained of were constitutionally protected under the First Amendment and the contention that the truckers were barred from prosecuting this suit by reason of the fact that they had themselves engaged in conduct identical to that about which they were complaining with regard to the railroads and were thus *in pari delicto*. Because of the view we take of the proper construction of the Sherman Act, we find it unnecessary to consider any of these other defenses.

publicity campaign had violated the Sherman Act while that of the truckers had not.[7] In reaching this conclusion, the trial court expressly disclaimed any purpose to condemn as illegal mere efforts on the part of the railroads to influence the passage of new legislation or the enforcement of existing law. Instead, it rested its judgment upon findings, first, that the railroads' publicity campaign, insofar as it was actually directed at lawmaking and law enforcement authorities, was malicious and fraudulent—malicious in that its only purpose was to destroy the truckers as competitors, and fraudulent in that it was predicated upon the deceiving of those authorities through the use of the third-party technique; [8] and, secondly, that the railroads' campaign also had as an important, if not overriding, purpose the destruction of the truckers' goodwill, among both the general public and the truckers' existing customers, and thus injured the truckers in ways unrelated to the passage or enforcement of law. In line with its theory that restraints of trade and monopolizations resulting from valid laws are not actionable under the Sherman Act, however, the trial court awarded only nominal damages to the individual truckers, holding that no damages were recoverable for loss of business due to the veto of the Pennsylvania "Fair Truck Bill." The judgment did, however, award substantial damages to the

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[7] The opinion of the District Court on the merits of the controversy is reported at 155 F. Supp. 768. An additional opinion dealing with the question of relief is reported at 166 F. Supp. 163. For reports of earlier opinions dealing with preliminary motions, see 113 F. Supp. 737, 14 F. R. D. 189, and 19 F. R. D. 146.

[8] The District Court did not expressly find that any particular part of the railroads' publicity campaign was false in its content. Rather, it found that the technique of the railroads was "to take a dramatic fragment of truth and by emphasis and repetition distort it into falsehood." 155 F. Supp., at 814.

truckers' trade association as well as the broad injunction asked for in the complaint.[9]

The conclusion that the truckers' publicity campaign had not violated the Sherman Act was reached despite findings that the truckers also had engaged in a publicity campaign designed to influence legislation, as charged in the counterclaim, and despite findings that the truckers had utilized the third-party technique in this campaign. Resting largely upon the fact that the efforts of the truckers were directed, at least for the most part,[10] at trying to get legislation passed that was beneficial to them rather than harmful to the railroads, the trial court found that the truckers' campaign was purely defensive in purpose and concluded that the truckers' campaign differed from that of the railroads in that the truckers were not trying to destroy a competitor. Accordingly, it held that the truckers' campaign, though technically in restraint of trade, was well within the rule of reason which

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[9] If anything, the injunction was even broader than had been requested in the complaint for it effectively enjoined the defendants from any publicity activities against the truckers whether or not the third-party technique was used. See 166 F. Supp., at 172–173.

[10] The trial court did recognize that on at least one occasion the truckers attempted to encourage legislation that would have been directly harmful to the railroads rather than beneficial to themselves. Thus, the court found: "About the middle of the decade [the 1940's] PMTA had a tax manual prepared charging that the railroads of Pennsylvania themselves did not pay their fair share of taxes as compared with other states and made a wide distribution of it to legislators, banks, security investment houses, etc." The trial court found, however, that this action of the truckers also lay within the rule of reason because "the truckers had been the target of a strong campaign directed to the public with the purpose of convincing the public that trucks did not pay their fair share of taxes," thus making it necessary for the truckers to "be permitted to likewise show the public that their competitors, the railroads, were actually guilty of the fault charged against the truckers." 155 F. Supp., at 803.

governs the interpretation of §§ 1 and 2 of the Sherman Act and consequently dismissed the counterclaim.

The railroads appealed from this judgment, both as to the conclusion that they had violated the Sherman Act as charged in the original complaint and as to the conclusion that the truckers had not violated the Act as charged in the counterclaim. The Court of Appeals for the Third Circuit, one judge dissenting in part, upheld the judgment of the District Court in every respect, stating that the findings amply support the judgment and that there was sufficient evidence to support all of the findings.[11] This was followed by a petition for certiorari filed on behalf of the railroads and Byoir limited to the question of the correctness of the judgment insofar as it held that they had violated the Sherman Act. Because the case presents a new and unusual application of the Sherman Act and involves severe restrictions upon the rights of these railroads and others to seek the passage or defeat of legislation when deemed desirable, we granted that petition.[12]

We accept, as the starting point for our consideration of the case, the same basic construction of the Sherman Act adopted by the courts below—that no violation of the Act can be predicated upon mere attempts to influence the passage or enforcement of laws. It has been recognized, at least since the landmark decision of this Court in *Standard Oil Co.* v. *United States*,[13] that the Sherman Act forbids only those trade restraints and monopolizations

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[11] 273 F. 2d 218. Chief Judge Biggs dissented from the opinion of the majority of the Court of Appeals insofar as it upheld the District Court's conclusion that the railroads and Byoir had violated the Sherman Act. For similar reasons, he concurred in that part of the majority opinion which upheld the conclusion that the truckers had not violated the Act.

[12] 362 U. S. 947.

[13] 221 U. S. 1, at 51–62.

that are created, or attempted, by the acts of "individuals or combinations of individuals or corporations." [14] Accordingly, it has been held that where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out.[15] These decisions rest upon the fact that under our form of government the question whether a law of that kind should pass, or if passed be enforced, is the responsibility of the appropriate legislative or executive branch of government so long as the law itself does not violate some provision of the Constitution.

We think it equally clear that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly. Although such associations could perhaps, through a process of expansive construction, be brought within the general proscription of "combination[s] . . . in restraint of trade," they bear very little if any resemblance to the combinations normally held violative of the Sherman Act, combinations ordinarily characterized by an express or implied agreement or understanding that the participants will jointly give up their trade freedom, or help one another to take away the trade freedom of others through the use of such devices as price-fixing agreements, boycotts, market-division agreements, and other similar arrangements.[16] This essential dissimilarity between an agreement jointly to seek legislation or law enforcement and the agreements traditionally condemned by § 1 of the Act, even if not itself conclusive on the question of the applicability of the

[14] *Id.*, at 57.

[15] *United States* v. *Rock Royal Co-op.*, 307 U. S. 533; *Parker* v. *Brown*, 317 U. S. 341.

[16] See *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 491–493.

Act, does constitute a warning against treating the defendants' conduct as though it amounted to a common-law trade restraint. And we do think that the question is conclusively settled, against the application of the Act, when this factor of essential dissimilarity is considered along with the other difficulties that would be presented by a holding that the Sherman Act forbids associations for the purpose of influencing the passage or enforcement of laws.

In the first place, such a holding would substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade. In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives. To hold that the government retains the power to act in this representative capacity and yet hold, at the same time, that the people cannot freely inform the government of their wishes would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act.[17] Secondly, and of at least equal significance,

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[17] In *Parker* v. *Brown, supra,* this Court was unanimous in the conclusion that the language and legislative history of the Sherman Act would not warrant the invalidation of a state regulatory program as an unlawful restraint upon trade. In so holding, we rejected the contention that the program's validity under the Sherman Act was affected by the nature of the political support necessary for its implementation—a contention not unlike that rejected here. The reasoning underlying that conclusion was stated succinctly by Mr. Chief Justice Stone: "Here the state command to the Commission and to the program committee of the California Prorate Act is not rendered unlawful by the Sherman Act since, in view of the latter's words and history, it must be taken to be a prohibition of individual and not state action. It is the state which has created the machinery for establishing the prorate program. Although the organization of a prorate zone is

such a construction of the Sherman Act would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms. Indeed, such an imputation would be particularly unjustified in this case in view of all the countervailing considerations enumerated above. For these reasons, we think it clear that the Sherman Act does not apply to the activities of the railroads at least insofar as those activities comprised mere solicitation of governmental action with respect to the passage and enforcement of laws. We are thus called upon to consider whether the courts below were correct in holding that, notwithstanding this principle, the Act was violated here because of the presence in the railroads' publicity campaign of additional factors sufficient to take the case out of the area in which the principle is controlling.

The first such factor relied upon was the fact, established by the finding of the District Court, that the railroads' sole purpose in seeking to influence the passage and enforcement of laws was to destroy the truckers as competitors for the long-distance freight business. But we do not see how this fact, even if adequately supported in the record,[18] could transform conduct otherwise lawful

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proposed by producers, and a prorate program, approved by the Commission, must also be approved by referendum of producers, it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy. The prerequisite approval of the program upon referendum by a prescribed number of producers is not the imposition by them of their will upon the minority by force of agreement or combination which the Sherman Act prohibits. The state itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application." 317 U. S., at 352.

[18] A study of the record reveals that the only evidence or subsidiary findings upon which this conclusory finding could be based is the undisputed fact that the railroads did seek laws by arguments and

into a violation of the Sherman Act. All of the considerations that have led us to the conclusion that the Act does not apply to mere group solicitation of governmental action are equally applicable in spite of the addition of this factor. The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so. It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors. This Court has expressly recognized this fact in its opinion in *United States* v. *Rock Royal Co-op.*, where it was said: "If ulterior motives of corporate aggrandizement stimulated their activities, their efforts were not thereby rendered unlawful. If the Act and Order are otherwise valid, the fact that their effect would be to give coöperatives a monopoly of the market would not violate the Sherman Act . . . ." [19] Indeed, it is quite probably people with just such a hope of personal advantage who provide much of the information upon which governments must act. A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would thus deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them. We reject such a construction of the Act and hold that, at least insofar

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propaganda that could have had the effect of damaging the competitive position of the truckers. There is thus an absence of evidence of intent independent of the efforts that were made to influence legislation and law enforcement. We nonetheless accept the finding of the District Court on this issue for, in our view, the disposition of this case must be the same regardless of that fact.

[19] 307 U. S. 533, 560.

as the railroads' campaign was directed toward obtaining governmental action, its legality was not at all affected by any anticompetitive purpose it may have had.

The second factor relied upon by the courts below to justify the application of the Sherman Act to the railroads' publicity campaign was the use in the campaign of the so-called third-party technique. The theory under which this factor was related to the proscriptions of the Sherman Act, though not entirely clear from any of the opinions below, was apparently that it involved unethical business conduct on the part of the railroads. As pointed out above, the third-party technique, which was aptly characterized by the District Court as involving "deception of the public, manufacture of bogus sources of reference, [and] distortion of public sources of information," depends upon giving propaganda actually circulated by a party in interest the appearance of being spontaneous declarations of independent groups. We can certainly agree with the courts below that this technique, though in widespread use among practitioners of the art of public relations,[20] is one which falls far short of the ethical standards generally approved in this country. It does not follow, however, that the use of the technique in a publicity campaign designed to influence governmental action constitutes a violation of the Sherman Act. Insofar as that Act sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity, and, as we have already pointed out, a publicity campaign to influence governmental action falls clearly into the category

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[20] The extent to which the third-party technique is utilized in the public relations field is demonstrated by the fact, found by the District Court, that each of the several public relations firms interviewed by the railroads before they finally decided to hire the Byoir organization to conduct their publicity campaign included the use of this technique in its outline of proposed activities submitted for consideration by the railroads. See 155 F. Supp., at 778.

of political activity. The proscriptions of the Act, tailored as they are for the business world, are not at all appropriate for application in the political arena. Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities, a caution which has been reflected in the decisions of this Court interpreting such legislation.[21] All of this caution would go for naught if we permitted an extension of the Sherman Act to regulate activities of that nature simply because those activities have a commercial impact and involve conduct that can be termed unethical.

Moreover, we think the courts below themselves recognized this fact to some extent for their disposition of the case is inconsistent with the position that the use of the third-party technique alone could constitute a violation of the Sherman Act. This much is apparent from the fact that the railroads' counterclaim against the truckers was not allowed. Since it is undisputed that the truckers were as guilty as the railroads of the use of the technique,[22] this factor could not have been in any sense controlling of the holding against the railroads. Rather,

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[21] See, *e. g., United States* v. *Harriss,* 347 U. S. 612. Cf. *United States* v. *Rumely,* 345 U. S. 41.

[22] The District Court expressly recognized this fact in its opinion: "The record discloses that both sides used, or wanted to use, fronts and/or the propaganda technique." 155 F. Supp., at 816. This conclusion was amply supported by specific findings. Thus, the court found: "The record establishes that the truckers wrote to and made personal contacts with legislators in support of bills increasing the weight of trucks; that they had representatives of other industries write and make personal contacts with legislators in Harrisburg without disclosing trucker connections; and that they had such persons intentionally refrain from advising the legislators and the said officials that the letters and contacts had been solicited; that they solicited from legislators statements in support of their position and had news releases issued thereon." 155 F. Supp., at 803.

it appears to have been relied upon primarily as an indication of the vicious nature of the campaign against the truckers. But whatever its purpose, we have come to the conclusion that the reliance of the lower courts upon this factor was misplaced and that the railroads' use of the third-party technique was, so far as the Sherman Act is concerned, legally irrelevant.

In addition to the foregoing factors, both of which relate to the intent and methods of the railroads in seeking governmental action, the courts below rested their holding that the Sherman Act had been violated upon a finding that the purpose of the railroads was "more than merely an attempt to obtain legislation. *It was the purpose and intent . . . to hurt the truckers in every way possible even though they secured no legislation.*" (Emphasis in original.) Specifically, the District Court found that the purpose of the railroads was to destroy the goodwill of the truckers among the public generally and among the truckers' customers particularly, in the hope that by doing so the over-all competitive position of the truckers would be weakened, and that the railroads were successful in these efforts to the extent that such injury was actually inflicted. The apparent effect of these findings is to take this case out of the category of those that involve restraints through governmental action and thus render inapplicable the principles announced above. But this effect is only apparent and cannot stand under close scrutiny. There are no specific findings that the railroads attempted directly to persuade anyone not to deal with the truckers. Moreover, all of the evidence in the record, both oral and documentary, deals with the railroads' efforts to influence the passage and enforcement of laws. Circulars, speeches, newspaper articles, editorials, magazine articles, memoranda and all other documents discuss in one way or another the railroads' charges that heavy trucks injure the roads, violate the

laws and create traffic hazards, and urge that truckers should be forced to pay a fair share of the costs of rebuilding the roads, that they should be compelled to obey the laws, and that limits should be placed upon the weight of the loads they are permitted to carry. In the light of this, the findings of the District Court that the railroads' campaign was intended to and did in fact injure the truckers in their relationships with the public and with their customers can mean no more than that the truckers sustained some direct injury as an incidental effect of the railroads' campaign to influence governmental action and that the railroads were hopeful that this might happen.[23] Thus, the issue presented by the lower courts' conclusion of a violation of the Sherman Act on the basis of this injury is no different than the issue presented by the factors already discussed. It is inevitable, whenever an attempt is made to influence legislation by a campaign of publicity, that an incidental effect of that campaign may be the infliction of some direct injury upon the interests of the party against whom the campaign is directed. And it seems equally inevitable that those conducting the campaign would be aware of, and possibly even pleased by, the prospect of such injury. To hold that the knowing infliction of such injury renders the campaign itself illegal would thus be tantamount to out-

[23] Here again, the petitioners have leveled a vigorous attack upon the trial court's findings. As a part of this attack, they urge that there is no basis in reason for the finding that some shippers quit doing business with the truckers as a result of the railroads' publicity campaign. Their contention is that since the theme of the campaign was that the truckers had an unfair competitive advantage and could consequently charge unfairly low prices, the campaign would have encouraged, rather than discouraged, shippers who availed themselves of the truckers' services. This argument has considerable appeal but, as before, we find it unnecessary to pass upon the validity of these findings for we think the conclusion must be the same whether they are allowed to stand or not.

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lawing all such campaigns. We have already discussed the reasons which have led us to the conclusion that this has not been done by anything in the Sherman Act.

There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified. But this certainly is not the case here. No one denies that the railroads were making a genuine effort to influence legislation and law enforcement practices. Indeed, if the version of the facts set forth in the truckers' complaint is fully credited, as it was by the courts below, that effort was not only genuine but also highly successful. Under these circumstances, we conclude that no attempt to interfere with business relationships in a manner proscribed by the Sherman Act is involved in this case.

In rejecting each of the grounds relied upon by the courts below to justify application of the Sherman Act to the campaign of the railroads, we have rejected the very grounds upon which those courts relied to distinguish the campaign conducted by the truckers. In doing so, we have restored what appears to be the true nature of the case—a "no-holds-barred fight" [24] between two industries both of which are seeking control of a profitable source of income.[25] Inherent in such fights, which are commonplace in the halls of legislative bodies, is the possibility, and in many instances even the probability, that one group or the other will get hurt by the arguments that are made.

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[24] We borrow this phrase from the dissenting opinion below of Chief Judge Biggs.

[25] Since the commencement of this litigation, a new bill increasing truck-weight limits has passed the Pennsylvania Legislature and has become law by virtue of the Governor's approval. Thus, the fight goes on.

In this particular instance, each group appears to have utilized all the political powers it could muster in an attempt to bring about the passage of laws that would help it or injure the other. But the contest itself appears to have been conducted along lines normally accepted in our political system, except to the extent that each group has deliberately deceived the public and public officials. And that deception, reprehensible as it is, can be of no consequence so far as the Sherman Act is concerned. That Act was not violated by either the railroads or the truckers in their respective campaigns to influence legislation and law enforcement. Since the railroads have acquiesced in the dismissal of their counterclaim by not challenging the Court of Appeals' affirmance of that order in their petition for certiorari, we are here concerned only with those parts of the judgments below holding the railroads and Byoir liable for violations of the Sherman Act. And it follows from what we have said that those parts of the judgments below are wrong. They must be and are

Reversed.

UNITED STATES *v.* FRUEHAUF ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 91. Argued January 11, 1961.—Decided February 20, 1961.

Several employers were indicted in substantially the language of the statute for violating § 302 of the Labor Management Relations Act, 1947, by paying and delivering a sum of money to the president of a labor organization representing some of their employees who were engaged in an industry affecting commerce; and the president of the labor organization was indicted, substantially in the language of the statute, for having received and accepted the sum of money from the employers. The District Judge ruled that a trial memorandum filed by the Government constituted a judicial admission that the transaction was a loan, and he dismissed the indictment on the ground that the statute did not apply to a loan. The Government appealed directly to this Court under 18 U. S. C. § 3731, and the sole question presented in its jurisdictional statement was "whether a loan of money comes within the . . . prohibitions" of § 302. After argument, the Solicitor General made representations to the Court which indicated that he considered the Government free, in the event of remand, to prove under the indictment that the transaction came within the statute by virtue of its particular facts, from which it might have been found that it lacked various characteristics of a bona fide loan. *Held:* Inasmuch as the record before this Court presents only an abstract question, the ruling dismissing the indictment is set aside and the case is remanded for trial upon the indictment. Pp. 147–159.

Judgment set aside and case remanded.

S. Hazard Gillespie, Jr. argued the cause for the United States. On the brief were *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Eugene L. Grimm.*

Louis Nizer argued the cause for appellees. With him on the briefs were *Charles Seligson, Cyrus R. Vance,*

Mortimer A. Sullivan, Albert C. Bickford, Charles S. Burdell, Donald McL. Davidson, James D. Walsh, Albert I. Schmalholz and *Melvin Lloyd Robbins.*

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

On June 17, 1959, an indictment in two counts was filed in the United States District Court for the Southern District of New York against appellees Roy Fruehauf, Fruehauf Trailer Co., Burge Seymour, Associated Transport, Inc., and Brown Equipment and Manufacturing Co. (hereinafter referred to collectively as the Fruehauf-Seymour group) [1] and appellee Dave Beck. The first count, based on § 302 (a) of the Labor Management Relations Act, 1947, 61 Stat. 157, 29 U. S. C. § 186 (a), which makes it unlawful "for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce," [2] charged that on or about June 21, 1954, each of the appellees of the Fruehauf-Seymour group, employers of employees engaged in an industry affecting commerce,

> "did unlawfully, wilfully and knowingly pay and deliver and agree to pay and deliver to Dave Beck,

[1] It appears that Roy Fruehauf is President of Fruehauf Trailer Co., that Burge Seymour is President of Associated Transport, Inc., and that Brown Equipment and Manufacturing Co. is a wholly owned subsidiary of Associated Transport, Inc.

[2] Section 505 of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 537, enacted September 14, 1959, amended this section to read, in pertinent part:

"It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

"(1) to any representative of any of his employees who are employed in an industry affecting commerce . . . ."

> President, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, a representative of the aforesaid employees, a thing of value, to wit, money, in the amount of $200,000."

The second count, based on § 302 (b), 61 Stat. 157, 29 U. S. C. § 186 (b), and similarly couched in the words of the statute,[3] charged that Beck had received and accepted, and agreed to receive and accept, from the appellees of the Fruehauf-Seymour group, $200,000. All of the appellees entered pleas of not guilty; after various pretrial proceedings, during the course of which "trial memoranda" were submitted by the Government and by several of the appellees, the case came on for trial. At the outset of the hearing, the district judge suggested that if, as he was advised by the trial memoranda of certain among the appellees, any of them intended to move for dismissal of the indictment, such a motion should be made at that time. Counsel for the appellees replied that they "would be in a better position to address ourselves to the grounds for a dismissal after the government had made an opening here, . . . if on inquiry in this pretrial, preliminary conference, the government conceded certain positions that it has conceded at arraignment and other places in

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[3] Count Two of the indictment charged that "On or about the 21st day of June, 1954, . . . Dave Beck, . . . a representative of employees who were engaged in an industry affecting commerce . . . did unlawfully, wilfully and knowingly receive and accept and agree to receive and accept from [the several appellees of the Fruehauf-Seymour group], employers of the aforesaid employees, a thing of value, to wit, money, in the amount of $200,000." Section 302 (b), as it was in effect at the time of the transaction alleged, provided: "It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value." The Labor-Management Reporting and Disclosure Act of 1959, § 505, amended the section to cause it to parallel the amended version of § 302 (a), note 2, *supra*.

the minutes." The district judge then read into the record an extended excerpt from the Government's trial memorandum [4] which purported to outline the "facts which support the charge and which the government intends to prove." These were: (A) That Beck asked Roy Fruehauf to "lend him $200,000," which "loan" was subsequently discussed at a meeting of Fruehauf and attorneys for Beck and Fruehauf Trailer Co.; that after unsuccessful attempts to "place the loan" with officers of various banks, "Fruehauf and Burge Seymour found it necessary to arrange the loan without the aid of financial institutions and, instead, processed it through the Fruehauf Trailer Co. (Roy Fruehauf, president), Associated Transport Co. (Burge Seymour, president), and the latter's wholly owned subsidiary Brown Equipment and Manufacturing Co." (B) That "The method by which this otherwise simple transfer of $200,000.00 from Fruehauf to Beck was effected is a fairly complex one, apparently caused by difficulties encountered by the defendant employers in effectuating what they have called a 'loan' but without officers of their corporations learning of the transaction." (C) That "[T]he details of this circuitous financing operations [*sic*]" were as follows: Inasmuch as "Neither Fruehauf nor Seymour wished to effect the loan by use of personal funds," and "neither Fruehauf nor Seymour felt that their respective corporations could overtly finance the transfer of funds in such an amount without embarrassing themselves," it was determined that

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[4] The memorandum has not been made a part of the record in this Court. As read into the record, in part, by the district judge, it appears to have been prefixed by the statement:

"This memorandum is submitted for the purpose of supplying the Court with a general outline and analysis of the facts the government intends to prove together with an exposition of the statutory and decsional [*sic*] law regarding the crime charged in the instant case."

the Brown Company "would actually make the transfer to Beck." Thereupon, (1) on June 21, 1954, Fruehauf Trailer Co. "transferred" $175,000 by check to Brown in exchange for Brown's $175,000 promissory note, payable December 30, 1954, and "purporting to bear interest in the amount of 5% per annum," whereas, in fact, "no interest was ever paid to, or even anticipated by, Fruehauf or his corporation." (2) Brown, on the same date, transferred $200,000 to Beck in return for Beck's promissory note for that amount at 4% per annum, payable December 30, 1954—a Brown check requisition form which falsely listed the object of this transfer being explained by Seymour as intended to conceal from "the people in Associated . . . that Beck was borrowing Associated funds." (3) Associated, on the same date, transferred $200,000 to Brown. One week later, Brown returned to Associated $175,000, the amount lent Brown by Fruehauf. On December 30, 1954, "after Seymour had renegotiated the loan with Manufacturers Trust Co.," Brown returned the remaining $25,000 to Associated. ("It should be noted that Beck was supposed to, but did not, repay the 'loan' to Brown by December 30, 1954.") (4) On December 27, 1954, Seymour borrowed $200,000 at 4% per annum for 90 days from Manufacturers Trust Co., collateralizing the loan with Beck's note and obligations of Fruehauf, Seymour and others, including an attorney for Fruehauf Trailer Co. (5) Seymour paid $2,066.66 interest to Manufacturers Trust, and by check dated March 30, 1955, returned the $200,000 loan to the bank. (6) "Beck paid the $200,000 loan from Brown by remitting to Seymour $163,215. on or about April 11, 1955, and $36,785. on or about June 30, 1955, which Seymour endorsed to Brown." (7) "Only $4,000 interest, approximately half of the interest due, was actually paid and that was remitted in the form of a check . . . [from Fruehauf Trailer Co.'s attorney] to Seymour."

Having read this portion of the Government's memorandum for the purpose of making known to the appellees "the government's position, at least on the matter of the loan," the district judge ruled that "in my view that statement by the government is a judicial admission that the transaction was a loan. As a matter of fact, to verify that belief, the government later argues in its brief that the use of the money was a thing of value. So at least, so far as I am concerned, there can be no dispute that the government's position is that this was a loan, and we are now resolved to the question of whether a loan under these circumstances was illegal under the statute . . . ."

"[O]n the basis of the disclosure by the Court of what the Court understands to be a judicial admission by the government," the court then asked, again, whether appellees wished to be heard on a motion to dismiss. At this point, government counsel interposed "to communicate one thought to the Court that may not have been communicated by my brief." He stated:

> "Despite the fact that there is the repeated use of the word 'loan' in the government's advance outline before the Court, caused by the fact that the government's case in large part is as asserted by these defendants as the trial will reflect as it proceeds, nevertheless the government's position on the loan, and I hope to make this clear as the trial progresses, is actually twofold.
>
> "A loan, if your Honor please, is something that relates to a state of mind between the person who is receiving the money and the person who is giving the money, and again the repayment which actually occurred in this case is only one aspect of whether or not the transfer of funds between one party or from one party to another is actually a loan.
>
> "Now, to be quite specific, I will simply say that the position that the government takes is that the

> government has called this a loan, and in reiterating the facts as we know them from the defendants, the defendants having repeatedly used the word 'loan,' we say that this is not necessarily so, because in fact any loan when it is made, to prove the fact that it was a loan, goes through certain stages, and is accompanied by certain attributes and here those items were not present in this case."

After adverting to the size of the "loan," the fact that no collateral was given, and the facts that the "loan" could not be processed through financial institutions, that no interest was paid between the corporations although the transaction purported to require its payment, and that Beck did not in fact pay the 4% interest due under the terms of his note to Brown, government counsel concluded: "That is our first position. And the second position is that even if this is a loan as a matter of law it is still encompassed within the statute." The district judge replied:

> "I do not think that anything you said detracts from the argument that you made in your memorandum, that you are going to prove that this was a loan, and on that basis I intend to entertain an application with respect to the dismissal of the indictment."

All of the appellees moved to dismiss on the ground, among others, that the transaction between Beck and the Fruehauf-Seymour group, being a "loan," was not within the prohibition of the statute. Argument on the motion was had, and government counsel reiterated his position:

> "The COURT: Assuming that this case was tried and the Court was disposed to frame special interrogatories to the jury, and one of those interrogatories was, Was the transaction a loan, and the jury brought back the answer No: do you think the Court could allow that answer to stand on the basis of the facts

as you have set them forth in your brief, or wouldn't the Court have to set aside the finding as being contrary to the evidence and the weight of the evidence?

"Mr. GUZZETTA: Your Honor, in the context of the remarks I made after you read in open court my brief, I would say that that would not be an erroneous finding by them.

"The COURT: In other words, your position is that despite the facts which you set forth this could be held to be not a loan? When I say the facts you set forth, I mean the facts in your memorandum.

"Mr. GUZZETTA: As I tried to indicate, . . . the government's position is twofold. If it wasn't a loan, if the jury determine on the basis of the facts which they hear that this was—that the outer clothing, fabricated by one highly complex intercorporate transaction, didn't make this transfer a loan, clearly, it would come within the statute. There would be no problem in my mind at all. Secondly, if the jury decided that it was a loan, I wouldn't say that that would preclude them from finding a verdict of guilty because . . . a loan is encompassed under the statute."

The District Court granted the motions to dismiss the indictment as to all of the appellees. It ruled:

"I am convinced that the language which I read into the record from the Government's brief is a judicial admission that this transaction was a loan. I have no doubt in my own mind at least, that in a trial either to the court or the jury, in a preliminary hearing where the defendants have not yet subjected themselves to jeopardy, if the Government established the facts which it recounted in its brief that it intended to prove, a finding by a jury to the contrary would have to be set aside, nor could the Court

find to the contrary. Those facts, in my view, notwithstanding the qualifications attempted orally, and despite those qualifications and accepting those qualifications, those facts, in my view, establish that the transaction was a pure and simple loan.

". . . Having found as I do on the Government's judicial admission that the transaction was a loan, we must then resolve whether the transaction as a loan was violative of the statute as it was at the time of the transaction, and I am of the opinion that it was not."

From this oral ruling the Government brought the case here by direct appeal pursuant to the Criminal Appeals Act, 18 U. S. C. § 3731. The sole question presented in its Jurisdictional Statement is "whether a loan of money comes within the . . . prohibitions" of § 302 of the Labor Management Relations Act, 1947.[5] Briefs and oral argument in this Court proceeded upon the assumption that this question, and only this question, was properly raised by the record, and that the question, thus shaped, presupposed the substantial reality and *bona fides* of the "loan." Counsel for the Government, in response to questions from the bench, asserted that in light of the framing of the issues on this direct appeal, the Government's trial theory would have to be that the Beck-Fruehauf-Seymour transaction was an incontestable, good-faith loan at a fair rate of interest, and that such other circumstances of the transaction as the lack of collateral would be immaterial. However, in a subsequent com-

[5] This statement of the question differs from that in the Government's Notice of Appeal, which stated the issue to be "Whether the payment of money by an employer (of employees in an industry affecting commerce) to a representative of his employees, intending repayment of said money with interest, is within the proscriptions of Section 302 (a) and (b) of the Labor Management Relations Act, 1947 . . . ."

munication addressed to the Court and opposing counsel by the Solicitor General, the Government took the position "that the Court may properly take account in disposing of this case of the salient facts with respect to the transaction, as developed by the prosecutor before the district judge and as taken into account by the district judge in dismissing the indictment, and that the question before the Court may be considered in the factual context in which it was presented; the question presented fairly comprised the two issues of (1) whether any loan was covered by Section 302, and (2) whether this loan was covered by Section 302."

On this record, the question put to the Court for our direct review under 18 U. S. C. § 3731 is left unclear. An indictment cast in statutory language has been dismissed for failure to charge an offense within the meaning of the legislation whose words it employs, on the ground (as expressed in the ruling of the District Court) that the Government's trial memorandum constituted a "judicial admission that the transaction was a loan." The portions of the trial memorandum upon which this ruling rests establish, at most, that approximately a year after the Fruehauf-Seymour group transferred $200,000 to Beck, Beck transferred $200,000 back to the Fruehauf-Seymour group, with $4,000 "interest," "approximately half of the interest due." On the basis of such facts, putting aside of course all questions of variance between indictment and proof that might emerge at a trial, seemingly the Government might have attempted to make out violations of § 302 on any of a number of alternative theories: (1) that the "loan" was a sham, a mere ruse and covering device intended to pass from Fruehauf and Seymour to Beck a gift or bribe of money; (2) that irrespective of intention, the acceptance by the Fruehauf-Seymour group of $200,000 plus $4,000 interest in satisfaction of Beck's obligation to repay the "loan" with twice

that amount of interest constituted a forbidden delivery of the unpaid interest to Beck; (3) that irrespective of the terms of Beck's note, the loan of a large sum of money at a rate of interest significantly lower than the going commercial rate effected a delivery to Beck of the difference between the interest payable at a commercial rate and the interest agreed on; (4) that irrespective of the interest rate, the transaction—by which Fruehauf and Seymour made available a large, unsecured loan which Beck could not have gotten through normal financing channels—resulted in the delivery to Beck of a "thing of value," namely, the benefit of having the money in hand; (5) that irrespective of the particular incidents of this transaction, all loans, as such, violate the statute, either because the use of money is itself a "thing of value" which may not in any case be delivered by an employer to his employees' representative, even in consideration of the payment of interest, under the statute, or because every loan, *qua* loan, comports the "delivery" of the thing loaned, which delivery (regardless of repayment) violates § 302.[6] However, the District Court's ruling that, by admission of the Government, the transaction was a "loan," appears to mean that, in light of its trial memorandum, the Government is foreclosed from pursuing some, probably most, of these theories. Which among them the court thus viewed as closed remains uncertain. On the other hand, in a representation to this Court, the Solicitor General does not leave it unequivocally clear, so as to preclude controversy in the lower court were the case to be allowed to go to trial, which (if not all) of the theories he would regard as still open. The only issue

[6] Subsection (c) of § 302 excepts five enumerated situations from the section's broad ban on delivery or receipt of any thing of value: *e. g.*, § 302 (c) (3) provides that the section shall not be applicable "with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business."

which we can be sure that the District Court decided as a matter of construction of the statute (as distinguished from those issues which the District Court held could not be proved under the indictment consistently with the Government's "judicial admission") is the issue posed by the fifth theory above—the issue posed, in its most evidently abstract form, by the question presented here in the Government's Jurisdictional Statement—"whether a loan of money," every loan of money, as such, "comes within the [statute's] . . . prohibitions."

We do not reach that question on this appeal. For we cannot but regard it—abstracted as it has become, in the course of these proceedings, from the immediate considerations which should determine the disposition of appellees' motions to dismiss an indictment incontestably valid on its face—as other than a request for an advisory opinion. Such opinions, such advance expressions of legal judgment upon issues which remain unfocused because they are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaced situation embracing conflicting and demanding interests, we have consistently refused to give. See *Parker* v. *Los Angeles County,* 338 U. S. 327; *Rescue Army* v. *Municipal Court,* 331 U. S. 549; *United Public Workers* v. *Mitchell,* 330 U. S. 75; *Alabama State Federation of Labor* v. *McAdory,* 325 U. S. 450; *Arizona* v. *California,* 283 U. S. 423.

Nor does the record raise questions concerning the sufficiency of the indictment which would require, in an appropriate case, that the case be sent to the Court of Appeals, pursuant to 18 U. S. C. § 3731. For this is not a case in which the District Court has construed the allegations of an indictment, or limited the scope of the Government's presentation by construction of a bill of

particulars or the prosecutor's opening statement. In the present case we cannot know with reference to what supposed factual circumstances the District Court attributed to the Government the admission that the Beck-Fruehauf-Seymour transaction constituted a "loan." Without spelling out in detail the diverse argumentative possibilities that underlie the judge's attribution of a "loan" as an unequivocally defined concept to the Government, it suffices to say that experience in instances of similar unclarity under the Criminal Appeals Act counsels the wisdom of abstaining from reviewing construction of a criminal statute on so cloudy a record as is now before the Court. Compare *United States* v. *Colgate & Co.*, 250 U. S. 300, with *United States* v. *A. Schrader's Son, Inc.*, 252 U. S. 85.

The core of the difficulty in the present case is that the record does not preclude the Government from attempting to prove that the transaction in question came within the statutory ban by reason of any or all possible theories. Of course, an undertaking by counsel here, however honorable its impulse, cannot bind the Government in the future. And the District Court's ruling, insofar as it purports to close any avenues open to the Government under the indictment—not in view of specifications made in a bill of particulars or an opening statement, but on the basis of a "judicial admission" culled from a pretrial memorandum—was impermissible and constitutes an insufficient basis to justify the exercise of this Court's jurisdiction on direct appeal.

We do not think, however, that the purpose of Rule 15 of this Court, under which the Government filed the Jurisdictional Statement which brought the case here, requires us to penalize the Government by dismissing this appeal, *simpliciter*. This Court has the power, expressly provided in 28 U. S. C. § 2106, to "vacate, set aside or

reverse any judgment, decree, or order of a court lawfully brought before it for review, and . . . remand the cause and . . . require such further proceedings to be had as may be just under the circumstances." The exercise of that authority is appropriate here. The ruling dismissing the indictment is set aside and the case is remanded for trial upon this valid indictment.

So ordered.

MR. JUSTICE STEWART, dissenting.

The dismissal of the indictment in this case was placed squarely upon the district court's construction of a criminal statute. Specifically, the court ruled that a loan of money did not fall within the prohibition of § 302 of the Labor Management Relations Act of 1947 (before its amendment in 1959). In bringing the appeal directly here, the Government eliminated from the case any possible questions other than the correctness of the district court's construction of the underlying statute—to which this Court's jurisdiction is limited under the Criminal Appeals Act. 18 U. S. C. § 3731. *United States* v. *Keitel,* 211 U. S. 370, 397–398; *United States* v. *Patten,* 226 U. S. 525, 535, 540; *United States* v. *Colgate & Co.,* 250 U. S. 300, 301, 306; *United States* v. *Borden Co.,* 308 U. S. 188, 192–194. "[I]n reviewing a direct appeal from a District Court under the Criminal Appeals Act, *supra,* our review is limited to the validity or construction of the contested statute. For 'The Government's appeal does not open the whole case.'" *United States* v. *Petrillo,* 332 U. S. 1, 5.

I think the issue whether a loan of money came within the proscriptions of the statute is before us now and should be decided. I further think this is the only issue properly before us. However, since the Court thinks otherwise, I am persuaded that an expression of my views on the subject would not be appropriate.

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MAYNARD *v.* DURHAM & SOUTHERN RAILWAY CO.

CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA.

No. 183. Argued January 12, 1961.—Decided February 20, 1961.

An employee sued a railroad in a state court to recover damages under the Federal Employers' Liability Act for an injury sustained in the course of his employment. As a defense, the railroad tendered a release signed by the employee, and the court granted a nonsuit after all the evidence was in. There was a conflict in the evidence as to what happened when the release was signed. *Held:* The judgment is reversed. Pp. 160–163.

(a) The rule of *Dice* v. *Akron, C. & Y. R. Co.*, 342 U. S. 359, that the validity of a release under the Federal Employers' Liability Act is a federal question, applies where a release is challenged as not being supported by consideration as well as where the attack is made for fraud. P. 161.

(b) On the record, there was a genuine issue of fact concerning the presence of consideration for the release, and that issue should have been submitted to a jury. Pp. 161–163.

251 N. C. 783, 112 S. E. 2d 249, reversed.

Charles F. Blanchard argued the cause for petitioner. With him on the brief were *William T. Hatch* and *William Joslin.*

Charles B. Nye argued the cause for respondent. With him on the brief was *Clem B. Holding.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioner, an employee of respondent, sued in a North Carolina court for damages under the Federal Employers' Liability Act, 45 U. S. C. § 51. As a defense, respondent tendered a release signed by petitioner and moved for a nonsuit. The motion was allowed after all the evidence was in, and the Supreme Court of North Carolina

affirmed, one judge dissenting. 251 N. C. 783, 112 S. E. 2d 249.

We said in *Dice* v. *Akron, C. & Y. R. Co.*, 342 U. S. 359, 361, that the "validity of releases under the Federal Employers' Liability Act raises a federal question to be determined by federal rather than state law." While that case dealt with a release challenged on the ground of fraud, the rule it announced also governs releases challenged for lack of consideration. For releases obtained by fraud or for no consideration could equally defeat the federal rights created by this Act of Congress. It was because of our doubts that the decision below squared with that rule that we brought the case here on certiorari. 363 U. S. 839.

Petitioner was injured August 22, 1955, and came back to work on September 12, 1955. On September 17 he signed the release in question. There is conflicting evidence as to what happened at that time. According to petitioner he went into the office of Mr. McAllister, General Manager, and asked for his pay check; Mr. McAllister "gave me a paper, told me to sign that, and I signed it"; petitioner did not read the paper; he signed it "because every check that we ever got from the railroad we had to sign for it"; he signed thinking he was signing for his pay check; he thought the railroad owed him $144.60 for labor, the amount he received; he "never received anything from the railroad as a result of the injury." Petitioner also testified that some six months after he received the $144.60, he was asked to sign a release for his injuries and refused. As to the paper he signed on September 17, petitioner further testified that Mr. McAllister "didn't make me any false representations. The only thing he did do there, he just didn't explain the paper to me. He didn't make any deceitful suggestions to me. He didn't make any fraudulent suggestions to me." Petitioner also testified, "The $144.60 that I received there from Mr.

McAllister was not for injuries. That was my pay check."

On the other side there was testimony by a former employee, who was petitioner's witness, that it was the policy of the company not to pay wages for the time a person was "off from work" unless he signed a release and that policy applied when an employee did not work because of an injury. This witness also testified that in a conversation he and petitioner had with Mr. McAllister,* McAllister told petitioner he would have to sign a release before he could get back pay. Moreover, Mr. McAllister testified that petitioner stated "that he would like to settle up with the company, that he was broke and needed some money"; that McAllister told petitioner "that he knew if we settled up with him it would be necessary for him to sign a release"; that petitioner said he was "willing to sign a release" and that that was "the purpose of his visit"; that he, McAllister, explained to petitioner what was in the release and that if he signed it he would be paid "for his time lost"; that McAllister did not promise "any future payments" if petitioner signed the release "except that possibly we would take care of his doctor's bills if he had any."

In addition petitioner testified that while he did not know it was the railroad's policy to pay an injured employee for time lost only upon signing a release, "This wasn't the kind of thing that I would sign for my regular pay check. I didn't know what it was. I just did not give it no thought."

We find no evidence sufficient for a jury that respondent obtained the release by fraud, duress, or undue influence.

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*The witness, who was Chairman of the local union at the time of the accident, could not remember whether this meeting took place before or after September 17, 1955 (the date of the release), although he was sure it took place after August 22, 1955. Petitioner testified this meeting took place after September 17.

We conclude, however, that there was a jury question as to whether the release was given for a consideration.

We think the correct rule concerning the adequacy of consideration for a release of claims under the Act was stated in *Burns* v. *Northern Pac. R. Co.*, 134 F. 2d 766, 770. "In order that there may be consideration, there must be mutual concessions. A release is not supported by sufficient consideration unless something of value is received to which the creditor had no previous right." If, in other words, an employee receives wages to which he had an absolute right, the fact that the amount is called consideration for a release does not make the release valid. See *Hogue* v. *National Automotive Parts Assn.*, 87 F. Supp. 816, 821.

On this record there is a genuine issue of fact concerning the presence of consideration for the release. Petitioner claimed that what he received was his pay check, rightfully owing. Against that was evidence that no back wages were due and that an amount equal to back wages was paid for the release. It is not for the judges to resolve the conflict and to conclude that one side or the other was right. The issue of fact that is presented is one on which fair-minded jurors might honestly differ. Cf. *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500, 510.

Reversed.

MR. JUSTICE FRANKFURTER, dissenting.

This case was brought here on a meager typewritten petition which invoked the Court's certiorari jurisdiction on the claim that the North Carolina Supreme Court had disregarded controlling federal standards for determining the validity of a release from liability under the Federal Employers' Liability Act. In reversing the North Carolina Supreme Court, this Court does not support the grounds on which review was urged. The oral argument dispelled such a claim and revealed, what the Court's

opinion now recognizes, that the conflict between the state court and this Court turns on assessment of the trial testimony. This Court has repeatedly announced that the writ of certiorari is not to be employed to pass on matters of evidence and our Rule 19 formally bars such an obvious misuse of our discretionary jurisdiction. Again and again we deny petitions for certiorari which merely raise disputed issues of fact. Instead of making cases arising under the Federal Employers' Liability Act an exceptional class, Congress in 1916 explicitly withdrew Federal Employers' Liability cases from the Court's obligatory jurisdiction. 39 Stat. 727. For reasons set forth at length in my dissenting opinion in *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U. S. 521, 524, I would dismiss this writ as improvidently granted. Doing so after argument has been had would serve to discourage petitions brought solely to review matters of evidence; to adjudicate the case on the merits by taking one view of the evidence as against another only encourages petitions that ought not to be filed here. See *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U. S. 387.

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

Petitioner was employed by respondent as a "section" worker at Apex, North Carolina. He normally worked five eight-hour days per week, and was compensated for hours worked at a rate aggregating about $290 per month. The record is not entirely clear on the point, but it would appear that he had received the wages he had earned through Friday, August 19, 1955. On Monday, August 22, he was injured in the course of his work, but he worked the remainder of the day and also the next, Tuesday, August 23. He was then off work for a total of 19 days, 13 of which were working days, returning to

work on Monday, September 12, and working through Friday, September 16, of that week. On Saturday, September 17, he signed a "Release" of all claims against his employer on account of his injury and delivered the same to his employer in exchange for its check to his order in the amount of $144.60—which, it appears, is the exact amount he would have earned had he worked each working day through the period he was off.

At the conclusion of the trial of his action, brought under the Federal Employers' Liability Act against his employer, the trial court rejected his contentions that the "Release" was (1) obtained by fraud and (2) was not supported by any consideration, held the "Release" to be a valid bar of his claim for damages, and dismissed the suit. On appeal, the Supreme Court of North Carolina affirmed, 251 N. C. 783, 112 S. E. 2d 249, and we granted certiorari. 363 U. S. 839.

The only question here is whether that judgment was justified by the record. With all respect, I think it was.

I agree with the Court that the evidence wholly failed to sustain the claim of fraud. In fact, as the Court's opinion shows, petitioner's testimony affirmatively discloses that there was none. He testified that respondent's officer, with whom he dealt in respect of the "Release," "didn't make me any false representations. . . . He didn't make any deceitful suggestions to me. He didn't make any fraudulent suggestions to me."

But I am equally unable to find in the record any evidence to show that the "Release" was given without consideration. Petitioner admits that he was required to sign the "Release" before respondent would pay him the $144.60 which he received in exchange for it. Of course, I agree with the Court's statement of the law that " 'A release is not supported by sufficient consideration unless

something of value is received to which the [releasor] had no previous right.' If, in other words, an employee receives wages to which he had an absolute right, the fact that the amount is called consideration for a release does not make the release valid."

Here, however, there is no evidence that the $144.60 which petitioner received in exchange for the release had been earned by, or was due, him. It is true that that amount was exactly the sum he would have earned in the relevant period had he worked. But he did not work in that period. He admits that he was off work from Wednesday morning, August 23, to Monday morning, September 12—a total of 19 days, 13 of which were working days. Of course, he could have had a contract with his employer obligating it to pay him normal wages while disabled by injury or sickness. But he has not shown that any such contract existed.

As I read and understand them, these undisputed facts fail to show that the amount paid by respondent to petitioner for the Release was his own money—money that he had earned as wages, or that was otherwise owing to him. As I see it, then, petitioner has wholly failed to produce any evidence to show that the Release was made without consideration.

Whether petitioner may have had a solid basis to rescind the Release—upon the ground of mutual mistake of fact, *i. e.*, that he was more seriously injured than either he or respondent believed at the time the Release was made, of which there is considerable indication in the record—would present a question of more substance. But that question is not before us, as petitioner has not proceeded on that theory.

On the record as it stands, I think the North Carolina courts were right, and that their judgment should be affirmed.

MONROE ET AL. *v.* PAPE ET AL.

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

No. 39. Argued November 8, 1960.—Decided February 20, 1961.

Under R. S. § 1979, derived from § 1 of the "Ku Klux Act" of April 20, 1871, petitioners (six Negro children and their parents) brought an action in a Federal District Court against the City of Chicago and 13 of its police officers for damages for violation of their rights under the Fourteenth Amendment. They alleged that, acting "under color of the statutes, ordinances, regulations, customs and usages" of Illinois and the City of Chicago but without any warrant for search or arrest, the police officers broke into petitioners' home in the early morning, routed them from bed, made them stand naked in the living room, and ransacked every room, emptying drawers and ripping mattress covers; that the father was taken to the police station and detained on "open" charges for ten hours while he was interrogated about a two-day-old murder; that he was not taken before a magistrate, though one was accessible; that he was not permitted to call his family or attorney; and that he was subsequently released without criminal charges being preferred against him. *Held:* The complaint stated a cause of action against the police officers under § 1979; but the City of Chicago was not liable under that section. Pp. 168–192.

1. Allegation of facts constituting a deprivation under color of state authority of the guaranty against unreasonable searches and seizures, contained in the Fourth Amendment and made applicable to the States by the Due Process Clause of the Fourteenth Amendment, satisfies to that extent the requirement of § 1979. Pp. 170–171.

2. In enacting § 1979, Congress intended to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position. Pp. 171–187.

(a) The statutory words "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory" do not exclude acts of an official or policeman who can show no authority under state law, custom or usage to do what he did, or even who violated the state constitution and laws. Pp. 172–187.

(b) One of the purposes of this legislation was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance, or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges and immunities guaranteed by the Fourteenth Amendment might be denied by state agencies. Pp. 174–180.

(c) The federal remedy is supplementary to the state remedy, and the state remedy need not be sought and refused before the federal remedy is invoked. P. 183.

(d) Misuse of power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law is action taken "under color of" state law within the meaning of § 1979. *United States* v. *Classic*, 313 U. S. 299; *Screws* v. *United States*, 325 U. S. 91. Pp. 183–187.

3. Since § 1979 does not contain the word "wilfully," as does 18 U. S. C. § 242, and § 1979 imposes civil liability rather than criminal sanctions, actions under § 1979 can dispense with the requirement of showing a "specific intent to deprive a person of a federal right." P. 187.

4. The City of Chicago is not liable under § 1979, because Congress did not intend to bring municipal corporations within the ambit of that section. Pp. 187–192.

272 F. 2d 365, reversed.

Donald Page Moore argued the cause for petitioners. With him on the brief were *Morris L. Ernst, Ernst Liebman, Charles Liebman* and *John W. Rogers.*

Sydney R. Drebin argued the cause for respondents. With him on the brief was *John C. Melaniphy.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case presents important questions concerning the construction of R. S. § 1979, 42 U. S. C. § 1983, which reads as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any

citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

The complaint alleges that 13 Chicago police officers broke into petitioners' home in the early morning, routed them from bed, made them stand naked in the living room, and ransacked every room, emptying drawers and ripping mattress covers. It further alleges that Mr. Monroe was then taken to the police station and detained on "open" charges for 10 hours, while he was interrogated about a two-day-old murder, that he was not taken before a magistrate, though one was accessible, that he was not permitted to call his family or attorney, that he was subsequently released without criminal charges being preferred against him. It is alleged that the officers had no search warrant and no arrest warrant and that they acted "under color of the statutes, ordinances, regulations, customs and usages" of Illinois and of the City of Chicago. Federal jurisdiction was asserted under R. S. § 1979, which we have set out above, and 28 U. S. C. § 1343 [1] and 28 U. S. C. § 1331.[2]

[1] This section provides in material part:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

. . . . . .

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

[2] Subsection (a) provides:

"The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value

The City of Chicago moved to dismiss the complaint on the ground that it is not liable under the Civil Rights Acts nor for acts committed in performance of its governmental functions. All defendants moved to dismiss, alleging that the complaint alleged no cause of action under those Acts or under the Federal Constitution. The District Court dismissed the complaint. The Court of Appeals affirmed, 272 F. 2d 365, relying on its earlier decision, *Stift* v. *Lynch,* 267 F. 2d 237. The case is here on a writ of certiorari which we granted because of a seeming conflict of that ruling with our prior cases. 362 U. S. 926.

I.

Petitioners claim that the invasion of their home and the subsequent search without a warrant and the arrest and detention of Mr. Monroe without a warrant and without arraignment constituted a deprivation of their "rights, privileges, or immunities secured by the Constitution" within the meaning of R. S. § 1979. It has been said that when 18 U. S. C. § 241 made criminal a conspiracy "to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution," it embraced only rights that an individual has by reason of his relation to the central government, not to state governments. *United States* v. *Williams,* 341 U. S. 70. Cf. *United States* v. *Cruikshank,* 92 U. S. 542; *Ex parte Yarbrough,* 110 U. S. 651; *Guinn* v. *United States,* 238 U. S. 347. But the history of the section of the Civil Rights Act presently involved does not permit such a narrow interpretation.

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of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

In their complaint, petitioners also invoked R. S. §§ 1980, 1981, 42 U. S. C. §§ 1985, 1986. Before this Court, however, petitioners have limited their claim to recovery to the liability imposed by § 1979. Accordingly, only that section is before us.

Section 1979 came onto the books as § 1 of the Ku Klux Act of April 20, 1871. 17 Stat. 13. It was one of the means whereby Congress exercised the power vested in it by § 5 of the Fourteenth Amendment to enforce the provisions of that Amendment.[3] Senator Edmunds, Chairman of the Senate Committee on the Judiciary, said concerning this section:

> "The first section is one that I believe nobody objects to, as defining the rights secured by the Constitution of the United States when they are assailed by any State law or under color of any State law, and it is merely carrying out the principles of the civil rights bill,[4] which has since become a part of the Constitution," [5] *viz.,* the Fourteenth Amendment.

Its purpose is plain from the title of the legislation, "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes." 17 Stat. 13. Allegation of facts constituting a deprivation under color of state authority of a right guaranteed by the Fourteenth Amendment satisfies to that extent the requirement of R. S. § 1979. See *Douglas* v. *Jeannette,* 319 U. S. 157, 161–162. So far petitioners are on solid ground. For the guarantee against unreasonable searches and seizures contained in the Fourth Amendment has been made applicable to the States by reason of the Due Process Clause of the Fourteenth Amendment. *Wolf* v. *Colorado,* 338 U. S. 25; *Elkins* v. *United States,* 364 U. S. 206, 213.

II.

There can be no doubt at least since *Ex parte Virginia,* 100 U. S. 339, 346–347, that Congress has the power to

[3] See Cong. Globe, 42d Cong., 1st Sess., App. 68, 80, 83–85.

[4] Act of April 9, 1866, 14 Stat. 27.

[5] *Supra,* note 3, 568.

enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it. See *Home Tel. & Tel. Co.* v. *Los Angeles,* 227 U. S. 278, 287–296. The question with which we now deal is the narrower one of whether Congress, in enacting § 1979, meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position. Cf. *Williams* v. *United States,* 341 U. S. 97; *Screws* v. *United States,* 325 U. S. 91; *United States* v. *Classic,* 313 U. S. 299. We conclude that it did so intend.

It is argued that "under color of" enumerated state authority excludes acts of an official or policeman who can show no authority under state law, state custom, or state usage to do what he did. In this case it is said that these policemen, in breaking into petitioners' apartment, violated the Constitution [6] and laws of Illinois. It is pointed out that under Illinois law a simple remedy is offered for that violation and that, so far as it appears, the courts of Illinois are available to give petitioners that full redress which the common law affords for violence done to a person; and it is earnestly argued that no "statute, ordinance, regulation, custom or usage" of Illinois bars that redress.

The Ku Klux Act grew out of a message sent to Congress by President Grant on March 23, 1871, reading:

> "A condition of affairs now exists in some States of the Union rendering life and property insecure and

[6] Illinois Const., Art. II, § 6, provides:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated; and no warrant shall issue without probable cause, supported by affidavit, particularly describing the place to be searched, and the persons or things to be seized." Respondents also point to Ill. Rev. Stat., c. 38, §§ 252, 449.1; Chicago, Illinois, Municipal Code, § 11–40.

> the carrying of the mails and the collection of the revenue dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. That the power to correct these evils is beyond the control of State authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear. Therefore, I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States. . . ." [7]

The legislation—in particular the section with which we are now concerned—had several purposes. There are threads of many thoughts running through the debates. One who reads them in their entirety sees that the present section had three main aims.

First, it might, of course, override certain kinds of state laws. Mr. Sloss of Alabama, in opposition, spoke of that object and emphasized that it was irrelevant because there were no such laws: [8]

> "The first section of this bill prohibits any invidious legislation by States against the rights or privileges of citizens of the United States. The object of this section is not very clear, as it is not pretended by its advocates on this floor that any State has passed any laws endangering the rights or privileges of the colored people."

Second, it provided a remedy where state law was inadequate. That aspect of the legislation was summed up as follows by Senator Sherman of Ohio:

> ". . . it is said the reason is that any offense may be committed upon a negro by a white man, and a

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[7] Cong. Globe, 42d Cong., 1st Sess., p. 244.

[8] *Id.*, App. 268.

> negro cannot testify in any case against a white man, so that the only way by which any conviction can be had in Kentucky in those cases is in the United States courts, because the United States courts enforce the United States laws by which negroes may testify." [9]

But the purposes were much broader. The *third* aim was to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice. The opposition to the measure complained that "It overrides the reserved powers of the States," [10] just as they argued that the second section of the bill "absorb[ed] the entire jurisdiction of the States over their local and domestic affairs." [11]

This Act of April 20, 1871, sometimes called "the third 'force bill,' " was passed by a Congress that had the Klan "particularly in mind." [12] The debates are replete with references to the lawless conditions existing in the South in 1871. There was available to the Congress during these debates a report, nearly 600 pages in length, dealing with the activities of the Klan and the inability of the state governments to cope with it.[13] This report was drawn on by many of the speakers.[14] It was not the unavailability of state remedies but the failure of certain States to enforce the laws with an equal hand that fur-

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[9] *Id.*, p. 345.

[10] *Id.*, p. 365. The speaker, Mr. Arthur of Kentucky, had no doubts as to the scope of § 1: "[I]f the sheriff levy an execution, execute a writ, serve a summons, or make an arrest, all acting under a solemn, official oath, though as pure in duty as a saint and as immaculate as a seraph, *for a mere error of judgment,* [he is liable] . . . ." *Ibid.* (Italics added.)

[11] *Id.*, p. 366.

[12] Randall, The Civil War and Reconstruction (1937), p. 857.

[13] S. Rep. No. 1, 42d Cong., 1st Sess.

[14] See, *e. g.*, Cong. Globe, 42d Cong., 1st Sess., App. 166–167.

nished the powerful momentum behind this "force bill." Mr. Lowe of Kansas said:

> "While murder is stalking abroad in disguise, while whippings and lynchings and banishment have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective. Combinations, darker than the night that hides them, conspiracies, wicked as the worst of felons could devise, have gone unwhipped of justice. Immunity is given to crime, and the records of the public tribunals are searched in vain for any evidence of effective redress." [15]

Mr. Beatty of Ohio summarized in the House the case for the bill when he said:

> ". . . certain States have denied to persons within their jurisdiction the equal protection of the laws. The proof on this point is voluminous and unquestionable. . . . [M]en were murdered, houses were burned, women were outraged, men were scourged, and officers of the law shot down; and the State made no successful effort to bring the guilty to punishment or afford protection or redress to the outraged and innocent. The State, from lack of power or inclination, practically denied the equal protection of the law to these persons." [16]

While one main scourge of the evil—perhaps the leading one—was the Ku Klux Klan,[17] the remedy created was

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[15] *Id.*, p. 374.

[16] *Id.*, p. 428.

[17] As Randall, *op. cit., supra,* note 12, p. 855, says in discussing the Ku Klux Klan: "A friendly view of the order might represent it as an agency of social control in the South. Yet it never attained the dignity of the vigilance committees of the western states nor of the committees of safety of Revolutionary times."

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not a remedy against it or its members but against those who representing a State in some capacity were *unable* or *unwilling* to enforce a state law. Senator Osborn of Florida put the problem in these terms: [18]

> "That the State courts in the several States have been unable to enforce the criminal laws of their respective States or to suppress the disorders existing, and in fact that the preservation of life and property in many sections of the country is beyond the power of the State government, is a sufficient reason why Congress should, so far as they have authority under the Constitution, enact the laws necessary for the protection of citizens of the United States. The question of the constitutional authority for the requisite legislation has been sufficiently discussed."

There was, it was said, no quarrel with the state laws on the books. It was their lack of enforcement that was the nub of the difficulty. Speaking of conditions in Virginia, Mr. Porter of that State said: [19]

> "The outrages committed upon loyal men there are under the forms of law."

Mr. Burchard of Illinois pointed out that the statutes of a State may show no discrimination: [20]

> "If the State Legislature pass a law discriminating against any portion of its citizens, or if it fails to enact provisions equally applicable to every class for the protection of their person and property, it will be admitted that the State does not afford the equal protection. But if the statutes show no discrimina-

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[18] Cong. Globe, 42d Cong., 1st Sess. 653.

[19] *Id.*, App. 277.

[20] *Id.*, App. 315.

tion, yet in its judicial tribunals one class is unable to secure that enforcement of their rights and punishment for their infraction which is accorded to another, or if secret combinations of men are allowed by the Executive to band together to deprive one class of citizens of their legal rights without a proper effort to discover, detect, and punish the violations of law and order, the State has not afforded to all its citizens the equal protection of the laws."

Mr. Hoar of Massachusetts stated: [21]

"Now, it is an effectual denial by a State of the equal protection of the laws when any class of officers charged under the laws with their administration permanently and as a rule refuse to extend that protection. If every sheriff in South Carolina refuses to serve a writ for a colored man and those sheriffs are kept in office year after year by the people of South Carolina, and no verdict against them for their failure of duty can be obtained before a South Carolina jury, the State of South Carolina, through the class of officers who are its representatives to afford the equal protection of the laws to that class of citizens, has denied that protection. If the jurors of South Carolina constantly and as a rule refuse to do justice between man and man where the rights of a particular class of its citizens are concerned, and that State affords by its legislation no remedy, that is as much a denial to that class of citizens of the equal protection of the laws as if the State itself put on its statute-book a statute enacting that no verdict should be rendered in the courts of that State in favor of this class of citizens."

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[21] *Id.*, p. 334.

Senator Pratt of Indiana spoke of the discrimination against Union sympathizers and Negroes in the actual enforcement of the laws: [22]

> "Plausibly and sophistically it is said the laws of North Carolina do not discriminate against them; that the provisions in favor of rights and liberties are general; that the courts are open to all; that juries, grand and petit, are commanded to hear and redress without distinction as to color, race, or political sentiment.
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> "But it is a fact, asserted in the report, that of the hundreds of outrages committed upon loyal people through the agency of this Ku Klux organization not one has been punished. This defect in the administration of the laws does not extend to other cases. Vigorously enough are the laws enforced against Union people. They only fail in efficiency when a man of known Union sentiments, white or black, invokes their aid. Then Justice closes the door of her temples."

It was precisely that breadth of the remedy which the opposition emphasized. Mr. Kerr of Indiana referring to the section involved in the present litigation said:

> "This section gives to any person who may have been injured in any of his rights, privileges, or immunities of person or property, a civil action for damages against the wrongdoer in the Federal courts. The offenses committed against him may be the common violations of the municipal law of his State. It may give rise to numerous vexations and outrageous prosecutions, inspired by mere mercenary considerations, prosecuted in a spirit of plunder, aided by the crimes of perjury and subornation of perjury, more reckless and dangerous to society than the alleged

[22] *Id.*, p. 505.

> offenses out of which the cause of action may have arisen. It is a covert attempt to transfer another large portion of jurisdiction from the State tribunals, to which it of right belongs, to those of the United States. It is neither authorized nor expedient, and is not calculated to bring peace, or order, or domestic content and prosperity to the disturbed society of the South. The contrary will certainly be its effect." [23]

Mr. Voorhees of Indiana, also speaking in opposition, gave it the same construction: [24]

> "And now for a few moments let us inspect the provisions of this bill, inspired as it is by the waning and decaying fortunes of the party in power, and called for, as I have shown, by no public necessity whatever. The first and second sections are designed to transfer all criminal jurisdiction from the courts of the States to the courts of the United States. This is to be done upon the assumption that the courts of the southern States fail and refuse to do their duty in the punishment of offenders against the law."

Senator Thurman of Ohio spoke in the same vein about the section we are now considering: [25]

> "It authorizes any person who is deprived of any right, privilege, or immunity secured to him by the

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[23] *Id.*, App., p. 50. Mr. Golladay of Tennessee expressed the same concern:

"Is the great State of New York invaded every time a murder is committed within her bounds? Was the great State of Pennsylvania invaded when rioters in the city of Philadelphia burned a public building? Was the great State of Massachusetts invaded when Webster, one of her first scholars, within the walls of Harvard murdered Parkman, or later, when evil-disposed persons violated her laws in Lowell? Did they require the Army and Navy and martial law? And, sir, because a midnight murderer is sometimes found in the South it should not be regarded as an invasion." *Id.*, App. 160.

[24] *Id.*, App. 179.

[25] *Id.*, App. 216.

> Constitution of the United States, to bring an action against the wrong-doer in the Federal courts, and that without any limit whatsoever as to the amount in controversy. The deprivation may be of the slightest conceivable character, the damages in the estimation of any sensible man may not be five dollars or even five cents; they may be what lawyers call merely nominal damages; and yet by this section jurisdiction of that civil action is given to the Federal courts instead of its being prosecuted as now in the courts of the States."

The debates were long and extensive. It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.

Much is made of the history of § 2 of the proposed legislation. As introduced § 2 was very broad:

> ". . . if two or more persons shall, within the limits of any State, band, conspire, or combine together to do any act in violation of the rights, privileges, or immunities of any person, to which he is entitled under the Constitution and laws of the United States, which, committed within a place under the sole and exclusive jurisdiction of the United States, would, under any law of the United States then in force, constitute the crime of either murder, manslaughter, mayhem, robbery, assault and battery, perjury, subornation of perjury, criminal obstruction of legal process or resistance of officers in discharge of official duty, arson, or larceny; and if one or more of the parties to said conspiracy or combination shall do

> any act to effect the object thereof, all the parties to or engaged in said conspiracy or combination, whether principals or accessories, shall be deemed guilty of a felony . . . ."

It was this provision that raised the greatest storm. It was § 2 that was rewritten so as to be in the main confined to conspiracies to interfere with a federal or state officer in the performance of his duties. 17 Stat. 13. Senator Trumbull said: [26]

> "Those provisions were changed, and as the bill passed the House of Representatives, it was understood by the members of that body to go no further than to protect persons in the rights which were guarantied to them by the Constitution and laws of the United States, and it did not undertake to furnish redress for wrongs done by one person upon another in any of the States of the Union in violation of their laws, unless he also violated some law of the United States, nor to punish one person for an ordinary assault and battery committed on another in a State."

But § 1—the section with which we are here concerned—was not changed as respects any feature with which we are presently concerned.[27] The words "under

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[26] *Id.*, p. 579.

[27] Section 1 in the bill as originally introduced read as follows:

"That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such

color of" law were in the legislation from the beginning to the end. The changes hailed by the opposition—indeed the history of the evolution of § 2 much relied upon now—are utterly irrelevant to the problem before us, *viz.*, the meaning of "under color of" law. The vindication of States' rights which was hailed in the amendments to § 2 raises no implication as to the construction to be given to "color of any law" in § 1. The scope of § 1—under any construction—is admittedly narrower than was the scope of the original version of § 2. Opponents of the Act, however, did not fail to note that by virtue of § 1 federal courts would sit in judgment on the misdeeds of state officers.[28] Proponents of the Act, on the other hand, were aware of the extension of federal power contemplated by every section of the Act. They found justification, however, for this extension in considerations such as those advanced by Mr. Hoar: [29]

> "The question is not whether a majority of the people in a majority of the States are likely to be attached to and able to secure their own liberties. The question is not whether the majority of the people in every State are not likely to desire to secure their own rights. It is, whether a majority of the people in every State are sure to be so attached to the principles of civil freedom and civil justice as to be as much desirous of preserving the liberties of others as their own, as to insure that under no temptation of party spirit, under no political excitement, under

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courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled 'An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication,' and the other remedial laws of the United States which are in their nature applicable in such cases."

[28] See text at note 23, *supra;* see note 10, *supra.*

[29] Cong. Globe, 42d Cong., 1st Sess., pp. 334–335.

> no jealousy of race or caste, will the majority either in numbers or strength in any State seek to deprive the remainder of the population of their civil rights."

Although the legislation was enacted because of the conditions that existed in the South at that time, it is cast in general language and is as applicable to Illinois as it is to the States whose names were mentioned over and again in the debates. It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked. Hence the fact that Illinois by its constitution and laws outlaws unreasonable searches and seizures is no barrier to the present suit in the federal court.

We had before us in *United States* v. *Classic, supra,* § 20 of the Criminal Code, 18 U. S. C. § 242,[30] which provides a criminal punishment for anyone who "under color of any law, statute, ordinance, regulation, or custom" subjects any inhabitant of a State to the deprivation of "any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States." Section 242 first came into the law as § 2 of the Civil Rights Act, Act of April 9, 1866, 14 Stat. 27. After passage of the Fourteenth Amendment, this provision was re-enacted and amended by §§ 17, 18, Act of May 31, 1870, 16 Stat. 140, 144.[31] The right involved in the *Classic* case was the right of voters in a primary to have their votes counted. The laws of Louisiana required the defendants "to count the ballots, to record the result of the count, and

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[30] Then 18 U. S. C. § 52.

[31] For a full history of the evolution of 18 U. S. C. § 242, see *Screws* v. *United States,* 325 U. S. 91, 98–100; *United States* v. *Classic,* 313 U. S. 299, 327, n. 10; cf. *Hague* v. *C. I. O.,* 307 U. S. 496, 509–510.

to certify the result of the election." *United States* v. *Classic, supra,* 325–326. But according to the indictment they did not perform their duty. In an opinion written by Mr. Justice (later Chief Justice) Stone, in which Mr. Justice Roberts, Mr. Justice Reed, and MR. JUSTICE FRANKFURTER joined, the Court ruled, "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." *Id.,* 326. There was a dissenting opinion; but the ruling as to the meaning of "under color of" state law was not questioned.

That view of the meaning of the words "under color of" state law, 18 U. S. C. § 242, was reaffirmed in *Screws* v. *United States, supra,* 108–113. The acts there complained of were committed by state officers in performance of their duties, *viz.,* making an arrest effective. It was urged there, as it is here, that "under color of" state law should not be construed to duplicate in federal law what was an offense under state law. *Id.* (dissenting opinion) 138–149, 157–161. It was said there, as it is here, that the ruling in the *Classic* case as to the meaning of "under color of" state law was not in focus and was ill-advised. *Id.* (dissenting opinion) 146–147. It was argued there, as it is here, that "under color of" state law included only action taken by officials pursuant to state law. *Id.* (dissenting opinion) 141–146. We rejected that view. *Id.,* 110–113 (concurring opinion) 114–117. We stated:

> "The construction given § 20 [18 U. S. C. § 242] in the *Classic* case formulated a rule of law which has become the basis of federal enforcement in this important field. The rule adopted in that case was formulated after mature consideration. It should be good for more than one day only. We do not have here a situation comparable to *Mahnich* v. *Southern S. S. Co.,* 321 U. S. 96, where we

> overruled a decision demonstrated to be a sport in the law and inconsistent with what preceded and what followed. The *Classic* case was not the product of hasty action or inadvertence. It was not out of line with the cases which preceded. It was designed to fashion the governing rule of law in this important field. We are not dealing with constitutional interpretations which throughout the history of the Court have wisely remained flexible and subject to frequent re-examination. The meaning which the *Classic* case gave to the phrase 'under color of any law' involved only a construction of the statute. Hence if it states a rule undesirable in its consequences, Congress can change it. We add only to the instability and uncertainty of the law if we revise the meaning of § 20 [18 U. S. C. § 242] to meet the exigencies of each case coming before us." *Id.*, 112–113.

We adhered to that view in *Williams* v. *United States*, *supra*, 99.

Mr. Shellabarger, reporting out the bill which became the Ku Klux Act, said of the provision with which we now deal:

> "The model for it will be found in the second section of the act of April 9, 1866, known as the 'civil rights act.' . . . This section of this bill, on the same state of facts, not only provides a civil remedy for persons whose former condition may have been that of slaves, but also to all people where, under color of State law, they or any of them may be deprived of rights . . . ." [32]

Thus, it is beyond doubt that this phrase should be accorded the same construction in both statutes—in § 1979 and in 18 U. S. C. § 242.

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[32] Cong. Globe, 42d Cong., 1st Sess., App. 68.

Since the *Screws* and *Williams* decisions, Congress has had several pieces of civil rights legislation before it. In 1956 one bill reached the floor of the House. This measure had at least one provision in it penalizing actions taken "under color of law or otherwise." [33] A vigorous minority report was filed attacking, *inter alia,* the words "or otherwise." [34] But not a word of criticism of the phrase "under color of" state law as previously construed by the Court is to be found in that report.

Section 131 (c) of the Act of September 9, 1957, 71 Stat. 634, 637, amended 42 U. S. C. § 1971 by adding a new subsection which provides that no person "whether acting under color of law or otherwise" shall intimidate any other person in voting as he chooses for federal officials. A vigorous minority report was filed [35] attacking the wide scope of the new subsection by reason of the words "or otherwise." It was said in that minority report that those words went far beyond what this Court had construed "under color of law" to mean.[36] But there was not a word of criticism directed to the prior construction given by this Court to the words "under color of" law.

The Act of May 6, 1960, 74 Stat. 86, uses "under color of" law in two contexts, once when § 306 defines "officer of election" and next when § 601 (a) gives a judicial remedy on behalf of a qualified voter denied the opportunity to register. Once again there was a Committee report containing minority views.[37] Once again no one challenged the scope given by our prior decisions to the phrase "under color of" law.

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[33] H. R. Rep. No. 2187, 84th Cong., 2d Sess., p. 16.

[34] *Id.*, p. 26.

[35] H. R. Rep. No. 291, 85th Cong., 1st Sess., pp. 24–60.

[36] *Id.*, pp. 57–58.

[37] H. R. Rep. No. 956, 86th Cong., 1st Sess., pp. 32–42.

If the results of our construction of "under color of" law were as horrendous as now claimed, if they were as disruptive of our federal scheme as now urged, if they were such an unwarranted invasion of States' rights as pretended, surely the voice of the opposition would have been heard in those Committee reports. Their silence and the new uses to which "under color of" law have recently been given reinforce our conclusion that our prior decisions were correct on this matter of construction.

We conclude that the meaning given "under color of" law in the *Classic* case and in the *Screws* and *Williams* cases was the correct one; and we adhere to it.

In the *Screws* case we dealt with a statute that imposed criminal penalties for acts "wilfully" done. We construed that word in its setting to mean the doing of an act with "a specific intent to deprive a person of a federal right." 325 U. S., at 103. We do not think that gloss should be placed on § 1979 which we have here. The word "wilfully" does not appear in § 1979. Moreover, § 1979 provides a civil remedy, while in the *Screws* case we dealt with a criminal law challenged on the ground of vagueness. Section 1979 should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.

So far, then, the complaint states a cause of action. There remains to consider only a defense peculiar to the City of Chicago.

III.

The City of Chicago asserts that it is not liable under § 1979. We do not stop to explore the whole range of questions tendered us on this issue at oral argument and in the briefs. For we are of the opinion that Congress did not undertake to bring municipal corporations within the ambit of § 1979.

When the bill that became the Act of April 20, 1871, was being debated in the Senate, Senator Sherman of Ohio proposed an amendment which would have made "the inhabitants of the county, city, or parish" in which certain acts of violence occurred liable "to pay full compensation" to the person damaged or his widow or legal representative.[38] The amendment was adopted by the Senate.[39] The House, however, rejected it.[40] The Conference Committee reported another version.[41] The

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[38] Cong. Globe, 42d Cong., 1st Sess., p. 663. The proposed amendment read:

"That if any house, tenement, cabin, shop, building, barn, or granary shall be unlawfully or feloniously demolished, pulled down, burned, or destroyed, wholly or in part, by any persons riotously and tumultuously assembled together; or if any person shall unlawfully and with force and violence be whipped, scourged, wounded, or killed by any persons riotously and tumultuously assembled together; and if such offense was committed to deprive any person of any right conferred upon him by the Constitution and laws of the United States, or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition of servitude, in every such case the inhabitants of the county, city, or parish in which any of the said offenses shall be committed shall be liable to pay full compensation to the person or persons damnified by such offense if living, or to his widow or legal representative if dead; and such compensation may be recovered by such person or his representative by a suit in any court of the United States of competent jurisdiction in the district in which the offense was committed, to be in the name of the person injured, or his legal representative, and against said county, city, or parish. And execution may be issued on a judgment rendered in such suit and may be levied upon any property, real or personal, of any person in said county, city, or parish, and the said county, city, or parish may recover the full amount of such judgment, costs and interest, from any person or persons engaged as principal or accessory in such riot in an action in any court of competent jurisdiction."

[39] *Id.*, 704–705.

[40] *Id.*, 725.

[41] "That if any house, tenement, cabin, shop, building, barn, or granary shall be unlawfully or feloniously demolished, pulled down,

House rejected the Conference report.[42] In a second conference the Sherman amendment was dropped and in its place § 6 of the Act of April 20, 1871, was substi-

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burned, or destroyed, wholly or in part, by any persons riotously and tumultuously assembled together; or if any person shall unlawfully and with force and violence be whipped, scourged, wounded, or killed by any persons riotously and tumultuously assembled together, with intent to deprive any person of any right conferred upon him by the Constitution and laws of the United States, or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition of servitude, in every such case the county, city, or parish in which any of the said offenses shall be committed shall be liable to pay full compensation to the person or persons damnified by such offense, if living, or to his widow or legal representative if dead; and such compensation may be recovered in an action on the case by such person or his representative in any court of the United States of competent jurisdiction in the district in which the offense was committed, such action to be in the name of the person injured, or his legal representative, and against said county, city, or parish, and in which action any of the parties committing such acts may be joined as defendants. And any payment of any judgment, or part thereof unsatisfied, recovered by the plaintiff in such action, may, if not satisfied by the individual defendant therein within two months next after the recovery of such judgment upon execution duly issued against such individual defendant in such judgment, and returned unsatisfied, in whole or in part, be enforced against such county, city, or parish, by execution, attachment, mandamus, garnishment, or any other proceeding in aid of execution or applicable to the enforcement of judgments against municipal corporations; and such judgment shall be a lien as well upon all moneys in the treasury of such county, city, or parish, as upon the other property thereof. And the court in any such action may on motion cause additional parties to be made therein prior to issue joined, to the end that justice may be done. And the said county, city, or parish may recover the full amount of such judgment, by it paid, with costs and interest, from any person or persons engaged as principal or accessory in such riot, in an action in any court of competent jurisdiction. And such county, city, or parish, so paying, shall also be subrogated to all the plaintiff's rights under such judgment." *Id.*, 749.

[42] Cong. Globe, 42d Cong., 1st Sess. 800–801.

tuted.[43] This new section, which is now R. S. § 1981, 42 U. S. C. § 1986, dropped out all provision for municipal liability and extended liability in damages to "any person or persons, having knowledge that any" of the specified wrongs are being committed. Mr. Poland, speaking for the House Conferees about the Sherman proposal to make municipalities liable, said:

> "We informed the conferees on the part of the Senate that the House had taken a stand on that subject and would not recede from it; that that section imposing liability upon towns and counties must go out or we should fail to agree." [44]

The objection to the Sherman amendment stated by Mr. Poland was that "the House had solemnly decided that in their judgment Congress had no constitutional power to impose any obligation upon county and town organizations, the mere instrumentality for the administration of state law." [45] The question of constitutional power of Congress to impose civil liability on municipalities was vigorously debated with powerful arguments advanced in the affirmative.[46]

Much reliance is placed on the Act of February 25, 1871, 16 Stat. 431, entitled "An Act prescribing the Form of the enacting and resolving Clauses of Acts and Resolutions of Congress, and Rules for the Construction thereof." Section 2 of this Act provides that "the word 'person' may extend and be applied to bodies politic and corporate." [47]

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[43] *Id.*, 804.

[44] *Id.*, 804.

[45] *Ibid.*

[46] See especially the comments of Senator Sherman. *Id.*, 820–821.

[47] This Act has been described as an instance where "Congress supplies its own dictionary." Frankfurter, Some Reflections on the Reading of Statutes, 47 Col. L. Rev. 527, 536. The present code

It should be noted, however, that this definition is merely an allowable, not a mandatory, one. It is said that doubts should be resolved in favor of municipal liability because private remedies against officers for illegal searches and seizures are conspicuously ineffective,[48] and because municipal liability will not only afford plaintiffs responsible defendants but cause those defendants to eradicate abuses that exist at the police level.[49] We do not reach those policy considerations. Nor do we reach the constitutional question whether Congress has the power to make municipalities liable for acts of its officers that violate the civil rights of individuals.

The response of the Congress to the proposal to make municipalities liable for certain actions being brought within federal purview by the Act of April 20, 1871, was so antagonistic that we cannot believe that the word "person" was used in this particular Act to include them.[50]

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provision defining "person" (1 U. S. C. § 1) does not in terms apply to bodies politic. See Reviser's Note, Vol. I, Rev. U. S. Stats. 1872, p. 19.

[48] See note, 100 U. of Pa. L. Rev. 1182, 1206–1212.

[49] See Foote, Tort Remedies for Police Violations of Individual Rights, 39 Minn. L. Rev. 493, 514. Cf. Fuller & Casner, Municipal Tort Liability in Operation, 54 Harv. L. Rev. 437, 459.

[50] This has been the view of the lower federal courts. *Charlton* v. *City of Hialeah,* 188 F. 2d 421, 423; *Hewitt* v. *City of Jacksonville,* 188 F. 2d 423, 424; *Cobb* v. *City of Malden,* 202 F. 2d 701, 703; *Agnew* v. *City of Compton,* 239 F. 2d 226, 230; *Cuiksa* v. *City of Mansfield,* 250 F. 2d 700, 703–704. In a few cases in which equitable relief has been sought, a municipality has been named, along with city officials, as defendant where violations of 42 U. S. C. § 1983 were alleged. See, *e. g., Douglas* v. *City of Jeannette,* 319 U. S. 157; *Holmes* v. *City of Atlanta,* 350 U. S. 879. The question dealt with in our opinion was not raised in those cases, either by the parties or by the Court. Since we hold that a municipal corporation is not a "person" within the meaning of § 1983, no inference to the contrary can any longer be drawn from those cases.

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Accordingly we hold that the motion to dismiss the complaint against the City of Chicago was properly granted. But since the complaint should not have been dismissed against the officials the judgment must be and is

Reversed.

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, concurring.

Were this case here as one of first impression, I would find the "under color of any statute" issue very close indeed. However, in *Classic* [1] and *Screws* [2] this Court considered a substantially identical statutory phrase to have a meaning which, unless we now retreat from it, requires that issue to go for the petitioners here.

From my point of view, the policy of *stare decisis,* as it should be applied in matters of statutory construction, and, to a lesser extent, the indications of congressional acceptance of this Court's earlier interpretation, require that it appear beyond doubt from the legislative history of the 1871 statute that *Classic* and *Screws* misapprehended the meaning of the controlling provision,[3] before a departure from what was decided in those cases would be justified. Since I can find no such justifying indication in that legislative history, I join the opinion of the Court. However, what has been written on both sides of the matter makes some additional observations appropriate.

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[1] 313 U. S. 299.

[2] 325 U. S. 91.

[3] The provision is now found in 42 U. S. C. § 1983: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Those aspects of Congress' purpose which are quite clear in the earlier congressional debates, as quoted by my Brothers DOUGLAS and FRANKFURTER in turn, seem to me to be inherently ambiguous when applied to the case of an isolated abuse of state authority by an official. One can agree with the Court's opinion that:

> "It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies. . . ."

without being certain that Congress meant to deal with anything other than abuses so recurrent as to amount to "custom, or usage." One can agree with my Brother FRANKFURTER, in dissent, that Congress had no intention of taking over the whole field of ordinary state torts and crimes, without being certain that the enacting Congress would not have regarded actions by an official, made possible by his position, as far more serious than an ordinary state tort, and therefore as a matter of federal concern. If attention is directed at the rare specific references to isolated abuses of state authority, one finds them neither so clear nor so disproportionately divided between favoring the positions of the majority or the dissent as to make either position seem plainly correct.[4]

Besides the inconclusiveness I find in the legislative history, it seems to me by no means evident that a posi-

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[4] Compare Cong. Globe, 42d Cong., 1st Sess. 504 (Senator Pratt), and *id.*, at App. 50 (Rep. Kerr), with Cong. Globe, 41st Cong., 2d Sess. 3663 (Senator Sherman), Cong. Globe, 42d Cong., 1st Sess. 697 (Senator Edmunds), *id.*, at App. 68 (Rep. Shellabarger), and Cong. Globe, 39th Cong., 1st Sess. 1758 (Senator Trumbull).

tion favoring departure from *Classic* and *Screws* fits better that with which the enacting Congress was concerned than does the position the Court adopted 20 years ago. There are apparent incongruities in the view of the dissent which may be more easily reconciled in terms of the earlier holding in *Classic*.

The dissent considers that the "under color of" provision of § 1983 distinguishes between unconstitutional actions taken without state authority, which only the State should remedy, and unconstitutional actions authorized by the State, which the Federal Act was to reach. If so, then the controlling difference for the enacting legislature must have been either that the state remedy was more adequate for unauthorized actions than for authorized ones or that there was, in some sense, greater harm from unconstitutional actions authorized by the full panoply of state power and approval than from unconstitutional actions not so authorized or acquiesced in by the State. I find less than compelling the evidence that either distinction was important to that Congress.

I.

If the state remedy was considered adequate when the official's unconstitutional act was unauthorized, why should it not be thought equally adequate when the unconstitutional act was authorized? For if one thing is very clear in the legislative history, it is that the Congress of 1871 was well aware that no action requiring state judicial enforcement could be taken in violation of the Fourteenth Amendment without that enforcement being declared void by this Court on direct review from the state courts. And presumably it must also have been understood that there would be Supreme Court review of the denial of a state damage remedy against an official on grounds of state authorization of the unconstitutional

action. It therefore seems to me that the same state remedies would, with ultimate aid of Supreme Court review, furnish identical relief in the two situations. This is the point Senator Blair made when, having stated that the object of the Fourteenth Amendment was to prevent any discrimination by the law of any State, he argued that:

> "This being forbidden by the Constitution of the United States, and all the judges, State and national, being sworn to support the Constitution of the United States, and the Supreme Court of the United States having power to supervise and correct the action of the State courts when they violated the Constitution of the United States, there could be no danger of the violation of the right of citizens under color of the *laws* of the States." Cong. Globe, 42d Cong., 1st Sess., at App. 231.

Since the suggested narrow construction of § 1983 presupposes that state measures were adequate to remedy unauthorized deprivations of constitutional rights and since the identical state relief could be obtained for state-authorized acts with the aid of Supreme Court review, this narrow construction would reduce the statute to having merely a jurisdictional function, shifting the load of federal supervision from the Supreme Court to the lower courts and providing a federal tribunal for fact findings in cases involving authorized action. Such a function could be justified on various grounds. It could, for example, be argued that the state courts would be less willing to find a constitutional violation in cases involving "authorized action" and that therefore the victim of such action would bear a greater burden in that he would more likely have to carry his case to this Court, and once here, might be bound by unfavorable state court findings. But the legislative debates do not disclose con-

gressional concern about the burdens of litigation placed upon the victims of "authorized" constitutional violations contrasted to the victims of unauthorized violations. Neither did Congress indicate an interest in relieving the burden placed on this Court in reviewing such cases.

The statute becomes more than a jurisdictional provision only if one attributes to the enacting legislature the view that a deprivation of a constitutional right is significantly different from and more serious than a violation of a state right and therefore deserves a different remedy even though the same act may constitute both a state tort and the deprivation of a constitutional right. This view, by no means unrealistic as a common-sense matter,[5] is, I believe, more consistent with the flavor of the legislative history than is a view that the primary purpose of the statute was to grant a lower court forum for fact findings. For example, the tone is surely one of overflowing protection of constitutional rights, and there is not a hint of concern about the administrative burden on the Supreme Court, when Senator Frelinghuysen says:

> "As to the civil remedies, for a violation of these privileges, we know that when the courts of a State

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[5] There will be many cases in which the relief provided by the state to the victim of a use of state power which the state either did not or could not constitutionally authorize will be far less than what Congress may have thought would be fair reimbursement for deprivation of a constitutional right. I will venture only a few examples. There may be no damage remedy for the loss of voting rights or for the harm from psychological coercion leading to a confession. And what is the dollar value of the right to go to unsegregated schools? Even the remedy for such an unauthorized search and seizure as Monroe was allegedly subjected to may be only the nominal amount of damages to physical property allowable in an action for trespass to land. It would indeed be the purest coincidence if the state remedies for violations of common-law rights by private citizens were fully appropriate to redress those injuries which only a state official can cause and against which the Constitution provides protection.

violate the provisions of the Constitution or the law of the United States there is now relief afforded by a review in the Federal courts. And since the 14th Amendment forbids any State from making or enforcing any law abridging these privileges and immunities, as you cannot reach the Legislatures, the injured party should have an original action in our Federal courts, so that by injunction or by the recovery of damages he could have relief against the party who under color of such law is guilty of infringing his rights. As to the civil remedy no one, I think, can object." *Id.*, at 501.

And Senator Carpenter reflected a similar belief that the protection granted by the statute was to be very different from the relief available on review of state proceedings:

"The prohibition in the old Constitution that no State should pass a law impairing the obligation of contracts was a negative prohibition laid upon the State. Congress was not authorized to interfere in case the State violated that provision. It is true that when private rights were affected by such a State law, and that was brought before the judiciary, either of the State or nation, it was the duty of the court to pronounce the act void; but there the matter ended. Under the present Constitution, however, in regard to those rights which are secured by the fourteenth amendment, they are not left as the right of the citizen in regard to laws impairing the obligation of contracts was left, to be disposed of by the courts as the cases should arise between man and man, but Congress is clothed with the affirmative power and jurisdiction to correct the evil.

"I think there is one of the fundamental, one of the great, the tremendous revolutions effected in our Government by that article of the Constitution. It

> gives Congress affirmative power to protect the rights of the citizen, whereas before no such right was given to save the citizen from the violation of any of his rights by State Legislatures, and the only remedy was a judicial one when the case arose." *Id.*, at 577.

In my view, these considerations put in serious doubt the conclusion that § 1983 was limited to state-authorized unconstitutional acts, on the premise that state remedies respecting them were considered less adequate than those available for unauthorized acts.

II.

I think this limited interpretation of § 1983 fares no better when viewed from the other possible premise for it, namely that state-approved constitutional deprivations were considered more offensive than those not so approved. For one thing, the enacting Congress was not unaware of the fact that there was a substantial overlap between the protections granted by state constitutional provisions and those granted by the Fourteenth Amendment. Indeed one opponent of the bill, Senator Trumbull, went so far as to state in a debate with Senators Carpenter and Edmunds that his research indicated a complete overlap in every State, at least as to the protections of the Due Process Clause.[6] Thus, in one very significant sense, there was no ultimate state approval of a large portion of otherwise authorized actions depriving a person of due-process rights. I hesitate to assume that the proponents of the present statute, who regarded it as necessary even though they knew that the provisions of the Fourteenth Amendment were self-executing, would have thought the remedies unnecessary whenever there were self-executing provisions of state constitutions also forbidding what the Fourteenth Amendment forbids. The only alternative is

[6] *Id.*, at 577.

to disregard the possibility that a state court would find the action unauthorized on grounds of the state constitution. But if the defendant official is denied the right to defend in the federal court upon the ground that a state court would find his action unauthorized in the light of the state constitution, it is difficult to contend that it is the added harmfulness of state approval that justifies a different remedy for authorized than for unauthorized actions of state officers. Moreover, if indeed the legislature meant to distinguish between authorized and unauthorized acts and yet did not mean the statute to be inapplicable whenever there was a state constitutional provision which, reasonably interpreted, gave protection similar to that of a provision of the Fourteenth Amendment, would there not have been some explanation of this exception to the general rule? The fact that there is none in the legislative history at least makes more difficult a contention that these legislators were in fact making a distinction between use and misuse of state power.

There is a further basis for doubt that it was the additional force of state approval which justified a distinction between authorized and unauthorized actions. No one suggests that there is a difference in the showing the plaintiff must make to assert a claim under § 1983 depending upon whether he is asserting a denial of rights secured by the Equal Protection Clause or a denial of rights secured by the Due Process Clause of the Fourteenth Amendment. If the same Congress which passed what is now § 1983 also provided remedies against two or more nonofficials who conspire to prevent an official from granting equal protection of the laws, see 42 U. S. C. § 1985, then it would seem almost untenable to insist that this Congress would have hesitated, on the grounds of lack of full state approval of the official's act, to provide similar remedies against an official who, unauthorized, denied that equal protection of the laws on his own initiative. For

there would be no likely state approval of or even acquiescence in a conspiracy to coerce a state official to deny equal protection. Indeed it is difficult to attribute to a Congress which forbad two private citizens from hindering an official's giving of equal protection an intent to leave that official free to deny equal protection of his own accord.[7]

We have not passed upon the question whether 42 U. S. C. § 1985,[8] which was passed as the second section of the Act that included § 1983, was intended to reach only the Ku Klux Klan or other substantially organized group activity, as distinguished from what its words seem to include, any conspiracy of two persons with "the purpose of preventing or hindering the constituted authorities of any State . . . from giving or securing to all persons within such State . . . the equal protection of the laws . . . ." [9] Without now deciding the question, I think

[7] Compare the statement of Representative Burchard:
"If the refusal of a State officer, acting for the State, to accord equality of civil rights renders him amenable to punishment for the offense under United States law, conspirators who attempt to prevent such officers from performing such duty are also clearly liable." Cong. Globe, 42d Cong., 1st Sess., App. 315.

[8] Section 2 as finally adopted was substantially as now provided in 42 U. S. C. § 1985: "If two or more persons in any State . . . conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State . . . from giving or securing to all persons within such State . . . the equal protection of the laws; [and] if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

[9] I do not think that this Court's decision in *Collins* v. *Hardyman*, 341 U. S. 651, can properly be viewed as determining the scope of

it is sufficient to note that the legislative history is not without indications that what the words of the statute seem to state was in fact the meaning assumed by Congress.[10]

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the provision of § 1985 which refers to conspiring "for the purpose of preventing . . . the constituted authorities of any State . . . from giving . . . the equal protection of the laws . . . ." Not only did the Court specifically disclaim any consideration of this provision, but it proceeded to emphasize that the petitioners therein had only been subjected to a private discrimination since "There is not the slightest allegation that defendants were conscious of or trying to influence the law, or were endeavoring to obstruct or interfere with it." 341 U. S., at 661. The holding that the equal protection of the law is unaffected by discriminatorily motivated violations of state law so long as the instrumentalities of law enforcement remain free, able, and willing to remedy these violations is clearly based upon premises which cannot control the quite dissimilar case of a conspiratorial attempt to affect the fairness of these instrumentalities, "the constituted authorities of any State."

[10] Representative Poland, who had doubted the constitutionality of the earlier forms of § 2, had no such doubts about its present form. His reading of the provision is clear from his defense of it:

"But I do agree that if a State shall deny the equal protection of the laws, or if a State make proper laws and have proper officers to enforce those laws, and somebody undertakes to step in and clog justice by preventing the State authorities from carrying out this constitutional provision, then I do claim that we have the right to make such interference an offense against the United States; that the Constitution does empower us to aid in carrying out this injunction, which, by the Constitution, we have laid upon the States, that they shall afford the equal protection of the laws to all their citizens. When the State has provided the law, and has provided the officer to carry out the law, then we have the right to say that anybody who undertakes to interfere and prevent the execution of that State law is amenable to this provision of the Constitution, and to the law that we may make under it declaring it to be an offense against the United States." *Id.*, at 514.

An opponent of the provision was, if anything, even clearer in expressing his understanding of the coverage of the provision:

". . . It does not require that the combination shall be one that the State cannot put down; it does not require that it shall amount to

These difficulties in explaining the basis of a distinction between authorized and unauthorized deprivations of constitutional rights fortify my view that the legislative history does not bear the burden which *stare decisis* casts upon it. For this reason and for those stated in the opinion of the Court, I agree that we should not now depart from the holdings of the *Classic* and *Screws* cases.

MR. JUSTICE FRANKFURTER, dissenting except insofar as the Court holds that this action cannot be maintained against the City of Chicago.

Abstractly stated, this case concerns a matter of statutory construction. So stated, the problem before the Court is denuded of illuminating concreteness and thereby of its far-reaching significance for our federal system. Again abstractly stated, this matter of statutory construction is one upon which the Court has already passed. But it has done so under circumstances and in settings that negative those considerations of social policy upon which the doctrine of *stare decisis,* calling for the controlling application of prior statutory construction, rests.

This case presents the question of the sufficiency of petitioners' complaint in a civil action for damages brought under the Civil Rights Act, R. S. § 1979,

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anything like insurrection. If three persons combine for the purpose of preventing or hindering the constituted authorities of any State from extending to all persons the equal protection of the laws, although those persons may be taken by the first sheriff who can catch them or the first constable, although every citizen in the country may be ready to aid as a *posse*, yet this statute applies. It is no case of domestic violence, no case of insurrection, and no case, therefore, for the interference of the Federal Government, much less its interference where there is no call made upon it by the Governor or the Legislature of the State." *Id.*, at App. 218 (Senator Thurman); see also *id.*, at 514 (Rep. Farnsworth).

42 U. S. C. § 1983.[1] The complaint alleges that on October 29, 1958, at 5:45 a. m., thirteen Chicago police officers, led by Deputy Chief of Detectives Pape, broke through two doors of the Monroe apartment, woke the Monroe couple with flashlights, and forced them at gunpoint to leave their bed and stand naked in the center of the living room; that the officers roused the six Monroe children and herded them into the living room; that Detective Pape struck Mr. Monroe several times with his flashlight, calling him "nigger" and "black boy"; that another officer pushed Mrs. Monroe; that other officers hit and kicked several of the children and pushed them to the floor; that the police ransacked every room, throwing clothing from closets to the floor, dumping drawers, ripping mattress covers; that Mr. Monroe was then taken to the police station and detained on "open" charges for ten hours, during which time he was interrogated about a murder[2] and exhibited in lineups; that he was not brought before a magistrate, although numerous magistrate's courts were accessible; that he was not advised of his procedural rights; that he was not permitted to call his family or an attorney; that he was subsequently released without criminal charges having been filed against him. It is also alleged that the actions of the officers throughout were without authority of a search warrant or an arrest warrant; that those actions constituted arbitrary and unreasonable conduct; that the

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[1] The complaint is in nine counts, and seeks to assert a claim in favor of Mr. Monroe, Mrs. Monroe, and their children, respectively, under each of R. S. §§ 1979, 1980 and 1981, 42 U. S. C. §§ 1983, 1985 and 1986. Petitioners have abandoned in this Court their claims under §§ 1980 and 1981, and we are not now asked to determine the applicability of those sections to the facts alleged.

[2] The murder was asserted by the examining officers to have been committed two days before, on October 27.

officers were employees of the City of Chicago, which furnished each of them with a badge and an identification card designating him as a member of the Police Department; that the officers were agents of the city, acting in the course of their employment and engaged in the performance of their duties; and that it is the custom of the Department to arrest and confine individuals for prolonged periods on "open" charges for interrogation, with the purpose of inducing incriminating statements, exhibiting its prisoners for identification, holding them *incommunicado* while police officers investigate their activities, and punishing them by imprisonment without judicial trial. On the basis of these allegations various members of the Monroe family seek damages against the individual police officers and against the City of Chicago. The District Court dismissed the complaint for failure to state a claim and the Court of Appeals for the Seventh Circuit affirmed. 272 F. 2d 365.

Petitioners base their claim to relief in the federal courts on what was enacted as § 1 of the "Ku Klux Act" of April 20, 1871, "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes." 17 Stat. 13. It became, with insignificant rephrasing, § 1979 of the Revised Statutes. As now set forth in 42 U. S. C. § 1983, it is, in relevant part, as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

I.

In invoking § 1979 (the old designation will be used hereafter), petitioners contend that its protection of "rights, privileges, or immunities secured by the Constitution" encompasses what "due process of law" and "the equal protection of the laws" of the Fourteenth Amendment guarantee against action by the States. In this contention they are supported both by the title of the Act of 1871 and by its legislative history. See the authoritative statement of Mr. Edmunds, reporting the bill from the Senate Committee on the Judiciary, Cong. Globe, 42d Cong., 1st Sess. 568. See also *id.*, at 332–334, App. 83–85, 310. It is true that a related phrase, "any right or privilege secured . . . by the Constitution or laws," in § 241 of Title 18, U. S. C., was said by a plurality of the Court in *United States* v. *Williams,* 341 U. S. 70, to comprehend only the rights arising immediately from the relationship of the individual to the central government. And see *United States* v. *Cruikshank,* 92 U. S. 542.[3] But this construction was demanded by § 241, which penalizes conspiracies of private individuals acting as such, while § 1979 applies only to action taken "under color of any statute," etc. Different problems of statutory meaning are presented by two enactments deriving from different

[3] Drawing upon the reasoning of the *Slaughter-House Cases,* 16 Wall. 36, this decision determined that only those rights or privileges were secured by the Constitution and laws which were inherent in the status of the individual as a citizen of the National Government, see *Ex parte Yarbrough,* 110 U. S. 651, *Guinn* v. *United States,* 238 U. S. 347, or which were necessary to the integrity of the federal governmental institution, see *Motes* v. *United States,* 178 U. S. 458; compare *Logan* v. *United States,* 144 U. S. 263, with *United States* v. *Powell,* 212 U. S. 564, or which were created by Congress in the legitimate exercise of its Article I powers, see *United States* v. *Waddell,* 112 U. S. 76.

constitutional sources. See the *Civil Rights Cases,* 109 U. S. 3. Compare *United States* v. *Williams, supra,* with *Screws* v. *United States,* 325 U. S. 91. If petitioners have alleged facts constituting a deprivation under color of state authority of a right assured them by the Fourteenth Amendment, they have brought themselves within § 1979. *Douglas* v. *Jeannette,* 319 U. S. 157; *Hague* v. *C. I. O.,* 307 U. S. 496, 525–526 (opinion of Stone, J.).[4]

To be sure, *Screws* v. *United States, supra,* requires a finding of specific intent in order to sustain a conviction under the cognate penal provisions of 18 U. S. C. § 242 [5]— "an intent to deprive a person of a right which has been made specific either by the express terms of the Constitution or laws of the United States or by decisions interpreting them." 325 U. S., at 104. Petitioners' complaint here alleges no such specific intent. But, for a number of reasons, this requirement of *Screws* should not be carried over and applied to civil actions under § 1979. First, the word "willfully" in 18 U. S. C. § 242 from which the requirement of intent was derived in *Screws* does not appear in § 1979. Second, § 1979, by the very fact that it is a civil provision, invites treatment different from that to be given its criminal analogue. The constitutional scruples concerning vagueness which were deemed to compel the *Screws* construction have less force in the context of a civil proceed-

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[4] It was brought to the attention of Congress in 1871 that "rights, privileges, or immunities" was a more extensive phrase than "privileges or immunities" as used in the Fourteenth Amendment prohibiting a State from abridging "the privileges or immunities of citizens of the United States." Cong. Globe, 42d Cong., 1st Sess., App. 49–50.

[5] "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State . . . to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States . . . shall be fined not more than $1,000 or imprisoned not more than one year, or both."

ing,[6] and § 1979, insofar as it creates an action for damages, must be read in light of the familiar basis of tort liability that a man is responsible for the natural consequences of his acts. Third, even in the criminal area, the specific intent demanded by *Screws* has proved to be an abstraction serving the purposes of a constitutional need without impressing any actual restrictions upon the nature of the crime which the jury tries. The *Screws* opinion itself said that "The fact that the defendants may not have been thinking in constitutional terms is not material where their aim was not to enforce local law but to deprive a citizen of a right and that right was protected by the Constitution." 325 U. S., at 106. And lower courts in applying the statute have allowed inference of the requisite specific intent from evidence, it would appear, of malevolence alone.[7] But if intent to infringe "specific" constitutional rights comes in practice to mean no more than intent without justification to bring about the circumstances which infringe those rights, then the consequence of introducing the specific intent issue into a litigation is, in effect, to require fictional pleading, needlessly burden jurors with abstruse instructions, and lessen the degree of control which federal courts have over jury vagaries.

If the courts are to enforce § 1979, it is an unhappy form of judicial disapproval to surround it with doctrines which partially and unequally obstruct its operation. Specific intent in the context of the section would cause

[6] Civil liability has always been drawn from such indefinite standards as reasonable care, a man of ordinary prudence, foreseeability, etc. And see *Baltimore & Ohio R. Co.* v. *Groeger,* 266 U. S. 521; *Miller* v. *Strahl,* 239 U. S. 426.

[7] See *Koehler* v. *United States,* 189 F. 2d 711 (C. A. 5th Cir.); *Clark* v. *United States,* 193 F. 2d 294 (C. A. 5th Cir.); *Crews* v. *United States,* 160 F. 2d 746 (C. A. 5th Cir.). These cases are not cited by way of approval.

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such embarrassment without countervailing justification. Petitioners' allegations that respondents in fact did the acts which constituted violations of constitutional rights are sufficient.

II.

To show such violations, petitioners invoke primarily the Amendment's Due Process Clause.[8] The essence of their claim is that the police conduct here alleged offends those requirements of decency and fairness which, because they are "implicit in the concept of ordered liberty," are imposed by the Due Process Clause upon the States. *Palko* v. *Connecticut,* 302 U. S. 319, 325. When we apply to their complaint that standard of a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," [9] which has been the touchstone for this Court's enforcement of due process,[10] the merit of this constitutional claim is evident. The conception expressed in *Wolf* v. *Colorado,* 338 U. S. 25, 27, that "The security of one's privacy against arbitrary intrusion by the police . . . is basic to a free society," was not an innovation of *Wolf.* The tenet that there exists a realm of sanctuary surrounding every individual and infrangible, save in a very limited class of circumstances, by the agents of government, had informed the decision of the King's Bench two centuries earlier in *Entick* v. *Carrington,* 2 Wils. 275, had been the basis of Otis' cotemporary speech against the Writ of

[8] Petitioners also rely on the Equal Protection Clause. The disposition of the litigation by the majority here makes it unnecessary to discuss this aspect of the case.

[9] *Snyder* v. *Massachusetts,* 291 U. S. 97, 105.

[10] See *Twining* v. *New Jersey,* 211 U. S. 78; *Powell* v. *Alabama,* 287 U. S. 45; *Palko* v. *Connecticut,* 302 U. S. 319; *Betts* v. *Brady,* 316 U. S. 455; *Gibbs* v. *Burke,* 337 U. S. 773; *Rochin* v. *California,* 342 U. S. 165.

Assistance, see Gray's notes in Quincy's Massachusetts Reports, App. I, at 471; Tudor, Life of James Otis (1823) 63, and has in the intervening years found expression not only in the Fourth Amendment to the Constitution of the United States, but also in the fundamental law of every State.[11] Modern totalitarianisms have been a stark reminder, but did not newly teach, that the kicked-in door is the symbol of a rule of fear and violence fatal to institutions founded on respect for the integrity of man.

The essence of the liberty protected by the common law and by the American constitutions was "the right to shut the door on officials of the state unless their entry is under proper authority of law"; particularly, "the right to resist unauthorized entry which has as its design the securing of information to fortify the coercive power of the state against the individual." *Frank* v. *Maryland*, 359 U. S.

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[11] Ala. Const., Art. I, § 5; Alaska Const., Art. I, § 14; Ariz. Const., Art. II, § 8; Ark. Const., Art. II, § 15; Cal. Const., Art. I, § 19; Colo. Const., Art. II, § 7; Conn. Const., Art. I, § 8; Del. Const., Art. I, § 6; Fla. Const., Declaration of Rights, § 22; Ga. Const., Art. I, § 2–116; Hawaii Const., Art. I, § 5; Idaho Const., Art. I, § 17; Ill. Const., Art. II, § 6; Ind. Const., Art. I, § 11; Iowa Const., Art. I, § 8; Kan. Const., Bill of Rights, § 15; Ky. Const., Bill of Rights, § 10; La. Const., Art. 1, § 7; Me. Const., Art. I, § 5; Md. Const., Declaration of Rights, Art. 26; Mass. Const., Pt. I, Art. XIV; Mich. Const., Art. II, § 10; Minn. Const., Art. I, § 10; Miss. Const., Art. 3, § 23; Mo. Const., Art. I, § 15; Mont. Const., Art. III, § 7; Neb. Const., Art. I, § 7; Nev. Const., Art. I, § 18; N. H. Const., Pt. I, Art. 19; N. J. Const., Art. I, par. 7; N. M. Const., Art. II, § 10; N. Y. Const., Art. I, § 12, and Civil Rights Law, § 8; N. C. Const., Art. I, § 15; N. D. Const., Art. I, § 18; Ohio Const., Art. I, § 14; Okla. Const., Art. II, § 30; Ore. Const., Art. I, § 9; Pa. Const., Art. I, § 8; R. I. Const., Art. I, § 6; S. C. Const., Art. I, § 16; S. D. Const., Art. VI, § 11; Tenn. Const., Art. I, § 7; Tex. Const., Art. I, § 9; Utah Const., Art. I, § 14; Vt. Const., C. I, Art. 11; Va. Const., Art. I, § 10; Wash. Const., Art. I, §7; W. Va. Const., Art. III, § 6; Wis. Const., Art. I, § 11; Wyo. Const., Art. I, § 4.

360, 365.[12] Searches of the dwelling house were the special object of this universal condemnation of official intrusion.[13] Night-time search was the evil in its most obnoxious form.[14] Few reported cases have presented all of the manifold aggravating circumstances which petitioners here allege—intrusion *en masse*, by dark, by force, unauthorized by warrant, into an occupied private home, without even the asserted justification of belief by the intruders that the inhabitants were presently committing some criminal act within; physical abuse and the calculated degradation of insult and forced nakedness; sacking and disordering of personal effects throughout the home; arrest and detention against the background terror of threatened criminal proceedings. Wherever similar conduct has appeared, the courts have unanimously condemned police entries as lawless.[15]

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[12] See *Huckle* v. *Money*, 2 Wils. 205; *Wilkes* v. *Wood*, 19 How. St. Tr. 1153; *Bessemer* v. *Eidge*, 162 Ala. 201, 50 So. 270; 1 Cooley's Constitutional Limitations (8th ed. 1927) 610–615; Fraenkel, Concerning Searches and Seizures, 34 Harv. L. Rev. 361 (1921), containing a collection of authorities.

[13] See, *e. g.*, *Thurman* v. *State*, 116 Fla. 426, 156 So. 484; compare *Simpson* v. *State*, 152 Tex. Cr. R. 481, 215 S. W. 2d 617, with *McClannan* v. *Chaplain*, 136 Va. 1, 15–17, 116 S. E. 495. Note the common legislative proscription upon the search of private homes by officers otherwise authorized to make entries for the enforcement of prohibition laws and other regulatory statutes. *E. g.*, National Prohibition Act, tit. II, § 25, 41 Stat. 305, 315; and see Cornelius, Search and Seizure (2d ed. 1930), §§ 135–144.

[14] See 2 Hale, Pleas of the Crown (Wilson ed. 1800) 150.

[15] See, *e. g.*, *People* v. *Cahan*, 44 Cal. 2d 434, 282 P. 2d 905 (1955); *Sarafini* v. *San Francisco*, 143 Cal. App. 2d 570, 300 P. 2d 44 (1956); *Ware* v. *Dunn*, 80 Cal. App. 2d 936, 183 P. 2d 128 (1947); *Walker* v. *Whittle*, 83 Ga. App. 445, 64 S. E. 2d 87 (1951); *People* v. *Dalpe*, 371 Ill. 607, 21 N. E. 2d 756 (1939); *Hart* v. *State*, 195 Ind. 384, 145 N. E. 492 (1924); *Johnson* v. *Commonwealth*, 296 S. W. 2d 210 (Ky. App. 1956); *Deaderick* v. *Smith*, 33 Tenn. App. 151, 230 S. W. 2d 406 (1950).

If the question whether due process forbids this kind of police invasion were before us in isolation, the answer would be quick. If, for example, petitioners had sought damages in the state courts of Illinois and if those courts had refused redress on the ground that the official character of the respondents clothed them with civil immunity, we would be faced with the sort of situation to which the language in the *Wolf* opinion was addressed: "we have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment." 338 U. S., at 28. If that issue is not reached in this case it is not because the conduct which the record here presents can be condoned. But by bringing their action in a Federal District Court petitioners cannot rest on the Fourteenth Amendment *simpliciter*. They invoke the protection of a specific statute by which Congress restricted federal judicial enforcement of its guarantees to particular enumerated circumstances. They must show not only that their constitutional rights have been infringed, but that they have been infringed "under color of [state] statute, ordinance, regulation, custom, or usage," as that phrase is used in the relevant congressional enactment.

III.

Of course, if Congress by appropriate statutory language attempted to reach every act which could be attributed to the States under the Fourteenth Amendment's prohibition: "No State shall . . . ," the reach of the statute would be the reach of the Amendment itself. Relevant to the enforcement of such a statute would be not only the concept of state action as this Court has developed it, see *Nixon* v. *Condon,* 286 U. S. 73, 89, but also considerations of the power of Congress, under the Amendment's Enforcement Clause, to determine what

is "appropriate legislation" to protect the rights which the Fourteenth Amendment secures. Cf. *United States* v. *Raines,* 362 U. S. 17. Still, in this supposed case we would arrive at the question of what Congress could do only after we had determined what it was that Congress had done. So, in the case before us now, we must ask what Congress did in 1871. We must determine what Congress meant by "under color" of enumerated state authority.[16]

Congress used that phrase not only in R. S. § 1979, but also in the criminal provisions of § 2 of the First Civil Rights Act of April 9, 1866, 14 Stat. 27, from which is derived the present 18 U. S. C. § 242,[17] and in both cases used it with the same purpose.[18] During the seventy years

[16] The various analyses which have enabled this Court to find state action in situations other than that presented by *Barney* v. *New York,* 193 U. S. 430, are plainly not appropriate to consideration of the question whether in a given instance official conduct is "under color" of state law. *Nashville, C. & St. L. R. Co.* v. *Browning,* 310 U. S. 362, and *Iowa-Des Moines Nat'l Bank* v. *Bennett,* 284 U. S. 239, came here on certiorari from state court proceedings. *Coulter* v. *Louisville & Nashville R. Co.,* 196 U. S. 599, and *Raymond* v. *Chicago Traction Co.,* 207 U. S. 20, held that accepted administrative usage in the exercise of a power specifically conferred by state legislation and wholly dependent upon that legislation for its coercive effects might constitute such action of a State as to present a cognizable federal question. But see *Memphis* v. *Cumberland Tel. & Tel. Co.,* 218 U. S. 624. Similarly, *Home Tel. & Tel. Co.* v. *Los Angeles,* 227 U. S. 278, held that the existence in a state constitution of provisions coincident with those of the Federal Constitution did not *ipso facto* immunize state officials from the original jurisdiction of the federal courts. From none of these cases is implication to be drawn pertinent to the interpretation of § 1979.

[17] See note 5, *supra.*

[18] Mr. Shellabarger, Chairman of the House Select Committee which authored the Act of April 20, 1871, whose first section is now § 1979, reported to the House that that section was modeled upon the second section of the Act of April 9, 1866, 14 Stat. 27, and that the two sections were intended to cover the same cases, with qualifica-

which followed these enactments, cases in this Court in which the "under color" provisions were invoked uniformly involved action taken either in strict pursuance of some specific command of state law [19] or within the scope of executive discretion in the administration of state laws.[20]

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tions not relevant here. Cong. Globe, 42d Cong., 1st Sess., App. 68. See also *id.*, at 461. The 1866 provision had been re-enacted, substantially and in form, by the seventeenth and eighteenth sections of the Act of May 31, 1870, 16 Stat. 140, 144, and the 1874 revision of the provision was in turn patterned on the present § 1979. See *Screws* v. *United States,* 325 U. S. 91, 99–100. The sections have consistently been read as coextensive in their reach of acts "under color" of state authority. *Picking* v. *Pennsylvania R. Co.,* 151 F. 2d 240, 248 (C. A. 3d Cir.); *Burt* v. *City of New York,* 156 F. 2d 791, 792 (C. A. 2d Cir.); *McShane* v. *Moldovan,* 172 F. 2d 1016, 1020 (C. A. 6th Cir.); *Geach* v. *Moynahan,* 207 F. 2d 714, 717 (C. A. 7th Cir.).

As enacted in 1871, the provision which is now § 1979 reached acts taken "under color of any *law,* statute, ordinance, regulation, custom, or usage of any State . . . ." 17 Stat. 13. (Emphasis added.) In the Revised Statutes of 1874 and 1878 "law" was omitted from the section, although "law" was retained in the parallel criminal provision, R. S. § 5510, as amended, 18 U. S. C. § 242, and in the jurisdictional provisions, R. S. §§ 563 (12) and 629 (16). The deletion in § 1979 appears in the Reviser's Draft (1872) without explanation. 1 Revision of U. S. Statutes, Draft (1872) 947. No alteration in statutory coverage is permissibly to be based upon the change.

The jurisdictional provisions may now be found in 28 U. S. C. § 1343.

[19] *Carter* v. *Greenhow,* 114 U. S. 317; *Bowman* v. *Chicago & N. W. Ry. Co.,* 115 U. S. 611; *Giles* v. *Harris,* 189 U. S. 475; *Devine* v. *Los Angeles,* 202 U. S. 313; *Myers* v. *Anderson,* 238 U. S. 368; *Nixon* v. *Herndon,* 273 U. S. 536; *Lane* v. *Wilson,* 307 U. S. 268; *Douglas* v. *Jeannette,* 319 U. S. 157. One case not involving a state constitution, statute, or ordinance was an instance of state *judicial* action. *Green* v. *Elbert,* 137 U. S. 615; and see *Anglo-American Prov. Co.* v. *Davis Prov. Co., No. 2,* 191 U. S. 376.

[20] *Holt* v. *Indiana Mfg. Co.,* 176 U. S. 68; *Moyer* v. *Peabody,* 212 U. S. 78; *Hague* v. *C. I. O.,* 307 U. S. 496; cf. *Smith* v. *Allwright,* 321 U. S. 649.

The same is true, with two exceptions, in the lower federal courts.[21] In the first of these two cases it was held that § 1979 was not directed to instances of lawless police brutality, although the ruling was not put on "under color"

[21] *Northwestern Fertilizing Co.* v. *Hyde Park,* 18 Fed. Cas. 393, No. 10,336 (C. C. N. D. Ill. 1873); *Baltimore & Ohio R. Co.* v. *Allen,* 17 F. 171 (C. C. W. D. Va. 1883); *Tuchman* v. *Welch,* 42 F. 548, and *M. Schandler Bottling Co.* v. *Welch,* 42 F. 561 (C. C. D. Kan. 1890); *Hemsley* v. *Myers,* 45 F. 283 (C. C. D. Kan. 1891); *Davenport* v. *Cloverport,* 72 F. 689 (D. C. D. Ky. 1896); *Fraser* v. *McConway & Torley Co.,* 82 F. 257 (C. C. D. Pa. 1897); *Crystal Springs Land & Water Co.* v. *Los Angeles,* 76 F. 148 (C. C. S. D. Cal. 1896), aff'd, 177 U. S. 169 (see *California Oil & Gas Co.* v. *Miller,* 96 F. 12 (C. C. S. D. Cal. 1899)); *Aultman & Taylor Co.* v. *Brumfield,* 102 F. 7 (C. C. N. D. Ohio 1900), app. dism'd 22 S. Ct. 938; *Wadleigh* v. *Newhall,* 136 F. 941 (C. C. N. D. Cal. 1905); *Farson* v. *City of Chicago,* 138 F. 184 (C. C. N. D. Ill. 1905); *Brickhouse* v. *Brooks,* 165 F. 534 (C. C. E. D. Va. 1908); *Simpson* v. *Geary,* 204 F. 507 (D. C. D. Ariz. 1913); *Raich* v. *Truax,* 219 F. 273 (D. C. D. Ariz. 1915), aff'd, 239 U. S. 33; *Marcus Brown Holding Co.* v. *Pollak,* 272 F. 137 (D. C. S. D. N. Y. 1920); *West* v. *Bliley,* 33 F. 2d 177 (D. C. E. D. Va. 1929), aff'd, 42 F. 2d 101 (C. A. 4th Cir. 1930); *Trudeau* v. *Barnes,* 65 F. 2d 563 (C. A. 5th Cir. 1933); *Jones* v. *Oklahoma City,* 78 F. 2d 860 (C. A. 10th Cir. 1935); *Mitchell* v. *Greenough,* 100 F. 2d 184 (C. A. 9th Cir. 1938); *Blackman* v. *Stone,* 101 F. 2d 500 (C. A. 7th Cir. 1939); *City of Manchester* v. *Leiby,* 117 F. 2d 661 (C. A. 1st Cir. 1941); *Hannan* v. *City of Haverhill,* 120 F. 2d 87 (C. A. 1st Cir. 1941); *Hume* v. *Mahan,* 1 F. Supp. 142 (D. C. E. D. Ky. 1932), rev'd, 287 U. S. 575; *Premier-Pabst Sales Co.* v. *McNutt,* 17 F. Supp. 708 (D. C. S. D. Ind. 1935); *Gobitis* v. *Minersville School Dist.,* 21 F. Supp. 581 (D. C. E. D. Pa. 1937), 24 F. Supp. 271 (1938), aff'd, 108 F. 2d 683 (C. A. 3d Cir. 1939), rev'd, 310 U. S. 586; *Connor* v. *Rivers,* 25 F. Supp. 937 (D. C. N. D. Ga. 1938), aff'd, 305 U. S. 576; *Ghadiali* v. *Delaware State Medical Society,* 28 F. Supp. 841 (D. C. D. Del. 1939); *Mills* v. *Board of Education,* 30 F. Supp. 245 (D. C. D. Md. 1939); *Bluford* v. *Canada,* 32 F. Supp. 707 (D. C. W. D. Mo. 1940), app. dism'd, 119 F. 2d 779 (C. A. 8th Cir. 1941); *Kennedy* v. *City of Moscow,* 39 F. Supp. 26 (D. C. D. Idaho 1941). In these cases R. S. § 1979 or the parallel jurisdictional provisions were invoked. Note that in the *Jones* and *Farson* cases, *supra,* defendant's conduct

grounds.[22] In the second, an indictment charging a county tax collector with depriving one Ah Koo of a federally secured right under color of a designated California law, set forth in the indictment, was held insufficient against a demurrer. *United States* v. *Jackson,* 26 Fed. Cas. 563, No. 15,459 (C. C. D. Cal. 1874). The court wrote:

> "The indictment contains no averment that Ah Koo was a foreign miner, and within the provisions of the state law. If this averment be unnecessary . . . the act of congress would then be held to apply to a case of illegal extortion by a tax collector from any person,

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was specifically authorized by local ordinance, although plaintiffs asserted the invalidity of those ordinances under state as well as under federal law. In both cases relief was denied on the ground that no state action was shown, within the rule of *Barney* v. *New York,* 193 U. S. 430. To this group of cases involving acts authorized by state law must be added *Miller* v. *Rivers,* 31 F. Supp. 540 (D. C. M. D. Ga. 1940), rev'd as moot, 112 F. 2d 439 (C. A. 5th Cir. 1940), in which a state governor had several times authorized action in violation of state court restraining orders, finally declaring martial law in the face of the state judicial decrees. Two reported criminal prosecutions under § 242 also involved conduct sanctioned by state law. *United States* v. *Buntin,* 10 F. 730 (C. C. S. D. Ohio 1882); *United States* v. *Stone,* 188 F. 836 (D. Md. 1911). Cf. *United States* v. *Horton,* 26 Fed. Cas. 375, No. 15,392 (D. Ala. 1867), *semble.*

[22] *Brawner* v. *Irvin,* 169 F. 964 (C. C. N. D. Ga. 1909). In one case decided in 1940 just prior to *United States* v. *Classic,* 313 U. S. 299, a Federal District Court did distinctly decide that similar police misconduct unauthorized by state law, was "under color" of state law. *United States* v. *Sutherland,* 37 F. Supp. 344 (D. C. N. D. Ga. 1940). An unreported 1940 case, *United States* v. *Cowan* (D. C. E. D. La.), is said to have reached a similar result. See 1941 Atty. Gen. Rep. 98; Brief for the United States, *United States* v. *Classic,* 313 U. S. 299, p. 45, n. 25. In neither of these two cases does there appear to have been any examination of the legislative history of the "under color" statutes, nor is any reasoning offered to support the conclusion of the courts.

though such exaction might be wholly unauthorized by the law under which the officer pretended to act.

"We are satisfied that it was not the design of congress to prevent or to punish such abuse of authority by state officers. The object of the act was, not to prevent illegal exactions, but to forbid the execution of state laws, which, by the act itself, are made void. . . .

"It would seem, necessarily, to follow, that the person from whom the tax was exacted must have been a person from whom, under the provisions of the state law, the officer was authorized to exact it. The statute requires that a party shall be subjected to a deprivation of right secured by the statute under color of some law, statute, order or custom; but if this exaction, although made by a tax collector, has been levied upon a person not within the provisions of the state law, the exaction cannot be said to have been made 'under color of law,' any more than a similar exaction from a Chinese miner, made by a person wholly unauthorized, and under the pretense of being a tax collector." *Id.*, at 563–564.

Throughout this period, the only indication of this Court's views on the proper interpretation of the "under color" language is a dictum in the *Civil Rights Cases*, 109 U. S. 3. There, in striking down other Civil Rights Act provisions which, as the Court regarded them, attempted to reach private conduct not attributable to state authority, Mr. Justice Bradley contrasted those provisions with § 2 of the Act of 1866: "This [latter] law is clearly corrective in its character, intended to counteract and furnish redress against State laws and proceedings, and customs having the force of law, which sanction the wrongful acts specified." *Id.*, at 16.

A sharp change from this uniform application of seventy years was made in 1941, but without acknowledgment or

indication of awareness of the revolutionary turnabout from what had been established practice. The opinion in *United States* v. *Classic,* 313 U. S. 299, accomplished this. The case presented an indictment under § 242 charging certain local Commissioners of Elections with altering ballots cast in a primary held to nominate candidates for Congress. Sustaining the sufficiency of the indictment in an extensive opinion concerned principally with the question whether the right to vote in such a primary was a right secured by the Constitution,[23] Mr. Justice Stone wrote that the alteration of the ballots was "under color" of state law. This holding was summarily announced without exposition; it had been only passingly argued.[24] Of the three authorities cited to support it, two did not involve the "under color" statutes,[25] and the third, *Hague* v. *C. I. O.,* 307 U. S. 496, was a case in which high-ranking municipal officials claimed authorization for their actions under municipal ordinances (here held unconstitu-

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[23] The court below had dismissed the indictment on the ground that the right was not so secured and had not discussed the "under color" issue. 35 F. Supp. 66.

[24] The Government's brief contended that, inasmuch as the Civil Rights statutes were passed to enforce the Fourteenth Amendment, they should be read as coextensive with it: "under color" of state law should be coincident with "State action" as this Court had developed the "State action" concept. Classic's brief argued the point as though it were urging a "State action" contention.

[25] *Ex parte Virginia,* 100 U. S. 339, arose under federal legislation penalizing "any officer or other person charged with any duty in the selection or summoning of jurors" who discriminated on grounds of race, color, or previous condition of servitude in the choosing of juries. The issue was whether this provision could constitutionally be applied to a state judge who discriminated in the administration of a state statute fair on its face. *Home Tel. & Tel. Co.* v. *Los Angeles,* 227 U. S. 278, posed the question whether the enforcement of an allegedly confiscatory municipal regulatory ordinance was state action for purposes of Federal District Court "arising under" jurisdiction.

tional) and under the general police powers of the State.[26] All three of these cases had dealt with "State action" problems, and it is "State action," not the very different question of the "under color" clause, that Mr. Justice Stone appears to have considered.[27] (I joined in this opinion without having made an independent examination of the legislative history of the relevant legislation or of the authorities drawn upon for the *Classic* construction. Acquiescence so founded does not preclude the responsible recognition of error disclosed by subsequent study.) When, however, four years later the Court was called on to review the conviction under § 242 of a Georgia County Sheriff who had beaten a Negro prisoner to death, the opinion of four of the six Justices who believed that the statute applied merely invoked *Classic* and *stare decisis* and did not reconsider the meaning which that case had uncritically assumed was to be attached to the language, "under color" of state authority. *Screws* v. *United States,* 325 U. S. 91. The briefs in the *Screws* case did

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[26] The Mayor and other officials of Jersey City were charged with a concerted program of discriminatory law enforcement intended to drive union organizers out of the city. The acts upon which amenability to suit under § 1979 was predicated were (1) the enforcement of a municipal ordinance which this Court held unconstitutional on its face; (2) the enforcement of a second ordinance in a manner which willfully discriminated against union organizers; and (3) "acts not under the authority of any ordinance or statute but committed under color of municipal office and as part of a deliberate municipal policy." 101 F. 2d 774, 790. The Court of Appeals for the Third Circuit held that, on these facts, all three classes of conduct, viewed together, constituted "State action." This Court affirmed and modified the decree without considering the point.

[27] That the Court had not in the *Classic* case isolated the "under color" issue from the question of "State action" is indicated by the opinions in *Snowden* v. *Hughes,* 321 U. S. 1. The latter case arose under § 1979, yet although the "State action" principle had been the basis for the decision below and was prominently treated in two opinions here, no reference was made to the "under color" phrase.

not examine critically the legislative history of the Civil Rights Acts.[28] The only reference to this history in the plurality opinion, insofar as it bears on the interpretation of the clause "under color of . . . law," is contained in a pair of sentences discounting two statements by Senators Trumbull and Sherman regarding the Civil Rights Acts of 1866 and 1870, cited by the minority.[29] The bulk of the plurality opinion's treatment of the issue consists of the argument that "under color" had been construed in *Classic* and that the construction there put on the words should not be abandoned or revised. 325 U. S., at 109–113. The case of *Williams* v. *United States,* 341 U. S. 97, reaffirmed *Screws* and applied it to circumstances of third-degree brutality practiced by a private detective who held a special police officer's card and was accompanied by a regular policeman.[30]

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[28] The brief for petitioners Screws et al. contains no citation to legislative history. The brief for the United States, after several citations intended to demonstrate that the purpose of the Civil Rights Acts was to enforce the Fourteenth Amendment and to protect the rights which it secures (these citations, employed to the same purpose, may be found in the plurality opinion, 325 U. S., at 98–99), sets forth only one other bit of legislative material: a statement made in debate by Senator Davis of Kentucky, an opponent of the Act of 1866, to the effect that the Act would repeal the penal laws of all the States. See Cong. Globe, 39th Cong., 1st Sess. 598.

[29] See 325 U. S., at 111 (plurality); *id.*, at 142–144 (dissent). These two statements are set forth in text at notes 38 and 39, *infra*. The plurality opinion also contains references to other aspects of the legislative history in another context, *id.*, at 98–100; see note 28, *supra*. In his separate opinion, Mr. Justice Rutledge twice adverts to legislative materials, once with regard to matters not relevant here, *id.*, at 120, n. 13, 14, and once, pertinently, with particular reference to the position of opponents of the 1866 Act that the legislation would invade the province of the States (setting forth Senator Davis' statement, see note 28, *supra*), *id.*, at 132, n. 33. Mr. Justice Murphy, also writing separately, does not discuss the "under color" issue.

[30] Neither the Court's opinion nor the briefs in *Williams* contain any citation to the legislative history of the Civil Rights Acts. It is true

Thus, although this Court has three times found that conduct of state officials which is forbidden by state law may be "under color" of state law for purposes of the Civil Rights Acts, it is accurate to say that that question has never received here the consideration which its importance merits. That regard for controlling legislative history which is conventionally observed by this Court in determining the true meaning of important legislation that does not construe itself [31] has never been applied to the "under color" provisions; particularly, there has never been canvassed the full record of the debates preceding passage of the 1871 Act with which we are concerned in this case. Neither *Classic* nor *Screws* nor *Williams* warrants refusal now to take account of those debates and the illumination they afford. While we may well decline to re-examine recent cases which derive from the judicial process exercised under its adequate safeguards—documenting briefs and adequate arguments on both sides as foundation for due deliberation—the relevant demands of *stare decisis* do not preclude considering, for the first time thoroughly and in the light of the best available evidence of congressional purpose, a statutory

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that between *Screws* and *Williams* Congress in 1948 re-enacted § 242 without material change. If that section were before the Court in the present case, the implications of that re-enactment might have to be appraised. Yet whatever tenuous thread of legislative approbation of *Screws* might be drawn from the kind of bulk-sale congressional action which was involved in its enactment of a whole criminal code by way of the new Title 18, U. S. C., in 1948, any attempt to tangle in that same thread § 1979—a statute which has not been touched by Congress in three quarters of a century—would exceed the bounds of fictionally implied legislative adoption.

[31] *E. g., United States* v. *United Mine Workers,* 330 U. S. 258; *United States* v. *C. I. O.,* 335 U. S. 106; *United States* v. *Harriss,* 347 U. S. 612; *Phillips Petroleum Co.* v. *Wisconsin,* 347 U. S. 672; *Galvan* v. *Press,* 347 U. S. 522; *Textile Workers* v. *Lincoln Mills,* 353 U. S. 448.

interpretation which started as an unexamined assumption on the basis of inapplicable citations and has the claim of a dogma solely through reiteration. Particularly is this so when that interpretation, only recently made, was at its inception a silent reversal of the judicial history of the Civil Rights Acts for three quarters of a century.

"The rule of *stare decisis,* though one tending to consistency and uniformity of decision, is not inflexible." *Hertz* v. *Woodman,* 218 U. S. 205, 212. It is true, of course, that the reason for the rule is more compelling in cases involving inferior law, law capable of change by Congress, than in constitutional cases, where this Court—although even in such cases a wise consciousness of the limitations of individual vision has impelled it always to give great weight to prior decisions—nevertheless bears the ultimate obligation for the development of the law as institutions develop. See, *e. g., Smith* v. *Allwright,* 321 U. S. 649. But the Court has not always declined to re-examine cases whose outcome Congress might have changed. See Mr. Justice Brandeis, dissenting, in *Burnet* v. *Coronado Oil & Gas Co.,* 285 U. S. 393, 406–407, n. 1. Decisions involving statutory construction, even decisions which Congress has persuasively declined to overrule, have been overruled here. See *Girouard* v. *United States,* 328 U. S. 61, overruling *United States* v. *Schwimmer,* 279 U. S. 644, *United States* v. *Macintosh,* 283 U. S. 605, and *United States* v. *Bland,* 283 U. S. 636; see also *Commissioner* v. *Estate of Church,* 335 U. S. 632, overruling *May* v. *Heiner,* 281 U. S. 238.

And with regard to the Civil Rights Acts there are reasons of particular urgency which authorize the Court—indeed, which make it the Court's responsibility—to reappraise in the hitherto skimpily considered context of R. S. § 1979 what was decided in *Classic, Screws* and *Williams.* This is not an area of commercial law in which, presumably, individuals may have arranged their affairs in

reliance on the expected stability of decision. Compare *National Bank* v. *Whitney,* 103 U. S. 99; *Vail* v. *Arizona,* 207 U. S. 201; *Walling* v. *Halliburton Oil Well Cementing Co.,* 331 U. S. 17; *United States* v. *South Buffalo R. Co.,* 333 U. S. 771. Nor is it merely a mine-run statutory question involving a narrow compass of individual rights and duties. The issue in the present case concerns directly a basic problem of American federalism: the relation of the Nation to the States in the critically important sphere of municipal law administration. In this aspect, it has significance approximating constitutional dimension. Necessarily, the construction of the Civil Rights Acts raises issues fundamental to our institutions. This imposes on this Court a corresponding obligation to exercise its power within the fair limits of its judicial discretion. "We recognize that *stare decisis* embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations. But *stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable . . . ." *Helvering* v. *Hallock,* 309 U. S. 106, 119.

Now, while invoking the prior decisions which have given "under color of [law]" a content that ignores the meaning fairly comported by the words of the text and confirmed by the legislative history, the Court undertakes a fresh examination of that legislative history. The decision in this case, therefore, does not rest on *stare decisis,* and the true construction of the statute may be thought to be as free from the restraints of that doctrine as though the matter were before us for the first time. Certainly, none of the implications which the Court seeks to draw from silences in the minority reports of congressional committees in 1956, 1957, and 1960, or from the use of "under color" language in the very different context of the Act of May 6, 1960,

74 Stat. 86—concerned, in relevant part, with the preservation of election records and with the implementation of the franchise—serves as an impressive bar to re-examination of the true scope of R. S. § 1979 itself in its pertinent legislative setting.[32]

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[32] The Act of September 9, 1957, 71 Stat. 634, 637, provides that "No person, whether acting under color of law or otherwise, shall intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any other person for the purpose of interfering with the right of such other person to vote" at any election held solely or in part for the purpose of selecting or electing candidates for designated federal offices. Such an enactment, of course, can in no conceivable manner be considered congressional "adoption" or approbation of this Court's constructions of the "under color" clause in *Classic, Screws* and *Williams,* for the sufficient reason (among others) that the statute employs the clause only to go beyond it—manifesting a purpose, through the expression "under color of law or otherwise," to reach all individual conduct of the class described, whether or not "under color" of law, and whatever "under color" of law may mean. See H. R. Rep. No. 291, 85th Cong., 1st Sess. 12. The provisions of H. R. 627, 84th Cong., 2d Sess., as reported from the House Committee on the Judiciary and made the subject of H. R. Rep. No. 2187, 84th Cong., 2d Sess., are similar. See especially *id.,* at 9–11.

The Civil Rights Act of 1960, 74 Stat. 86, 88–89, 90, does twice use the clause "under color of [law]," but in contexts wholly different from that of R. S. § 1979. Section 301 of the 1960 Act requires every "officer of election" to retain and preserve during a specified period all records and papers which come into his possession relating to acts requisite to voting at an election wherein candidates for designated federal offices are voted for. Section 306 (which comprises the only use of "under color" language in the House bill that was the subject of H. R. Rep. No. 956, 86th Cong., 1st Sess.) defines an "officer of election" as "any person who, under color of any Federal, State, Commonwealth, or local law, statute, ordinance, regulation, authority, custom, or usage, performs or is authorized to perform any function, duty, or task in connection with any application, registration, payment of poll tax, or other act requisite to voting" in any election at which votes are cast for candidates for those designated federal offices. These provisions, like those of the 1957 Act, are of very limited scope, reaching only certain conduct affecting federal

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IV.

This case squarely presents the question whether the intrusion of a city policeman for which that policeman can show no such authority at state law as could be successfully interposed in defense to a state-law action against him, is nonetheless to be regarded as "under color" of state authority within the meaning of R. S. § 1979. Respondents, in breaking into the Monroe apartment, violated the laws of the State of Illinois.[33] Illinois law

elections. Section 601 of the 1960 Act provides that in any proceeding instituted by the Attorney General for preventive relief against the deprivation, on account of race or color, of certain voting rights, see R. S. § 2004, as amended by the Act of September 9, 1957, 71 Stat. 634, 637, 42 U. S. C. § 1971, the court shall, on proper request, make a finding whether such deprivation was or is pursuant to a pattern or practice. If the court finds such a pattern or practice, any person of that race or color resident within the affected area is entitled, during a specified period, to an order declaring him qualified to vote, "upon proof that at any election or elections (1) he is qualified under State law to vote, and (2) he has since such finding by the court been (a) deprived of or denied under color of law the opportunity to register to vote or otherwise to qualify to vote, or (b) found not qualified to vote by any person acting under color of law." Whatever meaning "under color of law" may have as so employed, Congress' use of the phrase in this narrowly limited context—applying to a situation in which voting rights have been infringed on grounds of race or color pursuant to a pattern or practice—cannot reasonably be taken as indicative of congressional attitude toward one or another possible construction of "under color" in the sweeping context of R. S. § 1979.

All this is said quite apart from the consideration of how little weight may properly be given to inferences drawn from the *silence* of *minority* reports of congressional committees, especially committees sitting almost a century after the enactment of the legislation in question.

[33] *People* v. *Grod*, 385 Ill. 584, 53 N. E. 2d 591; *People* v. *Dalpe*, 371 Ill. 607, 21 N. E. 2d 756; *People* v. *Brocamp*, 307 Ill. 448, 138 N. E. 728. See Ill. Rev. Stat., c. 38, §§ 691–699 (1959); Ill. Const., Art. II, § 6.

appears to offer a civil remedy for unlawful searches;[34] petitioners do not claim that none is available. Rather they assert that they have been deprived of due process of law and of equal protection of the laws under color of state law, although from all that appears the courts of Illinois are available to give them the fullest redress which the common law affords for the violence done them, nor does any "statute, ordinance, regulation, custom, or usage" of the State of Illinois bar that redress. Did the enactment by Congress of § 1 of the Ku Klux Act of 1871 encompass such a situation?

That section, it has been noted, was patterned on the similar criminal provision of § 2, Act of April 9, 1866. The earlier Act had as its primary object the effective nullification of the Black Codes, those statutes of the Southern legislatures which had so burdened and disqualified the Negro as to make his emancipation appear illusory.[35] The Act had been vetoed by President Johnson, whose veto message describes contemporary understanding of its second section; the section, he wrote,

> "seems to be designed to apply to some existing or future law of a State or Territory which may conflict with the provisions of the bill . . . . It provides for counteracting such forbidden legislation by imposing fine and imprisonment upon the legislators who may pass such conflicting laws, or upon the officers or agents who shall put, or attempt to put, them into execution. It means an official offense, not a com-

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[34] See *Bucher* v. *Krause*, 200 F. 2d 576 (C. A. 7th Cir.).

[35] See Cong. Globe, 39th Cong., 1st Sess. 474, 602, 1117–1118; 1123–1124, 1151, 1159–1160, 1758–1759. See 1 Fleming, Documentary History of Reconstruction (Reprint 1950) 273–311; 2 Commager, Documents of American History (6th ed. 1958) 2–7, for typical Black Code provisions. A more dispassionate appraisal of the Codes than was possible during the turbulence of Reconstruction is found in Randall, The Civil War and Reconstruction (1937) 724–730.

> mon crime committed against law upon the persons or property of the black race. Such an act may deprive the black man of his property, but not of the right to hold property. It means a deprivation of the right itself, either by the State judiciary or the State Legislature." [36]

And Senator Trumbull, then Chairman of the Senate Judiciary Committee,[37] in his remarks urging its passage over the veto, expressed the intendment of the second section as those who voted for it read it:

> "If an offense is committed against a colored person simply because he is colored, in a State where the law affords him the same protection as if he were white, this act neither has nor was intended to have anything to do with his case, because he has adequate remedies in the State courts; but if he is discriminated against under color of State laws because he is colored, then it becomes necessary to interfere for his protection." [38]

Section 2 of the 1866 Act was re-enacted in substance in 1870 as part of "An Act to enforce the Right of Citizens . . . to vote in the several States . . . ," 16 Stat. 140,

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[36] Cong. Globe, 39th Cong., 1st Sess. 1680. See also *id.*, at 1266. Light is thrown upon this distinction between the deprivation of a right and its violation—deprivation being competent to the law-making and law-enforcing organs of a State—by comparison of the language of § 1979, establishing liability for the "deprivation of any rights, privileges, or immunities secured by the Constitution . . . ," 17 Stat. 13, with the provisions of the criminal conspiracy section of the 1870 Act, penalizing conspiracies to intimidate any person in order to "hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution." 16 Stat. 140, 141. Cf. *Civil Rights Cases,* 109 U. S. 3, 17–18.

[37] Senator Trumbull had introduced the bill. Cong. Globe, 39th Cong., 1st Sess. 129.

[38] Cong. Globe, 39th Cong., 1st Sess. 1758.

144. The following colloquy on that occasion is particularly revealing:

> "Mr. SHERMAN. . . . My colleague cannot deny that we can by appropriate legislation prevent any private person from shielding himself under a State regulation, and thus denying to a person the right to vote . . . .
>
> "Mr. CASSERLY. I should like to ask the Senator from Ohio how a State can be said to abridge the right of a colored man to vote when some irresponsible person in the streets is the actor in that wrong?
>
> "Mr. SHERMAN. If the offender, who may be a loafer, the meanest man in the streets, covers himself under the protection or color of a law or regulation or constitution of a State, he may be punished for doing it.
>
> "Mr. CASSERLY. Suppose the State law authorizes the colored man to vote; what then?
>
> "Mr. SHERMAN. That is not the case with which we are dealing. . . . This bill only proposes to deal with offenses committed by officers or persons under color of existing State law, under color of existing State constitutions. No man could be convicted under this bill reported by the Judiciary Committee unless the denial of the right to vote was done under color or pretense of State regulation. The whole bill shows that. . . . [T]he first and second sections of the bill . . . simply punish officers as well as persons for discrimination under color of State laws or constitutions; and it so provides all the way through." [39]

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[39] Cong. Globe, 41st Cong., 2d Sess. 3663. Mr. Sherman's remarks were addressed not specifically to the section which paralleled the 1866 "under color" language, but to the whole of the pending Senate amendment, a substitute for the House bill. Compare *id.*, at 3561

The original text of the present § 1979 contained words, left out in the Revised Statutes, which clarified the objective to which the provision was addressed:

> "That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, *any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding,* be liable to the party injured . . . ." [40]

Representative Shellabarger, reporting the section, explained it to the House as "in its terms carefully confined to giving a civil action for such wrongs against citizenship as are done under color of State laws which abridge these rights." [41] Senator Edmunds, steering the measure through the Senate, found constitutional sanction for it in the Fourteenth Amendment, explaining that state action may consist in executive nonfeasance as well as malfeasance, so that any offenses against a citizen in a

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with *id.*, at 3503. It was from the Senate amendment, containing an "under color" provision modeled on § 2 of the Act of 1866, that the 1870 Act, as finally enacted, immediately derived.

[40] 17 Stat. 13. (Emphasis added.)

[41] Cong. Globe, 42d Cong., 1st Sess., App. 68. Mr. Shellabarger was the Chairman of the House Select Committee which drafted the Ku Klux Act. In reporting it out of committee, he described its first section, now § 1979, as modeled on the second section of the First Civil Rights Act of 1866. *Ibid.* In debate on the 1866 Act Shellabarger had said that the earlier provision was meant "not to usurp the powers of the States to punish offenses generally against the rights of citizens in the several States, but its whole force is expended in defeating an attempt, under State laws, to deprive races and the members thereof as such of the rights enumerated in this act." Cong. Globe, 39th Cong., 1st Sess. 1294.

State are susceptible of federal protection "unless the criminal who shall commit those offenses is punished and the person who suffers receives that redress which the principles and spirit of the laws entitle him to have." [42] And James A. Garfield supported the bill in the House as "so guarded as to preserve intact the autonomy of the States, the machinery of the State governments, and the municipal organizations established under State laws." [43]

Indeed, the Ku Klux Act as a whole encountered in the course of its passage strenuous constitutional objections which focused precisely upon an assertedly unauthorized extension of federal judicial power into areas of exclusive state competence.[44] A special target was § 2 of the bill as reported to the House, providing criminal penalties:

> "if two or more persons shall, within the limits of any State, band, conspire, or combine together to do

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[42] Cong. Globe, 42d Cong., 1st Sess. 697.

[43] *Id.*, at 808.

[44] The claim was several times repeated in debate that the bill operated to absorb "the entire jurisdiction of the States over their local and domestic affairs," *id.*, at 366, or that it would bring "private grievances to the Federal courts." *Id.*, at 395. With very few exceptions (*ibid.*, *id.*, at 361, 429, App. 91) these criticisms were not directed to the Act's first section, now § 1979. See also *id.*, at 416, 510, 660, App. 160, 179, 241–243, 258. One opposition speaker did object specifically to § 1 as providing a federal forum for the deprivation of a suitor's rights although "The offenses committed against him may be the common violations of the municipal law of his State." *Id.*, at App. 50. And one supporter of the measure, who argued that the Fourteenth Amendment gave Congress power to enact a general criminal law, if necessary, for the protection of citizens under the Privileges and Immunities, Due Process, and Equal Protection Clauses, said of § 2 of the Act of 1866, the model for § 1 of the 1871 Act, that it punished acts which would otherwise be "mere misdemeanors" at state law. *Id.*, at 504. But these two remarks are the only assertions, throughout hundreds of pages of debate, that § 1 might reach conduct which state law proscribed. Proponents of the bill, addressing themselves to the charge of federal over-

> any act in violation of the rights, privileges, or immunities of any person, to which he is entitled under the Constitution and laws of the United States, which, committed within a place under the sole and exclusive jurisdiction of the United States, would, under any law of the United States then in force, constitute the crime of either murder, manslaughter, mayhem, robbery, assault and battery, perjury, subornation of perjury, criminal obstruction of legal, process [*sic*] or resistance of officers in discharge of official duty, arson, or larceny . . . ." [45]

In vain the proponents of this section argued its propriety, seeking to support it by argument *ex necessitate* from the complete failure of state judicial and executive organs to control the depredations of the Klan.[46] Even

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reaching, insisted that they could support the measure only because they understood that it did not presume to enter upon that realm of protection of rights traditionally reserved to the States. *Id.*, at 800. See notes 47–50, *infra.* And see the statement of Senator Edmunds, *id.*, at 697–698: "[The bill] does not undertake to interpose itself out of the regular order of the administration of law. It does not attempt to deprive any State of the honor which is due to the punishment of crime."

[45] *Id.*, at 317. Any act to effect the object of the conspiracy rendered all the conspirators guilty of a felony.

[46] The impetus for the enactment of the Ku Klux Act was President Grant's message to Congress asserting that a condition then existed in some States which rendered life and property insecure and which was beyond the power of state authorities to control. See *id.*, at App. 226. Throughout the debates on the bill the note was repeated: there was a need for federal action to supplant state administration which was failing to provide effective protection for private rights. *Id.*, at 345, 368, 374, 428, 444, 457–459, 460, 476, 505–506, 653, App. 78, 167, 185, 248–249, 252. Constitutional authority for such federal action was sought in the logic that "States" were ordered by the Fourteenth Amendment not to "deny" equal protection of the laws; that a "State" in effect denied such protection not only when its legislation was on its face unequal, but whenever its judicial or execu-

in the Reconstruction Congress, the majority party split. Many balked at legislation which they regarded as establishing a general federal jurisdiction for the protection of person and property in the States.[47] Only after a com-

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tive authorities by a consistent course of practice, "permanently and as a rule" refused to enforce its laws for the protection of some class of persons. *Id.*, at 334. See *id.*, at 416, 482, 505–506, 606–608, 697, App. 251–252, 315. But what was deemed the prerequisite to validity of congressional action in implementation of the Amendment under this theory was no less than a State's permitting "the rights of citizens to be systematically trampled upon without color of law," *id.*, at 375; "A systematic failure to make arrests, to put on trial, to convict, or to punish offenders." *Id.*, at 459. The National Government was thought powerless to intervene to regulate "A mere assault and battery, or arson, or murder . . . . The law is believed to be sufficient to cover such cases, and the officers of justice amply able to arrest and punish the offenders." *Id.*, at 457. See also Mr. Perry's assertion, *id.*, at App. 79, that the wrongs which Congress may remedy "are not injuries inflicted by mere individuals or upon ordinary rights of individuals," but injuries inflicted "under color of State authority or by conspiracies and unlawful combinations with at least the tacit acquiescence of the State authorities." Wrongs susceptible of adequate redress before the state courts evidently did not concern Congress, and Congress in 1871 did not attempt to reach those wrongs.

[47] General Garfield, *id.*, at App. 154: "In so far as this section punishes persons who under color of any State law shall deny or refuse to others the equal protection of the laws, I give it my cheerful support; but when we provide by congressional enactment to punish a mere violation of a State law, we pass the line of constitutional authority." (This objection is taken specifically to § 3 of the Act, authorizing federal executive intervention under certain circumstances.) See also, *e. g.*, *id.*, at App. 113–116: Mr. Farnsworth, who had no objection to § 1, now § 1979, vigorously opposed § 2 as extending to encompass individual action. Farnsworth regarded the Fourteenth Amendment as directed exclusively to the discriminations of state *legislation*, and his approval of § 1 indicates his understanding that it referred to conduct authorized by such legislation. Garfield seems to have agreed that § 1 did not reach even systematic maladministration of state law fair on its face. See *id.*, at App. 153.

plete rewriting of the section to meet these constitutional objections could the bill be passed.[48] Yet almost none of those who had decried § 2 as undertaking impermissibly to make the national courts tribunals of concurrent jurisdiction for the punishment of state-law offenses expressed similar objections to § 1, later § 1979.[49] One of the most

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[48] Mr. Shellabarger proposed the amendment to § 2, *id.*, at 477, to meet the constitutional objections which the original form of that section had evoked. See *id.*, at 478, App. 187–190, 313. Numerous members of the majority party thereupon withdrew their opposition to the bill. See *id.*, at 514, App. 187–190, 231, 313–315. The form of the second section as it was finally enacted is, in relevant part, substantially that of R. S. § 1980, 42 U. S. C. § 1985: "If two or more persons in any State . . . conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State . . . from giving or securing to all persons within such State . . . the equal protection of the laws; [and] if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators." See 17 Stat. 13. Mr. Shellabarger emphasized that the purpose of the change was to make the gist of the offense a deprivation of *equality* of rights, not a deprivation of rights alone. Cong. Globe, 42d Cong., 1st Sess. 478.

[49] Representative Poland had argued the unconstitutionality of the original § 2 on the ground that it sought to extend federal *protection* to private persons and property, whereas the Fourteenth Amendment guaranteed only *equal* protection, leaving the States free to protect or not to protect whatever interests they chose so long as the protection afforded was non-discriminatory. The amendment of § 2 met this objection, and Mr. Poland supported the bill, finding no cause for concern in the language of § 1. *Id.*, at 514. For other congressmen who opposed the initial form of § 2 but found no constitutional impediment to enactment of § 1, see *id.*, at 578–579 (Trumbull), App. 86 (Storm), 150–154 (Garfield), 187–190 (Willard). Farnsworth objected to even the amended form of § 2, but voiced no adverse

vehement of those who could find no constitutional sanction for federal judicial control of conduct already proscribed by state law, and who therefore opposed original § 2 as reaching beyond the limits of congressional competence, expressly supported § 1 as affording "further redress for violations under State authority of constitutional rights." [50]

The general understanding of the legislators unquestionably was that, as amended, the Ku Klux Act did "not undertake to furnish redress for wrongs done by one person upon another in any of the States . . . in violation of their laws, unless he also violated some law of the United States, nor to punish one person for an ordinary assault and battery . . . ." [51] Even those who—opposing the constitutional objectors—found sufficient congressional power in the Enforcement Clause of the Fourteenth Amendment to give this kind of redress, deemed inexpedient the exercise of any such power: "Convenience and courtesy to the States suggest a sparing use, and never so far as to supplant the State authorities except in cases of extreme necessity, and when the State governments criminally refuse or neglect those duties which are imposed

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criticism of § 1. *Id.*, at 513. Slater, also opposing § 2, argued that if Congress could assert general criminal jurisdiction in the States (as he contended that section did), it *could* also assert general civil jurisdiction in protection of persons and property. Apparently he did not regard § 1 as threatening such an assertion. *Id.*, at App. 304.

There was in fact relatively little opposition to § 1. See *id.*, at 568. Many vociferous opponents of the Act did not assail that section. *E. g., id.*, at 419, App. 112, 134–139, 300–303. What objections there were did not suggest that the section usurped state power by assuming a concurrent authority to redress state-law violations, but, quite the opposite, attacked the section for penalizing state judges, legislators and administrative officials acting in full obedience to state law, "under a solemn, official oath, though as pure in duty as a saint." *Id.*, at 365.

[50] *Id.*, at App. 315. See *id.*, at App. 313–315.

[51] *Id.*, at 579.

upon them." [52] Extreme Radicals, those who believed that the remedy for the oppressed Unionists in the South was a general expansion of federal judicial jurisdiction so that "loyal men could have the privilege of having their causes, civil and criminal, tried in the Federal courts," were disappointed with the Act as passed.[53]

Finally, it is significant that the opponents of the Act, exhausting ingenuity to discover constitutional objections to every provision of it, also construed § 1 as addressed only to conduct authorized by state law, and therefore within the admitted permissible reach of Fourteenth Amendment federal power. "The first section of this bill prohibits any invidious legislation by States against the rights or privileges of citizens of the United States," one such opponent paraphrased the provision.[54] And Senator Thurman, who insisted vociferously on the absence of federal power to penalize a conspiracy of individuals to violate state law ("that is a case of mere individual violence, having no color whatsoever of authority of law, either Federal or State; and to say that you can punish men for that mere conspiracy, which is their individual act, and which is a crime against the State laws themselves, punishable by the State laws, is simply to wipe out all the State jurisdiction over crimes and transfer it bodily to the Congress"),[55] admitted without question the constitutionality of § 1 [56] ("It refers to a deprivation under color of law, either statute law or 'custom or usage' which has become common law").[57]

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[52] *Id.*, at 368 (Sheldon). See also *id.*, at 501 (Frelinghuysen).

[53] *Id.*, at App. 277 (Porter).

[54] *Id.*, at App. 268 (Sloss).

[55] *Id.*, at App. 218.

[56] *Id.*, at App. 216.

[57] *Id.*, at App. 217. One significant objection made to § 1 reveals its opponents' comprehension of its scope. It was objected that the section was unnecessary inasmuch as under Amendment Fourteen and the Supremacy Clause there was no longer any danger of "violation

The Court now says, however, that "It was not the unavailability of state remedies but the failure of certain States to enforce the laws with an equal hand that furnished the powerful momentum behind this 'force bill.' " Of course, if the notion of "unavailability" of remedy is limited to mean an absence of statutory, paper right, this is in large part true.[58] Insofar as the Court undertakes to demonstrate—as the bulk of its opinion seems to do—that § 1979 was meant to reach some instances of action not specifically authorized by the avowed, apparent, written law inscribed in the statute books of the States, the argument knocks at an open door. No one would or could deny this, for by its express terms the statute comprehends deprivations of federal rights under color of any "statute, ordinance, regulation, *custom, or usage*" of a State. (Emphasis added.) The question is, *what* class of cases other than those involving state statute law were meant to be reached. And, with respect to this question, the Court's conclusion is undermined by the very portions of the legislative debates which it cites. For surely the misconduct of individual municipal police officers, subject to the effective oversight of appropriate state administrative and judicial authorities, presents a situation which differs *toto coelo* from one in which "Immunity is given to crime, and the records of the public tribunals are searched in vain for any evidence of effective redress," [59] or in which murder rages while a State makes

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of the rights of citizens under color of the *laws* of the States." *Id.*, at App. 231 (Blair). The appellate jurisdiction of the Supreme Court of the United States under § 25 of the Judiciary Act of 1789, providing for review on writ of error of state court judgments sustaining state authority against federal constitutional challenge or striking down asserted federal authority, was regarded as offering sufficient protection against the deprivations of rights covered by § 1. *Id.*, at App. 86 (Storm).

[58] See note 46, *supra*.

[59] Cong. Globe, 42d Cong., 1st Sess. 374.

"no successful effort to bring the guilty to punishment or afford protection or redress," [60] or in which the "State courts . . . [are] unable to enforce the criminal laws . . . or to suppress the disorders existing," [61] or in which, in a State's "judicial tribunals one class is unable to secure that enforcement of their rights and punishment for their infraction which is accorded to another," [62] or "of . . . hundreds of outrages . . . not one [is] punished," [63] or "the courts of the . . . States fail and refuse to do their duty in the punishment of offenders against the law," [64] or in which a "class of officers charged under the laws with their administration permanently and as a rule refuse to extend [their] protection." [65] These statements indicate that Congress—made keenly aware by the post-bellum conditions in the South that States through their authorities could sanction offenses against the individual by settled practice which established state law as truly as written codes—designed § 1979 to reach, as well, official conduct which, because engaged in "permanently and as a rule," or "systematically," [66] came through acceptance by law-administering officers to constitute "custom, or usage" having the cast of law. See *Nashville, C. & St. L. R. Co.* v. *Browning*, 310 U. S. 362, 369. They do not indicate an attempt to reach, nor does the statute by its terms include, instances of acts in defiance of state law and which no settled state practice, no systematic pattern of official action or inaction, no "custom, or usage, of any State," insulates from effective and adequate reparation by the State's authorities.

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[60] *Id.*, at 428.
[61] *Id.*, at 653.
[62] *Id.*, at App. 315.
[63] *Id.*, at 505.
[64] *Id.*, at App. 179.
[65] *Id.*, at 334.
[66] See note 46, *supra*.

Rather, all the evidence converges to the conclusion that Congress by § 1979 created a civil liability enforceable in the federal courts only in instances of injury for which redress was barred in the state courts because some "statute, ordinance, regulation, custom, or usage" sanctioned the grievance complained of. This purpose, manifested even by the so-called "Radical" Reconstruction Congress in 1871, accords with the presuppositions of our federal system. The jurisdiction which Article III of the Constitution conferred on the national judiciary reflected the assumption that the state courts, not the federal courts, would remain the primary guardians of that fundamental security of person and property which the long evolution of the common law had secured to one individual as against other individuals. The Fourteenth Amendment did not alter this basic aspect of our federalism.[67]

Its commands were addressed to the States. Only when the States, through their responsible organs for the formulation and administration of local policy, sought to deny or impede access by the individual to the central government in connection with those enumerated functions assigned to it, or to deprive the individual of a certain minimal fairness in the exercise of the coercive forces of the State, or without reasonable justification to treat him differently than other persons subject to their jurisdiction, was an overriding federal sanction imposed. As between individuals, no corpus of substantive rights was guaranteed by the Fourteenth Amendment, but only "due process of law" in the ascertainment and enforcement of rights and equality in the enjoyment of rights and safeguards that the States afford. This was the base of the distinction between federal citizenship and state

[67] "The Fourteenth Amendment, itself a historical product, did not destroy history for the States . . . ." *Jackman* v. *Rosenbaum Co.*, 260 U. S. 22, 31.

citizenship drawn by the *Slaughter-House Cases,* 16 Wall. 36. This conception begot the "State action" principle on which, from the time of the *Civil Rights Cases,* 109 U. S. 3, this Court has relied in its application of Fourteenth Amendment guarantees. As between individuals, that body of mutual rights and duties which constitute the civil personality of a man remains essentially the creature of the legal institutions of the States.

But, of course, in the present case petitioners argue that the wrongs done them were committed not by individuals but by the police as state officials. There are two senses in which this might be true. It might be true if petitioners alleged that the redress which state courts offer them against the respondents is different than that which those courts would offer against other individuals, guilty of the same conduct, who were not the police. This is not alleged. It might also be true merely because the respondents *are* the police—because they are clothed with an appearance of official authority which is in itself a factor of significance in dealings between individuals. Certainly the night-time intrusion of the man with a star and a police revolver is a different phenomenon than the night-time intrusion of a burglar. The aura of power which a show of authority carries with it has been created by state government. For this reason the national legislature, exercising its power to implement the Fourteenth Amendment, might well attribute responsibility for the intrusion to the State and legislate to protect against such intrusion. The pretense of authority alone might seem to Congress sufficient basis for creating an exception to the ordinary rule that it is to the state tribunals that individuals within a State must look for redress against other individuals within that State. The same pretense of authority might suffice to sustain congressional legislation creating the exception. See *Ex parte Virginia,* 100 U. S. 339. But until Congress has

declared its purpose to shift the ordinary distribution of judicial power for the determination of causes between co-citizens of a State, this Court should not make the shift. Congress has not in § 1979 manifested that intention.

The unwisdom of extending federal criminal jurisdiction into areas of conduct conventionally punished by state penal law is perhaps more obvious than that of extending federal civil jurisdiction into the traditional realm of state tort law. But the latter, too, presents its problems of policy appropriately left to Congress. Suppose that a state legislature or the highest court of a State should determine that within its territorial limits no damages should be recovered in tort for pain and suffering, or for mental anguish, or that no punitive damages should be recoverable. Since the federal courts went out of the business of making "general law," *Erie R. Co.* v. *Tompkins,* 304 U. S. 64, such decisions of local policy have admittedly been the exclusive province of state lawmakers. Should the civil liability for police conduct which can claim no authority under local law, which is actionable as common-law assault or trespass in the local courts, comport different rules? Should an unlawful intrusion by a policeman in Chicago entail different consequences than an unlawful intrusion by a hoodlum? These are matters of policy in its strictly legislative sense, not for determination by this Court. And if it be, as it is, a matter for congressional choice, the legislative evidence is overwhelming that § 1979 is not expressive of that choice. Indeed, its precise limitation to acts "under color" of state statute, ordinance or other authority appears on its face designed to leave all questions of the nature and extent of liability of individuals to the laws of the several States except when a State seeks to shield those individuals under the special barrier of state authority. To extend Civil Rights Act liability beyond that point is

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to interfere in areas of state policymaking where Congress has not determined to interfere.

Nor will such interference be negligible. One argument urged in *Screws* in favor of the result which that case reached was the announced policy of self-restraint of the Department of Justice in the prosecution of cases under 18 U. S. C. § 242. See 325 U. S., at 159–160. Experience indicates that private litigants cannot be expected to show the same consideration for the autonomy of local administration which the Department purportedly shows.[68]

Relevant also are the effects upon the institution of federal constitutional adjudication of sustaining under § 1979 damage actions for relief against conduct allegedly violative of federal constitutional rights, but plainly

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[68] In the last twenty years the lower federal courts have encountered a volume of litigation seeking Civil Rights Act redress for a variety of wrongs ranging from arbitrary refusal by housing department officials to issue architect's certificates, *Burt* v. *New York,* 156 F. 2d 791 (C. A. 2d Cir.), to allegedly malicious charges made by a state grand jury. *Lyons* v. *Baker,* 180 F. 2d 893 (C. A. 5th Cir.). Plaintiffs have sought redress against the signers of a mandamus petition, parties to a state mandamus proceeding to compel city commissioners to hold a local referendum, *Lyons* v. *Dehon,* 188 F. 2d 534 (C. A. 5th Cir.), against state officials administering a local WPA project for refusing to employ the plaintiff and instituting insanity proceedings against him, *Love* v. *Chandler,* 124 F. 2d 785 (C. A. 8th Cir.), against adversaries and judge in a state civil judicial proceeding where egregious error resulting in holding against plaintiffs was alleged, *Bottone* v. *Lindsley,* 170 F. 2d 705 (C. A. 10th Cir.); *Campo* v. *Niemeyer,* 182 F. 2d 115 (C. A. 7th Cir.); cf. *Moffett* v. *Commerce Trust Co.,* 187 F. 2d 242 (C. A. 8th Cir.). Most courts have refused to convert what would otherwise be ordinary state-law claims for false imprisonment or malicious prosecution or assault and battery into civil rights cases on the basis of conclusory allegations of constitutional violation. *Lyons* v. *Weltmer,* 174 F. 2d 473 (C. A. 4th Cir.); *McGuire* v. *Todd,* 198 F. 2d 60 (C. A. 5th Cir.); *Curry* v. *Ragan,* 257 F. 2d 449 (C. A. 5th Cir.); *Deloach* v. *Rogers,* 268 F. 2d 928 (C. A. 5th Cir.); *Agnew* v. *City of Compton,* 239 F. 2d 226 (C. A. 9th Cir.).

violative of state law. Permitting such actions necessitates the immediate decision of federal constitutional issues despite the admitted availability of state-law remedies which would avoid those issues.[69] This would make inroads, throughout a large area, upon the principle of federal judicial self-limitation which has become a significant instrument in the efficient functioning of the national judiciary. See *Railroad Comm'n of Texas* v. *Pullman Co.*, 312 U. S. 496, and cases following. Self-limitation is not a matter of technical nicety, nor judicial timidity. It reflects the recognition that to no small degree the effectiveness of the legal order depends upon the infrequency with which it solves its problems by resorting to determinations of ultimate power. Especially is this true where the circumstances under which those ultimate determinations must be made are not conducive to the most mature deliberation and decision. If § 1979 is made a vehicle of constitutional litigation in cases where state officers have acted lawlessly at state law, difficult questions of the federal constitutionality of certain official practices—lawful perhaps in some States, unlawful in others—may be litigated between private parties without the participation of responsible state authorities which is obviously desirable to protect legitimate state interests, but also to better guide adjudication by competent record-making and argument.

Of course, these last considerations would be irrelevant to our duty if Congress had demonstrably meant to reach by § 1979 activities like those of respondents in this case. But where it appears that Congress plainly did not have that understanding, respect for principles which this Court has long regarded as critical to the most effective func-

[69] See, *e. g.*, *Valle* v. *Stengel*, 176 F. 2d 697 (C. A. 3d Cir.), a case which decides a number of novel and difficult questions of federal constitutional law. The alleged conduct of defendant sheriff which was held actionable under § 1979 was in violation of state law.

tioning of our federalism should avoid extension of a statute beyond its manifest area of operation into applications which invite conflict with the administration of local policies. Such an extension makes the extreme limits of federal constitutional power a law to regulate the quotidian business of every traffic policeman, every registrar of elections, every city inspector or investigator, every clerk in every municipal licensing bureau in this country. The text of the statute, reinforced by its history, precludes such a reading.

In concluding that police intrusion in violation of state law is not a wrong remediable under R. S. § 1979, the pressures which urge an opposite result are duly felt. The difficulties which confront private citizens who seek to vindicate in traditional common-law actions their state-created rights against lawless invasion of their privacy by local policemen are obvious,[70] and obvious is the need for more effective modes of redress. The answer to these urgings must be regard for our federal system which presupposes a wide range of regional autonomy in the kinds of protection local residents receive. If various common-law concepts make it possible for a policeman—but no more possible for a policeman than for any individual hoodlum intruder—to escape without liability when he has vandalized a home, that is an evil. But, surely, its remedy devolves, in the first instance, on the States. Of course, if the States afford less protection against the police, as police, than against the hoodlum—if under authority of state "statute, ordinance, regulation, custom, or usage" the police are specially shielded—

[70] See Foote, Tort Remedies for Police Violations of Individual Rights, 39 Minn. L. Rev. 493 (1955); Barrett, Exclusion of Evidence Obtained by Illegal Searches—A Comment on People vs. Cahan, 43 Cal. L. Rev. 565 (1955); cf. Edwards, Criminal Liability for Unreasonable Searches and Seizures, 41 Va. L. Rev. 621 (1955). And see, *e. g.*, *State for Use Brooks* v. *Wynn*, 213 Miss. 306, 56 So. 2d 824.

§ 1979 provides a remedy which dismissal of petitioners' complaint in the present case does not impair. Otherwise, the protection of the people from local delinquencies and shortcomings depends, as in general it must, upon the active consciences of state executives, legislators and judges.[71] Federal intervention, which must at best be limited to securing those minimal guarantees afforded by the evolving concepts of due process and equal protection, may in the long run do the individual a disservice by deflecting responsibility from the state lawmakers, who hold the power of providing a far more comprehensive scope of protection. Local society, also, may well be the loser, by relaxing its sense of responsibility and, indeed, perhaps resenting what may appear to it to be outside interference where local authority is ample and more appropriate to supply needed remedies.

This is not to say that there may not exist today, as in 1871, needs which call for congressional legislation to protect the civil rights of individuals in the States. Strong contemporary assertions of these needs have been expressed. Report of the President's Committee on Civil Rights, To Secure These Rights (1947); Chafee, Safeguarding Fundamental Human Rights: The Tasks of States and Nation, 27 Geo. Wash. L. Rev. 519 (1959). But both the insistence of the needs and the delicacy of the issues involved in finding appropriate means for their satisfaction demonstrate that their

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[71] The common law seems still to retain sufficient flexibility to fashion adequate remedies for lawless intrusions. Compare with the cases cited in *Wolf* v. *Colorado*, 338 U. S. 25, 30, n. 1; *Bull* v. *Armstrong*, 254 Ala. 390, 48 So. 2d 467 (1950); *Sarafini* v. *San Francisco*, 143 Cal. App. 2d 570, 300 P. 2d 44 (1956); *Ware* v. *Dunn*, 80 Cal. App. 2d 936, 183 P. 2d 128 (1947); *Walker* v. *Whittle*, 83 Ga. App. 445, 64 S. E. 2d 87 (1951); *Johnson* v. *Atlantic Coast Line R. Co.*, 142 S. C. 125, 140 S. E. 443 (1927); *Deaderick* v. *Smith*, 33 Tenn. App. 151, 230 S. W. 2d 406 (1950).

demand is for legislative, not judicial, response. We cannot expect to create an effective means of protection for human liberties by torturing an 1871 statute to meet the problems of 1960.

Of an enactment like the Civil Rights Act, dealing with the safeguarding and promotion of individual freedom, it is especially relevant to be mindful that, since it is projected into the future, it is ambulatory in its scope, the statute properly absorbing the expanding reach of its purpose to the extent that the words with which that purpose is conveyed fairly bear such expansion. But this admissible expansion of meaning through the judicial process does not entirely unbind the courts and license their exercise of what is qualitatively a different thing, namely, the formulation of policy through legislation. In one of the last writings by that tough-minded libertarian, who was also no friend of narrow construction, Professor Zechariah Chafee, Jr., he admonished against putting the Civil Rights Act to dubious new uses even though, as a matter of policy, they might be desirable in the changed climate nearly a hundred years after its enactment: "At all events, we can be sure of one thing. If federal protection be desirable, we ought to get it by something better than a criminal statute of antiquated uncertainties and based on the out-moded Privileges and Immunities Clause of the Fourteenth Amendment. . . . It is very queer to try to protect human rights in the middle of the Twentieth Century by a left-over from the days of General Grant." *Id.*, at 529. It is not a work for courts to melt and recast this statute. "Under color" of law meant by authority of law in the nineteenth century. No judicial sympathy, however strong, for needs now felt can give the phrase—a phrase which occurs in a statute, not in a constitution—any different meaning in the twentieth. Compare Mr. Justice Holmes' varying approaches to construction of the same word in a statute

and in the Constitution, *Towne* v. *Eisner,* 245 U. S. 418, and *Eisner* v. *Macomber,* 252 U. S. 189, 219 (dissenting).

This meaning, no doubt, poses difficulties for the case-by-case application of § 1979. Manifestly the applicability of the section in an action for damages cannot be made to turn upon the actual availability or unavailability of a state-law remedy for each individual plaintiff's situation. Prosecution to adverse judgment of a state-court damage claim cannot be made prerequisite to § 1979 relief. In the first place, such a requirement would effectively nullify § 1979 as a vehicle for recovering damages.[72] In the second place, the conclusion that police activity which violates state law is not "under color" of state law does not turn upon the existence of a state tort remedy. Rather, it recognizes the freedom of the States to fashion their own laws of torts in their own way under no threat of federal intervention save where state law makes determinative of a plaintiff's rights the particular circumstance that defendants are acting by state authority. Section 1979 was not designed to cure and level all the possible imperfections of local common-law doctrines, but to provide for the case of the defendant who can claim that some particular dispensation of state authority immunizes him from the ordinary processes of the law.

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[72] This is so not only because of the practical impediment to Civil Rights Act relief which would be posed by a two-suit requirement, but because the efficient process of judicial administration might well require that a plaintiff present his federal constitutional contention to the state courts along with his state-law contentions, that he there assert the federal unconstitutionality of maintaining the defense of state authorization to a state-law tort action. Cf. *Angel* v. *Bullington,* 330 U. S. 183. Of course, once that federal contention is properly presented to the state courts, plaintiff has open for review here an adverse state-court judgment; but if plaintiff were successful in this Court, the effect of our disposition would be to return plaintiff to the state courts for a state-law measure of relief.

It follows that federal courts in actions at law under § 1979 would have to determine whether defendants' conduct is in violation of, or under color of, state law often with little guidance from earlier state decisions. Such a determination will sometimes be difficult, of course. But Federal District Courts sitting in diversity cases are often called upon to determine as intricate and uncertain questions of local law as whether official authority would cloak a given practice of the police from liability in a state-court suit. Certain fixed points of reference will be available. If a plaintiff can show that defendant is acting pursuant to the specific terms of a state statute or of a municipal ordinance, § 1979 will apply. See *Lane* v. *Wilson,* 307 U. S. 268. If he can show that defendant's conduct is within the range of executive discretion in the enforcement of a state statute, or municipal ordinance, § 1979 will apply. See *Hague* v. *C. I. O.,* 307 U. S. 496. Beyond these cases will lie the admittedly more difficult ones in which he seeks to show some " 'custom or usage' which has become common law." [73]

[73] See note 57, *supra.* Cf. *Civil Rights Cases,* 109 U. S. 3, 16. And see *Nashville, C. & St. L. R. Co.* v. *Browning,* 310 U. S. 362, 369: "Here . . . all the organs of the state are conforming to a practice, systematic, unbroken for more than forty years, and now questioned for the first time. It would be a narrow conception of jurisprudence to confine the notion of 'laws' to what is found written on the statute books, and to disregard the gloss which life has written upon it. Settled state practice cannot supplant constitutional guarantees, but it can establish what is state law. . . . Deeply embedded traditional ways of carrying out state policy, such as those of which petitioner complains, are often tougher and truer law than the dead words of the written text."

Where the jurisdiction of a Federal District Court is invoked to vindicate a claim under § 1979 and where that court finds that defendants' conduct is not under color of state law, difficult questions may also arise as to whether the court should nevertheless determine the respective rights of the parties at state law, under the doctrine of *Hurn* v. *Oursler,* 289 U. S. 238, and *Bell* v. *Hood,* 327 U. S. 678. But

V.

My Brother HARLAN's concurring opinion deserves separate consideration. It begins by asking what is its essential question: Why would the Forty-second Congress, which clearly provided tort relief in the federal courts for violations of constitutional rights by acts of a policeman acting pursuant to state authority, not also have provided the same relief for violations of constitutional rights by a policeman acting in violation of state authority? What, it inquires, would cause a Congress to distinguish between the two situations? Examining a first possible differentiating factor—the differing degrees of adequacy of protection of person and property already available in the state courts—it reasons that this could not have been significant in view of Congress' purpose in 1871, for that purpose was not to enact a statute having "merely a jurisdictional function, shifting the load of federal supervision from the Supreme Court to the lower courts and providing a federal tribunal for fact findings."

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see *California Water Service Co.* v. *City of Redding*, 304 U. S. 252; *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.*, 183 F. 2d 497 (C. A. 1st Cir.); *Robinson* v. *Stanley Home Prods. Inc.*, 272 F. 2d 601 (C. A. 1st Cir.). Petitioners in this case have never throughout the litigation below raised the issue of the possible application of the *Hurn* rule to these circumstances, nor is that issue among the questions presented in their petition for certiorari here. Under our Rule 23, subpar. 1 (c) it is not now, therefore, before the Court, and there is no intention here to intimate any opinion on the novel problem of federal jurisdiction of state-law claims "pendent" to such a case as this. Suffice it to say that whatever application *Hurn* may have to these situations, its application will entail a very different level of federal judicial involvement with the adjudication of rights between individuals in a State than would the interpretation of § 1979 which petitioners urge. Whatever incursion into areas of conventionally exclusive state-court competence jurisdiction "pendent" to a § 1979 claim might entail would touch considerations not peculiar to § 1979, but rather which concern the *Hurn* doctrine.

Examining the other possible distinction—the difference between injuries to individuals from isolated acts of abuse of authority by state officers and injuries to individuals from acts sanctioned by the dignity of state law—it finds that this, too, could not have been important, especially to a Congress which was aware of the existence of state constitutional guarantees of protection to the individual, and which enacted the conspiracy statute which became R. S. § 1980 and is now 42 U. S. C. § 1985.

To ask why a Congress which legislated to reach a state officer enforcing an unconstitutional law or sanctioned usage did not also legislate to reach the same officer acting unconstitutionally without authority is to abstract this statute from its historical context. The legislative process of the post-bellum Congresses which enacted the several Civil Rights Acts was one of struggle and compromise in which the power of the National Government was expanded piece by piece against bitter resistance; the Radicals of 1871 had to yield ground and bargain over detail in order to keep the moderate Republicans in line.[74] This was not an endeavor for achieving legislative patterns of analytically satisfying symmetry. It was a contest of large sallies and small retreats in which as much ground was occupied, at any time, as the temporary coalescences of forces strong enough to enroll a prevailing vote could agree upon. To assume that if Congress reached one situation it would also have reached another situation involving not dissimilar problems—assuming, *arguendo,* that the problems, viewed in intellectual abstraction, are not dissimilar—ignores the temper of the times which produced the Ku Klux Act. This approach would be persuasive only if the two situations, that of a

[74] See the history of § 2 of the Ku Klux Act described, *supra,* at notes 44–50. For an excellent picture of the background of this legislative struggle, see McKitrick, Andrew Johnson and Reconstruction (1960).

state officer acting pursuant to state authority and that of a state officer acting without state authority, were so entirely similar that they would not, in 1871, have been perceived as two different situations at all. In view of the fierce debate which occupied the Forty-second Congress as to whether the Fourteenth Amendment had been intended to do more than invalidate state legislation offensive on its face,[75] this supposition must be ruled out. Contrariwise, it is historically persuasive that the Forty-second Congress, which was not thinking in neat abstract categories, designed a statute to protect federal constitutional rights from an immediate evil perceived to be grave—the evil described by the statute's sponsor, Mr. Shellabarger, "such wrongs . . . as are done under color of State laws which abridge these rights," [76]—but did not, by the same measure, seek to control unconstitutional action abusive of a state authority which did not, itself, "abridge these rights."

Moreover, even under the most rigorous analysis the two situations argumentatively deemed not dissimilar are indeed dissimilar, and dissimilar in both of the two relevant aspects. As to the adequacy of state-court protection of person and property, there seems a very sound distinction, as a class, between injuries sanctioned by state law (as to which there can never be state-court redress, if at all, unless (1) the state courts are sufficiently receptive to a federal claim to declare their own law unconstitutional, or (2) the litigant persists through a tortuous and protracted process of appeals, after a state trial court has found the facts, through the state-court system to this Court) and injuries not sanctioned by state law. To make this line of distinction determine the incidence of Civil Rights legislation serves to cover the bulk of cases where

[75] See, *e. g.*, Cong. Globe, 42d Cong., 1st Sess. 482, 505–506, 697, App. 81–86, 315.

[76] *Id.*, at App. 68.

federal judicial protection would be needed. To be sure, this leaves certain cases unprotected, namely, the few instances of federal constitutional violations not authorized by state statute, custom or usage and which concern interests wholly unrecognized by state statute or common law. But the cost of ignoring the distinction in order to cover those cases—the cost, that is, of providing a federal judicial remedy for every constitutional violation—involves pre-emption by the National Government, in the larger class of cases in which rights secured by the Fourteenth Amendment relate to interests of person and property having a state-law origin, of matters of intimate concern to state and local governments. One of the most persistently recurring motifs in the legislative history of the Ku Klux Act is precisely a reluctance to invade these regions of state and local concern except insofar as absolutely necessary for effective assurance of the Fourteenth Amendment's guarantees. Therefore, the line of distinction between state-authorized and unauthorized actions, as a line of compromise among positions concerning which the legislative evidence is clear that Congress wanted to, and did, compromise, is the most probable for the Act's draftsmen to have selected.

To attribute significance to this line of distinction is not to reduce the Ku Klux Act to having "merely a jurisdictional function, shifting the load of federal supervision from the Supreme Court" to an original federal tribunal. First, there are certain classes of cases where § 1979, construed as reaching only unconstitutional conduct authorized by state law, will accord "substantive" relief that would not have been available through the means of state-law, state-court litigation subject to the commands of the Supremacy Clause and to Supreme Court review. This would be the case, for example, if a Negro were to bring an action for damages against a state election official who had denied him the right to vote pursuant to discriminatory

state franchise provisions [77] in a State which did not recognize a common-law action for deprivation of the right to vote. Similarly, one whose home had been searched by state police acting under a state statute, regulation, custom or usage which authorized an unconstitutional intrusion could recover by a § 1979 action a measure of relief determined, as a "substantive" matter, by federal law, whereas Supreme-Court-reviewed state-court suit might have availed him only damages for technical trespass. And, second, with reference to the more numerous classes of cases in which the redress which a federal trial court might give would be approximately the same, "substantively," as that which could be recovered by state-court suit, the theory that the Reconstruction Congress could not have meant § 1979 principally as a "jurisdictional" provision granting access to an original federal forum in lieu of the slower, more costly, more hazardous route of federal appeal from fact-finding state courts, forgets how important providing a federal trial court was among the several purposes of the Ku Klux Act.[78] One may agree that in one sense § 1979 is not "merely" jurisdictional—not jurisdictional in the sense, for example, that § 3 of the 1866 Civil Rights Act was jurisdictional.[79] Section 1979 does

[77] See, *e. g.*, *Lane* v. *Wilson*, 307 U. S. 268.

[78] See, *e. g.*, the pages of debate cited in note 46, *supra*.

[79] That section gave the District and Circuit Courts of the United States concurrent jurisdiction of all causes, civil and criminal, "affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section" of the 1866 Act. It further provided: "The jurisdiction in civil and criminal matters hereby conferred on the district and circuit courts of the United States shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offences against law, the common law, as modified and changed by the constitution and statutes of the State wherein

create a "substantive" right to relief. But this does not negative the fact that a powerful impulse behind the creation of this "substantive" right was the purpose that it be available in, and be shaped through, original federal tribunals.

In truth, to deprecate the purposes of this 1871 statute in terms of analysis which refers to "merely . . . jurisdictional" effects, to "shifting the load of federal supervision," and to the "administrative burden on the Supreme Court," is to attribute twentieth century conceptions of the federal judicial system to the Reconstruction Congress. If today Congress were to devise a comprehensive scheme for the most effective protection of federal constitutional rights, it might conceivably think in terms of defining those classes of cases in which Supreme Court review of state-court decision was most appropriate, and those in which original federal jurisdiction was most appropriate, fitting all cases into one or the other category. The Congress of 1871 certainly did not think in such terms. Until 1875 there was no original "federal question" jurisdiction in the federal courts,[80] and the ordinary mode of protection of federal constitutional rights was Supreme Court review.[81] In light of the then prevailing notions of the appropriate relative spheres of jurisdiction of state and

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the court having jurisdiction of the cause, civil or criminal, is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern said courts in the trial and disposition of such cause . . . ." Act of April 9, 1866, § 3, 14 Stat. 27.

[80] Except, of course, during the time between the Act of February 13, 1801, § 11, 2 Stat. 92, and its repeal by the Act of March 8, 1802, § 1, 2 Stat. 132. "Federal question" jurisdiction was conferred by the Act of March 3, 1875, § 1, 18 Stat. 470.

[81] Recognition of this situation underlies the comments of Messrs. Blair and Storm, see note 57, *supra*, and the debate among Senators Edmunds, Trumbull and Carpenter referred to in the concurring opinion. See especially Cong. Globe, 42d Cong., 1st Sess. 576–578.

federal courts of first impression, any allowance of Federal District and Circuit Court competence to adjudicate causes between co-citizens of a State was a very special case, a rarity.[82] To ask why, when such a special case was created to redress deprivations of federal rights under authority of state laws which abridged those rights, a special case was not also created to cover other deprivations of federal rights whose somewhat similar nature might have made the same redress appropriate, disregards the dominant jurisdictional thought of the day and neglects consideration of the fact that redress in a federal trial court was then to be very sparingly afforded. To extend original federal jurisdiction only in the class of cases in which, constitutional violation being sanctioned by state law, state judges would be less likely than federal judges to be sympathetic to a plaintiff's claim, is a purpose quite consistent with the "overflowing protection of constitutional rights" which, assuredly, § 1979 manifests.[83]

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[82] This is why Mr. Carpenter speaks of the Fourteenth Amendment's Enforcement Clause as working "one of the fundamental, one of the great, the tremendous revolutions effected in our Government by that article of the Constitution." *Id.*, at 577.

[83] See the remarks of Mr. Dawes, a member of the Committee which reported the Ku Klux bill, *id.*, at 476:

"The first remedy proposed by this bill is a resort to the courts of the United States. Is that a proper place in which to find redress for any such wrongs? If there be power to call into the courts of the United States an offender against these rights, privileges, and immunities, and hold him to an account there, either civilly or criminally, for their infringement, I submit to the calm and candid judgment of every member of this House that there is no tribunal so fitted, where equal and exact justice would be more likely to be meted out in temper, in moderation, in severity, if need be, but always according to the law and the fact, as that great tribunal of the Constitution."

And see, *e. g.*, the remarks of Mr. Coburn, *id.*, at 459–460:

"Whenever, then, there is a denial of equal protection by the State, the courts of justice of the nation stand with open doors, ready to

Finally, it seems not unreasonable to reject the suggestion that state-sanctioned constitutional violations are no more offensive than violations not sanctioned by the majesty of state authority. Degrees of offensiveness, perhaps, lie largely in the eye of the person offended, but is it implausible to conclude that there is something more reprehensible, something more dangerous, in the action of the custodian of a public building who turns out a Negro pursuant to a local ordinance than in the action of the same custodian who turns out the same Negro, in violation of state law, to vent a personal bias? Or something

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receive and hear with impartial attention the complaints of those who are denied redress elsewhere. Here may come the weak and poor and downtrodden, with assurance that they shall be heard. Here may come the man smitten with many stripes and ask for redress. Here may come the nation, in her majesty, and demand the trial and punishment of offenders, when all, all other tribunals are closed . . . .

"Can these means be made effectual? Can we thus suppress these wrongs? I will say we can but try. The United States courts are further above mere local influence than the county courts; their judges can act with more independence, cannot be put under terror, as local judges can; their sympathies are not so nearly identified with those of the vicinage; the jurors are taken from the State, and not the neighborhood; they will be able to rise above prejudices or bad passions or terror more easily. The marshal, clothed with more power than the sheriff, can make arrests with certainty, and, with the aid of the General Government, can seize offenders in spite of any banded and combined resistance such as may be expected. Thus, at least, these men, who disregard all law, can be brought to trial. Here we stop. The court is to do the rest, acting under all its solemn obligations of duty to country and God. Can we trust it, or are we afraid of our own institutions? Does the grim shadow of the State step into the national court, like a goblin, and terrify us? Does this harmless and helpless ghost drive us from that tribunal—the State that mocks at justice, the State that licenses outlawry, the State that stands dumb when the lash and the torch and the pistol are lifted every night over the quiet citizen? We believe that we can trust our United States courts, and we propose to do so."

more reprehensible about the public officer who beats a criminal suspect under orders from the Captain of Detectives, pursuant to a systematic and accepted custom of third-degree practice, than about the same officer who, losing his temper, breaks all local regulations and beats the same suspect? If it be admitted that there is a significant difference between the situation of the individual injured by another individual and who, although the latter is an agent of the State, can claim from the State's judicial or administrative processes the same protection and redress against him as would be available against any other individual, and the situation of one who, injured under the sanction of a state law which shields the offender, is left alone and helpless in the face of the asserted dignity of the State, then, certainly, it was the latter of these two situations—that of the unprotected Southern Negroes and Unionists—about which Congress was concerned in 1871.[84]

[84] It is suggested that Congress knew there existed state constitutional guarantees of which state legislation might fall afoul, and that nevertheless there is found in the debates no "explanation of [the] exception to the general rule" which would obtain if § 1979 were applied to conduct authorized by state statute, ordinance, regulation, custom or usage, but violative of a state constitution. To regard such an application as an "exception" is to misconceive the incidence of § 1979 by regarding its operation from the wrong perspective. The question whether official action does or does not come within the statute depends not upon what state law the action does or does not violate, but upon what state law does or does not authorize the action. The state authorization against which Congress aimed § 1979 was authorization by the living, functioning law of the State, not authorization in strict conformity with what may have become no more than an unheeded pattern of words upon the closed pages of a State's books of legal learning. It meant to reach those "Deeply embedded traditional ways of carrying out state policy [which] . . . are often tougher and truer law than the dead words of the written text," see note 73, *supra,* and it would by its terms have reached the case supposed by my Brother HARLAN not as a matter of exception in need of explanation, but by its natural logic.

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Again, an analysis which supposes that Congress, by §§ 1 and 2 [85] of the Ku Klux Act, was attempting to provide comprehensive coverage of a single problem and, therefore, may not be supposed to have left any aspect of the problem unprovided for, ignores that these two sections were in fact designed to cope with two wholly different problems—two wholly diverse evils. Section 2 was newly drafted in 1871, not, like § 1, taken over from the 1866 Act. It was both civil and criminal, not, like § 1, merely civil. It aimed exclusively at conspiracies, as § 1 did not. And, most important, it sought to protect only the federal right of equal protection, not, like § 1, all Fourteenth Amendment rights.[86] Because of its limited scope in this latter respect, those who drafted it and voted for it thought that it could constitutionally be made to reach instances of action having more tenuous connection with the lawfully asserted authority of the State than could a statute which also reached due process violations.[87] For the same reason, it does not reach isolated

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[85] Section 2 of the Ku Klux Act attached civil and criminal liability to conspiracy "for the purpose, either directly or indirectly, of depriving any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State from giving or securing to all persons within such State the equal protection of the laws . . . ." 17 Stat. 13. The civil provisions of this section were carried forward, as amended, in R. S. § 1980, and are now found in 42 U. S. C. § 1985. The criminal provisions, carried forward in R. S. § 5519, were declared unconstitutional in *United States* v. *Harris,* 106 U. S. 629, and *Baldwin* v. *Franks,* 120 U. S. 678.

[86] See Cong. Globe, 42d Cong., 1st Sess. 478, App. 315.

[87] The Fourteenth Amendment provides that no State shall "deprive" any person of life, liberty, or property without due process of law, and that no State shall "deny" to any person within its jurisdiction the equal protection of the laws. It is clear that the Forty-second Congress believed that "denial" could be worked by non-action, while "deprivation" required ill-action; thus, that the

instances of misuse of state authority, but only such as possess the character of "purposeful discrimination" [88] which amounts to a denial of equal protection. The evil that § 2 meant to stamp out was the evil of conspiracy—more particularly, the evil of the Klan, "a conspiracy, so far-flung and embracing such numbers, with a purpose to dominate and set at naught the 'carpetbag' and 'scalawag' governments of the day," that it appeared "able effectively to deprive Negroes of their legal rights and to close all avenues of redress or vindication." *Collins* v. *Hardyman,* 341 U. S. 651, 662.[89] The enormity and the power of this organization were what made it dangerous.[90] Section 1 aimed at another evil, the evil not of combinations dedicated to purposeful and systematic discrimination, but of violation of any rights, privileges, or immunities secured by the Constitution through the authority, enhanced by the majesty and dignity, of the States. Here it was precisely this authorization, this assurance that behind a constitutional violation lay the whole power of the State, that was the danger. One can agree that these two statutory sections may overlap unevenly rather than

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scope of federal enforcing power under the Equal Protection Clause reached further, in respect of situations in which there was no assertion of legitimate state authority, than did the equivalent scope of power under the Due Process and Privileges and Immunities Clauses. See, *id.,* at 459, 482, 505–506, 514, 607–608, 697, App. 251, 315. This appears to be why § 2 was acceptable in its amended, while not in its original, form.

[88] *Snowden* v. *Hughes,* 321 U. S. 1, 9; see also *Lisenba* v. *California,* 314 U. S. 219, 226.

[89] I agree that this is not the appropriate occasion to pass upon the construction of § 1985.

[90] For an appreciation of the nature and character of the Ku Klux Klan as it appeared to Congress in 1871, see S. Rep. No. 1, 42d Cong., 1st Sess., and the voluminous report of the Joint Select Committee to inquire into the Condition of Affairs in the late Insurrectionary States, published as S. Rep. No. 41, pts. 1–13, and H. R. Rep. No. 22, pts. 1–13, 42d Cong., 2d Sess.

dovetail, but surely it is more plausible to regard this uneven overlap as a result of the diverse origins and purposes of the sections than to derive from it the justification for a construction of § 1979 which distorts the section by stretching it to cover a class of cases presenting *neither* the evil with which § 1, *nor* the evil with which § 2, of the Ku Klux Act was designed to cope.

VI.

The present case comes here from a judgment sustaining a motion to dismiss petitioners' complaint. That complaint, insofar as it describes the police intrusion, makes no allegation that that intrusion was authorized by state law other than the conclusory and unspecific claim that "During all times herein mentioned the individual defendants and each of them were acting under color of the statutes, ordinances, regulations, customs and usages of the State of Illinois, of the County of Cook and of the defendant City of Chicago." In the face of Illinois decisions holding such intrusions unlawful and in the absence of more precise factual averments to support its conclusion, such a complaint fails to state a claim under § 1979.

However, the complaint does allege, as to the ten-hour detention of Mr. Monroe, that "it was, and it is now, the custom or usage of the Police Department of the City of Chicago to arrest and confine individuals in the police stations and jail cells of the said department for long periods of time on 'open' charges." These confinements, it is alleged, are for the purpose of interrogating and investigating the individuals arrested, in the aim of inducing incriminating statements, permitting possible identification of suspects in lineups, holding suspects *incommunicado* while police conduct field investigations of their associates and background, and punishing the arrested persons without trial. Such averments do pre-

sent facts which, admitted as true for purposes of a motion to dismiss, seem to sustain petitioners' claim that Mr. Monroe's detention—as contrasted with the night-time intrusion into the Monroe apartment—was "under color" of state authority. Under the few relevant Illinois decisions it is impossible to say with certainty that a detention *incommunicado* for ten hours is unlawful *per se*,[91] or that the courts of that State would hold that the lawless circumstances surrounding Mr. Monroe's arrest made his subsequent confinement illegal. On this record, then, petitioners' complaint suffices to raise the narrow issue of whether the detention *incommunicado*, considered alone, violates due process.[92]

Since the majority's disposition of the case causes the Court not to reach that constitutional issue, it is neither necessary nor appropriate to discuss it here.

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[91] Compare *People* v. *Frugoli*, 334 Ill. 324, 166 N. E. 129 (1929), and *Fulford* v. *O'Connor*, 3 Ill. 2d 490, 121 N. E. 2d 767 (1954), with *People* v. *Kelly*, 404 Ill. 281, 89 N. E. 2d 27 (1949).

[92] In considering the detention of Mr. Monroe as isolable from the invasion of the Monroe home for purposes of applying § 1979, one does not ignore that in its treatment of coerced-confession cases and deprivation-of-counsel cases coming here from state courts, this Court has looked to the whole sequence of activity by state authorities pertinent to the prosecution of a criminal defendant. *Malinski* v. *New York*, 324 U. S. 401, 412 (concurring opinion joined in, and made a majority view, at 438); *Watts* v. *Indiana*, 338 U. S. 49; *Turner* v. *Pennsylvania*, 338 U. S. 62; *Harris* v. *South Carolina*, 338 U. S. 68; *Gibbs* v. *Burke*, 337 U. S. 773. But these cases differ from the one at bar precisely in the fact that they do come here after the sustaining of a criminal conviction by the highest court of a State competent to act in the matter. In all such cases the processes of law administration of a State have rendered the final judgment of state law, and the federal question presented is whether the conviction has, in light of the totality of the events leading to that conviction, violated due process. The question in the instant case is the much narrower one whether petitioners have alleged conduct "under color" of state authority which deprives them of a Fourteenth Amendment right, and thus brought respondents' conduct within the specific requirements of the statute for initiating litigation in a Federal District Court.

SCHNELL ET AL. *v.* PETER ECKRICH & SONS, INC., ET AL.

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

No. 219. Argued January 11, 1961.—Decided February 20, 1961.

In this patent infringement suit in a Federal District Court in Indiana, an Illinois manufacturer which had no place of business in Indiana was named as a party defendant after it had openly assumed and controlled the defense of its customer, an Indiana corporation which had used the patented device in Indiana. *Held:* By so doing, the Illinois manufacturer did not, as a matter of law, subject itself to the jurisdiction of the Court in Indiana or waive the statutory venue requirements of 28 U. S. C. § 1400 (b). Pp. 260–264.

279 F. 2d 594, affirmed.

Charles J. Merriam argued the cause for petitioners. With him on the brief was *Norman M. Shapiro.*

M. Hudson Rathburn argued the cause for respondents. With him on the brief was *Richard D. Mason.*

MR. JUSTICE CLARK delivered the opinion of the Court.

The sole issue in this patent infringement suit, filed in the Northern District of Indiana, is whether as a matter of law respondent Allbright-Nell Co., an Illinois manufacturer, by openly assuming and controlling in this action the defense of its customer, respondent Peter Eckrich & Sons, Inc., of Indiana, subjected itself to the jurisdiction of that court and waived the statutory venue requirements of 28 U. S. C. § 1400 (b).[1] The motion of

[1] 28 U. S. C. § 1400 (b):

"Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business."

Allbright-Nell to dismiss as to it because venue in the Northern District of Indiana was improper was sustained without opinion. The Court of Appeals affirmed, 279 F. 2d 594.[2] We granted certiorari, 364 U. S. 813. We affirm the judgment.

Allbright-Nell manufactured the alleged infringing device, a machine for cutting sausage meat, known as the "ANCO Emulsitator." It sold some of the devices to Eckrich, whose principal place of business was at Fort Wayne, Indiana. In the contract of sale, Allbright-Nell agreed to defend any infringement suits which might be filed against Eckrich involving the device and to bear all of the expense thereof, including any recovery. While Eckrich was using the machines, petitioners sued it in Indiana for infringement.[3] Pursuant to its contract, Allbright-Nell employed attorneys who defended the suit in the name of Eckrich. Thereafter, before any judgment was entered, petitioners amended their complaint, naming Allbright-Nell as a party defendant. Service was made upon Allbright-Nell by serving its president in Illinois. Motions to quash (on the ground that such service was made outside of the jurisdiction of the court) and to dismiss (on the ground that venue under § 1400 (b) was improper) were promptly filed. The petitioners admit that this service conferred no jurisdiction on the court and also concede that Allbright-Nell had no place of business in Indiana and, therefore, under § 1400 (b), venue as to it could not lie in Indiana. However, they urge that

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[2] The appeal was allowed under 28 U. S. C. § 1292 (b) on the certificate of the District Court that the order dismissing Allbright-Nell involved a controlling question of law and that immediate appeal would materially advance the termination of the litigation.

[3] Subsequently, a second suit involving a different patent was filed in the same court, naming both of the respondents here as defendants. The court entered similar orders in it, and the cases were consolidated on appeal.

the presence of Allbright-Nell through the attorneys, openly defending and controlling the suit against Eckrich, gave the court jurisdiction over the former.[4] In effect, petitioners argue, Allbright-Nell was in fact before the court protecting its own interests, was acting only as a "puppeteer" of Eckrich, and was seeking all the benefits of litigation but attempting to avoid all of its responsibilities, save the ultimate application of *res judicata.* It, therefore, should be deemed to have entered a general appearance and waived its objection to venue. In the face of § 1400 (b), however, we think not.

While objection to venue "may be lost by failure to assert it seasonably, by formal submission in a cause, or by submission through conduct, . . . courts affix to conduct [such] consequences as to place of suit consistent with the policy behind" the applicable venue statute. *Neirbo Co.* v. *Bethlehem Corp.,* 308 U. S. 165, 168. As is pointed out in the cases, Congress adopted the predecessor to § 1400 (b) as a special venue statute in patent infringement actions to eliminate the "abuses engendered" by previous venue provisions allowing such suits to be brought in any district in which the defendant could be served. *Stonite Co.* v. *Melvin Lloyd Co.,* 315 U. S. 561. The Act was designed "to define the exact jurisdiction of the . . . courts in these matters," at p. 565, n. 5, and not to "dovetail with the general [venue] provisions." *Id.,* 566. As late as 1957 we have held § 1400 (b) to be "the sole and exclusive provision controlling venue in patent infringement actions." *Fourco Glass Co.* v. *Transmirra Products Corp.,* 353 U. S. 222, 229 (1957). The language of this special statute is clear and specific. The

[4] It is conceded that Allbright-Nell, by openly controlling the defense of this suit, in which it has an interest, will be bound by the final judgment and precluded by *res judicata,* from relitigating the same issues. *Souffront* v. *La Compagnie Des Sucreries De Porto Rico,* 217 U. S. 475; *Lovejoy* v. *Murray,* 3 Wall. 1.

practice complained of here was not at all unusual at the time of this statute's passage,[5] and for us to enlarge upon the mandate of the Congress as to venue in such patent actions would be an intrusion into the legislative field.

In fact, the petitioners would have us do now what this Court specifically refused to do 45 years ago in *Merriam Co.* v. *Saalfield,* 241 U. S. 22 (1916). There the entire defense of the named defendant (Saalfield) was openly financed and controlled by one Ogilvie, as to whom venue was improper; Merriam sought by supplemental bill to make Ogilvie a defendant before a final judgment was rendered, but after the issue of unfair competition had been decided; and Ogilvie would have been bound by the final judgment under *res judicata.* Nevertheless, his seasonable motion to quash the substituted service had upon the attorneys defending Saalfield was sustained. We believe the holding in *Merriam* completely supports our conclusion here. If a general appearance could be found in such conduct, the facts there were stronger, for the proceedings against Saalfield, handled entirely by Ogilvie, had progressed to the appointment of a master to determine the amount of damages. All that remained when it was sought to join Ogilvie was an accounting. Yet a unanimous Court sustained the dismissal, saying:

> "[I]f the decree [of injunction and accounting] . . . was not final as between appellant [Merriam Co.] and Saalfield, it cannot be *res judicata* as against Ogilvie; and thus the fundamental ground for proceeding against the latter by . . . substituted service of process disappears. This sufficiently shows the

[5] Some 30 years prior to that time this Court had occasion to pass on the effect of such conduct with relation to *res judicata* in *Lovejoy* v. *Murray,* 3 Wall. 1, 19 (1865), which held that one who controlled the defense in a suit was precluded from relitigating in a second action the issues adjudicated in the first.

> weakness of appellant's position, which, upon analysis, is found to be this: that upon the theory that Ogilvie would be estopped by a final decree if and when made, it sought to bring him into the suit, before final decree, as if he were already estopped. However convenient this might be to a complainant in appellant's position, it is inconsistent with elementary principles." At pp. 28–29.

Petitioners stress that here the conduct of Allbright-Nell continued *after* it was named a party. We are not persuaded that this has any bearing upon the issue to be decided. The conduct which will amount to a waiver of venue is that of the defendant alone and nothing a plaintiff might do can change the legal consequences which attach to that conduct. Cf. *Olberding* v. *Illinois Central R. Co.*, 346 U. S. 338. Certainly the point in time at which petitioners sought to join Allbright-Nell will control the amount of its total activities which will be considered in determining whether venue has been waived; but this cannot alter the conclusions to be drawn from that conduct. Therefore, whether Allbright-Nell's actions took place before or after being named a party is immaterial to the question of waiver under the special venue provisions of § 1400 (b).

Petitioners insist that this result exalts form over substance. We think not. "The requirement of venue is specific and unambiguous; it is not one of those vague principles which, in the interest of some overriding policy, is to be given a 'liberal' construction." *Olberding* v. *Illinois Central R. Co., supra,* at 340.

Affirmed.

COSTELLO *v.* UNITED STATES.

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

No. 59. Argued December 12, 1960.—Decided February 20, 1961.

Petitioner was naturalized in 1925 and proceedings were instituted in 1952 to revoke his citizenship because of fraudulent procurement. That proceeding was dismissed because the Government had failed to file an affidavit of good cause, and the District Court declined to specify that the dismissal was "without prejudice." A new proceeding to revoke his citizenship was instituted in 1958 under § 340 (a) of the Immigration and Nationality Act of 1952, on the ground that his naturalization was procured by concealment of a material fact and by willful misrepresentation. In applying for naturalization, petitioner had sworn that his occupation was "real estate." After considering the evidence, the District Court found that this was "willful misrepresentation and fraud" and that his true occupation was bootlegging, and it revoked his citizenship. *Held:* The judgment is affirmed. Pp. 266–288.

1. On the record in this case, the finding that petitioner willfully misrepresented his occupation is supported by clear, unequivocal and convincing evidence—the standard of proof required of the Government in cases such as this. Pp. 269–278.

(a) Decisions both before and after repeal of the Eighteenth Amendment indicate that a known bootlegger probably would not have been admitted to citizenship in 1925. Pp. 270–272.

(b) However "occupation" be defined, whether in terms of primary source of income, expenditure of time and effort, or how the petitioner himself viewed his occupation, the evidence supports the conclusion that real estate was not his occupation and that he was, in fact, a large-scale bootlegger. Pp. 272–275.

(c) There is evidence that petitioner invested his illicit earnings in real estate in the hope of profit; but he was not deriving his principal income from the real estate business, spending any appreciable time conducting such business or making it his central business concern. Pp. 275–277.

(d) The Government's proofs show not only that the petitioner's statements were factually incorrect but also that they were willfully false. P. 277.

(e) The conclusion that petitioner's representations as to his occupation were willfully false is reached without reliance upon any inference from his failure to take the stand in this proceeding and testify in his own behalf. Pp. 277–278.

2. None of petitioner's admissions as to his true occupation at the time of his naturalization was so tainted by wiretapping as to require its exclusion from evidence in the proceedings for revocation of his citizenship. Pp. 278–280.

3. In the circumstances of this case, the lapse of 27 years from the time of petitioner's naturalization to the time of the filing in 1952 of the Government's first denaturalization complaint did not bar the Government from instituting this proceeding to revoke his citizenship. Pp. 281–284.

4. Dismissal of the first denaturalization proceeding for failure to file an affidavit of good cause was a dismissal "for lack of jurisdiction," within the meaning of Rule 41 (b) of the Federal Rules of Civil Procedure. Therefore, the failure of the District Court to specify that the dismissal was "without prejudice" to the filing of a new complaint did not bar the second denaturalization proceeding under that Rule. Pp. 284–288.

275 F. 2d 355, affirmed.

Edward Bennett Williams argued the cause for petitioner. With him on the briefs were *Agnes A. Neill* and *Morris Shilensky.*

Wayne G. Barnett and *Ralph S. Spritzer* argued the cause for the United States. On the briefs were *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Eugene L. Grimm.*

Mr. Justice Brennan delivered the opinion of the Court.

The petitioner became a naturalized citizen on September 10, 1925. The District Court for the Southern District of New York revoked his citizenship on March 9, 1959, in this proceeding brought by the Government under § 340 (a) of the Immigration and Nationality Act of 1952. That Act authorizes revocation of natu-

ralized citizenship "on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation . . . ."[1] The petitioner, in 1925, swore in his Preliminary Form for Naturalization, in his Petition for Naturalization, and when he appeared before a Naturalization Examiner, that his occupation was "real estate." The District Court found that this was "willful misrepresentation and fraud" and that "his true occupation was bootlegging," 171 F. Supp. 10, 16. The Court of Appeals for the Second Circuit affirmed, 275 F. 2d 355. We granted certiorari. 362 U. S. 973.

An earlier denaturalization complaint brought under 8 U. S. C. (1946 ed.) § 738 (a), the predecessor of § 340 (a), was dismissed on the ground that wiretapping may have infected both the Government's affidavit of good cause and its evidence. *United States* v. *Costello,* 145 F. Supp. 892. The Court of Appeals for the Second Circuit reversed on the ground that the Government should have been afforded an opportunity to show that its evidence either was untainted or was admissible

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[1] The statute, 66 Stat. 260, as amended, 68 Stat. 1232; 8 U. S. C. § 1451, reads in pertinent part as follows:

"(a) *Concealment of material evidence; refusal to testify.*

"It shall be the duty of the United States attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 1421 of this title in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation, and such revocation and setting aside of the order admitting such person to citizenship and such canceling of certificate of naturalization shall be effective as of the original date of the order and certificate, respectively: . . . ."

in any event. 247 F. 2d 384. We granted certiorari and reversed, 356 U. S. 256, on a ground not considered below, namely, that the affidavit of good cause, which is a prerequisite to the initiation of denaturalization proceedings under § 340 (a), *United States* v. *Zucca,* 351 U. S. 91, was not filed with the complaint. On remand the District Court declined to enter an order of dismissal "without prejudice" and entered an order which did not specify whether the dismissal was with or without prejudice. The Government did not appeal from that order but brought this new proceeding under § 340 (a) by affidavit of good cause and complaint filed on May 1, 1958.

The petitioner argues several grounds for reversal of the order revoking his citizenship. He contends: (1) that the finding that he willfully misrepresented his occupation is not supported by clear, unequivocal, and convincing evidence, the standard of proof required of the Government in these cases; (2) that some of his admissions as to his true occupation at the time of his naturalization were tainted by wiretapping, and thus were not evidence which the District Court might rely upon in reaching its conclusion; (3) that in the circumstances of this case the lapse of 27 years from the time of the petitioner's naturalization to the time of the filing in 1952 of the Government's first complaint should be deemed to bar the Government from instituting this proceeding; (4) that the second denaturalization proceeding was barred under Rule 41 (b) of the Federal Rules of Civil Procedure by the failure of the District Court on remand of the first proceeding to specify that the dismissal was "without prejudice" to the filing of a new complaint.

We find no merit in any of these contentions.[2] The judgment of the Court of Appeals will be affirmed.

[2] The District Court also found that the petitioner knowingly and willfully swore false allegiance to the Constitution and laws of the United States. Like the Court of Appeals, 275 F. 2d, at 360, we find

I.

The Government carries a heavy burden of proof in a proceeding to divest a naturalized citizen of his citizenship. American citizenship is a precious right. Severe consequences may attend its loss, aggravated when the person has enjoyed his citizenship for many years. See *Schneiderman* v. *United States,* 320 U. S. 118, 122–123; *Nowak* v. *United States,* 356 U. S. 660, 663. In *Chaunt* v. *United States,* 364 U. S. 350, 352–353, we said:

> "Acquisition of American citizenship is a solemn affair. Full and truthful response to all relevant questions required by the naturalization procedure is, of course, to be exacted, and temporizing with the truth must be vigorously discouraged. Failure to give frank, honest, and unequivocal answers to the court when one seeks naturalization is a serious matter. Complete replies are essential so that the qualifications of the applicant or his lack of them may be ascertained. Suppressed or concealed facts, if known, might in and of themselves justify denial of citizenship. Or disclosure of the true facts might have led to the discovery of other facts which would justify denial of citizenship.
>
> "On the other hand, in view of the grave consequences to the citizen, naturalization decrees are not lightly to be set aside—the evidence must indeed be 'clear, unequivocal, and convincing' and not leave 'the issue . . . in doubt.' *Schneiderman* v. *United States,* 320 U. S. 118, 125, 158; *Baumgartner* v. *United States,* 322 U. S. 665, 670. The issue in these cases is so important to the liberty of the citizen that

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it unnecessary to pass upon the petitioner's attack upon this finding, since we think that the revocation of his citizenship on the first ground was clearly correct.

> the weight normally given concurrent findings of two lower courts does not preclude reconsideration here . . . ."

In 1925 a known bootlegger would probably not have been admitted to citizenship. Decisions before and after the repeal of the Eighteenth Amendment held that the applicant who trafficked in the sale, manufacture, or transportation of intoxicating liquors during Prohibition, within the five years preceding his application, did not meet the statutory criterion that an applicant must have behaved as a person "of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same." Act of 1906, § 4, 34 Stat. 596, 598.

In *United States* v. *De Francis,* 60 App. D. C. 207, 208, 50 F. 2d 497, 498, the Court of Appeals for the District of Columbia stated, "Any person who violates the provisions of the Prohibition Act violates the principles of the Constitution of the United States, and cannot be held to be attached to the principles of the Constitution of the United States. Nor can it be said that such a person possesses good moral character."

In *Turlej* v. *United States,* 31 F. 2d 696, 699, it was said, "Few cases can be found where applicants for citizenship have been admitted, if guilty of violating liquor laws within the five years preceding the hearing, and such cases have been severely criticized by the courts. This was true even before the adoption of the Eighteenth Amendment as a part of our national Constitution." See also *In re Trum,* 199 F. 361.

In *United States* v. *Villaneuva,* 17 F. Supp. 485, 487, the court said, "Courts have quite universally held that violations of prohibition liquor laws, whether national or state, should be taken into consideration in determining questions respecting the good moral character of appli-

cants for citizenship and their attachment to the principles of the Constitution of the United States."

In *United States* v. *Mirsky,* 17 F. 2d 275, a denaturalization case, Judge Thacher of the District Court for the Southern District of New York, who had admitted Costello to citizenship less than a year earlier, said: "One who deliberately violates the Eighteenth Amendment of the Constitution cannot be said to be attached to the principle declared by that amendment." P. 275. "Neither the fact that in this and in other communities there are many citizens who are not attached in thought or deed to the principle embodied in the Constitution by the Eighteenth Amendment, nor the fact that opposition to that principle with a view to removing it from the Constitution is quite generally thought to be the part of good citizenship, can relieve this court of its duty to apply the law as it is now written." P. 276.

See also *In re Nagy,* 3 F. 2d 77; *In re Raio,* 3 F. 2d 78; *In re Phillips,* 3 F. 2d 79; *In re Bonner,* 279 F. 789; *Ex parte Elson,* 299 F. 352.

Some of these cases turned on a finding of illegal procurement of the certificate because of demonstrated lack of attachment to the principles of the Constitution rather than upon "fraud" under 8 U. S. C. (1946 ed.) § 738 (a).[3]

[3] Section 340 (a) authorizes denaturalization on the single ground of "concealment of a material fact or . . . willful misrepresentation." Its predecessors, § 338 (a) of the Nationality Act of 1940, and § 15 of the original Act of Congress in 1906 giving statutory basis for denaturalization, authorized denaturalization for "fraud" or illegal procurement. The change from "fraud" to "concealment of a material fact or . . . willful misrepresentation" apparently was made primarily to remove doubt as to whether denaturalization could be based on so-called "intrinsic" fraud, fraud through false swearing in the naturalization proceedings, or only on the traditional equity ground for cancellation of a judgment, "extrinsic" fraud, inhering in activities collateral to the proceedings themselves such as the

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However, the cases demonstrate the materiality of the concealment by the petitioner of his bootlegging if that in fact was his true occupation. Such concealment would support the conclusion that he was an applicant who had "[s]uppressed or concealed facts . . . [which] . . . if known, might in and of themselves justify denial of citizenship." *Chaunt* v. *United States, supra,* at 352–353.

We have examined the record to determine if the evidence leaves "the issue in doubt," *Schneiderman* v. *United States,* 320 U. S. 118, 158, whether the petitioner procured his naturalization by willfully misrepresenting that his occupation was real estate. It does not. However occupation is defined, whether in terms of primary source of income, expenditure of time and effort, or how the petitioner himself viewed his occupation, we reach the conclusion that real estate was not his occupation and that he was in fact a large-scale bootlegger.

The Government built its case on a solid foundation of admissions made by the petitioner in several federal

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concealment of witnesses from the court. Certain lower court cases had indicated that only extrinsic fraud might be encompassed within the term, compare *United States* v. *Kusche,* 56 F. Supp. 201, with *United States* v. *Hauck,* 155 F. 2d 141, in accordance with the rule that had apparently been applied to revocation of a judgment admitting to citizenship prior to the Act of 1906, see *United States* v. *Gleeson,* 90 F. 778; cf. *United States* v. *Norsch,* 42 F. 417. Congress thus acted in 1952 to make it clear that false statements in the course of the naturalization proceedings could be the basis for revocation of citizenship. See S. Rep. No. 1515, 81st Cong., 2d Sess. 756–769. But there appears to be no congressional purpose to lay down a looser definitional standard for "willful misrepresentation" or laxer requirements of proof than had previously been applied by the courts which held misstatements during naturalization proceedings to constitute fraud under the prior statutes. The practice of the Immigration and Naturalization Service apparently treated "fraud" under the older Acts as involving willful misrepresentation or concealment of material facts. See S. Rep. No. 1515, 81st Cong., 2d Sess. 756.

and New York State inquiries beginning in 1938. In that year he admitted to a Special Agent of the Bureau of Internal Revenue that he had engaged in the illicit liquor business from 1923 or 1924 until a year or two before the repeal of the Eighteenth Amendment in 1933. In 1939 he testified before a federal grand jury in the Southern District of New York that "I did a little bootlegging. . . . The last time was around 1926." In 1943 he testified before a New York County grand jury that he had been in the liquor business in the twenties and had an office at 405 Lexington Avenue, New York City, as early as 1925. He also admitted that he had reported an aggregate income of $305,000 for New York State income tax purposes for the years 1919 to 1932 and that "[m]aybe most of it" was earned in the bootlegging business. Indeed, except for $25,000 realized from a real estate venture to be discussed shortly, there was no evidence of income from any legitimate business. In 1943, in a proceeding before an Official Referee of the Appellate Division of the Supreme Court of New York, he acknowledged that money he had lent to Arnold Rothstein, prior to the latter's murder in 1928, might have been derived "from a little bootlegging"; he also admitted that during the Prohibition era his business of smuggling alcoholic liquors into the United States was "profitable." In 1947 he appeared before the New York State Liquor Authority and testified that from 1923 to 1926 he operated a bootlegging business from 405 Lexington Avenue.

Several of his associates in bootlegging enterprises presented a picture of large-scale operations by the petitioner from early in Prohibition past the time of his application for citizenship. Emanuel Kessler, a big operator apprehended in 1923 and convicted for his activities, financed, about 1921, the petitioner's purchase of trucks to haul Kessler's liquors after Kessler landed them on Long Island

from boats on the high seas. Kessler "very often" discussed shipments with the petitioner in telephone calls to the Lexington Avenue office. Kessler's volume at the time was about 3,000 cases per week and he paid the Costello organization approximately $6,000 a week for haulage and storage. Kessler said that before he began serving his sentence "Frank Costello personally asked me . . . for some money so he could continue on. I think I left him either 100 or 200 cases."

Frank Kelly, who began bootlegging about 1922, smuggled liquors into the country using a chartered ship which he moored off the Long Island shore. He became associated with the petitioner in 1925 when he was introduced to the petitioner and the petitioner's Canadian representative, Harry Sausser, at Montauk, Long Island. On this occasion, Sausser negotiated with Kelly for the storage of liquors on Kelly's boat. Kelly was one of a combine including the petitioner which was indicted in 1925 for conspiracy to violate the liquor laws.

Philip Coffey, also indicted with the petitioner in 1925, was a former Kessler employee. He purchased liquor from the Costello organization at 405 Lexington Avenue as early as 1922 or 1923. He insisted that he did "all my business with Eddie Costello," the petitioner's brother, but admitted placing orders with Edward in the petitioner's presence and discussing purchases with the petitioner. Coffey told of an occasion, which he thought occurred in 1925, when Kelly and the petitioner came by automobile to Montauk Point and Kelly gave him instructions for the removal of liquor from Kelly's chartered schooner. He said that he was paid for his services at petitioner's Lexington Avenue office by Edward Ellis, the petitioner's bookkeeper.

Albert Feldman, another admitted bootlegger, started in 1920 and dealt with both the petitioner and Kessler. He arranged with the petitioner about 1923 at the

Lexington Avenue office to have the petitioner haul and store some liquor for him. He also talked with the petitioner regarding its sale. The petitioner told Feldman he had "a customer for the 1000 cases," that he "could sell them and he would be able to pay me in a few days, as soon as they were delivered, to which I agreed; and Frank said that 'I'll be responsible for the money.'" In regard to the petitioner's role in liquor transactions, Feldman said, "everything was Frank Costello. He was the business man. He did all the business."

Helen L. Sausser, daughter of Harry Sausser, was 18 when she became acquainted with the petitioner in 1925. Sausser was one of the two persons who executed the affidavit attached to the petitioner's Petition for Naturalization and swore that he also was in the real estate business. The daughter recalled overhearing conversations between petitioner and her father about liquor, and said that her father admitted to her mother that he was engaged in bootlegging. The daughter testified that she had never known her father to engage in the real estate business.

Despite these strong proofs of the falsity of the petitioner's answers, the petitioner insists that the evidence derived from the Government's own investigation of his activities in the real estate business should leave us with a troubling doubt whether he stated falsely that he was engaged in that occupation. He had told the New York grand jury in 1943, when asked what "other occupation" besides bootlegging he followed during Prohibition, that "I was doing a little real estate at that time." The Government put in evidence in this proceeding state corporate records and records from the Registries of Deeds in New York City. These show that petitioner was indeed identified with three corporations empowered to engage in the purchase and sale of real estate. We dismiss two of the corporations, organized in 1926, without further men-

tion beyond the fact that the petitioner testified before the Official Referee in the Appellate Division that his investment of $25,000 or $30,000 in one of them came from "bootlegging or gambling"; there was no evidence of any real estate transactions involving either company. The petitioner's contention must therefore be tested in the light of the activities of Koslo Realty Corporation. This corporation was organized in December 1924 and at least as early as August 1925 listed its address as the petitioner's office, 405 Lexington Avenue. A December 1925 document lists the petitioner as president of the company. The only evidence of any investment by the petitioner or profitable transaction in which he engaged before May 1, 1925, when he filed his Petition for Naturalization, concerned a property at West End Avenue and 92d Street, Manhattan, acquired by the corporation in December 1924. The petitioner admitted before the New York County grand jury that his investment in that transaction was from earnings in "gambling or liquor" and claimed that he made a profit of $25,000 on the sale of the property in June 1925. The only other transactions occurred after May 1, 1925. The corporation bought lots in the Bronx in August and October 1925. Some of the lots were improved and all of them were sold in 1926.

These proofs raise no troubling doubt in our minds. They do not support an inference that his occupation was real estate. They show only that the petitioner invested his illicit earnings in real estate transactions with the hope of profit. But he was neither deriving his principal income from Koslo Realty Corporation, spending any appreciable time conducting its affairs, nor making it his central business concern. He himself admitted that he operated his bootlegging enterprises from the Lexington Avenue address. All of the witnesses who testified to activities at that address recounted bootlegging transactions and not one in real estate. And the postman who

delivered mail to the office from 1924 to 1926, and saw the petitioner there several times a week, saw neither a secretary nor a typewriter as might be expected in an active real estate business.

The Government's proofs show not merely that the petitioner's statements were factually incorrect, but show clearly, unequivocally, and convincingly that the statements were willfully false. The petitioner argues that the evidence is susceptible of the inference that he may have believed that the questions called for the disclosure only of a legal occupation. We may assume that "occupation" can be a word of elusive content in some circumstances, like the question involved in *Nowak* v. *United States, supra,* and *Maisenberg* v. *United States,* 356 U. S. 670, upon which decisions the petitioner relies. But that argument of ambiguity is farfetched here. No one in the petitioner's situation could have reasonably thought that the questions could be answered truthfully as they were. It would have been a palpable absurdity for him to think that his occupation was real estate; he actually had no legal occupation. On this record, his only regular and continuing concern was his bootlegging upon which he depended for his livelihood. He only dabbled in real estate and by his own admission financed even this sideline from "liquor or gambling." We need not determine whether the evidence supports the conclusion that petitioner organized Koslo Realty Corporation to provide him with a façade or front to mislead the law-enforcement authorities as to his true occupation, although the appearance of a legitimate occupation was obviously convenient for him and his group. We are convinced, however, that the petitioner counted upon the corporation to give plausibility to his representation as to his occupation when he applied for citizenship.

Our conclusion that his representations were willfully false is reached without reliance upon an inference from

the failure of the petitioner to take the stand in this proceeding and testify in his own behalf. The Court of Appeals made some comments as to the significance of the petitioner's failure to testify, 275 F. 2d, at 358, but we do not read its opinion as basing the affirmance of the District Court's order upon such an inference. The district judge, whose order the Court of Appeals affirmed, made none. The evidence so strongly supports the District Court's conclusion that the aid of the inference was unnecessary to buttress it. We therefore find it unnecessary to decide in this case whether an inference may be drawn in a denaturalization proceeding from the failure of the defendant to present himself as a witness.

II.

The contention that illegal wiretapping precluded reliance upon the petitioner's admissions rests primarily upon interrogations by New York County District Attorney Frank Hogan in 1943 when the petitioner appeared before the New York County grand jury and the Official Referee in the Appellate Division. State officers had a tap on the petitioner's telephone during several months of 1943. Mr. Hogan made frequent references to the tapped conversations when questioning the petitioner. The petitioner claims that his admissions of bootlegging activities during Prohibition were impelled by the belief that Mr. Hogan had learned from the tapped conversations the information sought by the questions. It is argued that the wiretaps were illegal under our decision in *Benanti* v. *United States,* 355 U. S. 96, and that his admissions were therefore to be excluded from evidence as "fruit of the poisonous tree," on the reasoning in *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, and *Nardone* v. *United States,* 308 U. S. 338.

The short answer to this contention is that we conclude from the record that his truthful answers to Mr.

Hogan's questions were not given because he thought that the conversations tapped in 1943 revealed his activities in the Prohibition era, but because he realized that these facts had been known to the authorities for some time. None of Mr. Hogan's questions even implies that Mr. Hogan gained his information from the 1943 wiretaps. Mr. Hogan had a transcript of the 1939 federal grand jury minutes of the petitioner's appearance before that body. The petitioner presses no argument in this Court that his admissions before that grand jury were infected with wiretapping. Early in Mr. Hogan's examination, the petitioner admitted that he recalled being questioned before the grand jury in 1939. The questioning at that proceeding had elicited the petitioner's admission of his bootlegging. Furthermore, his arrest and trial under the 1925 indictment for conspiracy to violate the liquor laws were matters of public record. And in 1938 the petitioner had also admitted his bootlegging to the agent for the Bureau of Internal Revenue. It is plain common sense to conclude that this information, long a matter of official knowledge, not something which he thought might have been disclosed in the 1943 wiretaps, impelled the petitioner to answer Mr. Hogan truthfully.

Moreover, District Attorney Hogan testified in the present proceeding. He expressly disavowed that his questions of the petitioner as to his activities during Prohibition were based on the 1943 wiretaps. He testified that his information was derived from files of the District Attorney's office, newspaper reports and court records. Although one of the intercepted telephone conversations was between the petitioner and one O'Connell, a codefendant in the 1925 Prohibition prosecution, Mr. Hogan stated that none of the 1943 wiretaps concerned the petitioner's bootlegging activities. The 1943 grand jury and Appellate Division investigations were concerned only

with the petitioner's part in the nomination that year of a candidate for Justice of the State Supreme Court.

It is true that the 1943 wiretaps prompted the calling of the petitioner before the county grand jury and the Official Referee. But the "fruit of the poisonous tree" doctrine excludes evidence obtained from or as a consequence of lawless official acts, not evidence obtained from an "independent source." *Silverthorne Lumber Co.* v. *United States, supra,* at 392. We said in *Nardone* v. *United States,* 308 U. S. 338, 341, "Sophisticated argument may prove a causal connection between information obtained through illicit wire-tapping and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint." We are satisfied that any knowledge in Mr. Hogan's possession which impelled the petitioner to answer truthfully came from such independent sources and that any connection between the wiretaps and the admissions was too attenuated to require the exclusion of the admissions from evidence.[4]

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[4] The petitioner makes reference to the opinion of the District Court rendered upon the dismissal of the first complaint. That opinion rested the conclusion that the affidavit of good cause and the evidence were infected with wiretapping partly upon wiretaps said to have been made in the 1920's. The district judge found "indications of the extensive use of wire taps covering a period of many years and beginning in the 1920's." 145 F. Supp., at 894. However, the district judge in this proceeding heard the testimony of two former Assistant United States Attorneys who conducted the investigation leading to the petitioner's indictment in 1925. The district judge "accepted as true" their testimony "that the Government's information as to the bootlegging activities of Costello was not derived from telephone conversations but was derived from statements of certain individuals acquainted with the defendant's activities." 171 F. Supp., at 25. We see no basis for disturbing this finding and the District Court's conclusion that no taint from wiretaps in the 1920's infected the later admissions made by the petitioner.

III.

In contending that lapse of time should be deemed to bar the Government from instituting this proceeding, the petitioner argues that the doctrine of laches should be applied to denaturalization proceedings, and that in any event, the delay of 27 years before bringing denaturalization proceedings denied him due process of law in the circumstances of the case.

It has consistently been held in the lower courts that delay which might support a defense of laches in ordinary equitable proceedings between private litigants will not bar a denaturalization proceeding brought by the Government. See *United States* v. *Ali,* 7 F. 2d 728; *United States* v. *Marino,* 27 F. Supp. 155; *United States* v. *Cufari,* 120 F. Supp. 941, reversed on other grounds, 217 F. 2d 404; *United States* v. *Parisi,* 24 F. Supp. 414; *United States* v. *Brass,* 37 F. Supp. 698; *United States* v. *Spohrer,* 175 F. 440; *United States* v. *Reinsch,* 50 F. Supp. 971, reversed on other grounds, 156 F. 2d 678; *United States* v. *Schneiderman,* 33 F. Supp. 510, reversed on other grounds, 320 U. S. 118. These cases have applied the principle that laches is not a defense against the sovereign. The reason underlying the principle, said Mr. Justice Story, is "to be found in the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers." *United States* v. *Hoar,* 26 Fed. Cas. 329, 330 (No. 15,373). This Court has consistently adhered to this principle. See, for example, *United States* v. *Kirkpatrick,* 9 Wheat. 720, 735–737; *United States* v. *Knight,* 14 Pet. 301, 315; see also *United States* v. *Summerlin,* 310 U. S. 414, 416; *Board of County Commissioners* v. *United States,* 308 U. S. 343, 351; *United States* v. *Thompson,* 98 U. S. 486, 489.

None of the cases in this Court considered the question of the application of laches in a denaturalization proceeding. However, even if we assume the applicability of laches, we think that the petitioner failed to prove both of the elements which are necessary to the recognition of the defense. Laches requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense. See *Galliher* v. *Cadwell,* 145 U. S. 368, 372; *Southern Pacific Co.* v. *Bogert,* 250 U. S. 483, 488–490; *Gardner* v. *Panama R. Co.,* 342 U. S. 29, 31.

The petitioner alleges lack of diligence in the Government's failure to proceed to revoke his certificate within a reasonable time after his arrest and trial under the 1925 indictment for conspiracy to violate the Prohibition laws, or at least within a reasonable time after his admissions before the federal grand jury in 1939. There is no necessity to determine the merits of this argument, for the record is clear that the petitioner was not prejudiced by the Government's delay in any way which satisfies this requisite of laches. In *Brown* v. *County of Buena Vista,* 95 U. S. 157, 161, this Court said: "The law of laches, like the principle of the limitation of actions, was dictated by experience, and is founded in a salutary policy. The lapse of time carries with it the memory and life of witnesses, the muniments of evidence, and other means of proof." Insofar as these factors inherent in the lapse of time were operative in the present case, they seem plainly to have worked to petitioner's benefit, not to his detriment. The evidence of the petitioner's real estate activity consisted almost exclusively of public records. There is no suggestion that these records are not all the evidence of real estate activity there is or that any had been destroyed or were unavailable. Nor do we perceive any prejudice to the petitioner in the fact that the Naturaliza-

tion Examiners who processed his application, the witnesses who appeared for him, and the judge who admitted him to citizenship, are dead. The examiners and the judge obviously could supply no evidence bearing on his claim that real estate was his occupation. Their knowledge on that subject came from him. And it stretches credulity to suppose that he would have inquired of those officials whether "occupation" meant lawful occupation. Finally, the petitioner does not suggest how the witnesses who supported his petition could have aided him on any issue material in this proceeding. In addition, his bootlegging associate, Sausser, died in 1926, and would not have been available even had the Government brought a proceeding immediately after the criminal trial.

Indeed, any harm from the lapse of time was to the Government's case. Although that case was supported primarily by documentary proofs and the petitioner's admissions, the Government supplemented this evidence with the testimony of the petitioner's associates in the bootlegging enterprise, and of others who had knowledge of those events. The Government's proof was made more difficult when a number of the witnesses admitted that their memories of details had dimmed with the passage of the years.

We cannot say, moreover, that the delay denied the petitioner fundamental fairness. He suffered no prejudice from any inability to prove his defenses. Rather, the harm he may suffer lies in the harsh consequences which may attend his loss of citizenship. He has been a resident of the United States for over 65 years, since the age of four. We may assume that he has built a life in reliance upon that citizenship. But Congress has not enacted a time bar applicable to proceedings to revoke citizenship procured by fraud. On this record, the petitioner never had a right to his citizenship. Depriving

him of his fraudulently acquired privilege, even after the lapse of many years, is not so unreasonable as to constitute a denial of due process. Cf. *Johannessen* v. *United States,* 225 U. S. 227, 242–243.

IV.

The petitioner moved for leave to amend his petition for a writ of certiorari to add a question whether the present proceeding was barred by the order of the District Court dismissing the earlier proceeding on remand, without specifying whether the dismissal was with or without prejudice. We deferred decision on the motion pending oral argument. The motion is granted and we proceed to determine the merits of the question.

It is the petitioner's contention that the order dismissing the earlier complaint must be construed to be with prejudice because it did not specify that it was without prejudice, and the ground of dismissal was not within one of the exceptions under Rule 41 (b) of the Federal Rules of Civil Procedure. That Rule provides:

> "For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits."

We hold that a dismissal for failure to file the affidavit of good cause is a dismissal "for lack of jurisdiction," within the meaning of the exception under Rule 41 (b). In arguing contra, the petitioner relies on cases which hold that a judgment of denaturalization resulting from a proceeding in which the affidavit of good cause was not filed is not open to collateral attack on that ground. *Title* v. *United States,* 263 F. 2d 28; *United States* v. *Failla,* 164 F. Supp. 307. We think that petitioner misconceives the scope of this exception from the dismissals under Rule 41 (b) which operate as adjudications on the merits unless the court specifies otherwise. It is too narrow a reading of the exception to relate the concept of jurisdiction embodied there to the fundamental jurisdictional defects which render a judgment void and subject to collateral attack, such as lack of jurisdiction over the person or subject matter. We regard the exception as encompassing those dismissals which are based on a plaintiff's failure to comply with a precondition requisite to the Court's going forward to determine the merits of his substantive claim. Failure to file the affidavit of good cause in a denaturalization proceeding falls within this category. *United States* v. *Zucca, supra; Costello* v. *United States,* 356 U. S. 256.

At common law dismissal on a ground not going to the merits was not ordinarily a bar to a subsequent action on the same claim. In *Haldeman* v. *United States,* 91 U. S. 584, 585–586, which concerned a voluntary nonsuit, this Court said, "there must be at least one decision on a *right* between the parties before there can be said to be a termination of the controversy, and before a judgment can avail as a bar to a subsequent suit. . . . There must have been a right adjudicated or released in the first suit to make it a bar, and this fact must appear affirmatively." A similar view applied to many dismissals on the motion

of a defendant. In *Hughes* v. *United States,* 4 Wall. 232, 237, it was said: "In order that a judgment may constitute a bar to another suit, it must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same in both cases, and must be determined on its merits. If the first suit was dismissed for defect of pleadings, or parties, or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit." See also *House* v. *Mullen,* 22 Wall. 42, 46; *Swift* v. *McPherson,* 232 U. S. 51, 56; *St. Romes* v. *Levee Steam Cotton Press Co.,* 127 U. S. 614, 619; *Burgett* v. *United States,* 80 F. 2d 151; *Gardner* v. *United States,* 71 F. 2d 63.

We do not discern in Rule 41 (b) a purpose to change this common-law principle with respect to dismissals in which the merits could not be reached for failure of the plaintiff to satisfy a precondition. All of the dismissals enumerated in Rule 41 (b) which operate as adjudications on the merits—failure of the plaintiff to prosecute, or to comply with the Rules of Civil Procedure, or to comply with an order of the Court, or to present evidence showing a right to the relief on the facts and the law—primarily involve situations in which the defendant must incur the inconvenience of preparing to meet the merits because there is no initial bar to the Court's reaching them. It is therefore logical that a dismissal on one of these grounds should, unless the Court otherwise specifies, bar a subsequent action. In defining the situations where dismissals "not provided for in this rule" also operate as adjudications on the merits, and are not to be deemed jurisdictional, it seems reasonable to confine them to those situations where the policy behind the enumerated grounds is equally applicable. Thus a *sua sponte* dismissal by the Court for failure of the plaintiff to comply

with an order of the Court should be governed by the same policy. Although a *sua sponte* dismissal is not an enumerated ground, here too the defendant has been put to the trouble of preparing his defense because there was no initial bar to the Court's reaching the merits. See *United States* v. *Procter & Gamble Co.*, 356 U. S. 677, 680, and footnote 4; *American Nat. Bank & Trust Co.* v. *United States*, 79 U. S. App. D. C. 62, 142 F. 2d 571.[5]

In contrast, the failure of the Government to file the affidavit of good cause in a denaturalization proceeding does not present a situation calling for the application of the policy making dismissals operative as adjudications on the merits. The defendant is not put to the necessity of preparing a defense because the failure of the Government to file the affidavit with the complaint requires the dismissal of the proceeding. Nothing in the term "jurisdiction" requires giving it the limited meaning that the petitioner would ascribe to it. Among the terms of art in the law, "jurisdiction" can hardly be said to have a fixed content. It has been applied to characterize other prerequisites of adjudication which will not be re-exam-

[5] The inapplicability of the policy of the rule to other dismissals for failure to meet a precondition of adjudication has been recognized. The Advisory Committee on Amendments to the Federal Rules recommended in 1955 the addition of another specific exception, for dismissals for "lack of an indispensable party." Although the proposal was not adopted, one commentator has written:

"Undoubtedly a dismissal for lack of an indispensable party should be a dismissal without prejudice since the dismissal proceeds on the theory that his presence is required in order that the court may make an adjudication equitable to all persons involved. . . . The Committee's proposal would, however, take care of the situation where the court did not specifically provide that the dismissal was without prejudice; and thus expressly provide a result which the courts, of necessity, would have to reach even if the dismissal did not specify that it was without prejudice." 5 Moore, Federal Practice, 1959 Cum. Supp., p. 38.

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ined in subsequent proceedings and must be brought into controversy in the original action if a defendant is to litigate them at all. See, *e. g., Des Moines Navigation & R. Co.* v. *Iowa Homestead Co.,* 123 U. S. 552 (diversity of citizenship); *In re Sawyer,* 124 U. S. 200, 220–221 (jurisdictional amount). See generally *Noble* v. *Union River Logging R. Co.,* 147 U. S. 165, 173–174. Decisions in the lower courts applying the exception construe "jurisdiction" to encompass dismissals on grounds similar to that in the present case. See *Madden* v. *Perry,* 264 F. 2d 169; *Myers* v. *Westland Oil Co.,* 96 F. Supp. 667, reversed on other grounds, 181 F. 2d 371. We therefore hold that the Government was not barred from instituting the present proceeding.

Affirmed.

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

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

I do not think "bootlegging" *per se* would have been a ground for denying naturalization to an alien in the 1920's. If it were, it would be an act of hypocrisy unparalleled in American life. For the "bootlegger" in those days came into being because of the demand of the great bulk of people in our communities—including lawyers, prosecutors, and judges—for his products. However that may be, the forms of naturalization in use at the time did not ask for disclosure of all business activities of an applicant or of all sources of income. If that had been asked and if only one source of income were disclosed, then there would be a concealment relevant to our present problem—whether the nondisclosed income was from bootlegging, playing the races, bridge or poker games, or something else. The "occupation" of an applicant was

the question in the form Costello filed.* The form of the petition for naturalization did not ask for more; and unless we can say that "real estate" was not his "occupation" then we cannot let this denaturalization order stand. The Koslo Realty Corporation actually existed and petitioner was its president. It actually engaged in real estate transactions. The fact that this real estate business was secondary in petitioner's regime did not make it any the less his "occupation." Petitioner answered truthfully when he listed "real estate" as his "occupation." He did not answer truthfully if the answer is taken to embrace all his sources of income. But, as I said, the form did not require that complete disclosure; and I would not resolve any ambiguity in favor of the Government. We could not do so and be true to the strict standard exacted from the Government by *Schneiderman* v. *United States,* 320 U. S. 118, 122–123.

*The printed form of the Petition for Naturalization in use at the time had in it as item "Second" a line headed "My occupation is." After these words petitioner entered the words "Real Estate."

UNITED STATES *v.* LUCCHESE, ALIAS LUCKESE, ALIAS LUCASE, ALIAS ARRA, ALIAS LUCHESE.

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

No. 57. Argued December 8, 12, 1960.—Decided February 20, 1961.

This denaturalization proceeding against respondent was dismissed by the District Court because of failure of the Government to file an affidavit of good cause with the complaint, and that Court did not specify that the dismissal was "without prejudice." The Court of Appeals dismissed the Government's appeal, and this Court granted certiorari, which was sought by the Government only to assure its right to proceed against respondent in a new proceeding. *Held:* Under Rule 41 (b) of the Federal Rules of Civil Procedure, such a form of dismissal does not bar a new denaturalization proceeding against respondent, *Costello* v. *United States, ante,* p. 265, and, accordingly, the writ of certiorari is dismissed. Pp. 290–291.

Writ of certiorari dismissed.

Wayne G. Barnett argued the cause for the United States. On the brief were *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Eugene L. Grimm.*

Richard J. Burke argued the cause for respondent. With him on the brief was *Myron L. Shapiro.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This denaturalization proceeding was brought in the District Court for the Eastern District of New York under § 338 (a) of the Nationality Act of 1940. 8 U. S. C. (1946 ed.) § 738. The "good cause" affidavit was not filed with the complaint. The District Court dismissed the complaint following our decision in *United States* v. *Zucca,* 351 U. S. 91, "without prejudice to the government's right to institute a proceeding to denaturalize the defendant upon

the filing of the required affidavit." 149 F. Supp. 952. The Court of Appeals for the Second Circuit reversed, holding that the dismissal motion should have been denied. 247 F. 2d 123. We reversed and ordered the case "remanded to the District Court with directions to dismiss" the complaint. 356 U. S. 256. The District Court on the remand declined to order a dismissal "without prejudice" and instead entered an order which did not specify whether the dismissal was with or without prejudice. The Court of Appeals for the Second Circuit dismissed the Government's appeal in an unreported opinion which stated that "there was no basis for [the district judge] to take action other than he did, namely, to comply with the clear command of the Supreme Court, without attempted embellishment. We have no occasion now to pass on the effect of that command upon possible later litigation."

The Government filed its petition for certiorari only to assure its right to proceed against the respondent in a new proceeding in the event that we should rule in *Costello* v. *United States, ante,* p. 265, that the order entered by the District Court for the Southern District of New York in that case precluded the institution of the second denaturalization action against Costello. Our decision today in *Costello* establishes that such a form of dismissal does not bar a subsequent proceeding against the respondent. The writ is therefore

Dismissed.

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

BULLOCK *v.* SOUTH CAROLINA.

CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA.

No. 78. Argued January 9, 1961.—Decided February 20, 1961.

The totality of circumstances as the record makes them manifest did not warrant bringing this case here, and the writ of certiorari is dismissed.

Reported below: 235 S. C. 356, 111 S. E. 2d 657.

Matthew J. Perry argued the cause for petitioner. With him on the brief were *Lincoln C. Jenkins, Jr.* and *Donald James Sampson.*

Robert L. Kilgo argued the cause for respondent. With him on the brief were *Daniel R. McLeod,* Attorney General of South Carolina, *Everett N. Brandon,* Assistant Attorney General, and *S. Norwood Gasque.*

PER CURIAM.

After hearing oral argument and fully examining the record which was only partially set forth in the petition for certiorari, we conclude that the totality of circumstances as the record makes them manifest did not warrant bringing the case here. Accordingly, the writ is dismissed.

Per Curiam.

NOLAN, ADMINISTRATOR, ET AL. *v.* TRANSOCEAN AIR LINES.

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

No. 107. Argued January 12, 16, 1961.—Decided February 20, 1961.

With jurisdiction based solely on diversity of citizenship, this action was brought in a Federal District Court in New York to recover under the California Wrongful Death Statute for the death in California of a passenger on an airplane operated by a California corporation. Applying what it believed to be applicable California law, as declared by its intermediate appellate tribunals, the District Court dismissed the action as barred by limitations, and the Court of Appeals affirmed. *Held:* The judgment of the Court of Appeals is vacated and the case is remanded to that Court for reconsideration in the light of a considered dictum of the Supreme Court of California, announced after the ruling of the District Court and not brought to the attention of the Court of Appeals, which might lead to a different result. Pp. 293–296.

Reported below: 276 F. 2d 280.

Robert A. Dwyer argued the cause for petitioners. With him on the brief were *Edward M. O'Brien* and *Harry S. Wender.*

William J. Junkerman argued the cause for respondent. With him on the brief was *James B. McQuillan.*

PER CURIAM.

This action was brought in the United States District Court for the Southern District of New York to recover damages for the wrongful death of Jasper W. Hall, a resident of South Carolina, who was killed in California in the crash of an airplane operated by defendant-respondent Transocean Air Lines. Plaintiffs, petitioners here, are

the decedent's South Carolina-appointed administrator, decedent's widow, and decedent's minor child, who sues through the widow, her mother, appointed her guardian *ad litem* by the District Court. Federal jurisdiction was predicated solely on diversity of citizenship—the administrator being a New York resident, the widow and child South Carolina residents, the airline a California corporation with its principal place of business in California—and the substantive basis of the claim was California's Wrongful Death Statute, Cal. Code Civ. Proc. § 377, made applicable by the New York choice-of-law rules, see *Baldwin* v. *Powell,* 294 N. Y. 130, 61 N. E. 2d 412, which govern this diversity action. *Erie R. Co.* v. *Tompkins,* 304 U. S. 64; *Klaxon Co.* v. *Stentor Elec. Mfg. Co.,* 313 U. S. 487. The defendant, by its answer, set up the Statute of Limitations, and subsequently moved for summary judgment on the ground that the action was time-barred. Enforcing the one-year limitations period deemed controlling under Cal. Code Civ. Proc. § 340, brought into operation by New York's "borrowing statute," N. Y. Civ. Prac. Act § 13, the District Court held that the Statute had run as to the widow, and hence that the child and the administrator were also barred under the California doctrine, announced by California District Courts of Appeal in *Sears* v. *Majors,* 104 Cal. App. 60, 285 Pac. 321, and *Haro* v. *Southern P. R. Co.,* 17 Cal. App. 2d 594, 62 P. 2d 441, that where one beneficiary of a wrongful death claim is time-barred, all beneficiaries are time-barred, the cause of action being "joint." 173 F. Supp. 114. There was no decision on this precise point by the Supreme Court of California; that court had left *Sears* and *Haro* undisturbed. See also *Gates* v. *Wendling Nathan Co.,* 27 Cal. App. 2d 307, 81 P. 2d 173; *Glavich* v. *Industrial Accident Comm'n,* 44 Cal. App. 2d 517 112 P.

2d 774 (dictum). The District Court's order granting the motion for summary judgment was affirmed by the Court of Appeals for the Second Circuit. 276 F. 2d 280. We granted certiorari. 363 U. S. 836.

The writ brought here several points decided adversely to petitioners below. We need discuss only one issue, for its determination disposes of the case. The *Sears* and *Haro* cases, regarded by the District Court and the Court of Appeals as controlling the effect upon a claim for wrongful death of the running of the Statute of Limitations upon one but not upon another of the decedent's heirs (the latter being under a limitations-tolling disability), were decided in 1930 and 1936, respectively, and *Gates* in 1938, by California District Courts of Appeal. In December 1959, the Supreme Court of California, *en banc,* decided *Leeper* v. *Beltrami,* 53 Cal. 2d 195, 347 P. 2d 12, which, in a considered dictum construing Cal. Code Civ. Proc. § 352, stated: "If the cause of action were a joint one, the statute would be tolled as to both. 'If an action not severable is not barred as to one of the parties on account of his infancy at the time the cause of action arose, it is not barred as to either of the other parties.' " *Id.,* at 208–209, 347 P. 2d, at 22.

This case was handed down after the District Court's ruling granting summary judgment for respondent in the present litigation, and only shortly before argument in the Court of Appeals. It was not brought to the attention of, and was not considered by, that court. Inasmuch as the view expressed therein by the highest court of California may be decisive of an issue critical to petitioners' claims, and inasmuch as the Court of Appeals for the Second Circuit is charged with mandatory appellate review in the present case, that court should decide what relative weights, as authoritative sources for ascer-

taining California law, the New York Court of Appeals would accord to the *Sears-Haro* line (direct holdings of District Courts of Appeal between 1930 and 1938) and to *Leeper* (a considered, relevant dictum of general scope by the California Supreme Court in 1959). We set aside the judgment of the Court of Appeals and remand to that court for reconsideration of the case in light of the new factor introduced by *Leeper* v. *Beltrami, supra.*

So ordered.

NATIONAL LABOR RELATIONS BOARD *v.* CELANESE CORPORATION OF AMERICA.

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

No. 382. Decided February 20, 1961.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 279 F. 2d 204.

Solicitor General Rankin, Stuart Rothman, Dominick L. Manoli and *Norton Come* for petitioner.

Gerard D. Reilly and *Joseph C. Wells* for respondent.

PER CURIAM.

The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the Court of Appeals for consideration in the light of *Labor Board* v. *Mattison Machine Works, ante,* p. 123.

MR. JUSTICE DOUGLAS and MR. JUSTICE STEWART are of the opinion that certiorari should be denied.

GATES *v.* CALIFORNIA.

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

No. 528, Misc. Decided February 20, 1961.

Appeal dismissed and certiorari denied.

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.

TURPENTINE & ROSIN FACTORS, INC., *v.* UNITED STATES.

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

No. 556. Decided February 20, 1961.

192 F. Supp. 256, affirmed.

E. Way Highsmith and *J. H. Highsmith* for appellant.

Solicitor General Rankin, Assistant Attorney General Bicks and *Richard A. Solomon* for the United States.

PER CURIAM.

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

NATIONAL PSYCHOLOGICAL ASSOCIATION FOR PSYCHOANALYSIS, INC., ET AL. *v.* UNIVERSITY OF THE STATE OF NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 568. Decided February 20, 1961.

Appeal dismissed for want of a substantial federal question.
Reported below: 8 N. Y. 2d 197, 168 N. E. 2d 649.

Lyman Stansky for appellants.

Louis J. Lefkowitz, Attorney General of New York, and *Samuel A. Hirshowitz* and *Philip Watson,* Assistant Attorneys General, for appellee.

PER CURIAM.

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

SNYDER ET AL. *v.* TOWN OF NEWTOWN ET AL.

APPEAL FROM THE SUPREME COURT OF ERRORS OF CONNECTICUT.

No. 580. Decided February 20, 1961.

Appeal dismissed for want of a substantial federal question.
Reported below: 147 Conn. 374, 161 A. 2d 770.

Philip Reich for appellants.

James J. O'Connell and *Albert L. Coles* for appellees.

PER CURIAM.

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

MR. JUSTICE FRANKFURTER and MR. JUSTICE DOUGLAS are of the opinion that probable jurisdiction should be noted.

CORDAK, DOING BUSINESS AS A. B. DENTAL PLATE LABORATORY, ET AL. *v.* REUBEN H. DONNELLEY CORP. ET AL.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 582. Decided February 20, 1961.

Appeal dismissed for want of a substantial federal question.
Reported below: 20 Ill. 2d 153, 169 N. E. 2d 321.

John Paul Stevens for appellants.

Owen Rall for appellees.

PER CURIAM.

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

SYNANON FOUNDATION, INC., ET AL. *v.* CALIFORNIA.

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

No. 607. Decided February 20, 1961.

Appeal dismissed for want of a substantial federal question.

Robert W. Kenny for appellants.

Robert G. Cockins for appellee.

PER CURIAM.

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

BROOKS *v.* SOUTH CAROLINA.

APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA.

No. 610, Misc. Decided February 20, 1961.

Appeal dismissed and certiorari denied.
Reported below: 235 S. C. 344, 111 S. E. 2d 686.

J. Bratton Davis 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.

GREEN *v.* UNITED STATES.

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

Nos. 70 and 179. Argued January 10–11, 1961.—
Decided February 27, 1961.

Petitioner was convicted in a Federal District Court on a three-count indictment under 18 U. S. C. § 2113 for (1) entering a bank with intent to commit a felony, (2) robbing the bank, and (3) assaulting or putting in jeopardy the lives of persons by using a dangerous weapon while committing the robbery. Before passing sentence, the District Judge asked, "Did you want to say something?" whereupon petitioner's counsel at some length invoked the Judge's discretionary leniency. Petitioner was then sentenced to imprisonment for 20 years on each of the first two counts and for 25 years on the third count, all to run concurrently. Seven years later, petitioner filed two motions under Rule 35 of the Federal Rules of Criminal Procedure to vacate the sentence, claiming that (1) it was illegal because he had not been permitted to speak in his own behalf prior to sentencing, as required by Rule 32 (a), and (2) the 25-year sentence under Count 3 for aggravated bank robbery was illegal because the judge had exhausted his power to sentence when he imposed the sentence under Count 2 for unaggravated bank robbery. Both motions were denied. *Held:* The judgment is affirmed. Pp. 302–306.

273 F. 2d 216 and 274 F. 2d 59, affirmed.

James Vorenberg, acting under appointment by the Court, 363 U. S. 839, argued the causes and filed a brief for petitioner.

Robert Kramer argued the causes for the United States. On the brief were *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Julia P. Cooper.*

Judgment of the Court and opinion of MR. JUSTICE FRANKFURTER, joined by MR. JUSTICE CLARK, MR. JUSTICE HARLAN and MR. JUSTICE WHITTAKER, announced by MR. JUSTICE HARLAN.

Defendant, the petitioner here, in 1952 was convicted in the United States District Court for Massachusetts on a three-count indictment charging him with (1) entering a bank with intent to commit a felony, in violation of 18 U. S. C. § 2113 (a); (2) robbing the bank, also in violation of 18 U. S. C. § 2113 (a); and (3) assaulting or putting in jeopardy the lives of persons by use of a dangerous weapon while committing the robbery, in violation of 18 U. S. C. § 2113 (d). Five days later, after defendant's counsel had completed motions in arrest of judgment and for new trial, the district judge asked, "Did you want to say something?" whereupon counsel at some length invoked the trial judge's discretionary leniency. The defendant's age, family status, and physical condition were mentioned, as was the fact that he was then serving a sentence in a state penitentiary which would delay the time from which his federal punishment would run. Thereupon the trial judge, presumably relying upon a presentence probation report, observed that the defendant was a hardened criminal, that he had in the past committed other armed robberies, and that there was no warrant to believe that rehabilitation was possible. He then pronounced sentence as follows:

> "Theodore Green, the Court orders that on this indictment you be sentenced as follows: On Count 1 of the indictment 20 years, on Count 2 of the indictment that you be imprisoned for 20 years, and on Count 3 of the indictment that you be imprisoned for the period of 25 years, said prison sentence to run concurrent and to begin upon your release from prison upon the sentence you are now receiving under order of the State Court."

Subsequently, defendant was permitted to bring his appeal *in forma pauperis* which was dismissed by the Court of Appeals "for want of diligent prosecution." In two other later actions, defendant unsuccessfully brought proceedings under 28 U. S. C. § 2255 to vacate his sentence.

These two cases, here consolidated, arise out of two separate actions brought, some seven years after conviction, under Rule 35 of the Federal Rules of Criminal Procedure in an effort to set aside the sentence which petitioner asserts to be illegal. In No. 70, petitioner claims that the failure of the judge to inquire of the defendant if he had anything to say on his own behalf prior to sentencing rendered the subsequent sentence illegal under Federal Criminal Rule 32 (a).[1] In No. 179, petitioner questions the legality of the twenty-five-year sentence for aggravated bank robbery [2] when immediately prior to its imposition the judge had imposed a twenty-year sentence under another count of the indictment for the same offense without the elements of aggravation.

If Rule 32 (a) constitutes an inflexible requirement that the trial judge specifically address the defendant, *e. g.*, "Do you, the defendant, Theodore Green, have anything to say before I pass sentence?" then what transpired in the present case falls short of the requirement, even assuming that this inadequacy in the circumstances now before us would constitute an error *per se* rendering the sentence illegal.

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[1] Rule 32 (a) in pertinent part provides:
"Before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment."

[2] "Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both." 18 U. S. C. § 2113 (d).

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The design of Rule 32 (a) did not begin with its promulgation; its legal provenance was the common-law right of allocution. As early as 1689, it was recognized that the court's failure to ask the defendant if he had anything to say before sentence was imposed required reversal. See Anonymous, 3 Mod. 265, 266, 87 Eng. Rep. 175 (K. B.). Taken in the context of its history, there can be little doubt that the drafters of Rule 32 (a) intended that the defendant be personally afforded the opportunity to speak before imposition of sentence. We are not unmindful of the relevant major changes that have evolved in criminal procedure since the seventeenth century—the sharp decrease in the number of crimes which were punishable by death, the right of the defendant to testify on his own behalf, and the right to counsel. But we see no reason why a procedural rule should be limited to the circumstances under which it arose if reasons for the right it protects remain. None of these modern innovations lessens the need for the defendant, personally, to have the opportunity to present to the court his plea in mitigation. The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself. We are buttressed in this conclusion by the fact that the Rule explicitly affords the defendant two rights: "to make a statement in his own behalf," and "to present any information in mitigation of punishment." We therefore reject the Government's contention that merely affording defendant's counsel the opportunity to speak fulfills the dual role of Rule 32 (a). See *Taylor* v. *United States,* 285 F. 2d 703.

However, we do not read the record before us to have denied the defendant the opportunity to which Rule 32 (a) entitled him. The single pertinent sentence—the trial judge's question "Did you want to say something?"—may well have been directed to the defendant and not to his counsel. A record, certainly this record, unlike a play,

is unaccompanied with stage directions which may tell the significant cast of the eye or the nod of the head. It may well be that the defendant himself was recognized and sufficiently apprised of his right to speak and chose to exercise this right through his counsel. Especially is this conclusion warranted by the fact that the defendant has raised this claim seven years after the occurrence. The defendant has failed to meet his burden of showing that he was not accorded the personal right which Rule 32 (a) guarantees, and we therefore find that his sentence was not illegal.

However, to avoid litigation arising out of ambiguous records in order to determine whether the trial judge did address himself to the defendant personally, we think that the problem should be, as it readily can be, taken out of the realm of controversy. This is easily accomplished. Trial judges before sentencing should, as a matter of good judicial administration, unambiguously address themselves to the defendant. Hereafter trial judges should leave no room for doubt that the defendant has been issued a personal invitation to speak prior to sentencing.

In No. 179 petitioner contends that his sentence was rendered illegal because the district judge, after sentencing him to twenty years for bank robbery under Count 2, proceeded under Count 3 to sentence him to twenty-five years for the aggravated version of the same crime. The claim is that since the two counts did not charge separate offenses, the judge's power to sentence expired with the imposition of sentence under Count 2 and that five years should be remitted from petitioner's concurrent sentence.

The Government concedes that Count 3 did not charge a separate offense, see *Holiday* v. *Johnston,* 313 U. S. 342, 349, and there is every indication that the district judge was of this view. In his charge to the jury he stated:

> "The third count is a different type of count. That is not a separate offense. I will speak to you later

> of the manner in which you will handle the third count. That is not a separate offense . . . . That is not a separate count, to repeat, that is an aggravation of the second count, robbing the bank."

Although petitioner is technically correct that sentences should not have been imposed on both counts, the remedy which he seeks does not follow. This is not a case where sentence was passed on two counts stating alternative means of committing one offense; rather, the third count involved additional characteristics which made the offense an aggravated one—namely, putting persons in jeopardy of life by use of a dangerous weapon. Plainly enough, the intention of the district judge was to impose the maximum sentence of twenty-five years for aggravated bank robbery, and the formal defect in his procedure should not vitiate his considered judgment.[3]

Affirmed.

MR. JUSTICE STEWART, concurring.

I join in affirming the judgments. Rule 32 (a) does not seem to me clearly to require a district judge in every case to volunteer to the defendant an opportunity personally to make a statement, when the defendant has a lawyer at his side who speaks fully on his behalf. But I do think the better practice in sentencing is to assure the defendant an express opportunity to speak for himself, in addition to anything that his lawyer may have to say. I would apply such a rule prospectively, in the exercise of our supervisory capacity. See *Couch* v. *United States,* 235 F. 2d 519.

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[3] Petitioner further complains of an improper charge to the jury on Count 3. Rule 35 does not encompass all claims that could be made by direct appeal attacking the conviction, but rather is limited to challenges that involve the legality of the sentence itself.

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

I agree that Federal Criminal Rule 32 (a) makes it mandatory for a federal judge before imposing sentence to afford every convicted defendant an opportunity to make, in person and not merely through counsel, a statement in his own behalf presenting any information he wishes in mitigation of punishment and that failure to afford this opportunity to the defendant personally makes a sentence illegal. I agree too that the governing legal question in determining whether such an opportunity has been afforded under Rule 32 (a) is "whether the trial judge did address himself to the defendant personally," since it would be wholly artificial to regard this opportunity as having been afforded in the absence of a specific and personal invitation to speak from the trial judge to the defendant.[1] The very essence of the ancient common-law right called "allocution" which MR. JUSTICE FRANKFURTER recognizes as underlying Rule 32 (a) has always been the putting of the question to the defendant by the trial judge.[2]

I think the record in this case clearly shows that the defendant was denied this opportunity, that the sentence

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[1] "After being convicted, the defendant is usually so crushed as to hesitate to make demands lest they bring increased punishment. The rule [Rule 32 (a)] contemplates no such demand, and clearly, without the necessity of any demand at that stage of the trial, the defendant's legal rights should be accorded to him by the court." *Mixon* v. *United States*, 214 F. 2d 364, 366 (Rives, J., concurring).

[2] An extensive and detailed review of the English and American common law and statutory cases on this subject led one author to begin his conclusion with the following sentence: "Today, as always, allocution is an authoritative address by the court to the prisoner as he stands at the bar for sentence." Barrett, Allocution, 9 Mo. L. Rev. 115, 232, at 254.

imposed upon him therefore was illegal and for this reason that the cause should, in accordance with Federal Criminal Rule 35, be sent back to the District Court for resentencing after compliance with Rule 32 (a). MR. JUSTICE FRANKFURTER refuses to take this course, stating that "we do not read the record before us to have denied the defendant the opportunity" to talk to the judge about his sentence. This conclusion apparently rests on the view that the trial judge's single question deemed pertinent to this subject—" 'Did you want to say something?'—may well have been directed to the defendant and not to his counsel." The opinion goes on to imply that maybe when the judge asked "you" the question he cast his eye or nodded his head in the defendant's direction, maybe the defendant saw the eye cast or the head nod, and therefore it "may well be that the defendant himself was recognized and sufficiently apprised of his right to speak and chose to exercise this right through his counsel." On this chain of perhaps possible, but purely imaginary happenings, plus the seemingly irrelevant fact that the defendant "raised this claim seven years after the occurrence," it is said that the petitioner "has failed to meet his burden of showing that he was not accorded the personal right which Rule 32 (a) guarantees, and we therefore find that his sentence was not illegal."

A careful examination of the record reveals the utter implausibility of these imaginative suggested additions to the transcript. The trial judge's bare question "Did you want to say something?" follows immediately upon a lengthy statement covering three printed pages by the counsel for a codefendant arguing that his motion for a new trial should be granted because of the weakness of the evidence, inconsistencies in testimony, and lack of credibility of a government witness. The colloquy in the four pages preceding that likewise does not touch upon the question of sentencing. Even if it is assumed

that the trial judge might have been so thoughtless as to address so unspecific a question to a layman at that point in the proceedings, can it seriously be believed that under such circumstances the defendant would have understood the question to be inviting him to speak on the subject of mitigating factors to be considered in sentencing even if the judge had nodded in his direction when asking "Did you want to say something?" Moreover, the answer "Yes, sir" and the succeeding statement came not from the defendant, but from his counsel (who was not the preceding speaker). The obvious implication is the fact explicitly admitted twice in the Government's brief in this case: that the question was addressed to defendant's counsel and not to defendant himself.[3]

I am forced to conclude that the actual holding in this case makes Rule 32 (a) mean far less for this particular defendant than the Rule is declared to mean, at least for defendants tried in the future. Judges are warned that hereafter their records must leave no doubt that a "defendant has been issued a personal invitation to speak prior to sentencing." This, I think, is the correct meaning of the Rule as it was adopted, and this defendant just like all others should be accorded his right under it. He should not be denied that right either because of his criminal record or because of fears conjured up about the number of prisoners who might raise the same question in the event of a decision in this defendant's favor. Bad men, like good men, are entitled to be tried and sentenced in accordance with law, and

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[3] ". . . (R. No. 70, pp. 4–18). Then the court asked *defense counsel* if he wanted to say something. In response, counsel spoke for leniency in sentencing (R. No. 70, pp. 18–19)." Brief for the United States, p. 11. (Emphasis supplied.)

"Before sentencing, the court *specifically addressed counsel:* 'Did you want to say something?' " Brief for the United States, p. 31. (Emphasis supplied.)

when it is shown to us that a person is serving an illegal sentence our obligation is to direct that proper steps be taken to correct the wrong done, without regard to the character of a particular defendant or to the possible effect on others who might also want to challenge the legality of their sentences as they have the right to do "at any time" under Rule 35. If it has any relevance at all, the fact that there may be other prisoners in this country's jails serving illegal sentences would seem to me to make it all the more imperative that we grant appropriate relief in this case rather than search for some obviously dubious excuse to deny this petitioner's claim.

I do not understand why it is necessary or legally correct to defeat this prisoner's claim by invoking what appears to be a wholly new doctrine of burden of proof. What, may I ask, is the burden a defendant must meet to show he was not accorded the personal opportunity to address the judge before a sentence is imposed? Is it proof beyond a reasonable doubt, by a preponderance of the evidence, by the overwhelming weight of the evidence, or what? I suppose from MR. JUSTICE FRANKFURTER'S opinion that it was the duty of this defendant to show under some standard that when the judge said "Did you want to say something?" he neither pointed his finger, cast his eye nor nodded his head in the defendant's direction, and that it was incumbent upon the defendant to make this proof even though the Government admitted that the question had been addressed to his counsel and not to the defendant himself. It would seem to me, even in the absence of the Government's admission as to the factual occurrence, that since when the question was asked defendant's counsel immediately made a statement, the fair inference is that if there was any "significant cast of the eye or . . . nod of the head," it was directed toward counsel who responded and not toward the defendant who said nothing. Yet it is said that defendant's claim must

be defeated because he failed to overcome an inference, without basis in logic or law, of a fact which has been expressly disclaimed by the Government in this case.

The language of MR. JUSTICE FRANKFURTER'S opinion does not jibe with the harsh result reached in refusing to accord to petitioner the benefit of Rule 32 (a). As he points out, that Rule embodies the practice of the English-speaking world for three centuries or more, based as he properly says upon the belief that, "The most persuasive counsel may not be able to speak for a defendant as the defendant might, with halting eloquence, speak for himself." A rule so highly prized for so sound a reason for so long a time deserves to be rigorously enforced by this Court, not merely praised in resounding glittering generalities calculated to soften the blow of nonenforcement.

I would remand this case for resentence after compliance with Rule 32 (a).

CLANCY ET AL. *v.* UNITED STATES.

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

No. 88. Argued January 10, 1961.—Decided February 27, 1961.

At the trial in a Federal District Court at which petitioners were convicted of violating federal criminal statutes, government witnesses testified to conversations with certain of the petitioners and admitted that they subsequently prepared memoranda of such conversations. Counsel for petitioners moved under the Jencks Act, 28 U. S. C. § 3500, for production of such memoranda, and the motions were denied. Before this Court, the Government alleged that, despite denial of the motion for production, verbatim copies of these memoranda were in fact delivered to counsel for petitioners, although the record did not show it and counsel for petitioners denied it; and the Government contended that the case should merely be remanded to the District Court to determine whether this was so. *Held:* At least as to some of the statements, reversible error was committed, and petitioners are entitled to a new trial. Pp. 313–316.

(a) Such memoranda were "statements" within the meaning of the Act. Pp. 313–315.

(b) This Court deals with the record as it finds it. Since the production of at least some of the statements withheld was a right of the defendants, it is for the defense, not the District Court or this Court, to determine whether they could be utilized effectively; and petitioners are entitled to a new trial. Pp. 315–316.

276 F. 2d 617, reversed.

Paul P. Waller, Jr. and *John F. O'Connell* argued the cause and filed a brief for petitioners.

Daniel M. Friedman argued the cause for the United States. With him on the briefs were *Solicitor General Rankin, Assistant Attorney General Wilkey, Robert S. Erdahl, Philip R. Monahan, Beatrice Rosenberg* and *Jerome M. Feit.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case presents an important question under 71 Stat. 595, 18 U. S. C. § 3500, the statute sometimes referred to as the Jencks Act, as it deals with the problems presented in our decision by that name. *Jencks* v. *United States,* 353 U. S. 657. Petitioners were charged with making false statements (18 U. S. C. § 1001), with attempting to evade the wagering excise tax (26 U. S. C. § 7201), and with conspiring to defraud the United States of internal revenue taxes (18 U. S. C. § 371). They were found guilty and the judgments of conviction were affirmed. 276 F. 2d 617. The case is here on a writ of certiorari. 363 U. S. 836.

At the trial Minton, a government agent, testified concerning an interview with petitioner, Kastner, at which he was present. Minton testified "I did not take any notes at the time, but afterwards I returned to the office and made a memorandum of the interview." Counsel for Kastner asked the court for the production of that memorandum pursuant to the Jencks Act.[1]

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[1] 18 U. S. C. § 3500 provides in relevant part:

"(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

"(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

. . . . .

"(e) The term 'statement', as used in subsections (b), (c), and

Other government witnesses testified to conversations they had had with Clancy, Kastner, and a third partner in petitioners' wagering business. One of the witnesses, Agent Buescher, testified he tad taken no notes during these interviews, but had "compiled a memorandum" from notes taken at the time of the interview by the second witness, Agent Mochel. Both Buescher and Mochel testified that they had signed the later memoranda of the conversations. Counsel for petitioners requested production of the memoranda, and the requests were refused.

The trial court, though directing delivery to the defense of notes made by the witnesses at the time of the interviews, refused the requests for the memoranda, saying that written statements were not covered by the Jencks Act unless they were made "contemporaneously" with the interview. The Government now concedes that this was an erroneous ruling, as indeed it was. Each of these statements related "to the subject matter as to which the witness has testified." [2] Each was a "statement" as that word is defined in the Act.[3] The requirement that it be contemporaneous applies only to "a substantially verbatim recital of an oral statement" made to a government agent.[4] By the terms of the Act,[5] "a written statement made by said witness and signed or otherwise adopted or

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(d) of this section in relation to any witness called by the United States, means—

"(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

"(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

[2] 18 U. S. C. § 3500 (b), *supra,* note 1.

[3] 18 U. S. C. § 3500 (e), *supra,* note 1.

[4] 18 U. S. C. § 3500 (e) (2), *supra,* note 1.

[5] 18 U. S. C. § 3500 (e) (1), *supra,* note 1.

approved by him" is also included. These statements fell in that category and should have been produced. *Campbell* v. *United States, ante,* p. 85. And see *United States* v. *Sheer,* 278 F. 2d 65, 67–68. As the Senate Report on the bill that became the Jencks Act states: [6]

> "The committee believes that legislation would clearly be unconstitutional if it sought to restrict due process. On the contrary, the proposed legislation, as reported, reaffirms the decision of the Supreme Court in its holding that a defendant on trial in a criminal prosecution is entitled to reports and statements in possession of the Government touching the events and activities as to which a Government witness has testified at the trial.
>
> "The purpose of the proposed legislation is to establish a procedural device that will provide such a defendant with authenticated statements and reports of Government witnesses which relate directly upon his testimony."

The Government, however, contends that as to Agent Minton the error was harmless. It also asserts—though the record is silent and counsel for petitioners deny it—that verbatim carbon copies of the reports of Agents Buescher and Mochel were delivered to the defense at the trial. But since its version of what transpired is contested, the Government urges that the most we do is to remand the case to the District Court to determine whether verbatim copies of the reports were delivered to the defense at the trial. If they were so delivered, the Government argues, the court's denial of their production was harmless error.

We do not follow that suggestion. We deal with the record as we find it, which gives no support to the Gov-

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[6] S. Rep. No. 569, 85th Cong., 1st Sess., p. 2.

ernment's assertion that verbatim reports were delivered to the defense. Moreover, the Government's assertion is not a positive statement of the prosecution. Those who present the case here say with candor that they speak only "according to our information," which admittedly falls short of an assertion that the copies were delivered to the defense at the trial. Since the defense earnestly denies the statement, we can only conclude that on the record before us petitioners were denied an inspection of the documents to which they were entitled.

We put to one side *Rosenberg* v. *United States,* 360 U. S. 367, where a failure to produce a document was considered to be harmless error under the particular circumstances of that case. We do not reach the harmless error point because, if applicable, it is relevant only to the report of one of the agents, not to those of the other two. Since the production of at least some of the statements withheld was a right of the defense, it is not for us to speculate whether they could have been utilized effectively. As we said in *Jencks* v. *United States, supra,* 667:

> "Flat contradiction between the witness' testimony and the version of the events given in his report is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony."

Accordingly we conclude that at least as respects some of these statements reversible error was committed and that petitioners are entitled to a new trial. There are other questions raised that we do not reach, as we have no way of knowing whether they will arise on a new trial.

Reversed.

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

Petitioners were convicted of tax evasion and conspiracy to defraud the United States in the operation of a horse race booking enterprise. During the trial the defense asked for the production, under the Jencks Act, of certain signed memoranda of interviews of petitioners by government agents. The request was refused at the time. The Government, in its brief filed November 14, 1960, agrees that this refusal was error. It insists, however, that verbatim copies of the memoranda were delivered to the defense attorneys at a later stage in the trial during the cross-examination of one of the Government's agents. It requested, "unless petitioners agree with the [Government's] version of the facts," a remand of the case in order that the trial court might determine this sole question.

The attorneys for the petitioners made no reply to this claim of the Government until Thursday, January 5, 1961. In their reply brief on that date they categorically denied that verbatim copies had been delivered. This statement was later supported by affidavit of the attorneys.

The case came on for argument on Tuesday, January 10. The Government advised that the government employees involved in the case had not been available until the previous day and hence counter affidavits had not been obtainable. However, it offered to produce affidavits of the agents, as well as the Assistant United States Attorney who tried the case, that would support its claim. In explaining the situation that confronted it, the government counsel stated that he had personally talked by telephone to the United States Attorney after petitioners' brief was filed. This conversation, he said, together with that had with the Assistant United States Attorney who tried the case, confirmed the earlier conclusion that the

Government's contention was correct. However, since both the United States Attorney and his assistant made reference to the Government's witness (Agent Mochel, who had written the memoranda in controversy), government counsel also made every effort to reach Mochel and was successful on January 9. Mochel advised that when he was on the witness stand during the trial he had the carbon copies of his memoranda in his pocket and that upon request he took them out and handed them either (1) directly to petitioners' counsel, or (2) to the Assistant United States Attorney trying the case, who passed them on to petitioners' counsel in the courtroom. This was verified by the Assistant United States Attorney who, however, candidly admitted that he was somewhat "hazy" as to what documents were actually passed by him to counsel. The record indicates that he had made available to petitioners' counsel a large number of documents, including the original notes of the agents. The Government insists that this factual situation creates "sufficient doubt" to require a hearing by the trial judge and a determination of whether or not the memoranda in controversy were actually delivered to petitioners' counsel.

This Court, of course, cannot determine these conflicting factual assertions on an affidavit basis. In view of the lateness of petitioners' denial, however, the Government was not afforded sufficient time to supplement the record on the point. The original record lodged here indicates that Agent Mochel, in his testimony, made reference to "memoranda" and, in context, the indications are that the "memoranda" in controversy were at that time in the hands of petitioners' counsel, who were questioning him. Under these circumstances it appears to me that justice does require that we remand the case solely for determination of this point. If the verbatim copies were not delivered, no harm will have been done, for the trial court could then set aside the judgments of conviction

and grant a new trial. On the other hand, if the copies were actually delivered there could have been no prejudicial error and the judgments of conviction should stand.

The Court, however, refuses to order this done. It reverses the case on this technicality, regardless of the fact that the Government has persuasive evidence that petitioners' counsel actually had access to the very documents on which its reversal is based. The Court indicates that the Government's claim is outside the record. However, if the memoranda were in fact made available, as the Government claims, they were delivered during the trial and the record does have fleeting references that support such a conclusion. It would be a simple matter for these references to be made more complete at a hearing. In my view it is only fair that the Government should be given this opportunity. Moreover, I note that the Court has granted just such relief in many cases. See *Campbell* v. *United States, ante,* p. 85 (1961); *United States* v. *Shotwell Mfg. Co.,* 355 U. S. 233 (1957); *Communist Party* v. *Subversive Activities Control Board,* 351 U. S. 115 (1956).

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TAMPA ELECTRIC CO. *v.* NASHVILLE COAL CO. ET AL.

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

No. 87. Argued December 15, 1960.—Decided February 27, 1961.

Petitioner produces electric energy and sells it to a 60-mile by 30-mile service area in the vicinity of Tampa, Fla. In 1954, it had two generating plants which consumed only oil in their burners, as did all electric generating plants in peninsular Florida. It decided to construct a new generating plant and to try burning coal in at least two, and possibly all, units of that plant; and it contracted to purchase from respondents all coal it would require as boiler fuel at the new plant over a 20-year period. Petitioner's estimated maximum requirements exceeded the total consumption of coal in peninsular Florida; but it did not amount to more than 1% of the total amount of coal of the same type produced and marketed by the 700 coal suppliers in respondents' producing area. Respondents repudiated the contract on the ground that it was illegal under the antitrust laws, and petitioner sued for a declaratory judgment that it was valid and for its enforcement. The District Court declared the contract violative of § 3 of the Clayton Act and denied enforcement. The Court of Appeals affirmed. *Held:* The judgment is reversed. Pp. 321–335.

1. The contract here involved did not violate § 3 of the Clayton Act. Pp. 325–335.

(a) Even though a contract is an exclusive-dealing arrangement, it does not violate § 3 unless its performance probably would foreclose competition in a substantial share of the line of commerce affected. Pp. 325–328.

(b) In order for a contract to violate § 3 the competition foreclosed by it must constitute a substantial share of the relevant market. Pp. 328–329.

(c) On the record in this case, the relevant market is not peninsular Florida, the entire State of Florida or Florida and Georgia combined; it is the area in which respondents and the other 700 producers of the kind of coal here involved effectively compete. Pp. 330–333.

(d) In the competitive bituminous coal marketing area here involved, the contract sued upon does not tend to foreclose a substantial volume of competition. Pp. 333–335.

2. Since the contract does not fall within the broader proscription of § 3 of the Clayton Act, it is not forbidden by § 1 or § 2 of the Sherman Act. P. 335.

276 F. 2d 766, reversed.

William C. Chanler argued the cause and filed a brief for petitioner.

Abe Fortas argued the cause for respondents. With him on the brief was *Norman Diamond.*

MR. JUSTICE CLARK delivered the opinion of the Court.

We granted certiorari to review a declaratory judgment holding illegal under § 3 of the Clayton Act [1] a requirements contract between the parties providing for the purchase by petitioner of all the coal it would require as boiler fuel at its Gannon Station in Tampa, Florida, over a 20-year period. 363 U. S. 836. Both the District Court, 168 F. Supp. 456, and the Court of Appeals, 276 F. 2d 766, Judge Weick dissenting, agreed with respondents that the contract fell within the proscription of § 3 and therefore was illegal and unenforceable. We cannot agree that the contract suffers the claimed antitrust illegality [2] and, therefore, do not find it necessary to

[1] "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods . . . for use, consumption, or resale within the United States . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . of a competitor or competitors of the . . . seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce." 15 U. S. C. § 14.

[2] In addition to their claim under § 3 of the Clayton Act, respondents argue the contract is illegal under the Sherman Act, 15 U. S. C. §§ 1–2.

consider respondents' additional argument that such illegality is a defense to the action and a bar to enforceability.

The Facts.

Petitioner Tampa Electric Company is a public utility located in Tampa, Florida. It produces and sells electric energy to a service area, including the city, extending from Tampa Bay eastward 60 miles to the center of the State, and some 30 miles in width. As of 1954 petitioner operated two electrical generating plants comprising a total of 11 individual generating units, all of which consumed oil in their burners. In 1955 Tampa Electric decided to expand its facilities by the construction of an additional generating plant to be comprised ultimately of six generating units, and to be known as the "Francis J. Gannon Station." Although every electrical generating plant in peninsular Florida burned oil at that time, Tampa Electric decided to try coal as boiler fuel in the first two units constructed at the Gannon Station. Accordingly, it contracted with the respondents [3] to furnish the expected coal requirements for the units. The agreement, dated May 23, 1955, embraced Tampa Electric's "total requirements of fuel . . . for the operation of its first two units to be installed at the Gannon Station . . . not less than 225,000 tons of coal per unit per year," for a period of 20 years. The contract further provided that "if during the first 10 years of the term . . . the Buyer constructs additional units [at Gannon] in which coal is used as the fuel, it shall give the Seller notice thereof two years prior to the completion of such unit or units and upon completion of same the fuel requirements thereof shall be added to this contract." It was understood and agreed, however, that "the Buyer has the option to be exercised two years prior

[3] The original contract was with Potter Towing Company, and by subsequent agreements with Tampa Electric responsibility thereunder was assumed by respondent West Kentucky Coal Company.

to completion of said unit or units of determining whether coal or some other fuel shall be used in same." Tampa Electric had the further option of reducing, up to 15%, the amount of its coal purchases covered by the contract after giving six months' notice of an intention to use as fuel a by-product of any of its local customers. The minimum price was set at $6.40 per ton delivered, subject to an escalation clause based on labor cost and other factors. Deliveries were originally expected to begin in March 1957, for the first unit, and for the second unit at the completion of its construction.

In April 1957, soon before the first coal was actually to be delivered and after Tampa Electric, in order to equip its first two Gannon units for the use of coal, had expended some $3,000,000 more than the cost of constructing oil-burning units, and after respondents had expended approximately $7,500,000 readying themselves to perform the contract, the latter advised petitioner that the contract was illegal under the antitrust laws, would therefore not be performed, and no coal would be delivered. This turn of events required Tampa Electric to look elsewhere for its coal requirements. The first unit at Gannon began operating August 1, 1957, using coal purchased on a temporary basis, but on December 23, 1957, a purchase order contract for the total coal requirements of the Gannon Station was made with Love and Amos Coal Company. It was for an indefinite period cancellable on 12 months' notice by either party, or immediately upon tender of performance by respondents under the contract sued upon here. The maximum price was $8.80 per ton, depending upon the freight rate. In its purchase order to the Love and Amos Company, Tampa estimated that its requirements at the Gannon Station would be 350,000 tons in 1958; 700,000 tons in 1959 and 1960; 1,000,000 tons in 1961; and would increase thereafter, as required, to "about 2,250,000 tons per year." The second unit at Gannon

Station commenced operation 14 months after the first, *i. e.*, October 1958. Construction of a third unit, the coal for which was to have been provided under the original contract, was also begun.

The record indicates that the total consumption of coal in peninsular Florida, as of 1958, aside from Gannon Station, was approximately 700,000 tons annually. It further shows that there were some 700 coal suppliers in the producing area where respondents operated, and that Tampa Electric's anticipated maximum requirements at Gannon Station, *i. e.*, 2,250,000 tons annually, would approximate 1% of the total coal of the same type produced and marketed from respondents' producing area.

Petitioner brought this suit in the District Court pursuant to 28 U. S. C. § 2201, for a declaration that its contract with respondents was valid, and for enforcement according to its terms. In addition to its Clayton Act defense, respondents contended that the contract violated both §§ 1 and 2 of the Sherman Act which, it claimed, likewise precluded its enforcement. The District Court, however, granted respondents' motion for summary judgment on the sole ground that the undisputed facts, recited above, showed the contract to be a violation of § 3 of the Clayton Act. The Court of Appeals agreed. Neither court found it necessary to consider the applicability of the Sherman Act.

Decisions of District Court and Court of Appeals.

Both courts admitted that the contract "does not expressly contain the 'condition' " that Tampa Electric would not use or deal in the coal of respondents' competitors. Nonetheless, they reasoned, the "total requirements" provision had the same practical effect, for it prevented Tampa Electric for a period of 20 years from buying coal from any other source for use at that station. Each court cast aside as "irrelevant" arguments citing the

use of oil as boiler fuel by Tampa Electric at its other stations, and by other utilities in peninsular Florida, because oil was not in fact used at Gannon Station, and the possibility of exercise by Tampa Electric of the option reserved to it to build oil-burning units at Gannon was too remote. Found to be equally remote was the possibility of Tampa's conversion of existing oil-burning units at its other stations to the use of coal which would not be covered by the contract with respondents. It followed, both courts found, that the "line of commerce" on which the restraint was to be tested was coal—not boiler fuels. Both courts compared the estimated coal tonnage as to which the contract pre-empted competition for 20 years, namely, 1,000,000 tons a year by 1961, with the previous annual consumption of peninsular Florida, 700,000 tons. Emphasizing that fact as well as the contract value of the coal covered by the 20-year term, *i. e.*, $128,000,000, they held that such volume was not "insignificant or insubstantial" and that the effect of the contract would "be to substantially lessen competition," in violation of the Act. Both courts were of the opinion that in view of the executory nature of the contract, judicial enforcement of any portion of it could not be granted without directing a violation of the Act itself, and enforcement was, therefore, denied.[4]

Application of § 3 of the Clayton Act.

In the almost half century since Congress adopted the Clayton Act, this Court has been called upon 10 times,[5] including the present, to pass upon questions arising under § 3. *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346 (1922), the first of the cases, held that

[4] Cf. *Kelly* v. *Kosuga*, 358 U. S. 516.

[5] For discussion of previous cases, see *Standard Oil Co.* v. *United States*, 337 U. S. 293, 300–305.

the Act "sought to reach the agreements embraced within its sphere in their incipiency, and in the section under consideration to determine their legality by specific tests of its own. . . ." At p. 356. In sum, it was declared, § 3 condemned sales or agreements "where the effect of such sale or contract . . . would under the circumstances disclosed probably lessen competition, or create an actual tendency to monopoly." At pp. 356–357. This was not to say, the Court emphasized, that the Act was intended to reach every "remote lessening" of competition—only those which were substantial—but the Court did not draw the line where "remote" ended and "substantial" began. There in evidence, however, was the fact that the activities of two-fifths of the Nation's 52,000 pattern agencies were affected by the challenged device. Then, one week later, followed *United Shoe Machinery Corp.* v. *United States,* 258 U. S. 451 (1922), which held that even though a contract does "not contain specific agreements not to use the [goods] of a competitor," if "the practical effect . . . is to prevent such use," it comes within the condition of the section as to exclusivity. At p. 457. The Court also held, as it had in *Standard Fashion, supra,* that a finding of domination of the relevant market by the lessor or seller was sufficient to support the inference that competition had or would be substantially lessened by the contracts involved there. As of that time it seemed clear that if "the practical effect" of the contract was to prevent a lessee or buyer from using the products of a competitor of the lessor or seller and the contract would thereby probably substantially lessen competition in a line of commerce, it was proscribed. A quarter of a century later, in *International Salt Co.* v. *United States,* 332 U. S. 392 (1947), the Court held, at least in tying cases, that the necessity of direct proof of the economic impact of such a contract was not necessary where it was established that "the volume of business

affected" was not "insignificant or insubstantial" and that the effect was "to foreclose competitors from any substantial market." At p. 396. It was only two years later, in *Standard Oil Co.* v. *United States,* 337 U. S. 293 (1949), that the Court again considered § 3 and its application to exclusive supply or, as they are commonly known, requirements contracts. It held that such contracts are proscribed by § 3 if their practical effect is to prevent lessees or purchasers from using or dealing in the goods, etc., of a competitor or competitors of the lessor or seller and thereby "competition has been foreclosed in a substantial share of the line of commerce affected." At p. 314.

In practical application, even though a contract is found to be an exclusive-dealing arrangement, it does not violate the section unless the court believes it probable that performance of the contract will foreclose competition in a substantial share of the line of commerce affected. Following the guidelines of earlier decisions, certain considerations must be taken. *First,* the line of commerce, *i. e.,* the type of goods, wares, or merchandise, etc., involved must be determined, where it is in controversy, on the basis of the facts peculiar to the case.[6] *Second,* the area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates, and to which the purchaser can practicably turn for supplies. In short, the threatened foreclosure of competition must be in relation to the market affected. As was said in *Standard Oil Co.* v. *United States, supra:*

> "It is clear, of course, that the 'line of commerce' affected need not be nationwide, at least where the purchasers cannot, as a practical matter, turn to suppliers outside their own area. Although the effect on

[6] See *International Boxing Club* v. *United States,* 358 U. S. 242.

> competition will be quantitatively the same if a given volume of the industry's business is assumed to be covered, whether or not the affected sources of supply are those of the industry as a whole or only those of a particular region, a purely quantitative measure of this effect is inadequate because the narrower the area of competition, the greater the comparative effect on the area's competitors. Since it is the preservation of competition which is at stake, the significant proportion of coverage is that within the area of effective competition." At p. 299, note 5.

In the *Standard Oil* case, the area of effective competition—the relevant market—was found to be where the seller and some 75 of its competitors sold petroleum products. Conveniently identified as the Western Area, it included Arizona, California, Idaho, Nevada, Oregon, Utah and Washington. Similarly, in *United States* v. *Columbia Steel Co.,* 334 U. S. 495 (1948), a § 1 Sherman Act case, this Court decided the relevant market to be the competitive area in which Consolidated marketed its products, *i. e.,* 11 Western States. The Court found Consolidated's share of the nationwide market for the relevant line of commerce, rolled steel products, to be less than ½ of 1%, an "insignificant fraction of the total market," at p. 508; and its share of the more narrow but only relevant market, 3%, was described as "a small part," at p. 511, not sufficient to injure any competitor of United States Steel in that area or elsewhere.

Third, and last, the competition foreclosed by the contract must be found to constitute a substantial share of the relevant market. That is to say, the opportunities for other traders to enter into or remain in that market must be significantly limited as was pointed out in *Standard Oil Co.* v. *United States, supra.* There the impact of the requirements contracts was studied in the setting of the large number of gasoline stations—5,937 or

16% of the retail outlets in the relevant market—and the large number of contracts, over 8,000, together with the great volume of products involved. This combination dictated a finding that "Standard's use of the contracts [created] just such a potential clog on competition as it was the purpose of § 3 to remove" where, as there, the affected proportion of retail sales was substantial. At p. 314. As we noted above, in *United States* v. *Columbia Steel Co., supra,* substantiality was judged on a comparative basis, *i. e.,* Consolidated's use of rolled steel was "a small part" when weighed against the total volume of that product in the relevant market.

To determine substantiality in a given case, it is necessary to weigh the probable effect of the contract on the relevant area of effective competition, taking into account the relative strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market area, and the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein. It follows that a mere showing that the contract itself involves a substantial number of dollars is ordinarily of little consequence.

The Application of § 3 Here.

In applying these considerations to the facts of the case before us, it appears clear that both the Court of Appeals and the District Court have not given the required effect to a controlling factor in the case—the relevant competitive market area. This omission, by itself, requires reversal, for, as we have pointed out, the relevant market is the prime factor in relation to which the ultimate question, whether the contract forecloses competition in a substantial share of the line of commerce involved, must be decided. For the purposes of this case, therefore, we need not decide two threshold questions pressed by Tampa

Electric. They are whether the contract in fact satisfies the initial requirement of § 3, *i. e.*, whether it is truly an exclusive-dealing one, and, secondly, whether the line of commerce is boiler fuels, including coal, oil and gas, rather than coal alone.[7] We, therefore, for the purposes of this case, assume, but do not decide, that the contract is an exclusive-dealing arrangement within the compass of § 3, and that the line of commerce is bituminous coal.

Relevant Market of Effective Competition.

Neither the Court of Appeals nor the District Court considered in detail the question of the relevant market. They do seem, however, to have been satisfied with inquiring only as to competition within "Peninsular Florida." It was noted that the total consumption of peninsular Florida was 700,000 tons of coal per year, about equal to the estimated 1959 requirements of Tampa Electric. It was also pointed out that coal accounted for less than 6% of the fuel consumed in the entire State.[8] The District Court concluded that though the respondents were only one of 700 coal producers who could serve the same market, peninsular Florida, the contract for a period of 20 years excluded competitors from a substantial

[7] In support of these contentions petitioner urges us to consider that it remains free to convert existing oil-burning units at its other plants to coal-burning units, the fuel for which it would be free to purchase from any seller in the market; also that just as it is permitted to use oil at its other plants, so, too, it may construct all future Gannon units as oil burners; and that in any event it is free to draw a maximum of 15% of its Gannon fuel requirements from by-products of local customers. Petitioner further argues that its novel reliance upon coal in fact created new fuel competition in an area that theretofore relied almost exclusively upon oil and, to a lesser extent, upon natural gas.

[8] Oil and, to a lesser extent, natural gas are the primary fuels consumed in Florida.

amount of trade. Respondents contend that the coal tonnage covered by the contract must be weighed against either the total consumption of coal in peninsular Florida, or all of Florida, or the Bituminous Coal Act area comprising peninsular Florida and the Georgia "finger," or, at most, all of Florida and Georgia. If the latter area were considered the relevant market, Tampa Electric's proposed requirements would be 18% of the tonnage sold therein. Tampa Electric says that both courts and respondents are in error, because the "700 coal producers who could serve" it, as recognized by the trial court and admitted by respondents, operated in the Appalachian coal area and that its contract requirements were less than 1% of the total marketed production of these producers; that the relevant effective area of competition was the area in which these producers operated, and in which they were willing to compete for the consumer potential.

We are persuaded that on the record in this case, neither peninsular Florida, nor the entire State of Florida, nor Florida and Georgia combined constituted the relevant market of effective competition. We do not believe that the pie will slice so thinly. By far the bulk of the overwhelming tonnage marketed from the same producing area as serves Tampa is sold outside of Georgia and Florida, and the producers were "eager" to sell more coal in those States.[9] While the relevant competitive market is not ordinarily susceptible to a "metes and bounds" definition, cf. *Times-Picayune Pub. Co.* v. *United States,* 345 U. S. 594, 611, it is of course the area in which respondents

[9] Peabody Coal Company offered to supply petitioner with coal from its mines in western Kentucky, for use in the units at another of its Florida stations, and that offer prompted a renegotiation of the price petitioner was paying for the oil then being consumed at that station.

and the other 700 producers effectively compete. *Standard Oil Co.* v. *United States, supra.* The record shows that, like the respondents, they sold bituminous coal "suitable for [Tampa's] requirements," mined in parts of Pennsylvania, Virginia, West Virginia, Kentucky, Tennessee, Alabama, Ohio and Illinois. We take notice of the fact that the approximate total bituminous coal (and lignite) product in the year 1954 from the districts in which these 700 producers are located was 359,289,000 tons, of which some 290,567,000 tons were sold on the open market.[10] Of the latter amount some 78,716,000 tons were sold to electric utilities.[11] We also note that in 1954 Florida and Georgia combined consumed at least 2,304,000 tons, 1,100,000 of which were used by electric utilities, and the sources of which were mines located in no less than seven States.[12] We take further notice that the production and marketing of bituminous coal (and lignite) from the same districts, and assumedly equally available to Tampa on a commercially feasible basis, is currently on a par with prior years.[13] In point of statistical fact, coal consumption in the combined Florida-Georgia area has increased significantly since 1954. In 1959 more than 3,775,000 tons were there consumed, 2,913,000 being used by electric utilities including, presumably, the coal used by the petitioner.[14]

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[10] U. S. Bureau of the Census. I U. S. Census of Mineral Industries: 1954, Series: MI–12B, p. 4 (1957).

[11] *Id.*, at 12B–6.

[12] 1,569,000 tons from counties in West Virginia, Virginia, Kentucky, Tennessee and North Carolina; 412,000 tons from counties in Alabama, Georgia and Tennessee; the balance was produced in other counties in West Virginia, Virginia and western Kentucky. *Id.*, at 12B–10.

[13] United States Dept. of Interior, Bureau of Mines, II Minerals Yearbook (Fuels), 1959.

[14] United States Dept. of Interior, Bureau of Mines, Mineral Market Report, M. M. S. No. 3035, p. 23 (1960). These statistics were taken from sources cited by respondents.

The coal continued to come from at least seven States.[15] From these statistics it clearly appears that the proportionate volume of the total relevant coal product as to which the challenged contract pre-empted competition, less than 1%, is, conservatively speaking, quite insubstantial. A more accurate figure, even assuming pre-emption to the extent of the maximum anticipated total requirements, 2,250,000 tons a year, would be .77%.

Effect on Competition in the Relevant Market.

It may well be that in the context of antitrust legislation protracted requirements contracts are suspect, but they have not been declared illegal *per se*. Even though a single contract between single traders may fall within the initial broad proscription of the section, it must also suffer the qualifying disability, tendency to work a substantial—not remote—lessening of competition in the relevant competitive market. It is urged that the present contract pre-empts competition to the extent of purchases worth perhaps $128,000,000,[16] and that this

[15] 1,787,000 tons from certain counties in West Virginia, Virginia, Kentucky, Tennessee and North Carolina; 1,321,000 tons from counties in Alabama, Georgia and elsewhere in Tennessee; 665,000 tons from the western Kentucky fields; 2,000 tons from other counties in West Virginia and Virginia. *Ibid.*

[16] In this connection we note incidentally that in *Appalachian Coals, Inc.*, v. *United States*, 288 U. S. 344, 369 (1933), cited by respondents, Chief Justice Hughes quoted testimony showing that in 1932 it was nothing those days "for one interest or one concern to buy several million tons of coal." At n. 7. The findings of the District Court showed that one utility consumed 2,485,000 tons of coal a year. Other concerns had requirements running from 30,000 to 250,000 tons annually, while a textile manufacturer used 600,000 tons. At p. 370, n. 8. The Chief Justice also stated in his opinion that, within 24 counties in Kentucky, Tennessee (in both of which respondents operate) and their competitive States of Virginia and West Virginia, "there are over 1,620,000 acres of coal bearing land, containing approximately 9,000,000,000 net tons of recoverable coal . . . ." At p. 369.

"is, of course, not insignificant or insubstantial." While $128,000,000 is a considerable sum of money, even in these days, the dollar volume, by itself, is not the test, as we have already pointed out.

The remaining determination, therefore, is whether the pre-emption of competition to the extent of the tonnage involved tends to substantially foreclose competition in the relevant coal market. We think not. That market sees an annual trade in excess of 250,000,000 tons of coal and over a billion dollars—multiplied by 20 years it runs into astronomical figures. There is here neither a seller with a dominant position in the market as in *Standard Fashions, supra;* nor myriad outlets with substantial sales volume, coupled with an industry-wide practice of relying upon exclusive contracts, as in *Standard Oil, supra;* nor a plainly restrictive tying arrangement as in *International Salt, supra.* On the contrary, we seem to have only that type of contract which "may well be of economic advantage to buyers as well as to sellers." *Standard Oil Co.* v. *United States, supra,* at p. 306. In the case of the buyer it "may assure supply," while on the part of the seller it "may make possible the substantial reduction of selling expenses, give protection against price fluctuations, and . . . offer the possibility of a predictable market." *Id.,* at 306–307. The 20-year period of the contract is singled out as the principal vice, but at least in the case of public utilities the assurance of a steady and ample supply of fuel is necessary in the public interest. Otherwise consumers are left unprotected against service failures owing to shutdowns; and increasingly unjustified costs might result in more burdensome rate structures eventually to be reflected in the consumer's bill. The compelling validity of such considerations has been recognized fully in the natural gas public utility field. This is not to say that utilities are immunized from Clayton Act proscriptions, but merely that, in judging the term

of a requirements contract in relation to the substantiality of the foreclosure of competition, particularized considerations of the parties' operations are not irrelevant. In weighing the various factors, we have decided that in the competitive bituminous coal marketing area involved here the contract sued upon does not tend to foreclose a substantial volume of competition.

We need not discuss the respondents' further contention that the contract also violates § 1 and § 2 of the Sherman Act, for if it does not fall within the broader proscription of § 3 of the Clayton Act it follows that it is not forbidden by those of the former. *Times-Picayune Pub. Co.* v. *United States, supra,* at pp. 608–609.

The judgment is reversed and the case remanded to the District Court for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that the District Court and the Court of Appeals correctly decided this case and would therefore affirm their judgments.

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ARO MANUFACTURING CO., INC., ET AL. *v.* CONVERTIBLE TOP REPLACEMENT CO., INC.

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

No. 21. Argued October 13, 17, 1960.—Decided February 27, 1961.

The owner of all territorial rights in a certain area in Patent No. 2,569,724, covering the combination, in an automobile body, of a flexible top fabric, supporting structures, and a mechanism for sealing the fabric against the side of the automobile body to keep out the rain, brought this infringement suit against petitioners, which manufacture and sell replacement fabrics designed to fit the models of convertible automobiles equipped with tops embodying the combination covered by the patent. The patent covered only the combination of certain unpatented components and made no claim to invention based on the fabric or on its shape, pattern or design. *Held:* Petitioners were not guilty of either direct or contributory infringement of the patent. Pp. 337–346.

(a) Since the fabric was no more than an unpatented element of the combination which was claimed as the invention, and the patent did not confer a monopoly over the fabric or its shape, petitioners' manufacture and sale of the fabric did not constitute a direct infringement under 35 U. S. C. § 271 (a). Pp. 339–340.

(b) Even though petitioners knew that the purchasers intended to use the fabric for replacement purposes on automobile convertible tops covered by the claims on respondent's combination patent, petitioners' manufacture and sale would constitute contributory infringement under 35 U. S. C. § 271 (c) only if such a replacement by the purchaser himself would in itself constitute a direct infringement under § 271 (a). Pp. 340–342.

(c) A car owner would not infringe the combination patent by replacing the worn-out fabric of the patented convertible top on his car, since such a replacement by the car owner is a permissible "repair" and not an infringing "reconstruction." Pp. 342–346.

(d) No element, not itself separately patented, that constitutes one of the elements of a combination patent is entitled to patent

monopoly, however essential it may be to the patented combination and no matter how costly or difficult the replacement may be. Pp. 344–346.

270 F. 2d 200, reversed.

David Wolf argued the cause and filed a brief for petitioners.

Elliott I. Pollock argued the cause and filed a brief for respondent.

Ralph S. Spritzer argued the cause for the United States, as *amicus curiae,* urging reversal. On the brief were *Solicitor General Rankin, Assistant Attorney General Bicks, Charles H. Weston* and *Richard H. Stern.*

Mr. Justice Whittaker delivered the opinion of the Court.

On April 17, 1956, respondent, Convertible Top Replacement Co., Inc., acquired a "Territorial Grant" (coextensive with "the Commonwealth of Massachusetts") of all rights in Letters Patent No. 2,569,724, commonly known as the Mackie-Duluk patent, and 10 days later commenced this action against petitioners, Aro Manufacturing Co., Inc., and several of its officers, to enjoin the alleged infringement and contributory infringement of the patent and for an accounting of profits.

The patent—one for a "Convertible Folding Top with Automatic Seal at Rear Quarter"—covers the combination, in an automobile body, of a flexible top fabric, supporting structures, and a mechanism for sealing the fabric against the side of the automobile body in order to keep out the rain. Tops embodying the patent have been installed by several automobile manufacturers in various models of convertibles. The components of the patented combination, other than the fabric, normally are usable for the lifetime of the car, but the fabric has a much

shorter life. It usually so suffers from wear and tear, or so deteriorates in appearance, as to become "spent," and normally is replaced, after about three years of use. The consequent demand for replacement fabrics has given rise to a substantial industry, in which petitioner, Aro Manufacturing Co., is a national leader. It manufactures and sells replacement fabrics designed to fit the models of convertibles equipped with tops embodying the combination covered by the patent in suit.

After trial without a jury, the court held that the patent was valid, infringed and contributorily infringed by petitioners. It accordingly enjoined them from further manufacture, sale or use of these replacement fabrics, and appointed a master to hear evidence concerning, and to report to the court on, the matter of damages. The Court of Appeals affirmed, 270 F. 2d 200, and we granted certiorari, 362 U. S. 902.

The Court of Appeals, after holding that the patent was valid, stated that the "basic question" presented was whether petitioners' conduct constituted "making a permissible replacement of a part [the fabric] which expectedly became worn out or defective sooner than other parts of the patented combination" or whether such replacement constituted "a forbidden reconstruction of the combination." It then held that replacement of the fabric constituted reconstruction of the combination and thus infringed or contributorily infringed the patent. It reached that conclusion principally upon the ground that "the life of the fabric is not so short, nor is the fabric so cheap, that we can safely assume that an owner would rationally believe that in replacing it he was making only a minor repair to his top structure." 270 F. 2d, at 202, 205.

Validity of the patent is not challenged in this Court. The principal, and we think the determinative, question presented here is whether the owner of a combination

patent, comprised entirely of unpatented elements, has a patent monopoly on the manufacture, sale or use of the several unpatented components of the patented combination. More specifically, and limited to the particular case here, does the car owner infringe (and the supplier contributorily infringe) the combination patent when he replaces the spent fabric without the patentee's consent?

The fabric with which we deal here is an unpatented element of respondent's combination patent,[1] which covers only the combination of certain components, one of which is a "flexible top material." [2] The patent makes no claim to invention based on the fabric or on its shape, pattern or design. Whether the fabric or its shape might have been patentable is immaterial,[3] for the fact is that neither the fabric nor its shape has been patented. No claim that the fabric or its shape, pattern or design constituted the invention was made in the application or included in the patent.

Since the patentees never claimed the fabric or its shape as their invention, and the claims made in the patent are the sole measure of the grant,[4] the fabric is no more than an unpatented element of the combination which was

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[1] There are 10 claims in the patent. Claims 1 through 9 of the patent each specifically begin: "In a convertible automobile body, the combination of . . . ." Claim 10 does not contain the word "combination" but nevertheless equally claims only a combination.

[2] Among other elements in the claims are the automobile body structure or tonneau, a folding bow structure, a sealing strip, and a wiping arm.

[3] *Graver Mfg. Co.* v. *Linde Co.*, 336 U. S. 271, 277; *Universal Oil Co.* v. *Globe Oil & Refining Co.*, 322 U. S. 471, 484; *Milcor Steel Co.* v. *Fuller Co.*, 316 U. S. 143, 145–146.

[4] *Mercoid Corp.* v. *Mid-Continent Co.*, 320 U. S. 661, 667; *Mercoid Corp.* v. *Minneapolis-Honeywell Co.*, 320 U. S. 680, 684; *McClain* v. *Ortmayer*, 141 U. S. 419, 423–424; *Pennock* v. *Dialogue*, 2 Pet. 1, 16.

claimed as the invention, and the patent did not confer a monopoly over the fabric or its shape. In *Mercoid Corp.* v. *Mid-Continent Co.*, 320 U. S. 661, 667, this Court ruled the point as follows:

> "The patent is for a combination only. Since none of the separate elements of the combination is claimed as the invention, none of them when dealt with separately is protected by the patent monopoly."

And in *Mercoid Corp.* v. *Minneapolis-Honeywell Co.*, 320 U. S. 680, 684, the Court said:

> "The fact that an unpatented part of a combination patent may distinguish the invention does not draw to it the privileges of a patent. That may be done only in the manner provided by law. However worthy it may be, however essential to the patent, an unpatented part of a combination patent is no more entitled to monopolistic protection than any other unpatented device."

See also *McClain* v. *Ortmayer*, 141 U. S. 419, 423–424; *Pennock* v. *Dialogue*, 2 Pet. 1, 16.

It follows that petitioners' manufacture and sale of the fabric is not a *direct* infringement under 35 U. S. C. § 271 (a).[5] *Cimiotti Unhairing Co.* v. *American Fur Co.*, 198 U. S. 399, 410; *Eames* v. *Godfrey*, 1 Wall. 78, 79; *Prouty* v. *Ruggles*, 16 Pet. 336, 341; *U. S. Industries, Inc.*, v. *Otis Engineering Co.*, 254 F. 2d 198, 203 (C. A. 5th Cir.). But the question remains whether petitioners' manufacture and sale of the fabric constitute a *contributory* infringement of the patent under 35 U. S. C.

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[5] Section 271 (a) provides:

"Except as otherwise provided in this title, whoever without authority makes, uses or sells any patented invention, within the United States during the term of the patent therefor, infringes the patent."

§ 271 (c).[6] It is admitted that petitioners know that the purchasers intend to use the fabric for replacement purposes on automobile convertible tops which are covered by the claims of respondent's combination patent, and such manufacture and sale with that knowledge might well constitute contributory infringement under § 271 (c), if, but only if, such a replacement by the purchaser himself would in itself constitute a *direct* infringement under § 271 (a), for it is settled that if there is no *direct* infringement of a patent there can be no *contributory* infringement. In *Mercoid* v. *Mid-Continent, supra,* it was said: "In a word, if there is no infringement of a patent there can be no contributory infringer," 320 U. S., at 677, and that "if the purchaser and user could not be amerced as an infringer certainly one who sold to him . . . cannot be amerced for contributing to a non-existent infringement." *Id.,* at 674.[7] It is plain that § 271 (c)—a part of the Patent Code enacted in 1952—made no change in the fundamental precept that there can be no contributory infringement in the absence of a direct infringement. That section defines contributory infringement in terms of direct infringement—namely the sale of a component of a

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[6] Section 271 (c) is as follows:

"Whoever sells a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use *in an infringement of such patent,* and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer." (Emphasis added.)

[7] Although these statements were made in the dissenting opinions of MR. JUSTICE FRANKFURTER and Mr. Justice Roberts, respectively, there is nothing in the majority opinion remotely suggesting any disagreement with the fundamental conclusion that there can be no contributory infringement in the absence of direct infringement.

patented combination or machine for use "in an infringement of such patent." And § 271 (a) of the new Patent Code, which defines "infringement," left intact the entire body of case law on direct infringement.[8] The determinative question, therefore, comes down to whether the car owner would infringe the combination patent by replacing the worn-out fabric element of the patented convertible top on his car, or even more specifically, whether such a replacement by the car owner is infringing "reconstruction" or permissible "repair."

This Court's decisions specifically dealing with whether the replacement of an unpatented part, in a patented combination, that has worn out, been broken or otherwise spent, is permissible "repair" or infringing "reconstruction," have steadfastly refused to extend the patent monopoly beyond the terms of the grant. *Wilson* v. *Simpson,* 9 How. 109—doubtless the leading case in this Court that deals with the distinction—concerned a patented planing machine which included, as elements, certain cutting knives which normally wore out in a few months' use. The purchaser was held to have the right to replace those knives without the patentee's consent. The Court held that, although there is no right to "rebuild" a patented combination, the entity "exists" notwithstanding the fact that destruction or impairment of one of its elements renders it inoperable; and that, accordingly, replacement of that worn-out essential part is permissible restoration of the machine to the original use for which it was bought. 9 How., at 123. The Court explained that it is "the use of the whole" of the

[8] The reviser's note on § 271 (a) specifically stated that it is "declaratory only." 35 U. S. C. A., following § 271.

"The prior statute had no section defining or dealing with what constitutes infringement of a patent," and § 271 (a) was adopted "for completeness." Federico, Commentary on the New Patent Act, 35 U. S. C. A., preceding § 1, at p. 51.

combination which a purchaser buys, and that repair or replacement of the worn-out, damaged or destroyed part is but an exercise of the right "to give duration to that which he owns, or has a right to use as a whole." *Ibid.*[9]

The distilled essence of the *Wilson* case was stated by Judge Learned Hand in *United States* v. *Aluminum Co. of America,* 148 F. 2d 416, 425 (C. A. 2d Cir.): "The [patent] monopolist cannot prevent those to whom he sells from . . . reconditioning articles worn by use, unless they in fact make a new article." Instead of applying this plain and practical test, the courts below focused attention on operative facts not properly determinative of the question of permissible repair *versus* forbidden reconstruction. The Court of Appeals found that the fabric "is not a minor or relatively inexpensive component" of the patented combination, or an element that would expectedly wear out after a very short period of use—although its "expectable life span" is shorter than

[9] None of this Court's later decisions dealing with the distinctions between "repair" and "reconstruction" have added to the exposition made in *Wilson* v. *Simpson, supra,* and that opinion has long been recognized as the Court's authoritative expression on the subject. *Morgan Envelope Co.* v. *Albany Paper Co.,* 152 U. S. 425, and *Heyer* v. *Duplicator Mfg. Co.,* 263 U. S. 100, held that an owner or licensee of a patented machine or combination does not infringe the patent by replacing an unpatented element of the combination which has only a temporary period of usefulness, so that replacement is necessary for continued utilization of the machine or combination as a whole. Those cases came clearly within the *Wilson* case. *Cotton-Tie Co.* v. *Simmons,* 106 U. S. 89, the only other repair-reconstruction case decided by this Court since *Wilson,* found infringement by one who bought up, as scrap metal, patented metal straps, used in tying cotton bales, after the straps had been used and severed (in unbinding the bales), and who then welded or otherwise reconnected the straps at the severed point and resold them for further use in baling cotton. The case is distinguishable on its facts, and the fact that the ties were marked "Licensed to use once only," was deemed of importance by the Court. Cf. *Henry* v. *A. B. Dick Co.,* 224 U. S. 1.

that of the other components—and, for these reasons, concluded that "an owner would [not] rationally believe that . . . he was making only a minor repair" in replacing the worn-out fabric, but that, instead, the replacement "would be counted a major reconstruction." 270 F. 2d, at 205. We think that test was erroneous.

Respondent has strenuously urged, as an additional relevant factor, the "essentialness" of the fabric element to the combination constituting the invention. It argues that the particular shape of the fabric was the advance in the art—the very "heart" of the invention—which brought the combination up to the inventive level, and, therefore, concludes that its patent should be held to grant it a monopoly on the fabric. The rule for which respondent contends is: That when an element of a patented machine or combination is relatively durable—even though not so durable as the entire patented device which the owner purchased—relatively expensive, relatively difficult to replace, and is an "essential" or "distinguishing" part of the patented combination, any replacement of that element, when it wears out or is otherwise spent, constitutes infringing "reconstruction," and, therefore, a new license must be obtained from, and another royalty paid to, the patentee for that privilege.

We cannot agree. For if anything is settled in the patent law, it is that the combination patent covers only the totality of the elements in the claim and that no element, separately viewed, is within the grant. See the *Mercoid* cases, *supra,* 320 U. S., at 667; 320 U. S., at 684.[10] The basic fallacy in respondent's position is that it requires the ascribing to one element of the patented com-

[10] Although the *Mercoid* cases involve the doctrine of patent misuse, which is not an issue in this case, they also specifically delimit the character of a combination patent monopoly and it is upon that matter that they are relevant here.

bination the status of patented invention in itself. Yet this Court has made it clear in the two *Mercoid* cases that there is no legally recognizable or protected "essential" element, "gist" or "heart" of the invention in a combination patent. In *Mercoid Corp.* v. *Mid-Continent Co., supra,* the Court said:

> "That result may not be obviated in the present case by calling the combustion stoker switch the 'heart of the invention' or the 'advance in the art.' The patent is for a combination only. Since none of the separate elements of the combination is claimed as the invention, none of them when dealt with separately is protected by the patent monopoly." 320 U. S., at 667.

And in *Mercoid Corp.* v. *Minneapolis-Honeywell Co., supra,* the Court said:

> "The fact that an unpatented part of a combination patent may distinguish the invention does not draw to it the privileges of a patent. That may be done only in the manner provided by law. However worthy it may be, however essential to the patent, an unpatented part of a combination patent is no more entitled to monopolistic protection than any other unpatented device." 320 U. S., at 684.

No element, not itself separately patented, that constitutes one of the elements of a combination patent is entitled to patent monopoly, however essential it may be to the patented combination and no matter how costly or difficult replacement may be. While there is language in some lower court opinions indicating that "repair" or "reconstruction" depends on a number of factors, it is significant that each of the three cases of this Court, cited for that proposition, holds that a license to use a patented combination includes the right "to preserve its fitness for use so far as it may be affected by wear or breakage."

Leeds & Catlin Co. v. *Victor Talking Machine Co.*, 213 U. S. 325, 336; *Heyer* v. *Duplicator Mfg. Co., supra,* at 102; and *Wilson* v. *Simpson, supra,* at 123. We hold that maintenance of the "use of the whole" of the patented combination through replacement of a spent, unpatented element does not constitute reconstruction.

The decisions of this Court require the conclusion that reconstruction of a patented entity, comprised of unpatented elements, is limited to such a true reconstruction of the entity as to "in fact make a new article," *United States* v. *Aluminum Co. of America, supra,* at 425, after the entity, viewed as a whole, has become spent. In order to call the monopoly, conferred by the patent grant, into play for a second time, it must, indeed, be a second creation of the patented entity, as, for example, in *Cotton-Tie Co.* v. *Simmons, supra.* Mere replacement of individual unpatented parts, one at a time, whether of the same part repeatedly or different parts successively, is no more than the lawful right of the owner to repair his property. Measured by this test, the replacement of the fabric involved in this case must be characterized as permissible "repair," not "reconstruction."

Reversed.

MR. JUSTICE BLACK, concurring.

I fully concur in the judgment of reversal and with the opinion of the Court but want to express some additional views because of the concurring opinion of my Brother BRENNAN and the dissenting opinion of my Brother HARLAN. The latter two opinions, in my judgment, attempt to introduce wholly unnecessary and undesirable confusions, intricacies and complexities into what has been essentially a very simple question under the opinions of this Court, and that is: How can a court decide whether a person who has bought and owns a patented commodity composed of a combination of unpatented

elements is actually making a new one so as to infringe the patent, rather than merely replacing a worn-out part or parts necessary to continue the use of the commodity, which does not constitute patent infringement? I put the question as one of direct infringement because I agree with the other three opinions in this case that the petitioner Aro Manufacturing Co. here who cut out and sold fabrics to replace worn-out covers in patented automobile tops can be guilty of *contributory* infringement only if automobile owners who buy the fabrics and use them in their own cars are themselves guilty of *direct* infringements and liable for treble damages.[1] The crucial question here therefore is one of direct, not contributory, infringement. For this reason it seems to me that most of the talk in the case about contributory infringement and misuse of patents is confusing and beside the point. For the same reason the emphasis in this Court, the District Court and the Court of Appeals on the recodification [2] of the patent laws in 1952 seems to me to be out of place. The language and history of that Act show plainly:

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[1] This elementary principle was brought to the attention of Congress by Mr. Giles S. Rich, the chief draftsman of the provisions on contributory infringement in the 1952 recodification:

"Mr. RICH. . . . I should state at the outset that wherever there is contributory infringement there is somewhere something called direct infringement, and to that direct infringement someone has contributed. It is a very different thing from a concept like contributory negligence." Hearings before Subcommittee of House Judiciary Committee on H. R. 3760, 82d Cong., 1st Sess. 151 (1951).

[2] If anyone is inclined despite other evidence to the contrary to attribute to Congress a purpose to accomplish any far-reaching changes in the substantive law by this enactment, he should take note that just before the bill was passed in the Senate, Senator Saltonstall asked on the floor, "Does the bill change the law in any way or only codify the present patent laws?" Senator McCarran, Chairman of the Judiciary Committee which had been in charge of the bill for the Senate, replied, "It codifies the present patent laws." 98 Cong. Rec. 9323 (July 4, 1952).

(1) that Congress wanted to continue in force, but not expand, the judge-made doctrine of contributory infringement under which a person who knowingly aids, encourages or abets the direct infringement of a patent is to be held liable as a contributory infringer; [3] (2) that Congress

[3] To this end, the 1952 Act provides (35 U. S. C. § 271):

"(b) Whoever actively induces infringement of a patent shall be liable as an infringer.

"(c) Whoever sells a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer."

The hearings and committee reports show that the only purpose of these provisions was to prevent this Court's decision in *Mercoid Corp.* v. *Mid-Continent Inv. Co.*, 320 U. S. 661, from being treated as having obliterated the law of contributory infringement:

"Mr. ROGERS. Then I take it from your statements, that there is some difference of opinion among those engaged in the practice of patent law as to whether or not the Supreme Court in its decisions has done away with contributory infringement.

. . . . . .

"Mr. RICH. There is a great difference of opinion on the part of the bar and also apparently on the part of the judiciary . . . .

"Mr. ROGERS. Then in effect this recodification, particularly as to section 231 [from which came the present § 271], would point out to the court, at least that it was the sense of Congress that we remove this question of confusion as to whether contributory infringement existed at all, and state in positive law that there is such a thing as contributory infringement, or at least it be the sense of Congress by the enactment of this law that if you have in the Mercoid case done away with contributory infringement, then we reinstate it as a matter of substantive law of the United States and that you shall hereafter in a proper case recognize or hold liable one who has contributed to the infringement of a patent.

"That is the substantive law that we would write if we adopted this section 231 as it now exists. Is that not about right?

"Mr. RICH. That is a very excellent statement . . . ." Hearings, *supra*, note 1, at 159. [*Footnote 3 continued on p. 349.*]

did not want patentees to be barred from prosecuting their claims for direct infringement merely because they exercised their right to assert a claim in or out of court for contributory infringement; [4] (3) that the long-existing scope of a patentee's monopoly rights was not to be expanded

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". . . Considerable doubt and confusion as to the scope of contributory infringement has resulted from a number of decisions of the courts in recent years. The purpose of this section is to codify in statutory form principles of contributory infringement and at the same time eliminate this doubt and confusion." H. R. Rep. No. 1923 on H. R. 7794, 82d Cong., 2d Sess. 9.

[4] To protect a patentee's right to sue for contributory infringement, the 1952 Act provides:

"(d) No patent owner otherwise entitled to relief for infringement or contributory infringement of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having done one or more of the following: (1) derived revenue from acts which if performed by another without his consent would constitute contributory infringement of the patent; (2) licensed or authorized another to perform acts which if performed without his consent would constitute contributory infringement of the patent; (3) sought to enforce his patent rights against infringement or contributory infringement." 35 U. S. C. § 271 (d).

This provision was designed specifically to prevent the *Mercoid* case from being interpreted to mean that any effort to enforce a patent against a contributory infringer in itself constitutes a forfeiture of patent rights:

"Mr. RICH. . . .

"Other decisions following Mercoid have made it quite clear that at least some courts are going to say that any effort whatever to enforce a patent against a contributory infringer is in itself misuse. The cases are cited in the old hearings. Therefore, we have always felt—we who study this subject particularly—that to put any measure of contributory infringement into law you must, to that extent and to that extent only, specifically make exceptions to the misuse doctrine, and that is the purpose of paragraph (d)." Hearings, *supra,* note 1, at 161–162.

". . . The last paragraph of this section provides that one who merely does what he is authorized to do by statute is not guilty of misuse of the patent." H. R. Rep. No. 1923, *supra,* note 3, at 9.

beyond what it had always been, that is, the exclusive right to make, use or sell a patented invention during the life of the patent.[5] The present case, therefore, narrows down to this and no more: Is the making or the use of a new piece of fabric to replace the worn-out fabric cover of an automobile top attached to an automobile that the owner has bought and paid for as his own an infringement of a patent on that top? Note immediately that if it is an infringement it must be because the owner of the top, in doing nothing but replacing the worn-out fabric, "makes" the patented invention which is the top with all its parts. Common sense and prior decisions of this Court require us to hold that an automobile owner does not "make" a whole top when he merely replaces its worn-out fabric cover.

Let us first take a quick look at the top described in the patent. It is composed first and foremost of a metal frame, no part of which is, or could have been, patented. It also includes several other pieces of metal, one of them called a "wiper," which is simply a plain piece of metal that is not and could not have been patented. Again,

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[5] The 1952 Act carried out this purpose by providing:

"(a) Except as otherwise provided in this title, whoever without authority makes, uses or sells any patented invention, within the United States during the term of the patent therefor, infringes the patent." 35 U. S. C. § 271 (a).

Although there was no statutory provision defining infringement prior to 1952, the definition adopted is consonant with the long-standing statutory prescription of the terms of the patent grant, which was contained in § 4884 of the Revised Statutes as follows:

"Every patent shall contain a short title or description of the invention or discovery, correctly indicating its nature and design, and a grant to the patentee . . . of *the exclusive right to make, use, and vend the invention or discovery* throughout the United States . . . ." (Emphasis supplied.)

This provision is now contained without substantial change in 35 U. S. C. § 154.

there is a piece of fabric cut in a certain shape to fit and cover the unpatented frame. Of course this fabric could not be patented unless it had some peculiar novel quality of its own, but no such characteristic is or could have been claimed. The District Court held that this aggregation of nonpatentable parts was patentable as achieving a new result. The Court of Appeals, without passing on this question at all, merely took it for granted that a patentable "discovery" had been made. I shall also act on that assumption although I am not sure in just what respect the aggregation of these common components could possibly have served a new purpose or have been the result of anything more than the simplest childlike mechanical skill. In fact, the patentee must have known all about the old-fashioned surrey with the fringe on top and with isinglass curtains you could roll right down in case of a change in the weather. The top is also reminiscent of the tops of Model T Fords which began to scare horses on country roads nearly half a century ago. A reading of the record indicates that the new discovery might be thought to inhere in the fact that (a) this top protects from rain better than any that had previously been manufactured, (b) it could be made rainproof from the inside rather than requiring some one to get outside and manipulate snaps, or (c) the folding material is fastened "below the top of the tonneau" and "a wiping arm automatically operated by the bow structure [is used] for wiping the inside of the folding material as the top is raised and pressing it against the top of the tonneau." None of these alleged additions to the present stock of surrey and Tin Lizzie knowledge, however, gives us much aid in determining the real issue being decided here, which is whether replacing the fabric amounts to the "making" of a new top and thus a direct infringement of the patent. It is of importance in considering this question that the District Court found, and

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the Court of Appeals agreed, that the only thing the defendant made was the fabric portions of convertible tops. Certainly I suppose it would not be claimed that the sale of unshaped woolen fabric—a staple article of commerce—would make a tailor or merchant guilty of contributory infringement if he sold it to the owner of a pair of patented trousers for patching purposes. But evidently the contention is that when petitioner here put his scissors or whatever cutting instrument he used on the fabric and shaped it so that it would fit the top, he was thereby aiding the top's owner to "make" a new top, or at least to "reconstruct" one from the ground up. Nothing in any of the prior cases of this Court indicates that such a contention should be sustained.

The case that may well be classified as the leading one on the subject of "making" or "reconstruction" as distinguished from "repair" is *Wilson* v. *Simpson,* 9 How. 109, decided in 1850. That case involved a patent on a planing machine composed of unpatented parts described as the frame, the cogwheels, the shaft, and other elementary parts, which, when put together, constituted what was known as the "Woodworth planing-machine." Able counsel argued for the patentee that the cutting knives, which had to be replaced from time to time, could not be replaced without thereby infringing the patent. The contention was that the machine ceased to exist or have any "material existence" the moment its knives wore out, and that for this reason replacement of the knives amounted to a "making" of the whole patented invention which infringed the patentee's exclusive right to "make, use, and vend." The Court refused to accept this conceptualistic and misleading argument as to when a tangible machine ceases to have a "material existence." It did agree that "when the material of the combination ceases to exist, in whatever way that may occur, the right to

renew it depends upon the right to make the invention. If the right to make does not exist, there is no right to rebuild the combination." *Id.*, at 123. But the Court then went on to enunciate what has been the accepted rule in this Court ever since with respect to component parts of the combination: "When the wearing or injury is partial, then repair is restoration, and not reconstruction. . . . And it is no more than that, though it shall be a replacement of an essential part of a combination." *Ibid.*

In further explanation the Court pointed out that "[f]orm may be given to a piece of any material,—wood, metal, or glass,—so as to produce an original result, or to aid the efficiency of one already known, and that would be the subject for a patent." It went on to say that if that patented article should happen to be broken so that its parts could not be readjusted or so worn out and beyond repair as to be wholly useless, then a purchaser could not make another to replace it without infringing, but would have to buy a new one. This because the Court said that would amount to an "entire reconstruction" of the patented article. "If, however," and this is of crucial importance with reference to the combination patent in the present case, "this same thing is a part of an original combination, essential to its use, then the right to repair and replace recurs." *Id.*, at 124.

The common-sense rule of *Wilson* v. *Simpson* was followed in *Heyer* v. *Duplicator Mfg. Co.*, 263 U. S. 100. Involved there was a combination patent, a multiple copying machine, "one element of which," the Court said, "is a band of gelatine to which is transferred the print to be multiplied and which yields copies up to about a hundred. This band is attached to a spool or spindle which fits into the machine. Anyone may make and sell the gelatine composition but the ground of recovery was that the de-

fendant made and sold bands of sizes fitted for use in the plaintiff's machine and attached them to spindles, with intent that they should be so used. The main question is whether purchasers of these machines have a right to replace the gelatine bands from any source that they choose. If they have that right the defendant in selling to them does no wrong." *Id.*, at 101. A unanimous Court, speaking through Mr. Justice Holmes, recognized that the rule of *Wilson* v. *Simpson* disposed of this question, saying that "[s]ince *Wilson* v. *Simpson*, 9 How. 109, 123, it has been the established law that a patentee has not 'a more equitable right to force the disuse of the machine entirely, on account of the inoperativeness of a part of it, than the purchaser has to repair, who has, in the whole of it, a right of use.' " 263 U. S., at 101. Like the bands of gelatine in *Heyer*, the fabric in the present case is a common article of commerce, and also like the gelatine it has to have a special form to fit into the combination.

None of this Court's cases relied upon by my Brothers HARLAN and BRENNAN justifies adoption of the supposed guides and standards referred to in their opinions. Deciding whether a patented article is "made" does not depend on whether an unpatented element of it is perishable, or how long some of the elements last, or what the patentee's or a purchaser's intentions were about them, regardless of whether the application of such standards is considered a question of law, as it is by MR. JUSTICE BRENNAN, or a question of fact, as it is by MR. JUSTICE HARLAN. The holdings of prior cases in this Court have not actually rested on such minor and insignificant factors in determining when an article has been "made" and when it has not. A case in which only a minimal component has been omitted from a "making" of the combination, such as the extreme example of omission of a single bolt from a patented machine or a button from a patented garment, might call upon this Court to articulate some rather ob-

vious refinements to this simple test of "making." [6] But this is by no means such a case and it is dangerously misleading to suggest that so clear a case as this one requires the application of a Pandora's flock of insignificant standards, especially when it is recognized, as it must be upon analysis, that consistent application of the standards suggested would actually change the basic test from "making" to something not satisfactorily defined but indisputably different. And surely the scope of a patent should never depend upon a psychoanalysis of the patentee's or purchaser's intentions, a test which can only confound confusion.[7] The common sense of the whole matter is, as recognized in the *Wilson* case and again in the opinion of the Court today, that in none but the most extraordinary case—difficult even to imagine—will a court ever have to invoke specially contrived evidentiary standards to determine whether there has actually been a new "making" of the patented article.

Neither *Leeds & Catlin Co.* v. *Victor Talking Machine Co.*, 213 U. S. 325, nor *Cotton-Tie Co.* v. *Simmons*, 106 U. S. 89, nor any other cases of this Court that have treated this subject, depart from this common-sense rule of *Wilson* v. *Simpson*. In fact, as Mr. Justice Holmes pointed out in *Heyer* v. *Duplicator Mfg. Co.*, *supra*, the question in *Leeds & Catlin* did not concern "a right to sub-

[6] This point was made by Mr. Rich in the course of the hearings as follows: "If the part he is supplying is *in substance the very thing which was invented*, it seems to me personally, that he is an infringer, and he should not be let off on some little technicality that there is *something minor in the whole apparatus that he is not supplying*." Hearings, *supra*, note 1, at 153. (Emphasis supplied.) Of course, as Mr. Rich well knew, "the very thing" which is invented in any combination patent is the combination itself and not any unpatented component part of it—in this case, the whole convertible top, not the fabric used in it.

[7] Cf. *Mercoid Corp.* v. *Mid-Continent Inv. Co.*, 320 U. S. 661, 679–680 (Jackson, J., dissenting on other grounds).

stitute worn out parts" and "[t]he authority of *Wilson* v. *Simpson* and the cases that have followed it was fully recognized [in *Leeds & Catlin*] and must be recognized here." 263 U. S., at 102. The *Cotton-Tie* case likewise contains no support for holding that replacing the fabric in this top amounts to a "making" or even a "remaking" of the whole convertible top. The patent involved there was a cotton bale tie. Marked on each, for whatever it was worth, was "Licensed to use once only." After these ties had been used once and broken off the cotton bales, the old tie material, along with the buckles, was sold as scrap, then re-rolled, straightened, riveted together, and cut into proper lengths and attached to an old buckle. It was this making of completely new ties out of the discarded scrap material that was held to amount to a making of the patented device and therefore an infringement.[8] Cf. *Morgan Envelope Co.* v. *Albany Paper Co.*, 152 U. S. 425, 433–434. *Morgan Envelope,* in addition to its distinction of the *Cotton-Tie* case, is notable for its explicit reaffirmance of *Wilson* v. *Simpson* and for its statement by a unanimous Court that "[t]he true distinction" is whether the component part of the combination is "the subject of a separate patent." 152 U. S., at 435. I agree with my Brother WHITTAKER that this remains the true distinction today.[9]

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[8] See Transcript of Record, pp. 29–33, *Cotton-Tie Co.* v. *Simmons,* 106 U. S. 89.

[9] I am perfectly content with the dissenting opinion's denomination of our interpretation as a "reconstruction" of the cases in the sense in which I understand that term to be applied in these cases. I regret to say, however, that we cannot claim this interpretation to be a "discovery" in the patent sense. It was anticipated by Judge Learned Hand's citation of *Wilson* v. *Simpson* for the proposition that "[t]he [patent] monopolist cannot prevent those to whom he sells from . . . reconditioning articles worn by use, unless they in fact make a new article." *United States* v. *Aluminum Co. of America,* 148 F. 2d 416, 425.

In my judgment it would create mischievous results for a majority of this Court to create or approve ambiguous evidentiary standards which could only obfuscate the simple fact of whether a person is "making" a patented article composed of old unpatentable elements. For example, there should be no attempt to decide whether there is a making by comparing the time that the different elements of such a patent normally will exist if let alone. The owner is under no obligation to let them alone. Every owner has the right to repair and patch each part of the property he bought and paid for in order to make it last as long as he can. Everyone knows that this patented top is likely to last as long as the car itself if it is repaired from time to time. An accident might wholly destroy the entire top and then it might have to be replaced by a new one, which if done without the patentee's consent would of course be an infringement. I cannot suppose, however, that if the bows upon which the fabric rests at the top, or the metal frames upon which it stands, or the metal wiper which helps to level off the curtain folds, or the snaps that may have to be used, should happen to become worn out or destroyed, that anyone could reasonably come to the conclusion that a replacement of one of these worn-out parts would be a complete rebuilding of the old top or the "making" of a new one and therefore an infringement of the patent. Such a contention would seem little short of fantastic to me, and the same is true as to replacement of the fabric.

This case is of great importance in our competitive economy. The record shows that petitioner is but one of many small business enterprises filling a useful place in manufacturing the comparatively smaller parts of larger products like automobiles. It is quite right and in keeping with our patent system that small business enterprises should no more than large enterprises be allowed to

infringe the patents of others. But businessmen are certainly entitled to know when they are committing an infringement. It is for that reason that the patent statutes require applicants to define with particularity and claim without ambiguity the subject matter which is regarded to be an invention. 35 U. S. C. §§ 112, 154. In the absence of suits like this how could a businessman even suspect that he might be infringing a patent by marketing an unpatented and unpatentable part of a combination like this fabric top? It has long been settled with respect to combination patents that the monopoly rights extend only to the patented combination as a whole and that the public is free to appropriate any unpatented part of it, "however important." *Special Equipment Co.* v. *Coe,* 324 U. S. 370, 376, and cases cited. And in the 1952 recodification Congress was very careful, in what is now 35 U. S. C. § 271 (c), to specify that a vendor is liable as a contributory infringer only if he has sold the component part "knowing" that it is to be used in an infringement.[10] But to what avail these congressional precautions if this Court, by its opinions, would subject small businessmen to the devastating uncertainties of nebulous and permissive standards of infringement under which courts could impose treble damages upon them for making parts, distinct, separable, minor parts, or even major parts of a combination patent, upon which parts no patent has been or legally could have been issued. The fact that subjection of a small business enterprise to treble damages for such activities can have disastrous or even lethal consequences is suggested by the observation of the

[10] If the wording of the statutory provision be thought to leave any doubt on this point, the intent of Congress is made manifest by the fact that the position of the word "knowing" (originally "knowingly") in subsection (c) was changed after the hearings for this very purpose. See Hearings, *supra,* note 1, at 13, 142, 164, 176.

District Court in this very case that petitioner had not made a supersedeas bond, whether because unable or unwilling to do so the court said it was not informed. The efforts of Congress to help small business enterprises keep their heads above water in the Small Business Act of 1953,[11] which was enacted almost contemporaneously with the recodification of the patent laws, could be frustrated at least in large part by subjecting those engaged in industrial activities to the constantly overhanging threat of suits for patent infringements for the sale of unpatented articles. And I think it is indisputable that the unpredictability in any given case of the resolution of the intricate standards suggested by my Brothers HARLAN and BRENNAN would deter small businessmen from engaging even in activities that all members of this Court would ultimately agree do not constitute contributory infringement. In our own case these standards led to opposite conclusions when applied by three distinguished judges of the Court of Appeals and when applied by MR. JUSTICE BRENNAN.

The established policy in this Nation for more than a century has been that when an article described in a patent is sold and "passes to the hands of the purchaser, it is no longer within the limits of the monopoly. It passes outside of it, and is no longer under the protection of the act of congress. . . . Contracts in relation to it are regulated by the laws of the State, and are subject to state jurisdiction." [12] In this day of advanced technology and mechanical appliances upon which so many people depend,

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[11] 67 Stat. 232, as amended, 15 U. S. C. §§ 631–651.

[12] *Bloomer* v. *McQuewan*, 14 How. 539, 549–550; see *United States* v. *Univis Lens Co.*, 316 U. S. 241, 251, and cases collected in *General Talking Pictures Corp.* v. *Western Electric Co.*, 305 U. S. 124, 128, note 1 (dissenting opinion). This century-long mandate cannot be set aside because of what my Brother HARLAN now conceives to be a more enlightened policy in this field of law.

this wise policy against permitting patentees to expand their control of commodities after they reach the hands of bona fide purchasers is all the more important. Congress surely did not intend for it to be left within the sole discretion of the patent monopolist whether an unpatented component part will be separately available to the purchaser for replacement in the combination or whether, when that part wears out, the purchaser will be forced to replace a larger subcombination of the patented product or perhaps even the entire aggregation. I have an idea it would greatly surprise and shock the owners of convertible automobiles throughout this country to learn that there is a serious contention made that if they buy a new fabric to replace the worn-out fabric on their convertible top, loose legal formulas like those suggested by my Brothers HARLAN and BRENNAN can be applied to make them liable for treble damages, attorneys' fees and heavy costs. No such doctrine should be allowed to gain a foothold through judicial decisions. If bona fide purchasers of goods throughout the Nation are to be subjected to any such phenomenal expansion of the right of patentees, Congress, not this Court, should do it. One royalty to one patentee for one sale is enough under our patent law as written. And this proposition can be stated with knowledge that there is not a single sentence, clause, phrase or word in the entire legislative history of the 1952 recodification which could have led Congress to believe that it was being asked by means of the provisions enacted to enlarge the scope of a patentee's exclusive right to "make, use, and vend" the thing patented.

A fundamental error underlying the misleading standards suggested by my Brothers HARLAN and BRENNAN is the notion that in a case of this kind a court is obliged to search for the alleged "heart" or "core" of the combination patent. This misconception, which has unequivo-

cally been rejected in our prior decisions,[13] is nothing but an unwarranted transformation and expansion of a combination patent, which was correctly described by Mr. Justice Jackson as conferring only a ". . . right in an abstruse relationship between things in which individually there is no right." [14] A patented combination is no more than that, a novel relationship brought to bear on what presumably are familiar elements already in the public domain. Such familiar elements are not removed from the public domain merely because of their use, however crucial, in the novel combination. Of course, if novelty should inhere in one of the parts as well as in the whole, then that novel "heart" or "core" can be separately patented and separately protected. But in the absence of such a separate patent, which in this case would presumably be some sort of patent on the utility of the shape of the fabric, the public has the right to make, use and vend each part subject only to the established limitation of contributory infringement: that a part may not be knowingly supplied for use by an unauthorized person in a new making of what is in effect the whole combination.

Finally, petitioners point out that there is a serious constitutional question involved in the claim that automobile owners can be mulcted for damages for replacing the worn-out fabric in their convertible tops. Article I, § 8 of the Constitution provides:

> "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

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[13] See *Mercoid Corp.* v. *Mid-Continent Inv. Co.*, 320 U. S. 661, 667–668, and cases cited.

[14] *Id.*, at 679 (dissenting opinion).

I have no doubt of the wide powers of the States to govern the sale of fabrics, clipped or unclipped, cut or uncut, cloth, oilcloth, isinglass or plastic. But it is difficult for me to think that shaping up a common piece of fabric with a common pair of scissors or other cutter can be exalted to that important category of "Discoveries" that the Constitution authorizes Congress to promote by special federal legislation. Nor do I believe that a purpose should be attributed to Congress to allow the courts, by means of an incalculable weighing of a complex of nebulous standards, to divine whether persons should be given monopoly rights on account of the way they trim ordinary fabrics. If there is anything sure about the 1952 recodification it is that the purpose was to clarify not to confuse the law. The test applied in the opinion of the Court today will not confuse, is in accord with our prior decisions endorsed by Congress and, most important, is in keeping with the general purposes of this Nation to retain an economy in which competition is a general law of trade except where actual "Discoveries" have been made.

MR. JUSTICE BRENNAN, concurring in the result.

I agree that the replacement of the top was "repair" and not "reconstruction," but I cannot agree that the test suggested by my Brother WHITTAKER for determination of that question is the correct one. My Brother HARLAN'S dissent cogently states the reasons why I also think that is too narrow a standard of what constitutes impermissible "reconstruction." For there are circumstances in which the replacement of a single unpatented component of a patented combination short of a second creation of the patented entity may constitute "reconstruction." *Leeds & Catlin Co.* v. *Victor Talking Machine Co.*, 213 U. S. 325; *Davis Electrical Works* v. *Edison Electric Light Co.*, 60 F. 276; cf. *Williams* v. *Hughes Tool Co.*, 186 F. 2d 278. These holdings applied the long-established standard for

determination of "repair" or "reconstruction." Under that standard there is no single test to which all must yield; rather the determination is to be based upon the consideration of a number of factors. *Wilson* v. *Simpson*, 9 How. 109; *Heyer* v. *Duplicator Mfg. Co.*, 263 U. S. 100.[1] Appropriately to be considered are the life of the part replaced in relation to the useful life of the whole combination,[2] the importance of the replaced element to

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[1] The standard has been variously expressed. See, *e. g.*, "Whether the bounds of legitimate repair have been exceeded must be determined upon the facts of each case as it is presented." *Morrin* v. *Robert White Engineering Works*, 143 F. 519, 520. "In the absence of a crucial test to which all must yield, the only aid comes from various minor or incidental considerations, and their combined effect." *Davis Electrical Works* v. *Edison Electric Light Co.*, 60 F. 276, 280. "The right, in our view, must depend in every case upon the special facts of the case as they show the relation of the two classes of parts—those supplied and those remaining in the original construction—to the patented unit. . . . there might be a structure where the putting in of a certain number of new parts would be 'reconstruction,' whereas the putting in of a smaller number would be 'repair,' or even where the putting in of one new part would be reconstruction but the putting in of two or three would not be, depending in each case upon whether, after the replacement, the structure as a whole could reasonably be said to be a new structure or the old one." *Automotive Parts Co.* v. *Wisconsin Axle Co.*, 81 F. 2d 125, 127. "Each case, as it arises, must be decided in the light of all the facts and circumstances presented, and with an intelligent comprehension of the scope, nature, and purpose of the patented invention, and the fair and reasonable intention of the parties." *Goodyear Shoe Machinery Co.* v. *Jackson*, 112 F. 146, 150. "The dividing line between repairs and a making over cannot be verbally located. What has been done can with more or less confidence be pronounced to be one or the other, but neither the one nor the other can be defined." *Hess-Bright Mfg. Co.* v. *Bearings Co.*, 271 F. 350, 352.

[2] *Wilson* v. *Simpson, supra; Heyer* v. *Duplicator Manufacturing Co., supra; Williams* v. *Barnes*, 234 F. 339; *Micromatic Hone Corp.* v. *Mid-West Abrasive Co.*, 177 F. 2d 934; *Payne* v. *Dickinson*, 109 F. 2d 52; *El Dorado Foundry, Machine & Supply Co.* v. *Fluid Packed Pump Co.*, 81 F. 2d 782; *Slocomb & Co., Inc.*, v. *Layman*

the inventive concept,[3] the cost of the component relative to the cost of the combination,[4] the common sense understanding and intention of the patent owner and the buyer of the combination as to its perishable components,[5] whether the purchased component replaces a worn-out part or is bought for some other purpose,[6] and other pertinent factors.[7]

Machine Co., 227 F. 94, affirmed, 230 F. 1021. In the *Slocomb* case the Court said, 227 F., at p. 98: "If . . . patented mechanism be composed of various parts and elements the most expensive of which have an average life of twenty years, and other parts or features of comparatively trifling cost are subjected in the operation of the mechanism to such wear as to require renewal or replacement within a period of a few months, or of a year or two, it would seem reasonable and sensible to treat such renewal or replacement as involving repairs in contradistinction to reconstruction."

[3] *Leeds & Catlin Co.* v. *Victor Talking Machine Co., supra; Davis Electrical Works* v. *Edison Electric Light Co., supra,* "in certain stages of use the essence of a device, though in appearance only a small portion of it, may be lost, and its renewal amount to reconstruction." Pp. 279–280. *Morrin* v. *Robert White Engineering Works, supra,* p. 519.

[4] *Heyer* v. *Duplicator Mfg. Co., supra; American Safety Razor Corp.* v. *Frings Bros. Co.*, 62 F. 2d 416; *El Dorado Foundry, Machine & Supply Co.* v. *Fluid Packed Pump Co., supra; Slocomb & Co., Inc.*, v. *Layman Machine Co., supra.*

[5] *Westinghouse Elec. & Mfg. Co.* v. *Hesser,* 131 F. 2d 406, 410: "Where the perishable nature of the parts are recognized by the patentee, and where the parts are adapted to be removed from the patented combination and, from time to time, replaced, replacement of such parts is repair and not reconstruction."

And as regards indicia of an understanding see *El Dorado Foundry, Machine & Supply Co.* v. *Fluid Packed Pump Co., supra; Slocomb & Co., Inc.*, v. *Layman Machine Co., supra.*

[6] See *Leeds & Catlin Co.* v. *Victor Talking Machine Co., supra; Connecticut Telephone & Elec. Co.* v. *Automotive Equipment Co.*, 14 F. 2d 957, affirmed, 19 F. 2d 990.

[7] Is the replaced part the dominant structural element of the combination? *Southwestern Tool Co.* v. *Hughes Tool Co.*, 98 F. 2d 42; *Automotive Parts Co.* v. *Wisconsin Axle Co., supra,* p. 127: "if the new parts so dominate the structural substance of the whole as

It is true that some decisions of this Court in patent misuse cases [8] raised doubt as to the continuing vitality of this standard in actions such as this one for relief from contributory infringement. But the Congress swept away that doubt when it gave the standard statutory sanction in 1952.[9] My Brother WHITTAKER'S test that

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to justify the conclusion that it has been made anew, there is a rebuilding or reconstruction; and conversely, where the original parts, after replacement, are so large a part of the whole structural substance as to preponderate over the new, there has not been a reconstruction but only repair."

Has there been physical destruction of the combination from use of the component? *Cotton-Tie Co.* v. *Simmons*, 106 U. S. 89.

[8] See, *e. g.*, *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661, 669: "The result of this decision, together with those which have preceded it, is to limit substantially the doctrine of contributory infringement. What residuum may be left we need not stop to consider."

[9] 35 U. S. C. § 271. The purpose of (c) of this section appears in the House Judiciary Committee Report, H. R. Rep. No. 1923 on H. R. 7794, 82d Cong., 2d Sess., p. 9. "The doctrine of contributory infringement has been part of our law for about 80 years. It has been applied to enjoin those who sought to cause infringement by supplying someone else with the means and directions for infringing a patent. One who makes a special device constituting the heart of a patented machine and supplies it to others with directions (specific or implied) to complete the machine is obviously appropriating the benefit of the patented invention. It is for this reason that the doctrine of contributory infringement, which prevents appropriating another man's patented invention, has been characterized as 'an expression both of law and morals.' Considerable doubt and confusion as to the scope of contributory infringement has resulted from a number of decisions of the courts in recent years. The purpose of this section is to codify in statutory form principles of contributory infringement and at the same time eliminate this doubt and confusion." The legislative history makes it clear that paragraph (d) complements (c) with the view to avoid the application of the patent misuse doctrine to conduct such as that of the patent owner in the present case. See Hearings, H. R. 3760, 82d Cong., 1st Sess., Subcommittee of the House Judiciary Committee, 1951, pp. 161–162, 169–175.

"[m]ere replacement of individual unpatented parts, one at a time, whether of the same part repeatedly or different parts successively, is no more than the lawful right of the owner to repair his property" plainly would not heed the congressional mandate. Instead Congress meant, as I read the legislative history of the 1952 Act, that the courts should recognize, in actions for contributory infringement, the distinction between components stated in *Wilson* v. *Simpson, supra,* the leading case in this field:

> "The other constituent parts of this invention, though liable to be worn out, are not made with reference to any use of them which will require them to be replaced. These, without having a definite duration, are contemplated by the inventor to last so long as the materials of which they are formed can hold together in use in such a combination. No replacement of them at intermediate intervals is meant or is necessary. They may be repaired as the use may require. With such intentions, they are put into the structure. So it is understood by a purchaser, and beyond the duration of them a purchaser of the machine has not a longer use." 9 How. 125–126.

Giles S. Rich, the chief draftsman of § 271 (c), when told that manufacturers of replacement parts for automobiles, tractors, and other machines had protested against the section in fear of being held contributory infringers under it, replied: "Whether or not they would be liable would depend on the facts in each particular case. And I think that the best way to clear that up is to take up section (c) and deal with the matter specifically and point out to you the limitations that are there, which have to be met before anybody is held liable, and then leave it to you to decide whether a parts supplier should be held liable or not, *depending on the kind of a*

part he may be supplying. If *the part* he is supplying is *in substance the very thing which was invented,* it seems to me personally, that he is an infringer, and he should not be let off on some little technicality that there is something minor in the whole apparatus that he is not supplying." Hearings, H. R. 3760, 82d Cong., 1st Sess., *supra,* p. 153. He added: "in each case you would have to look at the details and see what was invented, and in effect whether the alleged infringer is appropriating somebody else's invention, or whether he is not." Hearings, *supra,* p. 157.

However, I disagree with my Brother HARLAN that we should refrain from making an independent application of the proper standard in this case because of the conclusion of both lower courts that the replacement of the top constituted "reconstruction." I would suppose that "repair" or "reconstruction" is so far a question of law as to relieve appellate review from the restraints of Federal Rule of Civil Procedure 52 (a). See *United States* v. *E. I. du Pont de Nemours & Co.,* 353 U. S. 586, 598. In no previous case presenting the question of "repair" or "reconstruction" has this Court believed itself restrained from making an independent determination. *Wilson* v. *Simpson, supra; Cotton-Tie Co.* v. *Simmons, supra; Morgan Envelope Co.* v. *Albany Perforated Wrapping Paper Co.,* 152 U. S. 425; *Leeds & Catlin Co.* v. *Victor Talking Machine Co., supra; Heyer* v. *Duplicator Mfg. Co., supra.* And here the error of the two courts below is manifest. The life of the top was approximately three years in contrast to the several times longer life of the other components of the combination. The top was replaceable at a cost of from $30 to $70 depending on the fabric; in contrast the cost of other elements of the combination was approximately $400. These considerations of themselves suggest that the replacement was mere "repair" of the worn component and not "reconstruction"

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of the patented combination. Surely they support the inference that all concerned knew that the fabric of the top would become weather-beaten or unable to perform its protective function long before those other components, not so exposed and more durable as well, wore out. Its perishable nature coupled with its fractional cost as compared to the whole combination and its ready replaceability all point to the conclusion reached here. And particularly persuasive, I think, that this replacement was mere "repair," is the role of the top relative to other components in the inventive concept. Patentable novelty inhered not merely in the shape of the fabric; the record shows that a wiping arm which pressed the material in such way as to create a seal at the belt line of the vehicle played a significantly important role in the inventive concept. The claim for the combination is that it made possible an automatic top, made the top weathertight and prevented unauthorized access to the vehicle. The wiper arm, rather than the shape of the material alone, accomplished the inventive purposes of providing a top which was weathertight and prevented unauthorized access.[10] The shape of the fabric was thus not the essence of the device and in all the circumstances it seems reasonable and sensible to treat the replacement of the top as "repair."

I, therefore, think that the judgment of the Court of Appeals must be reversed, except, however, as to the relief granted respondent in respect of the replacements made on Ford cars before July 21, 1955.

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[10] This appears from the patent claims and from the testimony of respondent's patent and engineering experts. The following representation was made in connection with amended claims: "The real invention is fastening the folding material considerably below the top of the tonneau and then using a wiping arm automatically operated by the bow structure for wiping the inside of the folding material as the top is raised and pressing it against the top of the tonneau."

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

For more than a hundred years it has been the law that the owner of a device covered by a combination patent can, without infringing, keep the device in good working order by replacing, either himself or through any source he wishes, unpatented parts, but that he may not, without rendering himself liable for infringement, reconstruct the device itself, whether because of its deterioration or for any other reason, and even though all of the component parts of the device are themselves unpatented. *Wilson* v. *Simpson,* 9 How. 109; *Cotton-Tie Co.* v. *Simmons,* 106 U. S. 89; *Morgan Envelope Co.* v. *Albany Perforated Wrapping Paper Co.,* 152 U. S. 425; *Leeds & Catlin Co.* v. *Victor Talking Machine Co.,* 213 U. S. 325; *Heyer* v. *Duplicator Mfg. Co.,* 263 U. S. 100. The underlying rationale of the rule is of course that the owner's license to use the device carries with it an implied license to keep it fit for the use for which it was intended, but not to duplicate the invention itself. Correlatively, one who knowingly participates in an impermissible reconstruction of a patented combination is guilty of contributory infringement. "Direct" and "contributory" infringements are now codified in § 271 of the Patent Act of 1952. 35 U. S. C. § 271.[1]

[1] "(a) Except as otherwise provided in this title, whoever without authority makes, uses or sells any patented invention, within the United States during the term of the patent therefor, infringes the patent.

"(b) Whoever actively induces infringement of a patent shall be liable as an infringer.

"(c) Whoever sells a component of a patented machine, manufacture, combination or composition, or a material or apparatus for use in practicing a patented process, constituting a material part of the invention, knowing the same to be especially made or especially adapted for use in an infringement of such patent, and not a staple article or commodity of commerce suitable for substantial noninfringing use, shall be liable as a contributory infringer."

In this case the District Court and the Court of Appeals upon full consideration have concurred in finding that Aro's replacement-supplying of the fabric portion of respondent's convertible automobile tops contributorily infringed the latter's territorial rights under the valid Mackie-Duluk combination patent, in that such activity constituted a deliberate participation on Aro's part in a forbidden reconstruction of the patented combination. In reversing, the Court holds that there can be no direct infringement (and hence, of course, no contributory infringement) of a combination patent by replacement of any of the components of the patented entity unless (1) such component is itself separately patented or (2) the *entire* entity is rebuilt at one time. Since the fabric cover component of the Mackie-Duluk top was not itself separately patented, and since it constituted but one part of the patented combination, the Court concludes that Aro's supplying of such covers for replacement on cars equipped with respondent's tops did not as a matter of law constitute contributory infringement.[2]

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[2] The Mackie-Duluk invention was described by the Court of Appeals as follows:

"Folding tops for vehicles consisting of bows of wood or metal covered with a flexible waterproof fabric . . . are, of course, as old as the automobile art which in the beginning only adopted with necessary modifications the much older art of collapsible tops for chaises, buggies and some other horse drawn vehicles. The rear panels of the folding tops of earlier days were fastened permanently at the bottom to the outside of the top of the rear portion of the body of the vehicle, and the quarters, the rear portions of the sides of the vehicle, if protected at all, were protected with flaps or curtains, sometimes integral with the top and sometimes not, fastened at the bottom to the outside of the top of the body with buttons, snaps or some equivalent means of fastening. Naturally, to prevent tearing, these quarter flaps had to be unfastened by hand when the top was lowered and when the top was put up fastened again by hand for neat appearance and also to prevent the entrance of rain. This manual fastening and unfastening of the bottoms of the quarter

My Brother BRENNAN's opinion, while disagreeing with that conclusion, would reverse because on its view of the record, untrammeled by the contrary findings and conclusions of the two lower courts, it is concluded that what

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flaps presented no great problem until the advent of the so-called convertible automobile with a folding top operated mechanically rather than manually. The problem presented by the quarter flaps of tops of this kind was first partially solved by fastening the bottom of the flap to the outside of the top of the body of the vehicle with 'releasable fastening means,' that is to say, with some sort of slide fastening device which would detach automatically when the top was lowered. The major part of the problem remained, however, for when the top was put up the flaps had to be fastened manually, which meant that the operator was required to get out of the car altogether, or at least to reach out, often, of course, in the rain. The object of the Mackie-Duluk patent was 'to provide an automatic fastening and sealing means at the top and sides of the tonneau of the convertible' which 'never has to be operated or touched by the driver of the car.' And, as we have already indicated, the District Court found that the patentees succeeded in attaining their object by devising a patentable combination of elements.

"The Mackie-Duluk device consisted of providing an elongated flap integral with the quarter sections of the fabric top adapted to be permanently fastened at the bottom deep within the body of the car, at or perhaps below, but certainly not in front, of the axis of rotation of the bows, to a trough welded to the body of the car and provided with a drain to carry off water entering between the flap and the car body. In addition, to minimize the entrance of water between the body and the flap, they provided a 'wiper arm' so-called, which in effect acted as an additional, low rearward bow pressing the downwardly extending flap outwardly against the top of the body of the vehicle as the top is raised from its folded position to close, or substantially to close, any gap there might be between the inside of the top of the body of the car and the flap extending downward into the interior of the automobile body." 270 F. 2d, at 202–203.

The District Court said:

"Mackie-Duluk was a substantial and enlightened step, filling a long-felt want, in a field in which defendants have produced, with one exception, only paper patents, the most emphasized being foreign, which did not even purport to do what Mackie-Duluk accomplished." *Id.*, at 201.

here took place constituted "repair" and not "reconstruction" of the Mackie-Duluk tops.

I am unable to subscribe to either of these views.

I.

I believe that the narrow concept of what constitutes impermissible reconstruction, reflected in the opinion of the Court, departs from established principles—principles which, it will be shown, were approved by Congress when it enacted § 271 of the new Patent Act, over objections of the Department of Justice altogether comparable to the position which it now advances as *amicus* in the present case.

The all-important thing is to determine from the past decisions of this Court what the proper test of "reconstruction" is, for I agree that 35 U. S. C. § 271 (c) limits contributory infringement to that which would be direct infringement, and that § 271 (a), dealing with direct infringement, leaves intact the pre-existing case law. The cases cited above amply demonstrate that there is no single yardstick for determining whether particular substitutions of new for original unpatented parts of a patented combination amount to permissible repair or forbidden reconstruction. The matter is to be resolved "on principles of common sense applied to the specific facts" of a given case, *Heyer, supra,* at 102. The single simple rule of "reconstruction" which the Court finds in those cases can, in my view, only be divined at the expense of reconstructing the decisions themselves.

The leading case is *Wilson* v. *Simpson, supra.* There, in holding that the owner of a planing machine covered by a combination patent could replace from any source he desired the unpatented cutting knives thereof, the Court said, p. 125:

> "The right of the assignee [the owner of the machine] to replace the cutter-knives is not because

> they are of perishable materials, but because the inventor of the machine has so arranged them as a part of its combination, that the machine could not be continued in use without a succession of knives at short intervals. Unless they were replaced, the invention would have been but of little use to the inventor or to others. The other constituent parts of this invention, though liable to be worn out, are not made with reference to any use of them which will require them to be replaced. These, without having a definite duration, are contemplated by the inventor to last so long as the materials of which they are formed can hold together in use in such a combination. No replacement of them at intermediate intervals is meant or is necessary. They may be repaired as the use may require. With such intentions, they are put into the structure. So it is understood by a purchaser, and beyond the duration of them a purchaser of the machine has not a longer use. But if another constituent part of the combination is meant to be only temporary in the use of the whole, and to be frequently replaced, because it will not last as long as the other parts of the combination, its inventor cannot complain, if he sells the use of his machine, that the purchaser uses it in the way the inventor meant it to be used, and in the only way in which the machine can be used."

In the *Cotton-Tie* case, *supra,* the question was whether combination patents for the making of ties for cotton bales, consisting of a metal buckle and band, were infringed by one who bought as scrap metal such ties and bands after severance from cotton bales, and resold them for further use as baling ties after piecing together several segments of the old bands and reconnecting the resulting single band with the original buckle. In holding that

this was an impermissible reconstruction of the patented combination,[3] the Court said:

> "Whatever right the defendants could acquire to the use of the old buckle, they acquired no right to combine it with a substantially new band, to make a cotton-bale tie. They so combined it when they combined it with a band made of the pieces of the old band in the way described. What the defendants did in piecing together the pieces of the old band was not a repair of the band or the tie, in any proper sense. The band was voluntarily severed by the consumer at the cotton-mill because the tie had performed its function of confining the bale of cotton in its transit from the plantation or the press to the mill. Its capacity for use as a tie was voluntarily destroyed. As it left the bale it could not be used again as a tie. As a tie the defendants reconstructed it, although they used the old buckle without repairing that. The case is not like putting new cutters into a planing-machine in place of those worn out by use, as in *Wilson* v. *Simpson,* 9 How. 109. The principle of that case was, that temporary parts wearing out in a machine might be replaced to preserve the machine, in accordance with the intention of the vendor, without amounting to a reconstruction of the machine." At 93–94.

In *Morgan Envelope, supra,* the Court found no contributory infringement on the part of one supplying toilet paper rolls specially designed for use in a patented combination, comprising a dispenser and the paper rolls themselves. Remarking (p. 433) that there "are doubtless many cases to the effect that the manufacture and sale

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[3] While, as the Court remarks (*ante,* p. 343, n. 9), the Court there did refer to the fact that the original ties were stamped "Licensed to use once only," it is manifest that nothing really turned on that point.

of a single element of a combination, with intent that it shall be united to the other elements, and so complete the combination, is an infringement," the Court found the situation before it distinguishable in that "the element [paper roll] made by the alleged infringer is an article of manufacture perishable in its nature, which it is the object of the mechanism [the dispenser] to deliver, and which must be renewed periodically, whenever the device is put to use." *Ibid.* On similar grounds the Court in *Heyer, supra,* found no contributory infringement in the intentional supplying of unpatented gelatine bands for use in a duplicating machine covered by a combination patent, of which one element was the gelatine band.

On the other hand, in *Leeds & Catlin, supra,* the intentional supplying of phonograph records for use on respondent's talking machines, which were protected by a combination patent covering both machine and records, was held to be contributory infringement, it being found that records were the "operative ultimate tool of the invention," that respondent's records were not inherently "perishable" in nature, and that the supplying of the competitor's records was not to replace records "deteriorated by use" or which had suffered "breakage." (P. 336.)

These cases destroy the significance of two factors on which the Court heavily relies for its conclusion in the present case: first, that the fabric top was an unpatented element of the Mackie-Duluk invention, and, second, that Aro's tops constituted a replacement of but one part of the patented combination. For as was said in *Leeds & Catlin* (p. 333), "[i]t can make no difference as to the infringement or non-infringement of a combination that one of its elements or all of its elements are unpatented"; and in all of these cases the claimed infringing replacement involved only *one* of the elements of the patented combination. Further, the different results reached in the cases, two finding "reconstruction" and

three only "repair," also vitiate the reasoning of the Court, in that they show that the issue of reconstruction *vel non* turns not upon any single factor, but depends instead upon a variety of circumstances, differing from case to case. The true rule was well put by this same Court of Appeals in its earlier decision in *Goodyear Shoe Machinery Co.* v. *Jackson,* 112 F. 146, 150:

> "It is impracticable, as well as unwise, to attempt to lay down any rule on this subject, owing to the number and infinite variety of patented inventions. Each case, as it arises, must be decided in the light of all the facts and circumstances presented, and with an intelligent comprehension of the scope, nature, and purpose of the patented invention, and the fair and reasonable intention of the parties. Having clearly in mind the specification and claims of the patent, together with the condition of decay or destruction of the patented device or machine, the question whether its restoration to a sound state was legitimate repair, or a substantial reconstruction or reproduction of the patented invention, should be determined less by definitions or technical rules than by the exercise of sound common sense and an intelligent judgment."

More particularly, none of the past cases in this Court or in the lower federal courts remotely suggests that "reconstruction" can be found only in a situation where the patented combination has been rebuilt *de novo* from the ground up.[4]

The reference which the Court makes to the *Mercoid* cases, 320 U. S. 661, 320 U. S. 680, is, in my opinion, entirely inapposite, since those cases, as the Court recognizes, p. 344, n. 10, *supra,* dealt with the issue of patent misuse, an issue which specifically is not before the Court

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[4] Compare note 7, *infra.*

at this time.[5] I realize that some of the language in the first *Mercoid* case (320 U. S., at 667–669), and more particularly its disapproving remarks about *Leeds & Catlin* (*id.*, 668), may be said to cast doubt on what it appears to me the contributory infringement cases plainly establish. Yet I cannot believe that *Mercoid* is properly to be read as throwing into discard all the teaching of the repair-reconstruction cases. What was said in *Mercoid* about contributory infringement must be read in the context of Mercoid's claim, found to have been established, that Mid-Continent had misused its combination patent by attempting in effect to wield it as a weapon to *monopolize* the sale of an unpatented element, a claim which is not here made.

I think it significant that in stating (p. 668) that the doctrine of the *Leeds & Catlin* case "must no longer prevail against the defense that a combination patent is being used to protect an unpatented part from competition," the Court went on to say, at 668–669:

> "That result obtains here though we assume for the purposes of this case that Mercoid was a contributory infringer and that respondents could have enjoined the infringement *had they not misused the patent for the purpose of monopolizing unpatented material.* Inasmuch as their misuse of the patent would have precluded them from enjoining a direct infringement [citing the *Morton Salt* case] they cannot stand in any better position with respect to a contributory infringer. Where there is a collision between the principle of the *Carbice* case and the conventional rules governing either direct or contributory infringement, the former prevails." (Italics supplied.)

[5] The District Court found against Aro's claim of patent misuse based on respondent's acquisition of territorial rights in the Mackie-Duluk patent. Aro did not appeal that finding.

Thus *Mercoid,* far from modifying the doctrine of the *Wilson* line of cases as to what constitutes contributory infringement, assumed that doctrine and defined the special circumstances when the court would refuse to give a patentee the benefit of that doctrine.[6] Those circumstances are not present in this case.

As for my Brother BLACK's opinion, the congressional action of 1952, reaffirming what I consider must be taken as the doctrine of the *Wilson* line of cases, also requires rejection of what he now conceives to be a more enlightened policy in this field of law.[7]

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[6] It seems clear from the legislative history of the 1952 Act that Congress intended (1) to reaffirm the doctrine of contributory infringement as laid down in *Wilson* v. *Simpson* and reasserted in cases like *Leeds & Catlin,* (2) to give that doctrine precedence against a claim of patent misuse as conceived in the *Mercoid* cases, at least where the misuse is said to inhere simply in assertion of patent rights. Both the proponents of the statute and the Department of Justice which opposed it assumed that contributory infringement, as defined in the *Wilson* line of cases, was one thing, and misuse, as then most recently defined in *Mercoid,* another. See Hearings before Subcommittee of House Judiciary Committee on H. R. 3866, 81st Cong., 1st Sess. 53–59 (1949); Hearings before Subcommittee of House Judiciary Committee on H. R. 3760, 82d Cong., 1st Sess. 168–175 (1951). The opinion of the Court seems to reconfirm *Mercoid* to fuller effectiveness than it had even before the 1952 Act by treating it as if the test of whether there was contributory infringement at all was to be found in its language.

[7] This policy was before the Committee in the form of an objection to the proposed codification of the *Wilson* line of cases and its doctrine in the 1952 Act. Despite the objection Congress passed § 271 without amendment.

"Mr. CRUMPACKER: We have received protests from manufacturers of replacement parts for such things as automobiles, farm tractors, and the like, who evidently feel that the language used in this H. R. 3760 would make them contributory infringers of patents on the original article, the tractor or something of that sort.

. . . . . .

"Mr. RICH [who was the principal spokesman for the group which drafted the present statute]: Those were the most vociferous objec-

II.

My Brother BRENNAN's opinion for reversal rests, as I understand it, not upon the view that the two courts below applied wrong legal standards in reaching their conclusion, but that " 'repair' or 'reconstruction' is so far a question of law as to relieve appellate review from the restraints of Federal Rule of Civil Procedure 52 (a)" and to allow the "making [of] an independent *application* of the proper standard" to the facts in this case. (Italics supplied.) For reasons larger than this particular litigation I cannot agree that it is either necessary or appropriate for us to substitute our particular judgment on this particular application of correct standards to the facts.

We do not sit in judgment on the decisions of the lower federal courts because we are endowed with some special measure of discernment, but because it is imperative that on matters of general concern, that is on matters of principle, there should be one authoritative and unifying expositor of federal law. I need not join issue on whether Rule 52 (a) serves to constrict appellate review in cases like this, cf. *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U. S. 271, 275, 279, for the rule which I believe should limit us is based on the purposes which this Court can and should fulfill.

In this case there is no question but that the two courts below adverted to all the relevant standards but, having done so, they concluded that on the facts before them there was contributory infringement. I cannot see what else my Brother BRENNAN is doing but reaching a different conclusion of his own. I cannot understand how such a conclusion, even were it accepted by a majority of the

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tors to the old bills on the subject. Whether or not they would be liable would depend on the facts in each particular case. . . ." Hearings before Subcommittee of House Judiciary Committee on H. R. 3760, 82d Cong., 1st Sess., at p. 153 (1951).

Court, could provide greater guidance to either courts or litigants than would a mere statement of approbation for the standards espoused by the courts below.

Because the question of "repair" or "reconstruction" must be a mixed question of law and fact, it does not follow that we should review other than gross misapplications (certainly not present here), when the legal ingredient of this mixture is concededly correct. In the analogous area of determining the issue of patentable novelty, Courts of Appeal have consistently deferred to the judgment of the District Court (see the excellent statement of Judge Fahy in *Standard Oil Development Co.* v. *Marzall,* 86 U. S. App. D. C. 210, 181 F. 2d 280, 283–284), and where they have departed from this judgment the reason has generally been because the District Court had failed to reach its conclusions by reference to correct standards. See *Kwikset Locks, Inc.,* v. *Hillgren,* 210 F. 2d 483; cf. *Great Atlantic & Pacific Tea Co.* v. *Supermarket Equipment Corp.,* 340 U. S. 147, 153, 154. Whether this practice be considered as compelled by the dictates of good sense or by Rule 52 (a), surely particular judgments fairly and reasonably reached in two lower courts in light of correct legal standards deserve at least that same deference from us.

I would affirm.

WILSON *v.* SCHNETTLER ET AL.

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

No. 182. Argued December 15, 1960.—Decided February 27, 1961.

Respondents, who are federal agents, arrested petitioner without a warrant and seized narcotics which they found on his person in the course of an incidental search. They then delivered him to state authorities who confined him in jail. After a state grand jury had indicted petitioner for possessing narcotics in violation of state law, he moved in a state court for an order suppressing use of the narcotics as evidence in his impending trial, and the state court denied the motion. Petitioner then sued in a federal district court to impound the narcotics, to enjoin their use in evidence and to enjoin respondents from testifying at petitioner's trial in the state court. Although his complaint alleged that the arrest was made without a warrant, there was no allegation that it was made without probable cause. *Held:* Dismissal of the complaint for failure to state a claim upon which relief could be granted is sustained. Pp. 382–388.

(a) Since the complaint did not allege that the arrest was without probable cause and since the arrest and incidental search and seizure were lawful if respondents had probable cause to make the arrest, the complaint failed to state a claim upon which relief could be granted. Pp. 383–384.

(b) Petitioner had a plain and adequate remedy at law in the criminal case pending against him in the state court. Pp. 384–385.

(c) By this action in the federal court, petitioner sought not only to interfere with and embarrass the state court in the impending criminal case, but also completely to thwart its judgment by relitigating in a trial *de novo* the very issue that he had already litigated unsuccessfully in the state court; and that is not permissible. Pp. 385–386.

(d) *Rea* v. *United States*, 350 U. S. 214, distinguished. Pp. 387–388.

275 F. 2d 932, affirmed.

James J. Doherty argued the cause for petitioner. With him on the brief was *Gerald W. Getty*.

Daniel M. Friedman argued the cause for respondents. On the brief were *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Kirby W. Patterson.*

MR. JUSTICE WHITTAKER delivered the opinion of the Court.

Respondents, who are federal narcotics agents, arrested petitioner without a warrant in Cook County, Illinois, and, in the course of an incidental search, found narcotic drugs on his person which they seized. Respondents then delivered petitioner to the Cook County authorities who confined him in the county jail. In due course, the county grand jury returned an indictment charging petitioner with possessing the narcotics in violation of an Illinois statute. Soon after his arraignment and plea of "not guilty," petitioner moved the court for an order suppressing the use of the narcotics as evidence in his impending criminal trial. After a full hearing, including the taking of evidence (not contained in this record), the court denied the motion.

Before the case was reached for trial, petitioner brought the present action against respondents in the Federal District Court in Chicago to impound the narcotics (though he did not allege that respondents have possession of them) and to enjoin their use, and the respondents from testifying, at the trial of the criminal case in the state court. The very meager complaint alleged, in addition to the facts we have stated, only a few of the facts relating to petitioner's arrest,[1] and that he believes "respondents

[1] In this respect, the complaint alleged only that at the hearing on the motion to suppress "the following facts and circumstances were developed:

"(a) The respondents testified that they had a certain building under surveillance where they had information that narcotic drugs were being sold. [*Footnote 1 continued on p. 383.*]

will be called to testify in [the state criminal] case that the petitioner unlawfully had in his possession the narcotic drugs seized by the respondents . . . ." It concluded with a prayer for the relief stated.

Respondents moved to dismiss the complaint for failure to state a claim upon which relief could be granted. After a hearing, the District Court granted the motion and dismissed the action. On appeal, the Seventh Circuit affirmed. 275 F. 2d 932. To consider petitioner's claim that the judgment is repugnant to controlling rules and decisions of this Court, we granted certiorari. 363 U. S. 840.

We have concluded that the action was properly dismissed and that the judgment must be affirmed.

Although the complaint alleged that the arrest was made without a warrant, there was no allegation that it was made without probable cause. In the absence of such an allegation the courts below could not, nor can we, assume that respondents arrested petitioner without probable cause to believe that he had committed or was committing a narcotics offense. And if they had such probable cause, the arrest, though without a warrant, was lawful and the subsequent search of petitioner's person and the seizure of the found narcotics were validly made incidentally to a lawful arrest. *Weeks* v. *United States,* 232 U. S. 383, 392; *Carroll* v. *United States,* 267 U. S. 132, 158; *Agnello* v. *United States,* 269 U. S. 20, 30; *Giordenello* v. *United States,* 357 U. S. 480, 483; *Draper* v.

"(b) That the respondents saw your petitioner approach the said building and enter the same; that a short time later they observed your petitioner leave the building whereupon they arrested him.

"(c) That they could not state under oath whether he had the narcotic drugs in his possession before he entered the building under surveillance or not; that when they arrested him, they did not have a warrant for his arrest."

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United States, 358 U. S. 307, 310–311.[2] For this reason alone the complaint failed to state a claim upon which relief could be granted.

Nor did the complaint allege, even in conclusional terms, that petitioner does not have a plain and adequate remedy at law in the state court to redress any possible illegality in the arrest and incidental search and seizure. Indeed, the allegations of the complaint affirmatively show that petitioner does have such a remedy in the Illinois court and that he has actually prosecuted it there, but only to the point of an adverse interlocutory order. That court, whose jurisdiction first attached, retains jurisdiction over this matter to the exclusion of all other courts—certainly to the exclusion of the Federal District Court—until its duty has been fully performed, *Harkrader* v. *Wadley,* 172 U. S. 148, 164; [3] *Peck* v. *Jenness,* 7 How. 612, 624–625,[4] and

[2] Article II, § 6, of the Illinois Constitution protects against unreasonable searches and seizures in substantially the same language as the Fourth Amendment. That State's interpretation of its constitutional provision and its exclusionary rule, similar to the one followed in the federal courts, makes the Illinois law accord with the principles established by this Court for the federal system. See, *e. g., People* v. *La Bostrie,* 14 Ill. 2d 617, 620–623, 153 N. E. 2d 570, 572–574; *People* v. *Tillman,* 1 Ill. 2d 525, 529–530, 116 N. E. 2d 344, 346–347.

[3] "When a state court and a court of the United States may each take jurisdiction of a matter, the tribunal where jurisdiction first attaches holds it, to the exclusion of the other, until its duty is fully performed and the jurisdiction involved is exhausted; and this rule applies alike in both civil and criminal cases." *Harkrader* v. *Wadley, supra,* at 164.

[4] "It is a doctrine of law too long established to require a citation of authorities, that . . . where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. These rules have their foundation, not merely in comity, but on necessity. For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one, if they dare to proceed in the other." *Peck* v. *Jenness, supra,* at 624–625.

it can determine this matter as well as, if not better than, the federal court. If, at the criminal trial, the Illinois court adheres to its interlocutory order on the suppression issue to petitioner's prejudice, he has an appeal to the Supreme Court of that State, and a right if need be to petition for "review by this Court of any federal questions involved." *Douglas* v. *City of Jeannette,* 319 U. S. 157, 163. It is therefore clear that petitioner has a plain and adequate remedy at law in the criminal case pending against him in the Illinois court.

There is still another cardinal reason why it was proper for the District Court to dismiss the complaint. We live in the jurisdiction of two sovereignties. Each has its own system of courts to interpret and enforce its laws, although in common territory. These courts could not perform their respective functions without embarrassing conflicts unless rules were adopted to avoid them. Such rules have been adopted. One of them is that an accused "should not be permitted to use the machinery of one sovereignty to obstruct his trial in the courts of the other, unless the necessary operation of such machinery prevents his having a fair trial." *Ponzi* v. *Fessenden,* 258 U. S. 254, 260. Another is that federal courts should not exercise their discretionary power "to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent . . . ." *Douglas* v. *City of Jeannette, supra,* at 163.

By this action, petitioner not only seeks to interfere with and embarrass the state court in his criminal case, but he also seeks completely to thwart its judgment by relitigating in a trial *de novo* in a federal court the very issue that he has already litigated in the state court. "If we were to sanction this intervention, we would expose every State criminal prosecution to insupportable disrup-

tion. Every question of procedural due process of law—with its far-flung and undefined range—would invite a flanking movement against the system of State courts by resort to the federal forum, with review if need be to this Court, to determine the issue. Asserted unconstitutionality in the impaneling and selection of the grand and petit juries, in the failure to appoint counsel, in the admission of a confession, in the creation of an unfair trial atmosphere, in the misconduct of the trial court [and, we may add, in the ruling of motions to suppress evidence, and in ruling the competency of witnesses and their testimony]—all would provide ready opportunities, which conscientious counsel might be bound to employ, to subvert the orderly, effective prosecution of local crime in local courts. To suggest these difficulties is to recognize their solution." *Stefanelli* v. *Minard,* 342 U. S. 117, 123–124.

Notwithstanding all of this, petitioner contends that the averments of his complaint were sufficient to entitle him to the relief prayed under the principles announced in *Rea* v. *United States,* 350 U. S. 214. But it is plain that the averments of this complaint do not invoke or even approach the principles of the *Rea* case. That case did not hold, as petitioner's contention assumes, that narcotic drugs lawfully seized by federal officers are inadmissible, or that such officers may not testify about their seizure, in state prosecutions. Such a concept would run counter to the express command of Congress that federal officers shall cooperate with the States in such investigations and prosecutions. See 21 U. S. C. § 198 (a). Indeed, the situation here is just the reverse of the situation in *Rea.* There, the accused had been indicted *in a federal court* for the unlawful acquisition of marihuana, and had moved in that court, under Rule 41 (e) of the Federal Rules of Criminal Procedure (18 U. S. C. App. Rule 41 (e)), for an order suppressing the use of the marihuana as evidence

at the trial. After hearing, the District Court, finding that the accused's arrest and search had been made by federal officers under an illegal warrant issued by a United States Commissioner, granted the motion to suppress. The effect of that order, under the express provisions of that Rule, was that the suppressed property "shall not be admissible in evidence at any hearing or trial." Cf. *Reina* v. *United States,* 364 U. S. 507, 510–511. Despite that order, one of the arresting federal officers thereafter caused the accused to be rearrested and charged, in a state court, with possession of the same marihuana in violation of the State's statute, and threatened to make the State's case by his testimony and the use of the marihuana that the federal court had earlier suppressed under Rule 41 (e). Thereupon, to prevent the thwarting of the federal suppression order, petitioner moved the federal court to enjoin that conduct. That court denied the motion and its judgment was affirmed on appeal. On certiorari, this Court, acting under its supervisory power over the federal rules, which "extends to policing [their] requirements and making certain that they are observed," 350 U. S., at 217, reversed the judgment, because "A federal agent [had] violated [and was about further to violate] the federal Rules governing searches and seizures—Rules prescribed by this Court and made effective after submission to the Congress. See 327 U. S. 821 *et seq.*" 350 U. S., at 217.

How different are the facts in the present case! Here there is no allegation or showing that any proceedings ever were taken against petitioner under any federal rule or in any federal court. There has been no finding that petitioner's arrest was unlawful or that the search of his person which yielded the narcotics was not incident to a lawful arrest and therefore proper. The state court's finding—the only court involved and the only finding on the matter—is the other way. Nor is there even any

allegation in the complaint that the arrest was not made upon probable cause, although it is admitted that the search was made incident to the arrest.

It is clear that the complaint was properly dismissed.

Affirmed.

MR. JUSTICE STEWART, concurring.

I could not base affirmance of the judgment upon the ground that the petitioner's motion was technically deficient in failing to recite the talismanic phrase "without probable cause." Nor do I think the District Court lacked power to issue the requested injunction, either by reason of 28 U. S. C. § 2283 or the rule formulated in *Harkrader* v. *Wadley,* 172 U. S. 148, 164. It seems to me that *Rea* v. *United States,* 350 U. S. 214, established that District Courts do have such power.*

But I join in affirming the judgment. The petitioner has failed to state a case warranting equitable relief under the standards of *Stefanelli* v. *Minard,* 342 U. S. 117, 122, and *Douglas* v. *City of Jeannette,* 319 U. S. 157, 163. As the Court's opinion points out, the factors which justified the issuance of an injunction in *Rea* are not present here.

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

The trial judge on respondents' motion [1] dismissed an "amended petition for declaratory judgment" that made the following allegations: Petitioner was arrested by two of the respondents, agents of the Federal Bureau of Narcotics, who acted without a warrant. He was searched by

*The dissenters in *Rea* agreed that this power exists. See 350 U. S., at 219.

[1] The motion to dismiss specified three grounds. Of them, only two are before this Court, *i. e.,* failure to state a cause of action and lack of jurisdiction over the subject matter.

these agents at the time of his arrest and narcotics were seized from him. Though imprisoned, he was neither taken before a Federal Commissioner nor charged with a crime against the United States. Instead, he was indicted for the possession of those same narcotics under the laws of Illinois. He unsuccessfully attempted to exclude the use of these narcotics as evidence or the testimony of the arresting agents by a motion made in the state court where "the law of the forum was applied and the Federal rules of Criminal Procedure were not applied." Petitioner based jurisdiction of the federal court on "the supervisory powers of Federal Courts over federal law enforcement agencies." Alleging that "the respondents will be called to testify in such case that the petitioner unlawfully had in his possession the narcotic drugs seized by the respondents," he asked, first, a declaratory judgment as to whether the federal agents had acted illegally in the arrest and incidental search of petitioner and, second, in the event that the search had been illegal, the impounding of the seized narcotics and an injunction against the respondents' testifying "in respect to the narcotic drugs so seized" in the state proceedings.

These allegations, liberally construed, entitle petitioner to a hearing, and, if they are supported by evidence, to the relief he seeks. In *Rea* v. *United States,* 350 U. S. 214, we held that an injunction would issue to prevent the use by federal agents in a state proceeding of the fruits of an illegal search. "The obligation of the federal agent is to obey the Rules [of Criminal Procedure]. They are drawn for innocent and guilty alike. They prescribe standards for law enforcement. They are designed to protect the privacy of the citizen, unless the strict standards set for searches and seizures are satisfied. That policy is defeated if the federal agent can flout them and use the fruits of his unlawful act either in federal or state proceedings." *Id.,* 217–218.

Under Rule 41 (e), Federal Rules of Criminal Procedure, the federal court is instructed to hear and determine a motion to suppress made by "A person aggrieved by an unlawful search and seizure [where] the property was illegally seized without warrant." [2] Implicit in that duty is the judicial enforcement of the provisions of the Fourth Amendment and Acts of Congress which limit the power of arrest and search. Judicial enforcement is no less to be invoked *after* the federal agents have acted than it is *before* they have acted, *i. e.*, when they apply to the courts for a warrant. That, as I understand, is the teaching of the *Rea* case.

It is said that petitioner has failed to allege that the arrest in question was made without probable cause, and thus illegal under federal law. See 26 U. S. C. § 7607 (2). It is said that he has failed to point out in what way his "legal remedy" (*i. e.*, the hearing on the motion to exclude in the state court) was inadequate. It is said that a federal court, in the exercise of discretion to grant or to deny declaratory relief, should refuse to act in these circum-

[2] Rule 41 (e) reads: "A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."

stances, especially since the grant of it would interfere with a state prosecution. I believe that none of these objections is well taken.

If it should appear at a hearing that the arrest and incidental search were legal under federal law, then petitioner would have no case. But surely his failure to make the magic allegation that the arrest was "without probable cause" should not cause him to be summarily cut off.[3] At most, the defect complained of would justify his being required to amend his pleading.

Petitioner's failure to allege the inadequacy of his "legal remedy" may be as easily disposed of. He is invoking, in this proceeding, the "supervisory powers" of the federal courts over the administration of federal law enforcement. That power is lodged in the federal courts. Congress could have entrusted the enforcement of all federal laws to state tribunals, as has India. But the First Congress made the decision to create a federal judicial system, complete unto itself. Some federal laws are enforceable in state tribunals. See, *e. g., Testa* v. *Katt,* 330 U. S. 386. But the Federal Rules of Criminal Procedure are not among them. Since the federal agents have chosen to avoid the federal courts, the issue as to compliance with the Federal Rules cannot be litigated in any way other than by this proceeding. In the state trial the issue will not be whether the federal agents have acted within the limits of their federal authority, but whether, under the state constitution, the search was a reasonable one.[4]

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[3] The Court of Appeals did not proceed on any such narrow grounds. It speaks of the "allegedly illegal arrest and search," and places its decision on the "[d]ecisive factual differences [which] distinguish the Rea case from the instant proceeding." 275 F. 2d 932, 933.

[4] Since petitioner has alleged that the Illinois court did not apply the standards imposed by the federal courts, we may leave aside questions which might be raised by the state court incorporation of

Under the Supremacy Clause state law must give way where, for example, a state procedure violates the Federal Constitution. Yet under the decision of this Court in *Wolf* v. *Colorado,* 338 U. S. 25, not even the duty of excluding evidence, because it was seized in violation of the command of the Fourth Amendment, is imposed on state courts as a requirement of federal law. The proper forum—indeed the only one available for litigation of compliance with that requirement—is the federal court.

We should also overrule the objection [5] based on the policy of 28 U. S. C. § 2283 which restrains a federal court from intermeddling with state proceedings, especially state criminal proceedings. Section 2283 [6] prohibits, in certain circumstances, the grant by a federal court of "an injunction to stay proceedings in a State court." What

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a federal standard to guide their determinations under state law. Cf. *Standard Oil Co. of Calif.* v. *Johnson,* 316 U. S. 481; *People* v. *Grod,* 385 Ill. 584, 586, 53 N. E. 2d 591, 593 (the state and federal constitutional provisions are said to be "in effect the same").

[5] Respondents stress the fact that petitioner's prayer asks for a "declaratory judgment" and quote language from decisions of this Court that speak of a judicial discretion to deny such relief. See, *e. g., Aetna Life Ins. Co.* v. *Haworth,* 300 U. S. 227, 240–241; *Brillhart* v. *Excess Ins. Co.,* 316 U. S. 491, 494–495; *Public Service Comm'n* v. *Wycoff Co.,* 344 U. S. 237, 241–245. Such cases are not applicable. The judicial discretion to deny declaratory relief is in the penumbra of the constitutional requirement of "case or controversy." There is no such issue here. Discretion, if it exists at all, must stem from the general equity notions based on the availability of other remedies. Indeed, petitioner's request for declaratory relief is no more than an inartistic demand that the federal judge entertain the motion and "receive evidence on any issue of fact necessary to the decision of the motion." Rule 41 (e). That it is denominated a request for declaratory judgment is mere surplusage.

[6] See, *e. g., Harkrader* v. *Wadley,* 172 U. S. 148; *Ex parte Young,* 209 U. S. 123.

we said about the relief sought in *Rea* v. *United States, supra,* is applicable here:

> "The District Court is not asked to enjoin state officials nor in any way to interfere with state agencies in enforcement of state law. . . . No injunction is sought against a state official. The only remedy asked is against a federal agent who, we are told, plans to use his illegal search and seizure as the basis of testimony in the state court." *Id.,* 216–217.

In this case, as in *Rea,* the interference, if any, is an indirect one and only incidental to placing federal officers under federal standards of behavior. If the considerations which led to decisions like *Stefanelli* v. *Minard,* 342 U. S. 117, were not controlling in *Rea* v. *United States, supra,* they should not be controlling in this case.

The rationale of *Rea* v. *United States, supra,* was that the federal courts had a specific duty of supervising compliance of federal law enforcement officers with the Federal Rules of Criminal Procedure. "A federal agent has violated the federal Rules governing searches and seizures—Rules prescribed by this Court and made effective after submission to the Congress. See 327 U. S. 821 *et seq.* The power of the federal courts extends to policing those requirements and making certain that they are observed." *Id.,* 217. The *Rea* case is now distinguished because in that case other contacts with the federal courts existed beyond the bare fact that federal officers were the actors in the illegal search. The additional contacts in the *Rea* case were three: (1) The search was made under a purported warrant of the federal courts. (2) An indictment based on the acquisition of the seized narcotics was filed in the federal court, although subsequently dismissed. (3) A motion to suppress was made in the federal court, while the indictment was pending, and was granted.

Those factual differences should not lead to a different result in this case. The decisive factor, indeed the only relevant one in this case, as in *Rea*, is that federal law enforcement officers are the actors in an illegal search and seizure.

If the officers in *Rea* had acted without any warrant, the result would not have been different. The victim of the search could certainly have obtained an order of suppression against the use of the evidence in the federal courts. Rule 41 (e) specifically so provides. The motion to suppress might have been made before an indictment was filed. Again, the victim would be entitled to an order regarding the use of the evidence in federal courts. See *Go-Bart Co.* v. *United States*, 282 U. S. 344, 358. The federal agents would not be "flouting" the Rules any the less if, in either of these two situations, they had, after the issue of the order under Rule 41 (e), prepared to use the suppressed evidence in a state court.

To be sure, no federal indictment was ever filed in this case; and the state proceeding was commenced prior to the issue of any order by a federal court on the legality of the search and seizure made by the federal law officers. That fact affords no reason why the victim of lawless federal police may not apply to a federal court for relief. When the Court relies on this circumstance it repudiates the very basis of the *Rea* decision, *viz.:* that the substantive command of the Federal Rules of Criminal Procedure has been "flouted" by federal officers.

Under the Fourth Amendment, the judiciary has a special duty of protecting the right of the people to be let alone, except as warrants issue on a showing of probable cause. This special relation of federal courts to the control of federal officials who lawlessly invade the privacy of individual citizens reaches far back into history. It had, at first, an ominous note, as the courts themselves were

the instrument of oppression. It was before a colonial court that James Otis, Jr., made his plea against the infamous "writs of assistance." [7] Since then the courts have played an honorable role in the protection of privacy. Warrants, which were at the start only a form of judicial protection extended to officials, have become the means for protecting the individual. A judicial officer has been interposed between the suspicious official and the citizen.[8] The role of the courts has been active. In *Weeks* v. *United States,* 232 U. S. 383, 391–392, this Court said:

> "The effect of the Fourth Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws."

That case forged the doctrine, now firmly entrenched, that the federal courts will not admit illegally seized property as evidence.[9] It is this doctrine which was the core

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[7] See *Boyd* v. *United States,* 116 U. S. 616, 624–625; *Harris* v. *United States,* 331 U. S. 145, 155, 157–159 (dissenting opinion); *Frank* v. *Maryland,* 359 U. S. 360, 374, 376–381 (dissenting opinion).

[8] This same evolution whereby the judiciary became the protectors of privacy took place in England. "[F]or these warrants are judicial acts, and must be granted upon examination of the fact." 2 Hale, History of the Pleas of the Crown (1st Am. ed. 1847), 150.

[9] See, *e. g., Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385; *Gouled* v. *United States,* 255 U. S. 298; *Go-Bart Co.* v. *United States,* 282 U. S. 344; *Taylor* v. *United States,* 286 U. S. 1; *Harris* v. *United States,* 331 U. S. 145; *Johnson* v. *United States,* 333 U. S. 10;

of the substantive command whose procedural outlines are reflected in Rule 41 (e). It is this doctrine that we unsympathetically reject today.

Our cases reflect the belief that federal judges have a distinct mission to perform in actively protecting the right of privacy of the individual. We said in *Johnson* v. *United States,* 333 U. S. 10, 14:

> "Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers."

This particular view reflected the deep-lying assumption that the command of the Fourth Amendment implies continuous supervision by the judiciary over law enforcement officers, quite different from the passive role which courts play in some spheres. The rule that a search, otherwise legal, may be illegal for failure to apply to a magistrate for a warrant was expressed in *Trupiano* v. *United States,* 334 U. S. 699, and *McDonald* v. *United States,* 335 U. S. 451. We stated that "search warrants are to be obtained and used wherever reasonably practicable." *Trupiano* v. *United States, supra,* 709. We have occasionally retreated, as *United States* v. *Rabinowitz,* 339 U. S. 56; *Frank* v. *Maryland,* 359 U. S. 360; and *Abel* v. *United States,* 362 U. S. 217, show. But we returned to the basic philosophy of the Fourth Amendment in *Rea* v. *United States, supra.* When I wrote for the Court in that case saying that "[t]he obligation of

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Brinegar v. *United States,* 338 U. S. 160; *Miller* v. *United States,* 357 U. S. 301; *Draper* v. *United States,* 358 U. S. 307; *Henry* v. *United States,* 361 U. S. 98; *Elkins* v. *United States,* 364 U. S. 206; *Rios* v. *United States,* 364 U. S. 253.

the federal agent is to obey the Rules," I thought we meant obedience to the substantive law for which those rules offer a procedural matrix.[10] At 217. It is difficult for me to believe that that protection is limited to those situations where the federal officers invoke the "process" of the federal court. Rule 41 (e) provides a remedy by way of suppression where "the property was illegally seized without warrant," as it was in this case, if the allegations are supported by evidence.

When we forsake *Rea* v. *United States* and tell the federal courts to keep hands off, we wink at a new form of official lawlessness. Federal officials are now free to violate the Federal Rules that were designed to protect the individual's privacy, provided they turn the evidence unlawfully obtained over to the States for prosecution. This is an evasion of federal law that has consequences so serious that I must dissent. This case may be inconsequential in the tides of legal history. But the rule we fashion is an open invitation to federal officials to "flout" federal law, to make such searches as they desire, to forget about the search warrants required by the Fourth Amendment, to break into homes willy-nilly, and then to repair to state courts. There the Federal Rules do not apply; there the exclusionary rule of *Weeks* v. *United States, supra,* does not apply. See *Wolf* v. *Colorado, supra.* There evidence, unlawfully obtained by the standards that govern federal officials, may be used against the victim. A few States have exclusionary rules as strict as

[10] It is said that the present proceeding is not one under Rule 41 (e), since there are no federal "proceedings" within the meaning of the enabling statute. 18 U. S. C. § 3771. But the policy remains the same, and the analogy of an independent suit based on the same rights is clear. Nor can it be said that 21 U. S. C. § 198 (a) creates any exemption for federal officers from the standards otherwise imposed on them. Cooperate they may, but they may not break the law to do so.

those commanded by the Fourth Amendment.[11] Many permit the use in state prosecutions of evidence which would be barred if tendered in federal prosecutions.[12] The tender regard which is expressed for federal-state relations will in ultimate effect be a tender regard for federal officials who flout federal law. Today we lower federal law enforcement standards by giving federal agents *carte blanche* to break down doors, ransack homes, search and seize to their heart's content—so long as they stay away from federal courts and do not try to use the evidence there. This is an invitation to lawlessness which I cannot join.

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[11] See, *e. g.*, Texas Code of Crim. Proc., Art. 727a, as amended by Acts 1953, 53d Leg., p. 669, c. 253, § 1; *People* v. *Cahan*, 44 Cal. 2d 434, 282 P. 2d 905.

[12] See, *e. g.*, *People* v. *Gonzales*, 356 Mich. 247, 97 N. W. 2d 16.

WILKINSON *v.* UNITED STATES.

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

No. 37. Argued November 17, 1960.—Decided February 27, 1961.

Summoned to testify before a Subcommittee of the House of Representatives Committee on Un-American Activities, which was investigating Communist infiltration into basic industries in the South and Communist Party propaganda activities in the South, petitioner refused to answer a question as to whether he was then a member of the Communist Party. He did not claim his privilege against self-incrimination but contended that the Subcommittee was without lawful authority to interrogate him and that its questioning violated his rights under the First Amendment. For refusing to answer, he was convicted of a violation of 2 U. S. C. § 192, which makes it a misdemeanor for any person summoned as a witness by either House of Congress or a committee thereof to refuse to answer any question pertinent to the question under inquiry. *Held:* Petitioner's conviction is sustained. Pp. 400–415.

1. The Committee's investigation of Communist infiltration into basic industries in the South and Communist propaganda activities in the South was clearly authorized by Congress. *Barenblatt* v. *United States,* 360 U. S. 109. Pp. 407–409.

2. On this record, it cannot be said that, in questioning petitioner, the Subcommittee was not pursuing a valid legislative purpose. Pp. 409–413.

(a) Petitioner's contention that the Subcommittee's sole reason for interrogating him was to subject him to public censure, harassment and exposure because of his opposition to the existence of the Un-American Activities Committee is not supported by the record. Pp. 411–412.

(b) It is not for this Court to speculate as to the motives that may have prompted the decision of individual members of the Subcommittee to summon petitioner, since their motives alone would not vitiate an investigation that was serving a legislative purpose. P. 412.

(c) Petitioner was not summoned to appear as a result of an indiscriminate dragnet procedure, lacking in probable cause for belief that he possessed information which might be helpful to the

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Subcommittee, since the Subcommittee had reason to believe when it summoned him that he was an active Communist leader engaged primarily in propaganda activities. Pp. 412–413.

3. The question whether petitioner was then a member of the Communist Party was pertinent to a subject under inquiry. P. 413.

4. Petitioner was clearly apprised of the pertinency of the question when he was directed to answer it. P. 413.

5. The Subcommittee's interrogation of petitioner did not violate his rights under the First Amendment. *Barenblatt* v. *United States*, 360 U. S. 109. Pp. 413–415.

(a) It was not unlawful for the Committee to investigate petitioner's conduct, even though he may have been engaged, at the moment, in public criticism of the Committee and attempting to influence public opinion in favor of abolishing it. P. 414.

(b) The Subcommittee's legitimate legislative interest was not the activity in which petitioner might have been engaged at the time, but in the manipulation and infiltration of activities and organizations by persons advocating the overthrow of the Government. Pp. 414–415.

272 F. 2d 783, affirmed.

Rowland Watts argued the cause for petitioner. With him on the brief was *Nanette Dembitz.*

Kevin T. Maroney argued the cause for the United States. With him on the briefs were *Solicitor General Rankin, Assistant Attorney General Yeagley, Bruce J. Terris, Lee B. Anderson* and *George B. Searls.*

David Scribner, Ben Margolis and *William B. Murrish* filed a brief for the National Lawyers Guild, as *amicus curiae,* urging reversal.

Mr. Justice Stewart delivered the opinion of the Court.

The petitioner was convicted for having unlawfully refused to answer a question pertinent to a matter under inquiry before a subcommittee of the House Committee on Un-American Activities at a hearing in Atlanta,

Georgia, on July 30, 1958.[1] His conviction was affirmed by the Court of Appeals, which held that our decision in *Barenblatt* v. *United States,* 360 U. S. 109, was "controlling." 272 F. 2d 783. We granted certiorari, 362 U. S. 926, to consider the petitioner's claim that the Court of Appeals had misconceived the meaning of the *Barenblatt* decision. For the reasons that follow, we are of the view that the Court of Appeals was correct, and that its judgment must be affirmed.

I.

The following circumstances were established by uncontroverted evidence at the petitioner's trial:

The Committee on Un-American Activities is a standing committee of the House of Representatives, elected at the commencement of each Congress.[2] The Committee, or any subcommittee thereof, is authorized to investigate "(i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation

[1] The applicable statute is 2 U. S. C. § 192. It provides: "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months." 2 U. S. C. § 192.

[2] Rule X of the Standing Rules of the House of Representatives, as amended by the Legislative Reorganization Act of 1946, c. 753, § 121, 60 Stat. 812, 822, 823.

thereto that would aid Congress in any necessary remedial legislation." [3]

In the spring of 1958 the Committee passed a resolution providing for a subcommittee hearing to be held in Atlanta, Georgia, "relating to the following subjects and having the legislative purposes indicated:

> "1. The extent, character and objects of Communist colonization and infiltration in the textile and other basic industries located in the South, and Communist Party propaganda activities in the South, the legislative purpose being:
>
> "(a) To obtain additional information for use by the Committee in its consideration of Section 16 of H. R. 9352, relating to the proposed amendment of Section 4 of the Communist Control Act of 1954, prescribing a penalty for knowingly and wilfully becoming or remaining a member of the Communist Party with knowledge of the purposes or objectives thereof; and
>
> "(b) To obtain additional information, adding to the Committee's overall knowledge on the subject so that Congress may be kept informed and thus prepared to enact remedial legislation in the National Defense, and for internal security, when and if the exigencies of the situation require it.
>
> "2. Entry and dissemination within the United States of foreign Communist Party propaganda, the legislative purpose being to determine the necessity for, and advisability of, amendments to the Foreign Agents Registration Act designed more effectively to counteract the Communist schemes and devices now used in avoiding the prohibitions of the Act.

[3] Rule XI of the Standing Rules (60 Stat. 823, 828). These Standing Rules were specifically adopted by the House, at the beginning of the 85th Congress in 1957 (H. Res. No. 5, 85th Cong., 1st Sess.).

> "3. Any other matter within the jurisdiction of the Committee which it, or any subcommittee thereof, appointed to conduct this hearing, may designate."

The subcommittee which was appointed pursuant to this resolution convened in Atlanta on July 29, 1958. At the opening of the proceedings on that day, the Chairman of the Committee orally summarized the purposes of the hearings. The petitioner was present and heard the Chairman's statement.

The first witness to appear was Amando Penha, who testified that he had been a member of the Communist Party from 1950 to 1958, having joined the Party at the request of the Federal Bureau of Investigation. He stated that he had served as a member of the National Textile Commission of the Party, which, he said, was set up to control and supervise the infiltration and colonization of the textile industry, particularly in the South. He described the "colonizer" system, which, he said, involves sending hard-core Party members into plants in jobs where they have close contact with rank-and-file workers. Penha described in some detail his trips throughout the South in compliance with the instructions of the National Textile Commission, and identified a number of individuals as "colonizers." Another witness, a Deputy Collector of Customs, described the influx of Communist propaganda sent from abroad into the United States and particularly into the South. Several other witnesses were then interrogated, some as to their activities as alleged Communist colonizers, others as to their connection with certain allegedly Communist-controlled publications. A number of these witnesses declined to answer most of the questions put to them.

On the following day the first witness before the subcommittee was Carl Braden. Although interrogated at length he declined to answer questions relating to alleged

Communist activity.[4] The next witness was the petitioner. After being sworn and stating his name he declined to give his residence address, stating that, "As a matter of conscience and personal responsibility, I refuse to answer any questions of this committee." When asked his occupation, he made the same response. He was then asked the question which was to become the subject of the present indictment and conviction: "Mr. Wilkinson, are you now a member of the Communist Party?" He declined to answer the question, giving the same response as before.

The Committee's Staff Director then addressed the petitioner at length, in explanation "of the reasons, the pertinency, and the relevancy of that question and certain other questions which I propose to propound to you." [5]

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[4] See *Braden* v. *United States*, *post*, p. 431.

[5] "Now, sir, I should like to make an explanation to you of the reasons, the pertinency, and the relevancy of that question and certain other questions which I propose to propound to you; and I do so for the purpose of laying a foundation upon which I will then request the chairman of this subcommittee to order and direct you to answer those questions.

"The Committee on Un-American Activities has two major responsibilities which it is undertaking to perform here in Atlanta.

"Responsibility number 1, is to maintain a continuing surveillance over the administration and operation of a number of our internal security laws. In order to discharge that responsibility the Committee on Un-American Activities must undertake to keep abreast of techniques of Communists' operations in the United States and Communist activities in the United States. In order to know about Communist activities and Communist techniques, we have got to know who the Communists are and what they are doing.

"Responsibility number 2, is to develop factual information which will assist the Committee on Un-American Activities in appraising legislative proposals before the committee.

"There are pending before the committee a number of legislative proposals which undertake to more adequately cope with the Communist Party and the Communist conspiratorial operations in the United States. H. R. 9937 is one of those. Other proposals are

In response the petitioner stated "I am refusing to answer any questions of this committee." He was then directed by the Subcommittee Chairman to answer the question as to his Communist Party membership. This time he responded as follows:

> "I challenge, in the most fundamental sense, the legality of the House Committee on Un-American

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pending before the committee not in legislative form yet, but in the form of suggestions that there be an outright outlawry of the Communist Party; secondly, that there be registrations required of certain activities of Communists; third, that there be certain amendments to the Foreign Agents Registration Act because this Congress of the United States has found repeatedly that the Communist Party and Communists in the United States are only instrumentalities of a Kremlin-controlled world Communist apparatus. Similar proposals are pending before this committee.

"Now with reference to pertinency of this question to your own factual situation, may I say that it is the information of this committee that you now are a hard-core member of the Communist Party; that you were designated by the Communist Party for the purpose of creating and manipulating certain organizations, including the Emergency Civil Liberties Committee, the affiliate organizations of the Emergency Civil Liberties Committee, including a particular committee in California and a particular committee in Chicago, a committee—the name of which is along the line of the committee for cultural freedom, or something of that kind. I don't have the name before me at the instant.

"It is the information of the committee or the suggestion of the committee that in anticipation of the hearings here in Atlanta, Georgia, you were sent to this area by the Communist Party for the purpose of developing a hostile sentiment to this committee and to its work for the purpose of undertaking to bring pressure upon the United States Congress to preclude these particular hearings. Indeed it is the fact that you were not even subpenaed for these particular hearings until we learned that you were in town for that very purpose and that you were not subpenaed to appear before this committee until you had actually registered in the hotel here in Atlanta.

"Now, sir, if you will tell this committee whether or not, while you are under oath, you are now a Communist, we intend to pursue that area of inquiry and undertake to solicit from you information respect-

Activities. It is my opinion that this committee stands in direct violation by its mandate and by its practices of the first amendment to the United States Constitution. It is my belief that Congress had no authority to establish this committee in the first instance, nor to instruct it with the mandate which it has.

"I have the utmost respect for the broad powers which the Congress of the United States must have to carry on its investigations for legislative purposes. However, the United States Supreme Court has held that, broad as these powers may be, the Congress cannot investigate into an area where it cannot legislate, and this committee tends, by its mandate and by its practices, to investigate into precisely those areas of free speech, religion, peaceful association and assembly, and the press, wherein it cannot legislate and therefore it cannot investigate."

The hearing continued. The Staff Director read part of the record of an earlier hearing in California, where a witness had testified to knowing the petitioner as a Communist. The petitioner was then asked whether this testimony was true. He refused to answer this and several further questions addressed to him. There was introduced into the record a reproduction of the petitioner's

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ing your activities as a Communist on behalf of the Communist Party, which is tied up directly with the Kremlin; your activities from the standpoint of propaganda; your activities from the standpoint of undertaking to destroy the Federal Bureau of Investigation and the Committee on Un-American Activities, because indeed this committee issued a report entitled 'Operation Abolition,' in which we told something, the information we then possessed, respecting the efforts of the Emergency Civil Liberties Committee, of which you are the guiding light, to destroy the F. B. I. and discredit the director of the F. B. I. and to undertake to hamstring the work of this Committee on Un-American Activities."

registration at an Atlanta hotel a week earlier, in which he had indicated that his business firm association was the "Emergency Civil Liberties Committee."

The subsequent indictment and conviction of the petitioner were based upon his refusal, in the foregoing context, to answer the single question "Are you now a member of the Communist Party?"

II.

The judgment affirming the petitioner's conviction is attacked here from several different directions. It is contended that the subcommittee was without authority to interrogate him, because its purpose in doing so was to investigate public opposition to the Committee itself and to harass and expose him. It is argued that the petitioner was wrongly convicted because the question which he refused to answer was not pertinent to a question under inquiry by the subcommittee, so that a basic element of the statutory offense was lacking. It is said that in any event the pertinency of the question was not made clear to the petitioner at the time he was directed to answer it, so that he was denied due process. Finally, it is urged that the action of the subcommittee in subpoenaing and questioning him violated his rights under the First Amendment to the Constitution.

In considering these contentions the starting point must be to determine the subject matter of the subcommittee's inquiry. House Rule XI, which confers investigative authority upon the Committee and its subcommittees, is quoted above. Because of the breadth and generality of its language, Rule XI cannot be said to state with adequate precision the subject under inquiry by a subcommittee at any given hearing. This the Court had occasion to point out in *Watkins* v. *United States,* 354 U. S. 178. See also *Barenblatt* v. *United States,* 360 U. S. 109, 116–117. But, as the *Watkins* opinion recognized, Rule XI

is only one of several possible points of reference. The Court in that case said that "[t]he authorizing resolution, the remarks of the chairman or members of the committee, or even the nature of the proceedings themselves" might reveal the subject under inquiry. 354 U. S., at 209. Here, as in *Barenblatt,* other sources do supply the requisite concreteness.

The resolution authorizing the subcommittee hearing in Atlanta was explicit. It clearly set forth three concrete areas of investigation: Communist infiltration into basic industry in the South, Communist Party propaganda in the South, and foreign Communist Party propaganda in the United States.[6] The pattern of interrogation of the witnesses who appeared on the first day of the hearing confirms that the subcommittee was pursuing those three subjects of investigation. The Staff Director's statement to the petitioner explicitly referred to the second of the three subjects—Communist Party propaganda in the South. We think that the record thus clearly establishes that the subcommittee at the time of the petitioner's interrogation was pursuing at least two related and specific subjects of investigation: Communist infiltration into basic southern industry, and Communist Party propaganda activities in that area of the country.

If these, then, were the two subjects of the subcommittee's inquiry, the questions that must be answered in considering the petitioner's contentions are several. First, was the subcommittee's investigation of these subjects, through interrogation of the petitioner, authorized

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[6] By contrast, the authorizing resolution that was before the Court in *Watkins* incorporated by reference the full breadth and generality of Rule XI itself. That resolution simply empowered the Committee Chairman to appoint subcommittees "for the purpose of performing any and all acts which the Committee as a whole is authorized to do." See 354 U. S., at 211, n. 50.

by Congress? Second, was the subcommittee pursuing a valid legislative purpose? Third, was the question asked the petitioner pertinent to the subject matter of the investigation? Fourth, was he contemporaneously apprised of the pertinency of the question? Fifth, did the subcommittee's interrogation violate his First Amendment rights of free association and free speech?

The question of basic congressional authorization was clearly decided in *Barenblatt* v. *United States, supra.* There we said, after reviewing the genesis and subsequent history of Rule XI, that "[I]t can hardly be seriously argued that the investigation of Communist activities generally, and the attendant use of compulsory process, was beyond the purview of the Committee's intended authority under Rule XI." 360 U. S., at 120–121. The subjects under inquiry here surely fall within "the investigation of Communist activities generally."

The petitioner argues, however, that the subcommittee was inspired to interrogate him by reason of his opposition to the existence of the Un-American Activities Committee itself, and that its purpose was unauthorized harassment and exposure. He points to the Chairman's opening statement which mentioned activity against the Committee, to the fact that he was subpoenaed to appear before the subcommittee soon after he arrived in Atlanta to stir up opposition to the Committee's activities, and to the statement of the Staff Director indicating the subcommittee's awareness of his efforts to develop a "hostile sentiment" to the Committee and to "bring pressure upon the United States Congress to preclude these particular hearings."

But, just as in *Barenblatt, supra,* we could find nothing in Rule XI to exclude the field of education from the Committee's compulsory authority, we can find nothing to indicate that it was the intent of Congress to immunize

from interrogation all those (and there are many) who are opposed to the existence of the Un-American Activities Committee.

Nor can we say on this record that the subcommittee was not pursuing a valid legislative purpose. The Committee resolution authorizing the Atlanta hearing, quoted above, expressly referred to two legislative proposals, an amendment to § 4 of the Communist Control Act of 1954 and amendments to the Foreign Agents Registration Act of 1938. A number of other sources also indicate the presence of a legislative purpose. The Chairman's statement at the opening of the hearings contained a lengthy discussion of legislation.[7] The Staff Director's statement to the petitioner also discussed legislation which the Committee had under consideration.[8] All these sources indicate the existence of a legislative purpose. And the determination that purposes of the kind referred to are unassailably valid was a cornerstone of our decision in *Barenblatt,*

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[7] ". . . [T]he Committee on Un-American Activities is continuously in the process of accumulating factual information respecting Communists, the Communist Party, and Communist activities which will enable the committee and the Congress to appraise the administration and operation of the Smith Act, the Internal Security Act of 1950, the Communist Control Act of 1954, and numerous provisions of the Criminal Code relating to espionage, sabotage, and subversion. In addition, the committee has before it numerous proposals to strengthen our legislative weapons designed to protect the internal security of this Nation.

"In the course of the last few years, as a result of hearings and investigations, this committee has made over 80 separate recommendations for legislative action. Legislation has been passed by the Congress embracing 35 of the committee recommendations and 26 separate proposals are currently pending in the Congress on subjects covered by other committee recommendations. Moreover, in the course of the last few years numerous recommendations made by the committee for administrative action have been adopted by the executive agencies of the Government."

[8] See note 5, *supra.*

supra: "That Congress has wide power to legislate in the field of Communist activity in this Country, and to conduct appropriate investigations in aid thereof, is hardly debatable. The existence of such power has never been questioned by this Court, and it is sufficient to say, without particularization, that Congress has enacted or considered in this field a wide range of legislative measures, not a few of which have stemmed from recommendations of the very Committee whose actions have been drawn in question here. In the last analysis this power rests on the right of self-preservation. . . ." 360 U. S., at 127–128.

The petitioner's contention that, while the hearing generally may have been pursuant to a valid legislative purpose, the sole reason for interrogating him was to expose him to public censure because of his activities against the Committee is not persuasive. It is true that the Staff Director's statement reveals the subcommittee's awareness of the petitioner's opposition to the hearings and indicates that the petitioner was not summoned to appear until after he had arrived in Atlanta as the representative of a group carrying on a public campaign to abolish the House Committee. These circumstances, however, do not necessarily lead to the conclusion that the subcommittee's intent was personal persecution of the petitioner. As we have noted, a prime purpose of the hearings was to investigate Communist propaganda activities in the South. It therefore was entirely logical for the subcommittee to subpoena the petitioner after he had arrived at the site of the hearings, had registered as a member of a group which the subcommittee believed to be Communist dominated, and had conducted a public campaign against the subcommittee. The fact that the petitioner might not have been summoned to appear had he not come to Atlanta illustrates the very point, for in that event he might not have been thought to have been

connected with a subject under inquiry—Communist Party propaganda activities in that area of the country.

Moreover, it is not for us to speculate as to the motivations that may have prompted the decision of individual members of the subcommittee to summon the petitioner. As was said in *Watkins, supra,* "a solution to our problem is not to be found in testing the motives of committee members for this purpose. Such is not our function. Their motives alone would not vitiate an investigation which had been instituted by a House of Congress if that assembly's legislative purpose is being served." 354 U. S., at 200. See also *Barenblatt, supra,* 360 U. S., at 132.

It is to be emphasized that the petitioner was not summoned to appear as the result of an indiscriminate dragnet procedure, lacking in probable cause for belief that he possessed information which might be helpful to the subcommittee. As was made clear by the testimony of the Committee's Staff Director at the trial, the subcommittee had reason to believe at the time it summoned the petitioner that he was an active Communist leader engaged primarily in propaganda activities.[9] This is borne out

[9] The trial testimony on this score was as follows: "In essence the information of which the committee was possessed was that Mr. Wilkinson was a member of the communist party, that he had been identified by a creditable witness under oath before the committee a short time or within a year or so prior to the Atlanta hearings, identified as a Communist. It was also the information of the committee that Mr. Wilkinson had been designated by the Communist hierarchy in the nation to spearhead or to lead the infiltration into the South of a group known as the Emergency Civil Liberties Committee which itself had been cited by the Internal Security Subcommittee as a communist operation or a communist front. It was the information of the committee that Mr. Wilkinson's assignments, including setting up rallies and meetings over the country for the purpose of engendering sentiment against the Federal Bureau of Investigation, against the security program of the govern-

by the record of the subcommittee hearings, including the content of the Staff Director's statement to the petitioner and evidence that at a prior hearing the petitioner had been identified as a Communist Party member.

The petitioner's claim that the question he refused to answer was not pertinent to a subject under inquiry merits no extended discussion. Indeed, it is difficult to imagine a preliminary question more pertinent to the topics under investigation than whether petitioner was in fact a member of the Communist Party. As was said in *Barenblatt,* "petitioner refused to answer questions as to his own Communist Party affiliations, whose pertinency of course was clear beyond doubt." 360 U. S., at 125. The contention that the pertinency of the question was not made clear to the petitioner at the time he was directed to answer it is equally without foundation. After the Staff Director gave a detailed explanation of the question's pertinency, the petitioner said nothing to indicate that he entertained any doubt on this score.[10]

We come finally to the claim that the subcommittee's interrogation of the petitioner violated his rights under the First Amendment. The basic issues which this contention raises were thoroughly canvassed by us in *Baren-*

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ment, and against the Committee on Un-American Activities and its activities. Mr. Wilkinson had in the course of the relatively recent past prior to his appearance in Atlanta been sent into Atlanta by the communist operation for the purpose of conducting communist activities in the South and more specifically in the Atlanta area. What I'm telling you now is only a general summary, you understand."

[10] Since both the pertinency of the question and the fact that its pertinency was brought home to the petitioner are so indisputably clear, we need not consider the Government's contention that the record does not show that the petitioner ever did or said anything that could be understood as an objection upon grounds of lack of pertinency. See *Watkins* v. *United States,* 354 U. S. 178, 214–215; *Barenblatt* v. *United States,* 360 U. S. 109, 124.

blatt. Substantially all that was said there is equally applicable here, and it would serve no purpose to enlarge this opinion with a paraphrased repetition of what was in that opinion thoughtfully considered and carefully expressed. See 360 U. S., at 125–134.

It is sought to differentiate this case upon the basis that "the activities in which petitioner was believed to be participating consisted of public criticism of the Committee and attempts to influence public opinion to petition Congress for redress—to abolish the Committee." But we cannot say that, simply because the petitioner at the moment may have been engaged in lawful conduct, his Communist activities in connection therewith could not be investigated. The subcommittee had reasonable ground to suppose that the petitioner was an active Communist Party member, and that as such he possessed information that would substantially aid it in its legislative investigation. As the *Barenblatt* opinion makes clear, it is the nature of the Communist activity involved, whether the momentary conduct is legitimate or illegitimate politically, that establishes the Government's overbalancing interest. "To suggest that because the Communist Party may also sponsor peaceable political reforms the constitutional issues before us should now be judged as if that Party were just an ordinary political party from the standpoint of national security, is to ask this Court to blind itself to world affairs which have determined the whole course of our national policy since the close of World War II. . . ." 360 U. S., at 128–129.

The subcommittee's legitimate legislative interest was not the activity in which the petitioner might have happened at the time to be engaged, but in the manipulation and infiltration of activities and organizations by persons advocating overthrow of the Government. "The strict requirements of a prosecution under the Smith Act . . .

are not the measure of the permissible scope of a congressional investigation into 'overthrow,' for of necessity the investigatory process must proceed step by step." 360 U. S., at 130.

We conclude that the First Amendment claims pressed here are indistinguishable from those considered in *Barenblatt*, and that upon the reasoning and the authority of that case they cannot prevail.

Affirmed.

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

In July 1958 the House Un-American Activities Committee announced its intention to conduct a series of hearings in Atlanta, Georgia, ostensibly to obtain information in aid of the legislative function of the House of Representatives.[1] Petitioner, a long-time opponent of the Committee,[2] decided to go to Atlanta for the purpose of lending his support to those who were fighting against the hearings. He arrived in Atlanta and registered in a hotel there on July 23 as a representative of the Emergency

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[1] In my dissenting opinion in *Barenblatt* v. *United States*, 360 U. S. 109, 153–166, I set out the evidence from the Committee's own reports which indicates the Committee's real purpose in conducting this kind of hearing.

[2] During the past several years, the petitioner appears to have been associated with at least three different organizations that had as their primary aim the abolition of the Un-American Activities Committee. In addition to his association with the Emergency Civil Liberties Committee, which is shown by this record, petitioner seems to have been associated with similar organizations in Los Angeles and Chicago. At least he was accused of such associations when he was called before a previous hearing of the Committee in 1956. See Hearings before the House Committee on Un-American Activities, 84th Cong., 2d Sess., at Los Angeles, California, December 5–8, 1956, entitled "Communist Political Subversion, Part I," pp. 6747–6753.

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Civil Liberties Committee, a New York organization which was working for the abolition of the Un-American Activities Committee. Within an hour of his registration, petitioner was served with a subpoena requiring his appearance before the Committee. When he appeared in response to this subpoena, petitioner was told that he had been subpoenaed because the Committee was informed that "you were sent to this area by the Communist Party for the purpose of developing a hostile sentiment to this committee and to its work for the purpose of undertaking to bring pressure upon the United States Congress to preclude these particular hearings." [3] A number of questions were then put to petitioner, all of which related to his personal beliefs and associations, but petitioner refused to answer any of these questions on the ground that they violated his rights under the First Amendment. For this, he was convicted under 2 U. S. C. § 192 and sentenced to jail for 12 months.

On these facts, which are undisputed in the record, the majority upholds petitioner's conviction as "indistinguishable" from that upheld in *Barenblatt* v. *United States*.[4] On this point, I find myself only partially in disagreement with the majority. I think this case could and should be distinguished from *Barenblatt* on the ground urged by MR. JUSTICE DOUGLAS—that the resolution authorizing the Un-American Activities Committee does not authorize that Committee to interrogate a person for criticizing it. I therefore join in the dissent filed by MR. JUSTICE DOUGLAS on that ground. On the other hand, I must agree with the majority that so far as petitioner's constitutional claims are concerned, *Barenblatt* is "indistin-

[3] Significantly, the petitioner was never told, nor does the record disclose for our consideration here, either the source or the nature of the alleged information referred to.

[4] 360 U. S. 109.

guishable." Unlike the majority, however, I regard this recognition of the unlimited sweep of the decision in the *Barenblatt* case a compelling reason, not to reaffirm that case, but to overrule it.

In my view, the majority by its decision today places the stamp of constitutional approval upon a practice as clearly inconsistent with the Constitution, and indeed with every ideal of individual freedom for which this country has so long stood, as any that has ever come before this Court. For, like MR. JUSTICE DOUGLAS, I think it clear that this case involves nothing more nor less than an attempt by the Un-American Activities Committee to use the contempt power of the House of Representatives as a weapon against those who dare to criticize it. The majority does not and, in reason, could not deny this for the conclusion is all but inescapable for anyone who will take the time to read the record.[5] They say instead that it makes no difference whether the Committee was harassing petitioner solely by reason of his opposition to it or not because "it is not for us to speculate as to the motivations that may have prompted the decision of individual members of the subcommittee to summon the petitioner." The clear thrust of this sweeping abdication of judicial power is that the Committee may continue to harass its opponents with absolute impunity so long as the "protections" of *Barenblatt* are observed. Since this is to be the rule under which the Committee will be permitted to operate, I think it necessary in the interest of fairness to those who may in the future wish to exercise their constitutional right to criticize the Com-

[5] I agree with the majority that, in a sense, "[t]hese circumstances, however, do not *necessarily* lead to the conclusion that the subcommittee's intent was personal persecution of the petitioner" (emphasis supplied), but I am satisfied that the evidence, though not absolutely conclusive, is overwhelming.

mittee that the true nature of those "protections" be clearly set forth.

The first such "protection" relates to the question of whom the Committee may call before it. Is there any limitation upon the power of the Committee to subpoena and compel testimony from anyone who attacks it? On this point, the majority, relying upon the fact that at a previous hearing the Committee was told by a paid informant that petitioner was a Communist and upon statements by the Committee's counsel to the effect that the Committee had information that petitioner had been sent to Atlanta by the Communist Party, says simply: "It is to be emphasized that the petitioner was not summoned to appear as the result of an indiscriminate dragnet procedure, lacking in probable cause for belief that he possessed information which might be helpful to the subcommittee." Significantly, the majority does not say just how much its "emphasis" on this point is worth, if anything. Thus, for all that appears in the majority opinion, there is no assurance that the Committee will be required to produce any information at all as a prerequisite to the exercise of its subpoena and contempt powers. Assuming for the sake of argument, however, that such a requirement will be imposed, it then becomes relevant to inquire as to just how much this requirement will mean in terms of genuine protection for those who in good faith wish to criticize the Committee.

That inquiry is, to my mind, satisfactorily settled by a look at the facts of this case. So far as appears from this record, the only information the Committee had with regard to petitioner was the testimony of an informant at a previous Committee hearing. The only evidence to the effect that petitioner was in fact a member of the Communist Party that emerges from that testimony is a flat conclusory statement by the informant that it was

so.[6] No testimony as to particular happenings upon which such a conclusion could rationally be based was given at that hearing. When this fact is considered in conjunction with the fact that petitioner was not accorded the opportunity to cross-examine the informant[7] or the protection of the statute permitting inspection of statements given to the F. B. I. by informants,[8] it seems obvious to me that such testimony is almost totally worthless for the purpose of establishing probable cause. For all we know, the informant may have had no basis at all for her conclusion and, indeed, the possibility of perjury cannot, in view of its frequent recurrence in these sorts of cases,[9] be entirely discounted. Thus, in my view, the "protection" afforded by a requirement of some sort of probable cause, even if imposed, is almost totally worthless. In the atmosphere existing in this country today, the charge that someone is a Communist is so common that hardly anyone active in public life escapes it. Every member of this Court has, on one occasion or another,

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[6] The "evidence" relied upon by the Committee is contained in the following colloquy between the informant, a Mrs. Schneider, and the Committee counsel, a Mr. Arens:

"Mr. Arens. Was it [the Citizens Committee To Preserve American Freedoms] Communist-controlled?

"Mrs. Schneider. Yes.

"Mr. Arens. Who was the ringleader in that organization?

"Mrs. Schneider. I didn't work in that organization, and I don't know who the ringleader was. My contact on that occasion was with Frank Wilkinson, I believe.

"Mr. Arens. Did you know him as a Communist?

"Mrs. Schneider. Yes." Hearings before the House Committee on Un-American Activities, *op. cit., supra,* n. 2, at 6730.

[7] This, of course, is the established practice in hearings before the House Committee on Un-American Activities.

[8] 18 U. S. C. § 3500.

[9] See, *e. g., Communist Party of the United States* v. *Subversive Activities Control Board,* 351 U. S. 115; *Mesarosh* v. *United States,* 352 U. S. 1.

been so designated. And a vast majority of the members of the other two branches of Government have fared no better. If the mere fact that someone has been called a Communist is to be permitted to satisfy a requirement of probable cause, I think it plain that such a requirement is wholly without value. To impose it would only give apparent respectability to a practice which is inherently in conflict with our concepts of justice and due process.

The other such "protection" afforded to critics of the Un-American Activities Committee under these decisions is included in the majority's so-called balancing test. Under that test, we are told, this Court will permit only those abridgments of personal beliefs and associations by Committee inquiry that the Court believes so important in terms of the need of the Committee for information that such need outweighs the First Amendment rights of the witness and the public.[10] For my part, I need look no further than this very case to see how little protection this high-sounding slogan really affords. For in this case the majority is holding that the interest of the Committee in the information sought outweighs that of the witness and the public in free discussion while, at the same time, it disclaims any power to determine whether the Committee is in fact interested in the information at all. The truth of the matter is that the balancing test, at least as applied to date, means that the Committee may engage in *any* inquiry a majority of this Court happens to think could possibly be for a legitimate purpose whether that "purpose" be the true reason for the inquiry or not. And

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[10] The test is stated by the majority in its opinion in *Barenblatt* in the following terms: "Where First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown." 360 U. S., at 126. Cf. *American Communications Assn.* v. *Douds*, 339 U. S. 382; *Beauharnais* v. *Illinois*, 343 U. S. 250.

under the tests of legitimacy that are used in this area, any first-year law school student worth his salt could construct a rationalization to justify almost any question put to any witness at any time.

Thus, in my view, the conclusion is inescapable that the only real limitation upon the Committee's power to harass its opponents is the Committee's own self-restraint, a characteristic which probably has not been predominant in the Committee's work over the past few years. The result of all this is that from now on anyone who takes a public position contrary to that being urged by the House Un-American Activities Committee should realize that he runs the risk of being subpoenaed to appear at a hearing in some far off place, of being questioned with regard to every minute detail of his past life, of being asked to repeat all the gossip he may have heard about any of his friends and acquaintances, of being accused by the Committee of membership in the Communist Party, of being held up to the public as a subversive and a traitor, of being jailed for contempt if he refuses to cooperate with the Committee in its probe of his mind and associations, and of being branded by his neighbors, employer and erstwhile friends as a menace to society *regardless of the outcome of that hearing.* With such a powerful weapon in its hands, it seems quite likely that the Committee will weather all criticism, even though justifiable, that may be directed toward it. For there are not many people in our society who will have the courage to speak out against such a formidable opponent. But cf. *Uphaus* v. *Wyman,* 364 U. S. 388. If the present trend continues, this already small number will necessarily dwindle as their ranks are thinned by the jails. Government by consent will disappear to be replaced by government by intimidation because some people are afraid that this country cannot survive unless Congress has the power to set aside the freedoms of the First Amendment at will.

I can only reiterate my firm conviction that these people are tragically wrong. This country was not built by men who were afraid and it cannot be preserved by such men.[11] Our Constitution, in unequivocal terms, gives the right to each of us to say what we think without fear of the power of the Government. That principle has served us so well for so long that I cannot believe it necessary to allow any governmental group to reject it in order to preserve its own existence. Least of all do I believe that such a privilege should be accorded the House Un-American Activities Committee. For I believe that true Americanism is to be protected, not by committees that persecute unorthodox minorities, but by strict adherence to basic principles of freedom that are responsible for this Nation's greatness. Those principles are embodied for all who care to see in our Bill of Rights. They were put there for the specific purpose of preventing just the sort of governmental suppression of criticism that the majority upholds here. Their ineffectiveness to that end stems, not from any lack of precision in the statement of the principles, but from the refusal of the majority to apply those principles as precisely stated. For the principles of the First Amendment are stated in precise and mandatory terms and unless they are applied in those terms, the

[11] Mr. Justice Brandeis made this very point in his concurring opinion in *Whitney* v. *Califonia,* where he said: "Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty." 274 U. S. 357, 375. Mr. Justice Brandeis doubtless had in mind, and indeed made specific reference to, the famous words in Thomas Jefferson's first inaugural address: "If there be any among us who would wish to dissolve this union or change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it."

freedoms of religion, speech, press, assembly and petition will have no effective protection. Where these freedoms are left to depend upon a balance to be struck by this Court in each particular case, liberty cannot survive. For under such a rule, there are no constitutional rights that cannot be "balanced" away.

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

When petitioner was summoned before a subcommittee of the House Committee on Un-American Activities in Atlanta, Georgia, the Staff Director for the Committee made the following statement to him:

> "It is the information of the committee or the suggestion of the committee that in anticipation of the hearings here in Atlanta, Georgia, you were sent to this area by the Communist Party for the purpose of developing a hostile sentiment to this committee and to its work for the purpose of undertaking to bring pressure upon the United States Congress to preclude these particular hearings. Indeed it is the fact that you were not even subpenaed for these particular hearings until we learned that you were in town for that very purpose and that you were not subpenaed to appear before this committee until you had actually registered in the hotel here in Atlanta.
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> "Now, sir, if you will tell this committee whether or not, while you are under oath, you are now a Communist, we intend to pursue that area of inquiry and undertake to solicit from you information respecting your activities as a Communist on behalf of the Communist Party, which is tied up directly with the Kremlin; your activities from the standpoint of propaganda; your activities from the standpoint of undertaking to destroy the Federal Bureau of Investigation and the Committee on Un-American Activ-

ities, because indeed this committee issued a report entitled 'Operation Abolition,' in which we told something, the information we then possessed, respecting the efforts of the Emergency Civil Liberties Committee, of which you are the guiding light, to destroy the F. B. I. and discredit the director of the F. B. I. and to undertake to hamstring the work of this Committee on Un-American Activities.

"So if you will answer that principal question, I intend to pursue the other questions with you to solicit information which would be of interest—which will be of vital necessity, indeed—to this committee in undertaking to develop legislation to protect the United States of America under whose flag you, sir, have protection.

"Now please answer the question: Are you now a member of the Communist Party?"

Petitioner answered, "I am refusing to answer any questions of this committee."

After a further explanation he was directed to answer. He replied:

"I have the utmost respect for the broad powers which the Congress of the United States must have to carry on its investigations for legislative purposes. However, the United States Supreme Court has held that, broad as these powers may be, the Congress cannot investigate into an area where it cannot legislate, and this committee tends, by its mandate and by its practices, to investigate into precisely those areas of free speech, religion, peaceful association and assembly, and the press, wherein it cannot legislate and therefore it cannot investigate." [1]

[1] The Washington Post on January 4, 1961, made a similar criticism of the House Committee on Un-American Activities:

"The Committee often functions as a kind of public pillory to punish men by publicity for offenses which the Constitution forbids

The Committee [2] is authorized by the Resolution governing it to make investigations of "the extent, character, and objects of un-American propaganda activities in the United States."

If it is "un-American" to criticize, impeach, and berate the Committee and to seek to have it abolished, then the Committee acted within the scope of its authority in asking the questions. But we take a dangerous leap when we reach the conclusion that criticism of the Committee was within the scope of the Resolution.

Criticism of government finds sanctuary in several portions of the First Amendment. It is part of the right

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Congress to make punishable by law. It 'exposes' men who express opinions or indulge in associations of which the Committee disapproves, carelessly calling them—or allowing witnesses under the cloak of congressional immunity to call them—Communists or Communist-sympathizers or Communist dupes.

"The Committee, as a consequence of this conduct, sometimes operates as a serious restraint on freedom of expression and freedom of association. It makes Americans fearful of uttering opinions for which they may be called to account by the Committee and fearful of joining organizations which the Committee may consider subversive."

[2] The ultimate mandate of the parent Committee at the time of the subcommittee hearing was to be found in paragraph 17 (b), Rule XI, Rules of the House of Representatives, H. Res. 5, 85th Cong., 1st Sess., 60 Stat. 828. It provides: "The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation." The record in this case also contains the mandate of the subcommittee (see note 5, *infra*), but the terms of the parent Committee's mandate are of course controlling. Of the purposes of the Committee, only the investigation of "un-American propaganda" activities seems even arguably to authorize the questions asked and the inquiry pursued in this case.

of free speech. It embraces freedom of the press. Can editors be summoned before the Committee and be made to account for their editorials denouncing the Committee, its tactics, its practices, its policies? If petitioner can be questioned concerning his opposition to the Committee, then I see no reason why editors are immune. The list of editors will be long as is evident from the editorial protests against the Committee's activities,[3] including its recent film, Operation Abolition.[4]

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[3] See note 1, *supra*.

[4] The Washington Post said editorially on December 28, 1960:

"In his letters printed elsewhere in this newspaper today, Rep. Francis Walter asserts that the film *Operation Abolition* 'contains absolutely no distortions' and that the staff member who had admitted it contained such defects 'had not himself used the word "distortions." ' In a television show over KCOP–TV, Los Angeles, a teaching assistant at the University of California referred to distortions in the film. William Wheeler, an investigator for the House Un-American Activities Committee, taking part in the program asked, 'What are you trying to prove by this?' The following exchange then took place:

"Mr. White: That the film has inaccuracies and distortions.

"Mr. Wheeler: I've admitted that.

"Mr. White: You've admitted that?

"Mr. Wheeler: Certainly.

"Mr. Walter offers some carefully selected quotes from the San Francisco press to refute this newspaper's assertion that the San Francisco police 'reacted with altogether needless ferocity.' Like the film *Operation Abolition* itself, he omits all the material showing the other side of the picture. For instance, San Francisco *Chronicle* reporter George Draper wrote:

" 'I did not see any of the kids actually fighting with the police. Their resistance was more passive. They would simply go limp and be manhandled out of the building. . . . I saw one slightly built lad being carried by two husky officers. One held the boy's shirt, the other had him by the feet. He was struggling, but he was no match for the two bigger men. Then from nowhere appeared a third officer. He ran up to the slender boy firmly held by the other two officers and clubbed him three times on the head. You could hear the hollow smack of the club striking. The boy went limp and was carried out.'

[*Footnote 4 continued on p. 427.*]

The First Amendment rights involved here are more than freedom of speech and press. Bringing people together in peaceable assemblies is in the same category. *De Jonge* v. *Oregon,* 299 U. S. 353. "The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental." *Id.,* at 364. The right to petition "for a redress of grievances" is also part of the First Amendment; it too is fundamental to "the very idea of a government, republican in form." *United States* v. *Cruikshank,* 92 U. S. 542, 552. Chief Justice Hughes, speaking for the Court in the *De Jonge* case involving communist activities no more nor less lawful than those charged here, said:

> "The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government

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"Nor does Mr. Walter mention the report of another eyewitness, Mel Wax, a special correspondent of the New York *Post.*

" 'Never, in 20 years as a reporter, have I seen such brutality. . . . San Francisco police hurled women down the staircase, spines bumping on each marble stair.'

"To Mr. Walter, it is an admitted but 'decidedly minor' distortion in the film that Harry Bridges was represented as being on the scene just *before* the rioting broke out when, in point of fact, he did not arrive until after it was all over. 'Honest' this error may have been; but it was more than unfortunate. For it contributed considerably to the deceptive and distorted message of the film that the student demonstration was inspired and led by Communists.

"Communists may have tried to claim the credit which Mr. Walter accords them. Unquestionably the affair got out of hand, and no one condones the rowdiness that ensued. But the truth is that the demonstration was inspired by distaste for the Un-American Activities Committee. And it was led by students who intended nothing more than an orderly protest—an inalienable political right in the United States."

> may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government." *De Jonge* v. *Oregon, supra,* at 365.

These are reasons why I would construe the Resolution narrowly so as to exclude criticism of the Committee. We have customarily done just that, insisting that if "an inquiry of dubious limits" is to be found in an Act or Resolution, Congress should unequivocally authorize it. *United States* v. *Rumely,* 345 U. S. 41, 46; *United States* v. *Harriss,* 347 U. S. 612; *Watkins* v. *United States,* 354 U. S. 178, 198.

The indictment charged only the failure to answer the one question, "Are you now a member of the Communist Party?" That question in other contexts might well have been appropriate. We have here, however, an investigation whose central aim was finding out what criticism a citizen was making of the Government. That was the gist of the case presented to the jury.[5]

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[5] At the trial committee counsel was cross-examined as follows:

"Q. Mr. Arens, you stated before the committee that Mr. Wilkinson had come to Atlanta to stir up hostility to the committee, that he was doing everything he could to prevent these hearings from being held in Atlanta?

"A. Yes, sir.

"Q. And that you did not subpoena him until you discovered that he had arrived here for that purpose?

"A. That's correct, sir.

"Q. Now, you state that within the three general categories under which the committee was holding hearings here of colonization in the textile industry, entry and dissemination of foreign propaganda and Communist party propaganda activity in the South, you are stating that Mr. Wilkinson stirring up hostility to the House Committee on Un-American Activities comes within the category of Communist party propaganda activity which justified the House Committee to subpoena him and question him, is that correct? I just want to understand your position.

"A. Yes, in general I agree with you, yes."

We cannot allow this man to go to prison for 12 months unless we hold that an investigation of those who criticize the Un-American Activities Committee was both authorized and constitutional. I cannot read the Resolution as authorizing that kind of investigation without assuming that the Congress intended to flout the First Amendment.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS joins, dissenting.

For the reasons stated in my Brother DOUGLAS' dissenting opinion in *Braden* v. *United States, post,* p. 446, which I joined, I believe that the Committee failed to lay an adequate foundation at the hearing for questions which, it was claimed, concerned the exercise of rights protected by the First Amendment.

I also dissent because on these facts the inference is inescapable that the dominant purpose of these questions was not to gather information in aid of law making or law evaluation but rather to harass the petitioner and expose him for the sake of exposure. A scant 19 months before the hearing in question petitioner was summoned before this very Committee and refused to answer questions on substantially the same grounds as those he claimed in this instance. Nor did his conduct in the interim afford any basis for a hope that he might have repented, an inference which, by contrast, was possible in *Flaxer* v. *United States,* 358 U. S. 147, 151, cited by the Government. For petitioner continued to proclaim his hostility to the Committee and his belief that it had no power to probe areas of free expression. He was not even called to testify at these hearings in Atlanta until the Committee learned that he was to be present in Atlanta to express his opposition to the Committee's work, as, of course, he had a right to do. In fact, the Committee's Staff Director came perilously close to admitting, on cross-examination by petitioner's counsel, that petitioner was called to the

stand only because of his opposition to the Committee's activities.

It is particularly important that congressional committees confine themselves to the function of gathering information when their investigation begins to touch the realm of speech and opinion. On this record, I cannot help concluding that the Committee had no reasonable prospect that petitioner would answer its questions, and accordingly that the Committee's purpose could not have been the legitimate one of fact gathering. I am forced to the view that the questions asked of petitioner were therefore not within the Committee's power. Cf. *Barenblatt* v. *United States,* 360 U. S. 109, 166 (dissenting opinion); *Uphaus* v. *Wyman,* 360 U. S. 72, 82 (dissenting opinion). I would reverse.

Syllabus.

BRADEN *v.* UNITED STATES.

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

No. 54. Argued November 17, 1960.—Decided February 27, 1961.

Summoned to testify before a Subcommittee of the House of Representatives Committee on Un-American Activities, which was investigating Communist infiltration into basic industries in the South and Communist Party propaganda activities in the South, petitioner refused to answer many of the questions directed to him. He did not claim his privilege against self-incrimination but contended that the questions were not pertinent to a question under inquiry by the Subcommittee and that its questioning violated his rights under the First Amendment. For refusing to answer, he was convicted of a violation of 2 U. S. C. § 192, which makes it a misdemeanor for any person summoned as a witness by either House of Congress or a committee thereof to refuse to answer any question pertinent to the question under inquiry. *Held:* Petitioner's conviction is sustained. Pp. 432–438.

1. On the record, the subjects under investigation by the Subcommittee when petitioner was interrogated were Communist infiltration into basic southern industries and Communist Party propaganda activities in the South; the Subcommittee's investigation of these subjects was authorized by Congress; the interrogation was pertinent to a question under Subcommittee inquiry; and petitioner was fully apprised of its pertinency. *Wilkinson* v. *United States, ante,* p. 399. Pp. 432–433.

2. The Subcommittee's inquiry as to whether the petitioner had been a member of the Communist Party at the instant when he affixed his signature to a letter urging opposition to certain bills in Congress did not violate his rights under the First Amendment. *Barenblatt* v. *United States,* 360 U. S. 109. Pp. 433–435.

3. It was the province of the Court, and not of the jury, to decide whether the questions asked by the Subcommittee were pertinent to the subject under inquiry. *Sinclair* v. *United States,* 279 U. S. 263. Pp. 436–437.

4. That, in refusing to answer the questions, petitioner relied upon his understanding of previous decisions of this Court was no defense. *Sinclair* v. *United States, supra.* Pp. 437–438.

272 F. 2d 653, affirmed.

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Leonard B. Boudin and *John M. Coe* argued the cause for petitioner. With them on the brief were *Victor Rabinowitz, Conrad J. Lynn, Samuel M. Koenigsberg* and *Charles A. Reich.*

Assistant Attorney General Yeagley argued the cause for the United States. With him on the briefs were *Solicitor General Rankin, Bruce J. Terris, George B. Searls, Joseph C. Weixel* and *Kevin T. Maroney.*

MR. JUSTICE STEWART delivered the opinion of the Court.

This case is a companion to *Wilkinson* v. *United States,* decided today, *ante,* p. 399. The petitioner was the witness immediately preceding Wilkinson at the hearing of a subcommittee of the House Un-American Activities Committee, in Atlanta, Georgia, on July 30, 1958. He refused to answer many of the questions directed to him, basing his refusal upon the grounds that the questions were not pertinent to a question under inquiry by the subcommittee and that the interrogation invaded his First Amendment rights. He was subsequently indicted and, after a jury trial, convicted for having violated 2 U. S. C. § 192, in refusing to answer six specific questions which had been put to him by the subcommittee.[1] The Court of Appeals affirmed, 272 F. 2d 653, relying on *Barenblatt* v. *United States,* 360 U. S. 109, and we granted certiorari, 362 U. S. 960.

The principal issues raised by the petitioner are substantially identical to those considered in *Wilkinson,* and extended discussion is not required in resolving them. Based upon the same record that was brought here in *Wilkinson,* we conclude for the reasons stated there that

[1] The indictment was in six counts, each count setting out a specific question which the petitioner had refused to answer. He was convicted on all six counts, and concurrent sentences were imposed.

the subjects under subcommittee investigation at the time the petitioner was interrogated were Communist infiltration into basic southern industry and Communist Party propaganda activities in the southern part of the United States. We conclude for the same reasons that the subcommittee's investigation of these subjects was authorized by Congress, that the interrogation was pertinent to a question under subcommittee inquiry,[2] and that the petitioner was fully apprised of its pertinency.[3]

In asserting a violation of his First Amendment rights, the petitioner here points out that he was asked, not simply whether he was or had been a Communist Party mem-

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[2] The questions which were the subjects of the six counts of the indictment were as follows:

"And did you participate in a meeting here at that time?

"Who solicited the quarters to be made available to the Southern Conference Educational Fund?

"Are you connected with the Emergency Civil Liberties Committee?

"Did you and Harvey O'Connor, in the course of your conference there in Rhode Island, develop plans and strategies outlining work schedules for the Emergency Civil Liberties Committee?

"Were you a member of the Communist Party the instant you affixed your signature to that letter?

"I would just like to ask you whether or not you, being a resident of Louisville, Kentucky, have anything to do there with the Southern Newsletter?"

The full transcript of the petitioner's interrogation by the subcommittee, introduced in the District Court, makes intelligible the relevance of these questions. Since concurrent sentences were imposed on the several counts, we need specifically consider here only the question covered by the fifth count, going to the petitioner's Communist Party membership. See *Barenblatt* v. *United States,* 360 U. S. 109, 115; *Claassen* v. *United States,* 142 U. S. 140, 147.

[3] As in *Wilkinson,* by the resolution authorizing the subcommittee's investigation, by the statements of the Chairman and other members of the subcommittee, by the tenor of interrogation of prior witnesses, and by a lengthy explanatory statement addressed contemporaneously to the petitioner.

ber, as in *Wilkinson* and *Barenblatt, supra,* but whether he was a member "the instant you affixed your signature to that letter." The letter in question, which had admittedly been signed by the petitioner and his wife, urged opposition to certain bills in Congress. The petitioner emphasizes that the writing of such a letter is not only legitimate but constitutionally protected activity, and points to other evidence in the record to indicate that he had been active in other completely legitimate causes.[4] Based upon these circumstances, he argues that the subcommittee did not have a proper legislative purpose in calling him before it, but that it was bent rather on persecuting him for publicly opposing the subcommittee's

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[4] For example, the petitioner points out that the "Southern Conference Educational Fund" with which he had been associated had been active in promoting racial integration in the South. The transcript of the subcommittee hearings makes clear, however, that these activities as such were not under investigation. As a member of the subcommittee stated:

"What I am interested in, is what are you doing on behalf of the Communist Party? We are not going to be clouded, so far as I am concerned, by talking about integration and segregation. This committee is not concerned in that. This committee is concerned in what you are doing in behalf of the Communist conspiracy."

At another point the following colloquy occurred:

"Mr. Braden: Two hundred Negro leaders in the South petitioned the Congress of the United States last week in connection with this hearing in Atlanta.

"Mr. Jackson: After looking at some of the names on this list, the letters went into the circular files of many members, because it was quite obvious that a number of names on that letter were names of those that had been closely associated with the Communist Party. Their interest and major part does not lie with honest integration. Their interest lies with the purposes of the Communist Party. And that is what we are looking into, and let us not be clouding this discussion and this hearing this morning by any more nonsense that we are here as representatives of the United States Government to further, or to destroy, or to have anything to do with, integration."

activities. He contends that under such circumstances an inquiry into his personal and associational conduct violated his First Amendment freedoms. On these grounds, the petitioner would differentiate the constitutional issues here from those that were before the Court in *Barenblatt, supra.*

But *Barenblatt* did not confine congressional committee investigation to overt criminal activity, nor did that case determine that Congress can only investigate the Communist Party itself. Rather, the decision upheld an investigation of Communist activity in education. Education, too, is legitimate and protected activity. Communist infiltration and propaganda in a given area of the country, which were the subjects of the subcommittee investigation here, are surely as much within its pervasive authority as Communist activity in educational institutions. The subcommittee had reason to believe that the petitioner was a member of the Communist Party, and that he had been actively engaged in propaganda efforts. It was making a legislative inquiry into Communist Party propaganda activities in the southern States. Information as to the extent to which the Communist Party was utilizing legitimate organizations and causes in its propaganda efforts in that region was surely not constitutionally beyond the reach of the subcommittee's inquiry. Upon the reasoning and authority of *Barenblatt,* 360 U. S., at 125–134, we hold that the judgment is not to be set aside on First Amendment grounds.

The petitioner in this case raises two additional issues that were not considered either in *Barenblatt, supra,* or in *Wilkinson, supra.* First, he says that it was error for the trial court not to leave it for the jury to determine whether the questions asked by the subcommittee were pertinent to the subject under inquiry. Secondly, he asserts that

he could not properly be convicted, because in refusing to answer the subcommittee's questions he relied upon his understanding of the meaning of previous decisions of this Court. We think that both of these contentions have been foreclosed by *Sinclair* v. *United States,* 279 U. S. 263.

At the trial the district judge determined as a matter of law that the questions were pertinent to a matter under inquiry by the subcommittee,[5] leaving to the jury the question whether the pertinence of the questions had been brought home to the petitioner. It is to be noted that counsel made no timely objection to this procedure and, indeed, affirmatively acquiesced in it.[6] But we need not base rejection of the petitioner's contention here on that ground, for, in any event, it was proper for the court to determine the question as a matter of law. This is precisely what was held in *Sinclair* v. *United States,* where the Court said at 279 U. S. 299: "The reasons for holding relevancy and materiality to be questions of law . . .

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[5] "You will note that each count in the indictment alleges that the refusal was with reference to a question pertinent to the matter under inquiry. You will not concern yourselves with this allegation as it involves a matter of law which it is the Court's duty to determine and which has been determined. I have determined as a matter of law that the committee had the right to ask these questions and the defendant had the duty to answer these questions under the conditions that I will later explain."

[6] In his opening statement to the jury, counsel for the petitioner said: "As the counsel for the government has properly stated, the question of whether or not those questions were pertinent to the subject matter under inquiry has been ruled to be a question of law for the Court. But whether or not the defendant Carl Braden at the time he refused to answer those questions knew that they were pertinent to the subject matter under inquiry is a question of fact which will be submitted by the Court to you gentlemen." Not until after the concluding arguments and the instructions to the jury did counsel claim for the first time that the question of actual pertinency was not for the court to decide.

apply with equal force to the determination of pertinency arising under § 102 [the predecessor of 2 U. S. C. § 192]. The matter for determination in this case was whether the facts called for by the question were so related to the subjects covered by the Senate's resolutions that such facts reasonably could be said to be 'pertinent to the question under inquiry.' It would be incongruous and contrary to well-established principles to leave the determination of such a matter to a jury."

During his interrogation the petitioner was asked: "Now do I understand that you have refused to answer the question as to whether or not you are now a member of the Communist Party solely upon the invocation of the provisions of the first amendment, but that you have not invoked the protection of the fifth amendment to the Constitution. Is that correct?" He gave the following answer: "That is right, sir. I am standing on the Watkins, Sweezy, Konigsberg, and other decisions of the United States Supreme Court which protect my right, and the Constitution as they interpret the Constitution of the United States, protecting my right to private belief and association."

It is now argued that because he relied upon his understanding of this Court's previous decisions he could not be convicted under the statute for failing to answer the questions. An almost identical contention was also rejected in *Sinclair* v. *United States, supra,* at 299: "There is no merit in appellant's contention that he is entitled to a new trial because the court excluded evidence that in refusing to answer he acted in good faith on the advice of competent counsel. The gist of the offense is refusal to answer pertinent questions. No moral turpitude is involved. Intentional violation is sufficient to constitute guilt. There was no misapprehension as to what was called for. The refusal to answer was deliber-

ate. The facts sought were pertinent as a matter of law, and § 102 made it appellant's duty to answer. He was bound rightly to construe the statute. His mistaken view of law is no defense." [7]

Here, as in *Sinclair,* the refusal to answer was deliberate and intentional.

Affirmed.

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

The petitioner in this case, as is shown by the facts set forth in the dissenting opinion of MR. JUSTICE DOUGLAS, in which I concur, has for some time been at odds with strong sentiment favoring racial segregation in his home State of Kentucky. A white man himself, the petitioner has nonetheless spoken out strongly against that sentiment. This activity, which once before resulted in his being charged with a serious crime,[1] seems also to have

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[7] This was reaffirmed in *United States* v. *Murdock,* 290 U. S. 389, 397, where it was said: "The applicable statute did not make a bad purpose or evil intent an element of the misdemeanor of refusing to answer, but conditioned guilt or innocence solely upon the relevancy of the question propounded. Sinclair was either right or wrong in his refusal to answer, and if wrong he took the risk of becoming liable to the prescribed penalty." See also *Watkins* v. *United States,* 354 U. S. 178, 208.

[1] In 1954 petitioner and his wife were indicted and petitioner was convicted of sedition by the State of Kentucky, for which he received a sentence of imprisonment for 15 years. This prosecution grew out of events surrounding petitioner's helping a Negro family to purchase a home in an all-white suburb of Louisville. The charges against petitioner and his wife were eventually dismissed following this Court's decision in *Pennsylvania* v. *Nelson,* 350 U. S. 497. See *Braden* v. *Commonwealth of Kentucky,* 291 S. W. 2d 843. For the prosecution's version of this case, see the testimony of the State Attorney General and the Commonwealth Attorney for Louisville (the latter having served as prosecutor in the case) before the Subcommittee to Investigate the Administration of the Internal Security Act

been the primary reason for his being called before the Un-American Activities Committee. For the occasion of that Committee's compelling petitioner to go from Rhode Island, where he was vacationing, to Atlanta for questioning appears from the record to have been the circulation of two letters, both in the nature of petitions to Congress, urging that certain legislative action be taken which, in the view of the signers of the petitions, would help those working against segregation. One of these petitions, signed by petitioner and his wife, asked those who read it to urge their representatives in Congress to vote against proposed legislation which would have empowered the States to enact antisedition statutes because, in the view of the signers, those statutes could too readily be used against citizens working for integration. The other petition, bearing the signature of 200 southern Negroes, was sent directly to the House of Representatives and requested that body not to allow the Un-American Activities Committee to conduct hearings in the South because, so the petition charged, "all of its [the Committee's] activities in recent years suggest that it is much more interested in harassing and labeling as 'subversive' any citizen who is inclined to be liberal or an independent thinker." The record shows that the Committee apparently believed that petitioner had drafted both of these petitions and that he had circulated them, not—as would appear from the face of the petitions—for the purpose of furthering the cause of integration, but for the purpose of furthering the interests of the Communist Party, of which the Committee claimed to have information that he was a member,[2] by fomenting racial strife and interfer-

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and other Internal Security Laws of the Senate Committee on the Judiciary, 85th Cong., 1st Sess., pp. 2–23. For the Bradens' version of the case, see Anne Braden, The Wall Between.

[2] So far as appears from the record, the evidence relied upon by the Committee to substantiate its claim that petitioner is or has

ing with the investigations of the Un-American Activities Committee.

When petitioner appeared in response to this subpoena, he was asked a number of questions regarding his personal beliefs and associations, culminating in the question of whether he was a member of the Communist Party at "the instant" he affixed his signature to the petition urging defeat of the statute authorizing state antisedition laws. Petitioner refused to answer these questions on the grounds, first, that the Committee had no power to ask the questions it put to him, and, secondly, that he could properly refuse to answer such questions under the First Amendment. For this refusal to answer he, like Frank Wilkinson who followed him on the witness stand at the Atlanta hearing,[3] was convicted under 2 U. S. C. § 192 and sentenced to 12 months in jail.[4] And, as was the case with the conviction of Wilkinson, the majority here affirms petitioner's conviction "[u]pon the reasoning and authority" of *Barenblatt* v. *United States*.[5]

Again I must agree with the majority that insofar as the conviction is attacked on constitutional grounds,[6] the

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been a member of the Communist Party is no stronger here than it was in *Wilkinson* v. *United States*, the companion case decided today, *ante*, p. 399. Here, as there, the Committee appears to have been relying upon a flat conclusory statement made by an informant, this time before a Senate Internal Security Subcommittee. See Hearings before the Subcommittee, *op. cit., supra*, n. 1, at 37.

[3] See *Wilkinson* v. *United States*, decided today, *ante*, p. 399.

[4] Petitioner was convicted on six counts and given concurrent sentences on each, but the majority, properly I think, states that "we need specifically consider here only the question covered by the fifth count . . . ." The fifth count related to the question referred to above dealing with petitioner's possible Communist Party membership at "the instant" he affixed his signature to the petition urging defeat of the statute authorizing state antisedition laws.

[5] 360 U. S. 109.

[6] As indicated by my concurrence in the dissent of MR. JUSTICE DOUGLAS noted above, I think the issue of the pertinency of the ques-

decision in *Barenblatt* constitutes ample authority for its action, even though it cannot be denied that the Committee's conduct constitutes a direct abridgment of the right of petition. Indeed, I think the majority might well have, with equal justification, relied upon a much earlier decision of this Court, that in *Beauharnais* v. *Illinois*.[7] For it was there that a majority of this Court first applied to the right of petition the flexible constitutional rule upon which the decision in this case is based—the rule that the right of petition, though guaranteed in precise and mandatory terms by the First Amendment, may be abandoned at any time Government can offer a reason for doing so that a majority of this Court finds sufficiently compelling. Ironically, the need there asserted by the State of Illinois and accepted by a majority of this Court as sufficiently compelling to warrant abridgment of the right of petition was the need to protect Negroes against what was subsequently labeled "libel . . . of a racial group," [8] although it was actually nothing more than the circulation of a petition seeking governmental and public support for a program of racial segregation.[9] Thus, the decision in *Beauharnais* had all the outward appearances of being one which would aid the underprivileged Negro minority.[10] This decision, however, is a dramatic illustration of the shortsightedness of such an interpretation of that case. For the very constitutional philosophy that

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tions asked here should be controlled by the decision in *Watkins* v. *United States*, 354 U. S. 178, rather than by the decision in *Barenblatt* v. *United States*, 360 U. S. 109.

[7] 343 U. S. 250.

[8] *Id.*, at 263.

[9] See the petition itself, reprinted as an Appendix to my dissenting opinion in that case. *Id.*, at 276.

[10] MR. JUSTICE DOUGLAS and I did not think so. See, *id.*, at 275: "If there be minority groups who hail this holding as their victory, they might consider the possible relevancy of this ancient remark:

" 'Another such victory and I am undone.' "

gave birth to *Beauharnais* today gives birth to a decision which may well strip the Negro of the aid of many of the white people who have been willing to speak up in his behalf. If the House Un-American Activities Committee is to have the power to interrogate everyone who is called a Communist,[11] there is one thing certain beyond the peradventure of a doubt—no legislative committee, state or federal, will have trouble finding cause to subpoena all persons anywhere who take a public stand for or against segregation. The lesson to be learned from these two cases is, to my mind, clear. Liberty, to be secure for any, must be secure for all—even for the most miserable merchants of hated and unpopular ideas.

Both *Barenblatt* and *Beauharnais* are offspring of a constitutional doctrine that is steadily sacrificing individual freedom of religion, speech, press, assembly and petition to governmental control. There have been many other such decisions and the indications are that this number will continue to grow at an alarming rate. For the presently prevailing constitutional doctrine, which treats the First Amendment as a mere admonition, leaves the liberty-giving freedoms which were intended to be protected by that Amendment completely at the mercy of Congress and this Court whenever a majority of this Court concludes, on the basis of any of the several judicially created "tests" now in vogue,[12] that abridgment

[11] And I think the decision in this case, as well as that in *Wilkinson* v. *United States*, also decided today, *ante*, p. 399, demonstrates conclusively that the Committee is to have at least that much power.

[12] These "tests" include whether the law in question "shocks the conscience," offends "a sense of justice," runs counter to the "decencies of civilized conduct," is inconsistent with "an ordered concept of liberty," offends "traditional notions of fair play and substantial justice," is contrary to "the notions of justice of English-speaking peoples," or is unjustified "on balance." See *Rochin* v. *California*, 342 U. S. 165, 175–176 (concurring opinion); *Uphaus* v. *Wyman*, 364

of these freedoms is more desirable than freedom itself. Only a few days ago, the application of this constitutional doctrine wiped out the rule forbidding prior censorship of movies in an opinion that leaves the door wide open to, if indeed it does not actually invite, prior censorship of other means of publication.[13] And the Blackstonian condemnation of prior censorship had long been thought, even by those whose ideas of First Amendment liberties have been most restricted, to be the absolute minimum of the protection demanded by that Amendment.[14]

I once more deny, as I have found it repeatedly necessary to do in other cases, that this Nation's ability to preserve itself depends upon suppression of the freedoms of religion, speech, press, assembly and petition.[15] But I do believe that the noble-sounding slogan of "self-preservation" [16] rests upon a premise that can itself destroy any

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U. S. 388, 392–393 (dissenting opinion). Significantly, in none of these "tests" does the result to be obtained depend upon the question whether there has been an abridgment of rights protected by the plain language of the Bill of Rights.

[13] *Times Film Corp.* v. *City of Chicago,* 365 U. S. 43.

[14] See, *e. g.,* Levy, Legacy of Suppression, at 13–15, 173, 185, 186, 190, 202–220, 241, 248, 258, 262, 263, 283, 288, 289, 293, 307 and 309.

[15] See, *e. g., American Communications Assn.* v. *Douds,* 339 U. S. 382, 452–453 (dissenting opinion); *Dennis* v. *United States,* 341 U. S. 494, 580 (dissenting opinion); *Barenblatt* v. *United States,* 360 U. S. 109, 145–153, 162 (dissenting opinion); *Flemming* v. *Nestor,* 363 U. S. 603, 628 (dissenting opinion); *Uphaus* v. *Wyman,* 364 U. S. 388, 400–401 (dissenting opinion).

[16] The use of this slogan is becoming commonplace in the opinions of this Court. Thus, in *Dennis* v. *United States,* 341 U. S. 494, at 509, it was said: "Overthrow of the Government by force and violence is certainly a substantial enough interest for the Government to limit speech. Indeed, this is the ultimate value of any society, for if a society cannot protect its very structure from armed internal attack, it must follow that no subordinate value can be protected." Then, in *Barenblatt* v. *United States,* 360 U. S. 109, at 127–128, we

democratic nation by a slow process of eating away at the liberties that are indispensable to its healthy growth. The very foundation of a true democracy and the foundation upon which this Nation was built is the fact that government is responsive to the views of its citizens, and no nation can continue to exist on such a foundation unless its citizens are wholly free to speak out fearlessly for or against their officials and their laws. When it begins to send its dissenters, such as Barenblatt, Uphaus, Wilkinson, and now Braden, to jail, the liberties indispensable to its existence must be fast disappearing. If self-preservation is to be the issue that decides these cases, I firmly believe they must be decided the other way. Only by a dedicated preservation of the freedoms of the First Amendment can we hope to preserve our Nation and its traditional way of life.

It is already past the time when people who recognize and cherish the life-giving and life-preserving qualities of the freedoms protected by the Bill of Rights can afford to sit complacently by while those freedoms are being destroyed by sophistry and dialectics. For at least 11 years, since the decision of this Court in *American Communications Assn.* v. *Douds*,[17] the forces of destruction have been hard at work. Much damage has already been done. If this dangerous trend is not stopped now, it may be an impossible task to stop it at all. The area set off for individual freedom by the Bill of Rights was marked by boundaries precisely defined. It is my belief that the area so set off provides an adequate minimum protection for the freedoms indispensable to individual liberty.

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are told: "In the last analysis this power rests on the right of self-preservation, 'the ultimate value of any society,' " a statement which is reiterated today in *Wilkinson* v. *United States*, *ante*, p. 399.

[17] 339 U. S. 382, decided in 1950. And see *Uphaus* v. *Wyman*, 364 U. S. 388, 392 (dissenting opinion).

Thus we have only to observe faithfully the boundaries already marked for us. For the present, however, the two cases decided by this Court today and the many others like them that have been decided in the past 11 years have all but obliterated those boundaries.[18] There are now no limits to congressional encroachment in this field except such as a majority of this Court may choose to set by a value-weighing process on a case-by-case basis.

I cannot accept such a process. As I understand it, this Court's duty to guard constitutional liberties is to guard those liberties the Constitution defined, not those that may be defined from case to case on the basis of this Court's judgment as to the relative importance of individual liberty and governmental power. The majority's approach makes the First Amendment, not the rigid protection of liberty its language imports, but a poor flexible imitation. This weak substitute for the First Amendment is, to my mind, totally unacceptable for I believe that Amendment forbids, among other things, any agency of the Federal Government—be it legislative, executive or judicial—to harass or punish people for their beliefs, or for their speech about, or public criticism of, laws and public officials. The Founders of this Nation were not then willing to trust the definition of First Amendment freedoms to Congress or this Court, nor am I now. History and the affairs of the present day show that the Founders were right. There are grim reminders all

[18] See, *e. g.*, *American Communication Assn.* v. *Douds*, 339 U. S. 382; *Dennis* v. *United States*, 341 U. S. 494; *Garner* v. *Board of Public Works of Los Angeles*, 341 U. S. 716; *Adler* v. *Board of Education of New York City*, 342 U. S. 485; *Beauharnais* v. *Illinois*, 343 U. S. 250; *Galvan* v. *Press*, 347 U. S. 522; *Yates* v. *United States*, 354 U. S. 298; *Uphaus* v. *Wyman*, 360 U. S. 72; *Barenblatt* v. *United States*, 360 U. S. 109; *Nelson* v. *County of Los Angeles*, 362 U. S. 1; *Flemming* v. *Nestor*, 363 U. S. 603; *Uphaus* v. *Wyman*, 364 U. S. 388; and *Times Film Corp.* v. *City of Chicago*, 365 U. S. 43.

around this world that the distance between individual liberty and firing squads is not always as far as it seems. I would overrule *Barenblatt,* its forerunners and its progeny, and return to the language of the Bill of Rights. The new and different course the Court is following is too dangerous.

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

At the bottom of this case are this Court's decisions in *Pennsylvania* v. *Nelson,* 350 U. S. 497, holding that Congress did not entrust to the States protection of the Federal Government against sedition, and *Brown* v. *Board of Education,* 347 U. S. 483, holding that racial segregation of students in public schools is unconstitutional. I had supposed until today that one could agree or disagree with those decisions without being hounded for his belief and sent to jail for concluding that his belief was beyond the reach of government.

On June 17, 1957, we decided *Watkins* v. *United States,* 354 U. S. 178, defining and curtailing the authority of Congressional Committees who sought the aid of the courts in holding witnesses in contempt.[1] We said in a

[1] In that case the witness testified freely about himself but balked at talking about others:

"I am not going to plead the fifth amendment, but I refuse to answer certain questions that I believe are outside the proper scope of your committee's activities. I will answer any questions which this committee puts to me about myself. I will also answer questions about those persons whom I knew to be members of the Communist Party and whom I believe still are. I will not, however, answer any questions with respect to others with whom I associated in the past. I do not believe that any law in this country requires me to testify about persons who may in the past have been Communist Party members or otherwise engaged in Communist Party activity but

six-to-one decision that "when First Amendment rights are threatened, the delegation of power to the committee must be clearly revealed in its charter" (*id.*, at 198); that "there is no congressional power to expose for the sake of exposure" (*id.*, at 200); that the meaning of "un-American" in the Resolution defining the Committee's authority is so vague that it is "difficult to imagine a less explicit authorizing resolution" (*id.*, at 202); that before a witness chooses between answering or not answering he is entitled "to have knowledge of the subject to which the interrogation is deemed pertinent" (*id.*, at 208–209); that in that case the Resolution and the statement of the Committee's chairman were "woefully inadequate to convey sufficient information as to the pertinency of the questions to the subject under inquiry." *Id.*, 215.

Sweezy v. *New Hampshire*, 354 U. S. 234, decided the same day as the *Watkins* case, reversed a conviction arising out of a state investigation into "subversive activities" where a teacher was asked questions concerning his relation to Marxism. THE CHIEF JUSTICE in his opinion stated:

> "Equally manifest as a fundamental principle of a democratic society is political freedom of the individual. Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. This

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who to my best knowledge and belief have long since removed themselves from the Communist movement.

"I do not believe that such questions are relevant to the work of this committee nor do I believe that this committee has the right to undertake the public exposure of persons because of their past activities. I may be wrong, and the committee may have this power, but until and unless a court of law so holds and directs me to answer, I most firmly refuse to discuss the political activities of my past associates."

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right was enshrined in the First Amendment of the Bill of Rights. Exercise of these basic freedoms in America has traditionally been through the media of political associations. Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents. All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted. Mere unorthodoxy or dissent from the prevailing mores is not to be condemned. The absence of such voices would be a symptom of grave illness in our society." *Id.*, 250–251.

The concurring opinion stated:

"Progress in the natural sciences is not remotely confined to findings made in the laboratory. Insights into the mysteries of nature are born of hypothesis and speculation. The more so is this true in the pursuit of understanding in the groping endeavors of what are called the social sciences, the concern of which is man and society. The problems that are the respective preoccupations of anthropology, economics, law, psychology, sociology and related areas of scholarship are merely departmentalized dealing, by way of manageable division of analysis, with interpenetrating aspects of holistic perplexities. For society's good—if understanding be an essential need of society—inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible. Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise

government and the people's well-being, except for reasons that are exigent and obviously compelling." *Id.*, 261–262.

On June 8, 1959—two years after the *Watkins* and *Sweezy* decisions—we decided *Barenblatt* v. *United States,* 360 U. S. 109, where a divided Court gave only slight consideration to the type of pertinency claim that was raised in *Watkins, Sweezy* and the present case, in part because it could rely on the petitioner's failure to raise that objection before the Committee. See *Barenblatt* v. *United States, supra,* 123–125.

Petitioner, who was called as a witness by the Committee in July 1958, which was even before *Barenblatt* was decided, refused to answer, relying on the *Watkins* and *Sweezy* decisions "as they interpret the Constitution of the United States, protecting my right to private belief and association."

I think he was entitled to rely on them. The Act under which he stands convicted states that a witness is guilty if he "wilfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry." 2 U. S. C. § 192. A refusal to answer was held in *Sinclair* v. *United States,* 279 U. S. 263, 299, not to be justified because one acted in good faith, the Court saying, "His mistaken view of the law is no defense." Yet no issue concerning the First Amendment was involved in the *Sinclair* case. When it is involved, as it is here, the propriety of the question in terms of pertinency should be narrowly resolved.

The Resolution under which the Committee on Un-American Activities acted in this case [2] is precisely the

[2] The Resolution provides in relevant part:

"The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (1) the extent, character, and objects of un-American propaganda

same as the one involved in *Watkins* v. *United States, supra.* We said concerning it, "It would be difficult to imagine a less explicit authorizing resolution. Who can define the meaning of 'un-American'? What is that single, solitary 'principle of the form of government as guaranteed by our Constitution'? . . . At one time, perhaps, the resolution might have been read narrowly to confine the Committee to the subject of propaganda. The events that have transpired in the fifteen years before the interrogation of petitioner make such a construction impossible at this date." 354 U. S., at 202.

We emphasized the need, when First Amendment rights were implicated, to lay a foundation before probing that area. The authority of the Committee must then "be clearly revealed in its charter." *Id.,* at 198. The "specific legislative need" must be disclosed. *Id.,* at 205. The pertinency of the questions and the subject matter under inquiry must be made known "with the same degree of explicitness and clarity that the Due Process Clause requires in the expression of any element of a criminal offense." *Id.,* at 209.

After *Watkins* anyone was entitled to rely on those propositions for protection of his First Amendment rights. The conditions and circumstances under which the questions were asked petitioner plainly did not satisfy the requirements specified in *Watkins.*

The setting of the six questions [3] which were asked petitioner and which he refused to answer shows nothing more

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activities in the United States, (2) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation."

[3] Petitioner was convicted on each of six counts of an indictment and sentenced to serve 12 months on each count, the sentences to

than an exercise by him of First Amendment rights of speech and press and of petition to Congress. It was not shown that these activities were part of a matrix for the overthrow of government. It was not shown—unless the bare word of the Committee is taken as gospel—that these constitutional activities had any relation whatever to communism, subversion, or illegal activity of any sort or kind. It was not shown where and how the Committee was ever granted the right to investigate those who petition Congress for redress of grievances.

Petitioner and his wife were field secretaries of an organization known as the Southern Conference Educational Fund. Prior to the committee hearing at Atlanta, Georgia, they wrote a letter [4] on the letterhead of the

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run concurrently. Therefore if any one of the counts can be sustained an affirmance would be necessary. See *Claassen* v. *United States*, 142 U. S. 140, 147.

[4] "Dear Friend:

"We are writing to you because of your interest in the Kentucky 'sedition' cases, which were thrown out of Court on the basis of a Supreme Court decision [*Pennsylvania* v. *Nelson, supra*] declaring state sedition laws inoperative.

"There are now pending in both houses of Congress bills that would nullify this decision. We understand there is real danger that these bills will pass.

"We are especially concerned about this because we know from our own experience how such laws can be used against people working to bring about integration in the South. Most of these state statutes are broad and loosely worded, and to the officials of many of our Southern states integration is sedition. You can imagine what may happen if every little local prosecutor in the South is turned loose with a state sedition law.

"It is small comfort to realize that such cases would probably eventually be thrown out by the Supreme Court. Before such a case reaches the Supreme Court, the human beings involved have spent several years of their lives fighting off the attack, their time and talents have been diverted from the positive struggle for integra-

Southern Conference urging people to write their Congressmen and Senators to oppose three bills pending before the Congress which would, to use their words, "nullify" a decision of this Court "declaring state sedition laws inoperative." They added "We are especially concerned about this because we know from our own experience how such laws can be used against people working to bring about integration in the South. Most of these state statutes are broad and loosely worded, and to the officials of many of our Southern states integration is sedition. You can imagine what may happen if every little prosecutor in the South is turned loose with a state sedition law."

Also prior to the Committee hearing in Atlanta, a group of Negroes petitioned Congress against the proposed Atlanta investigation of the House Committee on Un-American Activities. That petition stated:

> "We are informed that the Committee on Un-American Activities of the House of Representatives is planning to hold hearings in Atlanta, Georgia, at an early date.
>
> "As Negroes residing in Southern states and the District of Columbia, all deeply involved in the

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tion, and money needed for that struggle has been spent in a defensive battle.

"It should also be pointed out that these bills to validate state sedition laws are only a part of a sweeping attack on the U. S. Supreme Court. The real and ultimate target is the Court decisions outlawing segregation. Won't you write your two senators and your congressman asking them to oppose S. 654, S. 2646, and H. R. 977. Also ask them to stand firm against all efforts to curb the Supreme Court. It is important that you write—and get others to write—immediately as the bills may come up at any time.

"Cordially yours,

"CARL AND ANNE BRADEN,

"Field Secretaries."

struggle to secure full and equal rights for our people, we are very much concerned by this development.

"We are acutely aware of the fact that there is at the present time a shocking amount of un-American activity in our Southern states. To cite only a few examples, there are the bombings of the homes, schools, and houses of worship of not only Negroes but also of our Jewish citizens; the terror against Negroes in Dawson, Ga.; the continued refusal of boards of registrars in many Southern communities to allow Negroes to register and vote; and the activities of White Citizens Councils encouraging open defiance of the United States Supreme Court.

"However, there is nothing in the record of the House Committee on Un-American Activities to indicate that, if it comes South, it will investigate these things. On the contrary, all of its activities in recent years suggest that it is much more interested in harassing and labeling as 'subversive' any citizen who is inclined to be liberal or an independent thinker.

"For this reason, we are alarmed at the prospect of this committee coming South to follow the lead of Senator Eastland, as well as several state investigating committees, in trying to attach the 'subversive' label to any liberal white Southerner who dares to raise his voice in support of our democratic ideals.

"It was recently pointed out by four Negro leaders who met with President Eisenhower that one of our great needs in the South is to build lines of communication between Negro and white Southerners. Many people in the South are seeking to do this. But if white people who support integration are labeled 'subversive' by congressional committees, terror is spread among our white citizens and it becomes increasingly difficult to find white people who are

willing to support our efforts for full citizenship. Southerners, white and Negro, who strive today for full democracy must work at best against tremendous odds. They need the support of every agency of our Federal Government. It is unthinkable that they should instead be harassed by committees of the United States Congress.

"We therefore urge you to use your influence to see that the House Committee on Un-American Activities stays out of the South—unless it can be persuaded to come to our region to help defend us against those subversives who oppose our Supreme Court, our Federal policy of civil rights for all, and our American ideals of equality and brotherhood."

Petitioner was charged by the Committee with preparing that petition; counsel for the Committee later stated that the purpose of the petition was "precluding or attempting to preclude or softening the very hearings which we proposed to have here." The Committee said that it was not concerned with integration. It said that "A number of names on that letter were names of those who had been closely associated with the Communist Party. Their interest and major part does not lie with honest integration. Their interest lies with the purposes of the Communist Party. And that is what we are looking into . . . ."

Two of the questions which petitioner refused to answer pertained to the Southern Conference, the first one being "Did you participate in a meeting here at that time?" And the second one was "Who solicited quarters to be made available to the Southern Conference Educational Fund?"

Two other questions which petitioner refused to answer related to the Emergency Civil Liberties Committee. The first of these was "Are you connected with the Emergency

Civil Liberties Committee?" The second one was "Did you and Harvey O'Connor in the course of your conferences there in Rhode Island, develop plans and strategy outlining work schedules for the Emergency Civil Liberties Committee?" The Committee counsel charged that Mr. O'Connor was "a hard-core member of the communist conspiracy, head of the Emergency Civil Liberties Committee."

A fifth question which petitioner refused to answer related to the letter I have previously mentioned [5] which he and his wife sent to the people urging them to write their Senators and Congressmen opposing three bills that would reinstate state sedition laws. The question relating to this letter was "Were you a member of the Communist Party the instant you affixed your signature to that letter?"

The sixth and final question which petitioner refused to answer concerned the Southern Newsletter. Counsel asked if petitioner had "anything to do" with that letter. Petitioner replied "I think you are now invading freedom of the press . . . . I object to your invasion of the freedom of the press, and I also decline to answer the questions on the same grounds. You are not only attacking integrationists, you are attacking the press."

There is nothing in the record to show that the Southern Conference or the Emergency Civil Liberties Committee or the Southern Newsletter had the remotest connection with the Communist Party. There is only the charge of the Committee that there was such a connection. That charge amounts to little more than innuendo. This is particularly clear with respect to the question relating to petitioner's membership in the Communist Party. Having drawn petitioner's attention to the letter

[5] *Supra*, note 4.

he had written,[6] counsel for the Committee demanded to know if petitioner was a Communist "the instant you affixed your signature to that letter." No foundation at all had been laid for that question, and from the record no purpose for it appears, save the hope of the Committee to link communism with that letter which supported this Court's decision in *Pennsylvania* v. *Nelson, supra.* This Court, passing on the pertinency issue in *Barenblatt* v. *United States, supra,* 123–125, was careful to emphasize that Barenblatt "had heard the Subcommittee interrogate the witness Crowley along the same lines as he, petitioner, was evidently to be questioned, *and had listened to Crowley's testimony identifying him as a former member of an alleged Communist student organization . . .*" (Emphasis added.) No such foundation was ever laid here.

One would be wholly warranted in saying, I think, in light of the *Watkins* and *Sweezy* decisions that a Committee's undisclosed information or unsupported surmise would not justify an investigation into matters that on their face seemed well within the First Amendment.[7] If *Watkins* and *Sweezy* decided anything, they decided that

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[6] See *supra,* note 4.

[7] "The consequences that flow from this situation are manifold. In the first place, a reviewing court is unable to make the kind of judgment made by the Court in *United States* v. *Rumely, supra.* The Committee is allowed, in essence, to define its own authority, to choose the direction and focus of its activities. In deciding what to do with the power that has been conferred upon them, members of the Committee may act pursuant to motives that seem to them to be the highest. Their decisions, nevertheless, can lead to ruthless exposure of private lives in order to gather data that is neither desired by the Congress nor useful to it. Yet it is impossible in this circumstance, with constitutional freedoms in jeopardy, to declare that the Committee has ranged beyond the area committed to it by its parent assembly because the boundaries are so nebulous." 354 U. S., at 204.

before inroads in the First Amendment domain may be made, some demonstrable connection with communism must first be established and the matter be plainly shown to be within the scope of the Committee's authority. Otherwise the Committee may roam at will, requiring any individual to disclose his association with any group or with any publication which is unpopular with the Committee and which it can discredit by calling it communistic.

PUGACH *v.* DOLLINGER, DISTRICT ATTORNEY OF BRONX COUNTY, ET AL.

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

No. 111. Argued January 16, 1961.—Decided February 27, 1961.

A federal court may not enjoin the use in a criminal trial in a state court of evidence obtained by wire tapping in violation of § 605 of the Federal Communications Act. *Schwartz* v. *Texas,* 344 U. S. 199; *Stefanelli* v. *Minard,* 342 U. S. 117.

277 F. 2d 739, affirmed.

George J. Todaro argued the cause and filed a brief, and *Frances Kahn* filed an appearance, for petitioner.

Walter E. Dillon and *Irving Anolik* argued the cause for respondents. With them on the brief were *Isidore Dollinger,* respondent, *pro se,* and *Alexander E. Scheer.*

Briefs of *amici curiae,* urging affirmance, were filed by *Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *Jean M. Coon,* Assistant Attorney General, for the Attorney General of New York, and by *Edward S. Silver* and *Aaron Nussbaum* for the District Attorneys' Association of New York.

Emanuel Redfield filed a brief for the New York Civil Liberties Union et al., as *amici curiae,* urging reversal.

PER CURIAM.

The judgment is affirmed on the authority of *Schwartz* v. *Texas,* 344 U. S. 199, and *Stefanelli* v. *Minard,* 342 U. S. 117.

MR. JUSTICE BRENNAN would also affirm but solely on the authority of *Stefanelli* v. *Minard,* 342 U. S. 117.

MR. JUSTICE DOUGLAS, with whom THE CHIEF JUSTICE concurs, dissenting.

In *Schwartz* v. *Texas,* 344 U. S. 199, a pawnbroker was convicted as an accomplice in a robbery. Records of his telephone conversations, gotten by police eavesdropping, were admitted in evidence against him during his trial in the state court. He claimed that such evidence was inadmissible under 47 U. S. C. § 605.[1] This Court rejected that claim without even stopping to see if indeed there had been a violation of the federal statute. The rationale of that rejection was that, "Where a state has carefully legislated so as not to render inadmissible evidence obtained and sought to be divulged in violation of the laws of the United States, this Court will not extend by implication the statute of the United States so as to invalidate the specific language of the state statute." *Id.,* 202.

The later decision of this Court in *Benanti* v. *United States,* 355 U. S. 96, swept away that rationale, and *Schwartz* v. *Texas, supra,* today stands alone as an aberration from the otherwise vigorous enforcement this Court has given to the congressional policy embodied in 47 U. S. C. § 605. For in *Benanti,* in setting aside a federal conviction, we held that the proscription of wiretapping contained in § 605 forbade wiretapping by an authorized executive officer of the State, acting under the explicit terms of a state statute and pursuant to a warrant issued

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[1] ". . . and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person . . . ." See *Nardone* v. *United States,* 302 U. S. 379; *Nardone* v. *United States,* 308 U. S. 338; *Weiss* v. *United States,* 308 U. S. 321; *Benanti* v. *United States, supra;* cf. *Goldstein* v. *United States,* 316 U. S. 114; *Rathbun* v. *United States,* 355 U. S. 107.

by the state judiciary. "[K]eeping in mind [the] comprehensive scheme of interstate regulation and the public policy underlying Section 605 as part of that scheme, we find that Congress, setting out a prohibition in plain terms, did not mean to allow state legislation which would contradict that section and that policy." *Id.*, 105–106. It seems incongruous to me that this sweeping congressional purpose should now be held to make a detour around the precincts of a state court. This is especially true where, as here, officials have shown such an avid taste for violating the law. See Dash, Schwartz and Knowlton, The Eavesdroppers, pp. 68–69. In such circumstances, redress—other than by an exclusionary rule—against the criminal acts of those who bear the badge of the law is neither easy nor generous. Cf. *Wolf* v. *Colorado,* 338 U. S. 25, 41, 42–44 (dissenting opinion).

Yet today a majority of this Court summarily holds that *Schwartz* v. *Texas, supra,* is still the law, and petitioner is left only with the consoling knowledge that Congress *meant* to protect the privacy of his telephone conversations,[2] while the benefits of the congressional intendment are denied him.

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[2] *Schwartz* v. *Texas, supra,* stands for no more than a refusal, as a matter of federal law, to void a conviction said to be based on wire-tap evidence. The witness who divulges wire-tap information is no less guilty of a federal crime. See *Schwartz* v. *Texas, supra,* 201. Nor, after *Benanti,* does the fact that New York purported to authorize this police wire tap save it from illegality. See *In re Telephone Communications,* 9 Misc. 2d 121, 170 N. Y. S. 2d 84; *Matter of Interception of Telephone Communications,* 23 Misc. 2d 543, 198 N. Y. S. 2d 572. As I indicated in my dissent in *Schwartz* v. *Texas, supra,* 205, I am of the opinion that a wire tap is a search within the meaning of the Fourth Amendment, so that, in the absence of illegality under § 605, I would have to consider if the New York wire-tap procedure meets the constitutional test of reasonableness. But under § 605, *all* wire taps are forbidden.

Petitioner is charged, in a New York state court, with the commission of several serious crimes. His complaint in the instant proceeding alleged that "on or about June 15th, 1959, and thereafter" agents of the District Attorney and of the New York police force tapped his telephone wires pursuant to a state court warrant and "obtained certain information." That information, and other evidence to which it led, was divulged to the grand jury, which indicted petitioner, and to the press. But more importantly there was the allegation that the "defendants intend to use the evidence obtained by use of the aforesaid illegal wire taps and the information obtained through the illegal use of the aforesaid wire taps upon the trial" which petitioner imminently faces. The prayer asked that the defendants be enjoined "from proceeding . . . upon the indictments . . . on any grounds in which they may use wire tapping evidence, or on any grounds or investigations resulting from or instituted as a result of the aforesaid illegal wire taps."

There is no doubt that, once the wire-tap evidence is put in during the impending trial, petitioner is without remedy for the prejudice it does him in that trial, either in the state courts, *People* v. *Variano,* 5 N. Y. 2d 391, 157 N. E. 2d 857, or, under *Schwartz* v. *Texas, supra,* in the federal courts.

In *Stefanelli* v. *Minard,* 342 U. S. 117, the petitioner was charged with a violation of the state gambling laws. He sought to enjoin the use, at his trial, of evidence obtained by a police invasion of his home, an invasion admittedly in violation of the command of the Fourth Amendment. Relief was denied in the exercise of equitable discretion, three factors being relied on. First, the petitioner, it was said, could show no irreparable injury, for, at worst, he would go to jail on the evidence sought to be suppressed. Second, it was supposed that

the federal court was being asked "to intervene piecemeal to try collateral issues." At 123. Third, and overriding the first two, was the traditional reluctance of a federal court to meddle in state court proceedings, and especially in state court criminal proceedings.

The strongest expression of that reluctance is found in the general prohibition of federal injunctions "to stay proceedings in a State court." 28 U. S. C. § 2283. Although that provision bars an injunction operating on a party, after commencement of the state court proceedings, as well as an injunction directly against the state court, *Harkrader* v. *Wadley,* 172 U. S. 148; *Ex parte Young,* 209 U. S. 123, 161–162, it is not directly involved here. *Here the thrust of the relief is only to enjoin the use of wire-tap evidence, not to enjoin the action itself. Hence there is no bar to maintaining the action.* Cf. *Rea* v. *United States,* 350 U. S. 214. Where, as here, the relief sought is the adjudication of collateral matters which cannot be adjudicated in the state proceedings under state law, there is no occasion to invoke the statute. "That provision is an historical mechanism (Act of March 2, 1793, 1 Stat. 334, 335) for achieving harmony in one phase of our complicated federalism by avoiding needless friction between two systems of courts *having potential jurisdiction over the same subject-matter.*" *Hale* v. *Bimco Trading Co.,* 306 U. S. 375, 378. (Emphasis added.) Hence I do not reach the questions that would be raised if we had before us the alternative of enjoining the state action [3] or withholding all relief.

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[3] 28 U. S. C. § 2283 provides for three classes of exception: (1) as expressly authorized by Act of Congress, (2) where necessary in aid of jurisdiction, and (3) to protect or effectuate its judgments. Cf. *Toucey* v. *New York Life Ins. Co.,* 314 U. S. 118. Injunction against the *commencement* of state court criminal proceedings has long been the first line of defense for federally secured rights. As respects federally secured civil rights see, *e. g., Truax* v. *Raich,* 239 U. S. 33;

Can the dangers of allowing this early resort to the federal court outweigh the wrong of subjecting petitioner to the risk of conviction and imprisonment on the strength of criminally obtained and criminally presented evidence? This is not a case where there is piecemeal resort from one court to another. This remedy is the only one which is available to protect a federal right.[4] It is not a case where an appeal is properly delayed, so that the asserted error may be seen in the context of the whole trial, as no review at all is available. For the same reason, this is no case for the exercise of equitable discretion. If the federal question is not now protected, it can never become the basis for relief.

The doctrine of equitable discretion properly involves no more than a choice among remedies, an orderly management of judicial procedures. Doubtless there are times when equity should leave parties to their remedy "at law," *i. e.,* to their remedy in the ordinary course of the threatened proceeding. But once it is established

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Pierce v. *Society of Sisters,* 268 U. S. 510; *Terrace* v. *Thompson,* 263 U. S. 197; *Hague* v. *C. I. O.,* 307 U. S. 496; cf. *Douglas* v. *Jeannette,* 319 U. S. 157. As respects federally secured economic rights see, *e. g., Hynes* v. *Grimes Packing Co.,* 337 U. S. 86; *Cline* v. *Frink Dairy Co.,* 274 U. S. 445; *Hygrade Provision Co.* v. *Sherman,* 266 U. S. 497.

[4] Judge Clark, dissenting in this case below, said: "In sum it is beyond dispute that there is a general, indeed universal, custom of federal law violation. Now this is a distressing situation, made not less so that in the eyes of many worthy citizens it is required by the asserted exigencies of successful law administration. But it is not an unusual situation. For actually it is a clash between federal and state governmental policies. As such it is a recurring struggle in our history and quite possibly a necessary one to a federal form of government. In the past we have found ways of meeting and solving the problem. Of course there are several forms of remedy; but the one to which there seems continual return when other remedies fail is the resort to the equity powers of the federal courts to enjoin repeated violations of the criminal law." 277 F. 2d, at 748–749.

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that the other proceeding offers no remedy, the rationale of equitable discretion disappears. It becomes no more than the legal language which clothes the denial of a right in the guise of a mere procedural decision. Unless and until *Schwartz* v. *Texas, supra,* is overruled, the exercise of equitable discretion to deny preliminary relief from the threatened use of wire-tap evidence is wholly unjustified. Unless and until *Schwartz* is overruled, the beneficent effect of § 605 will be stultified by the admission of tainted evidence in state trials. The privacy of the individual, history assures us, can never be protected where its violation by state officers meets with reward rather than punishment.

THOMPSON *v.* WHITTIER, ADMINISTRATOR OF VETERANS AFFAIRS.

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

No. 500. Decided February 27, 1961.

Appeal dismissed because the case does not arise under 28 U. S. C. § 2282 and cannot be appealed directly to this Court under 28 U. S. C. § 1253.

Reported below: 185 F. Supp. 306.

Mary M. Kaufman for appellant.

Solicitor General Rankin, Assistant Attorney General Yeagley and *Kevin T. Maroney* for appellee.

PER CURIAM.

The motion to dismiss is granted. The case does not arise under 28 U. S. C. § 2282, requiring the convening of a three-judge court. See *I. L. G. W. U.* v. *Donnelly Garment Co.*, 304 U. S. 243. Therefore it cannot be directly brought here for review under 28 U. S. C. § 1253, and the appeal must be dismissed. Appellant is free to pursue his perfected appeal in the Court of Appeals.

S. S. KRESGE CO. *v.* BOWERS, TAX COMMISSIONER OF OHIO.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 534. Decided February 27, 1961.

Appeal dismissed for want of a substantial federal question.
Reported below: 170 Ohio St. 405, 166 N. E. 2d 139.

Carlton S. Dargusch and *Carlton S. Dargusch, Jr.* for appellant.

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

PER CURIAM.

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

MICHIGAN NATIONAL BANK ET AL. *v.* MICHIGAN ET AL.

APPEAL FROM THE SUPREME COURT OF MICHIGAN.

No. 155. Argued January 18–19, 1961.—Decided March 6, 1961.

R. S. § 5219 permits States to tax the shares of national banks, but not "at a greater rate than . . . other moneyed capital . . . coming into competition with the business of national banks." Michigan taxes the shareholders of national banks at a higher rate on the value of their shares of stock than it taxes the shareholders of federal and state savings and loan associations on the paid-in value of their shares. Both classes of institutions make residential mortgage loans; but national banks accept deposits which are employed in making loans and which amount to many times the aggregate value of their shares of stock, whereas savings and loan associations accept no deposits and make their loans mainly out of the proceeds of the sale of their shares of stock. *Held:* Even if savings and loan associations are in competition with national banks, the tax levied on the shareholders of national banks is not so discriminatory in practical effect as to violate R. S. § 5219. Pp. 468–483.

(a) The restrictions of § 5219 on the permitted methods of state taxation of national banks were designed to prohibit only those systems of state taxation which discriminate in practical effect against national banks or their shareholders as a class. Pp. 472–475.

(b) Michigan's taxes on the shares of national banks and on savings and loan associations, respectively, do not in practical effect discriminate against national banks or their shareholders as a class. Pp. 475–483.

358 Mich. 611, 101 N. W. 2d 245, affirmed.

Victor W. Klein argued the cause for appellants. With him on the brief were *Thomas G. Long, Philip T. Van Zile II* and *Harold A. Ruemenapp.*

William D. Dexter, Assistant Attorney General of Michigan, argued the cause for appellees. With him on the brief were *Paul L. Adams,* Attorney General, *Samuel J. Torina,* Solicitor General, and *T. Carl Holbrook,* Assistant Attorney General.

MR. JUSTICE CLARK delivered the opinion of the Court.

The State of Michigan levies "on the privilege of ownership" a 5½-mill tax per dollar on the value of each common share of stock in national banks [1] located in the State. It requires federal and state savings and loan associations in the State to pay, in addition to other taxes not here involved, for its shareholders an intangibles tax of 2/5 of a mill on each dollar of the paid-in value of their shares.[2] In addition, state associations also pay a franchise tax of ¼ mill per dollar of their capital and legal reserves.[3]

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[1] Act No. 9 of the Public Acts of Michigan for 1953 (Mich. Comp. Laws, 1948, 1956 Supp., § 205.132a) provides in pertinent part:

"For the calendar year 1952 . . . and for each year thereafter, or a portion thereof, there is hereby levied upon each resident or non-resident owner of shares of stock of national banking associations located in this state . . . and there shall be collected from each such owner an annual specific tax on the privilege of ownership of each such share of stock, whether or not it is income producing, equal in the case of a share of common stock to 5½ mills upon each dollar of the capital account of such association . . . represented by such share, and equal in the case of a share of preferred stock to 5½ mills upon the par value of such share."

[2] Mich. Comp. Laws, 1948, 1956 Supp., § 205.132, provides in pertinent part:

"For the calendar year 1952, and for each year thereafter or portion thereof there is hereby levied upon each resident or non-resident owner of intangible personal property . . . and there shall be collected from such owner an annual specific tax on the privilege of ownership of each item of such property owned by him. . . . [T]he tax on shares of stock in . . . savings and loan associations shall be 1/25 of 1 per cent of the paid-in value of such shares."

[3] Mich. Comp. Laws, 1948, § 450.304a, provides:

"Every building and loan association organized or doing business under the laws of this state shall . . . , for the privilege of exercising its franchise and of transacting its business within this state, pay to the secretary of state an annual fee of ¼ mill upon each dollar of its paid-in capital and legal reserve."

The Michigan tax structure was amended, in 1954, to provide that

Appellant Michigan National Bank, with banking offices in eight Michigan cities, brought this suit to recover taxes paid under protest for the year 1952, claiming that the levy under Michigan's Act No. 9 resulted in a tax on national bank shares at least eight times greater than that levied on "other moneyed capital in the hands of individual citizens" in the State, in violation of § 5219 of the Revised Statutes of the United States.[4] Initially its attack referred to moneyed capital in the hands of insurance and finance companies, credit unions and individuals, as well as savings and loan associations. Before trial in the Michigan Court of Claims, however, its claim was limited to the latter only, asserting that these institutions were in substantial competition with a phase of the national banking business, *i. e.*, residential mortgage loans, and were preferentially taxed. The resulting tax discrimination, appellant says, renders Act No. 9 invalid

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federal savings and loan associations also pay a privilege tax equal to ¼ mill on capital and legal reserves. Mich. Comp. Laws, 1948, 1956 Supp., § 489.371.

[4] R. S. § 5219, as amended, 12 U. S. C. § 548, provides in pertinent part:

"The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares . . . , provided the following conditions are complied with;

. . . . . .

"(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks: *Provided,* That bonds, notes, or other evidences of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made in competition with such business, shall not be deemed moneyed capital within the meaning of this section."

under the controlling decisions of this Court. Michigan's highest court has upheld the statute against this claim. 358 Mich. 611, 101 N. W. 2d 245. We noted probable jurisdiction, 364 U. S. 810. We have concluded that in practical operation, Michigan's tax structure does not have a discriminatory effect and is, therefore, valid. This determination obviates the necessity of our considering the voluminous and confusing statistics relevant to the issue of whether or not there exists competition between banks and savings and loan associations in the State.

The sole authorization upon which Michigan's Act No. 9 may rest is § 5219. *First Nat. Bank* v. *Anderson,* 269 U. S. 341 (1926); *Des Moines Nat. Bank* v. *Fairweather,* 263 U. S. 103 (1923). That authorization is qualified by a proviso that a state tax on national bank shares shall not be "at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks." We have assumed, without deciding, that the national banks located in Michigan and savings and loan associations there are in competition in a substantial phase of the business carried on by national banks, *i. e.,* residential mortgage loans. The sole question here is whether Act No. 9 effects a tax discrimination between national banks and savings and loan associations.

Background Relating to the Problem.

Michigan first authorized the organization of savings and loan associations in 1887.[5] They operate today under the same law as "cooperative" or mutual associations which accumulate capital only through the sale of shares to members, and by retention of a permitted surplus and a reserve from profits. They may make loans only on first mortgage real estate notes and can neither carry on a bank-

[5] Mich. Pub. Acts 1887, No. 50.

ing business nor receive deposits.[6] Their reserves must equal 10% of liabilities to their members and the associations' surplus is limited to 5% of assets.[7] Earnings above the permitted reserves and surplus must be paid to members currently and at stated periods. The Congress authorized the organization of federal savings and loan associations in 1933 in the Home Owners' Loan Act, 48 Stat. 128, as amended, 12 U. S. C. §§ 1461–1468. They operate along the same general lines as state associations. The shares of members in both are insured by the Federal Savings and Loan Insurance Corporation.[8]

National banks, of course, engage in the general banking business as authorized by the National Bank Act.[9] Prior to 1916 they were not permitted to make real estate mortgage loans except on certain farm lands. In that year the Congress authorized the banks to make residential loans for a term of not over a year and to the extent of 50% of the value of the mortgaged property.[10] This term was first enlarged in 1927 to five years [11] and then to 10 years in 1935 by 49 Stat. 706, which also authorized an increase to 60% as the maximum proportion of property value permitted to be loaned. In 1934, national banks were authorized to purchase F. H. A. guaranteed mortgages.[12] Ten years later that authority was enlarged to include V. A. loans which the Comptroller of the Currency by decision found to be in the same category as F. H. A. mortgages.[13] It was not until this time that national

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[6] Mich. Comp. Laws, 1948, § 489.37.

[7] Mich. Comp. Laws, 1948, § 489.24.

[8] 48 Stat. 1257, as amended, 12 U. S. C. § 1726.

[9] 12 U. S. C. §§ 21–200.

[10] 39 Stat. 754.

[11] 44 Stat. 1232–1233.

[12] 48 Stat. 1263.

[13] Home Loans Partially Guaranteed Under G. I. Act, Comptroller of the Currency Press Release, Dec. 12, 1944.

banks became any significant factor in the residential mortgage field. By 1952 the ratio of their deposits to their total assets had more than doubled, amounting to 92% of their assets,[14] having totaled only 41% thereof at the time of the passage of § 5219.

Michigan National was organized in 1941 with 150,000 shares of $10 par value and total resources of about $68,000,000. In 1952 it had outstanding 500,000 shares of the same par value (all of the increase having been issued as dividends) and resources of some $306,000,000. In 1952 its gross earnings on its capital account were 91%, which, after all expenses and taxes (except dividends and federal income tax), remained at over 31%. The 16 building and loan associations' average net earnings for the same year (before dividends and federal income taxes) amounted to 3.4% of their capital, approximately their normal annual earning. A $1,000 investment in Michigan National's stock (58.8 shares) in 1941 was worth $6,691.20 (157.5 shares) by 1952, an annual average increase in value of 61%. This does not include $1,308.80 in cash dividends paid over the same period.

Background and Construction of the Legislation.

1. *Section 5219.*

Congress enacted the Section in 1864 [15] and this Court has passed on it over 55 times in the near century of the Section's existence. During that period the Court has kept clearly in view, as was said in the last case in which

[14] In accounting terminology, bank deposits are liabilities. However, they are a source of assets and for convenience will be referred to as assets hereafter.

[15] 13 Stat. 111. It has been amended four times (15 Stat. 34, R. S. § 5219, 42 Stat. 1499, 44 Stat. 223), none of which changes are of any import here. In the 1958 edition of the United States Code it appears as § 548 of Title 12.

it wrote, that "the various restrictions [§ 5219] . . . places on the permitted methods of taxation are designed to prohibit only those systems of state taxation which discriminate in practical operation against national banking associations or their shareholders as a class." *Tradesmens Nat. Bank* v. *Oklahoma Tax Comm'n,* 309 U. S. 560, 567 (1940). Reverting to one of the first and controlling cases dealing with the Section, *Mercantile Bank* v. *New York,* 121 U. S. 138 (1887),[16] we find that Mr. Justice Matthews declared for a unanimous Court that the purpose of the Congress in passing the provision was "to prohibit the States from imposing such a burden as would prevent the capital of individuals from freely seeking investment in institutions which it was the express object of the law to establish and promote." At p. 154. The Court further held deposits in savings banks to be moneyed capital but approved their total exemption from state taxes, along with other enumerated property, on the ground that the State had shown "just reason" so to do. In essence the case stands for the proposition that the State cannot, by its tax structure, create "an unequal and unfriendly competition" with national banks. This case followed in the light of *Hepburn* v. *School Directors,* 23 Wall. 480 (1874), where Chief Justice Waite had pointed out that the taxable value of the stock in a national bank is not necessarily determined by its nominal or par value but rather by "the amount of moneyed capital which the investment represents for the time being." "Therefore some plan must be devised to ascertain what amount of money at interest is actually represented by a share of stock." At p. 484.

[16] Also see an earlier case, often cited, *People* v. *Weaver,* 100 U. S. 539 (1879), which held that it was the actual incidence and practical burden of the tax which the Section sought out. This position is treated in detail by Professor Woosley in his work, State Taxation of Banks (1935).

The question of tax equivalence thus posed has echoed and re-echoed through the cases. A year subsequent to the decision in *Mercantile Bank, supra,* the same point was raised in *Bank of Redemption* v. *Boston,* 125 U. S. 60 (1888), where the exemption of deposits in savings banks was approved in an opinion which again was written by Mr. Justice Matthews. The Court, in comparing the tax levied on the two institutions, *i. e.,* national banks and savings banks, said: "But shares of the national banks, while they constitute the capital stock of the corporations, do not represent the whole amount of the capital actually employed by them. They have deposits, too, shown in the present record to amount, in Massachusetts, to $132,042,332. The banks are not assessed for taxation on any part of these, although these deposits constitute a large part of the actual capital profitably employed by the banks in the conduct of their banking business. But it is not necessary to establish the exact equality in result of the two modes of taxation." At p. 67. A quarter of a century later, Mr. Justice Pitney in *Amoskeag Savings Bank* v. *Purdy,* 231 U. S. 373 (1913), in commenting on the factors to be considered in determining the burden of the tax, said: "There are other considerations to be weighed in determining the actual burden of the tax, one of which is the mode of valuing bank shares—by adopting 'book values' [capital, surplus, undivided profits]—which may be more or less favorable than the method adopted in valuing other kinds of personal property." At p. 392. The point was made even more clearly by Mr. Justice Brandeis in *First Nat. Bank* v. *Louisiana Tax Comm'n,* 289 U. S. 60 (1933), where he said: "There is a fundamental difference between banks, which make loans mainly from money of depositors, and the other financial institutions, which make loans mainly from the money supplied otherwise than by deposits."

At p. 64. And so, we are taught that in determining the burden of the tax—its discriminatory character—we look to its *effect,* not its *rate.* See *Amoskeag Savings Bank, supra; Covington* v. *First Nat. Bank,* 198 U. S. 100 (1905), and *Tradesmens Nat. Bank* v. *Oklahoma Tax Comm'n, supra,* the last case of this Court on the point.

2. *Michigan's Act No. 9.*

Act No. 9, we have stated, levies a tax of 5½ mills on the book value of each share of stock in national banks, while the separately imposed tax on all savings and loan association shares, exclusive of other taxes, is 2/5 of a mill on the paid-in value of the shares plus, on state associations only, ¼ of a mill on the value of the paid-in capital and legal reserves. It appears from the record that prior to the enactment of this tax an inequity in the State's tax structure was thought to exist between state and national banks. Upon study of the problem and the recommendation of the Taxation Committee of the Michigan Bankers Association, the State Legislature decided to tax all banks "exactly alike." It embodied the proposal of the Association into Act No. 9. While we have no legislative history in the record before us, according to the *amicus curiae* brief of the Bankers Association filed in the trial court, the sponsors of Act No. 9 thought it would be "reasonable from the viewpoint of the public, equitable from the viewpoint of the competitors, and practical from the viewpoint of the banks themselves." The opinion of responsible officials of this Association, filed in this case some seven years after Act No. 9 had been in effect and the taxes therein provided paid without protest, save for appellant and four other banks, was: "Actual experience with the taxation system shows that it has produced a reasonable amount of revenue to the State; that it has not created any competitive

disadvantage among the various types of institutions; and that it has proven to be simple to administer."

Michigan's Supreme Court has also held that no discrimination in the tax was proven. While the basis of this holding is not too clear, we take it that the finding of total tax equality as between the national banks and the associations, insofar as Act No. 9 was concerned, meant that, in the court's view, the Michigan Legislature, in fixing the rate (5½ mills) on the banks, had either (1) taken into consideration the moneyed capital on hand in each type of institution, *i. e.*, deposits, which were not present as to savings and loan associations, or (2) if such method of valuation of bank stock was not permissible, that the Legislature intended to exempt from taxation any difference between the taxes levied on national banks and savings and loan associations because of the functions of the latter as repositories for the "small savings and accumulations of the industrious and thrifty." Such differences, the Michigan Supreme Court said, were "justified as partial exemptions," under *Mercantile Bank, supra,* and subsequent cases. While we are not bound by either of these interpretations placed on Act No. 9 by Michigan's highest court, 358 Mich. 611, 639–640, 101 N. W. 2d 245, 259–260, we do accept as controlling its interpretation that, in fixing the rate on national bank shares, the Legislature took into account the moneyed capital controlled thereby.

We believe that, granted satisfaction of the other qualifications of § 5219, a State's tax system offends only if in practical operation it discriminates against national banks or their shareholders as a class. That is to say, we could not strike down Act No. 9, as interpreted by Michigan's highest court, unless it were manifest that an investment in national bank shares was placed at a disadvantage by the practical operation of the State's law. According to our cases, discussed above, that clearly appears to have

been the purpose of the Congress in enacting § 5219.[17] We have made a comprehensive examination of the record and fail to find such a discriminatory effect to be manifest in Michigan's tax system.

As has been repeatedly indicated in our decisions, a dollar invested in national bank shares controls many more dollars of moneyed capital, the measuring rod of § 5219. On the other hand, the same dollar invested in a savings and loan share controls no more moneyed capital than its face value. The bank share has the power and control of its proportionate interest in all of the money available to the bank for investment purposes. In the case of Michigan National, this control is more than 21 times greater than the share's proportionate interest in the capital stock, surplus and undivided profits would indicate. As to all national banks in the United States, the record shows that capital accounts amounting to about $7,000,000,000 control some $100,000,000,000 of deposits (92% of the total assets of all these banks) or an amount 14 times greater. Savings and loan associations have no similar assets of that character, their only source of moneyed capital being the share accounts of members and, at least in the case here, the relatively small amount of retained earnings and surplus permitted under law.

Relating the statistics to the immediate problem, the capital, surplus and undivided profits of Michigan National totaled about $13,000,000, to which the 5½-mill tax was applied. The tax amounted to $68,181. The 16 savings and loan associations with which appellant was in

[17] For a discussion of the effect of the cases, see Powell, Indirect Encroachment on Federal Authority by the Taxing Powers of the States, 31 Harv. L. Rev. 321, 367 (1918). He concludes that the cases lead "to a disregard of formal legal discrimination where there is in fact no substantial economic discrimination." To the same effect, see Woosley, *op. cit., supra,* note 16, at pp. 24–25.

competition had a paid-in share value of $134,000,000, to which was applied the 2/5-mill tax. The resultant tax was about $53,260. Had the same tax rate (2/5-mill) been applied to the moneyed capital, *i. e.*, deposits, of Michigan National ($283,000,000), the product would have more than equaled the tax revenue from the application of the 5½-mill rate against its capital account. In fact, it would have amounted to about $113,000, or 1.7 times the 1952 tax bill on appellant's shares. Similar results could be obtained as to all national banks in Michigan. Their total capital accounts, $166,700,000, when taxed at the 5½-mill rate, yield some $917,000 in taxes. The 2/5-mill rate, if applied to their total deposits, $3,516,000,000, results in $1,406,000 in taxes. This is more than 1.5 times the 1952 taxes assessed under Act No. 9.

While it is obvious that the taxable value of the shares in these two types of financial institutions is determined by different methods [18] and that they are being taxed at different rates, it does not follow that § 5219 is automatically violated. "[I]t is not a valid objection to a tax on national bank shares that other moneyed capital in the state [is] . . . taxed at a different rate or assessed by a

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[18] The taxable value of a national bank share of common stock under Act No. 9 is determined by dividing the "*capital account*" (common capital, surplus and undivided profits) by the number of shares of common stock outstanding. A share account in a savings and loan association, on the other hand, is valued according to its "*paid-in value*." That this latter figure includes neither surplus nor undivided profits is obvious from an inspection of the tax return of a savings and loan institution and its financial statement. For example, the Industrial Savings and Loan Association's intangibles tax return for 1952 shows that its paid-in share value was $5,970,000. The Association's monthly report for December 1952 shows that there were some $283,000 in undivided profits and $202,000 in legal reserves which were not included in the computation of paid-in value for tax purposes.

different method unless it appears that the difference in treatment results in fact in a discrimination unfavorable to the holders of the shares of national banks." *Tradesmens Nat. Bank* v. *Oklahoma Tax Comm'n, supra,* at 567. Cf. *Amoskeag Savings Bank* v. *Purdy, supra; Covington* v. *First Nat. Bank, supra.* We must remember the interpretation placed on Act No. 9 by Michigan's Supreme Court. It held in effect that the Legislature had taken into account, in fixing the different rates on national bank stock and savings and loan shares, the additional moneyed capital controlled by the former. Since Michigan National's share owner's investment has the equivalent profit-making power of an amount 21 times greater than itself and the investor in savings and loan share accounts has no similarly multiplied power, the national bank share would not be "unfavorably" treated unless it was taxed in excess of 21 times the levy on savings and loan share accounts. Cf. *Bank of Redemption* v. *Boston, supra,* at 67. Here the ratio is only 13.8 to one, and if the additional franchise tax upon state associations is included, the proportion drops to 8.5 to one. This is not to say that the value of the bank's deposits is a factor in the computation of the tax to be paid under the Michigan statutes. However, the deposits are relevant to the determination of whether or not the tax, as computed under the statutes, is a greater burden than that placed on "other moneyed capital." [19]

It is said, however, that this method would be contrary to *Minnesota* v. *First Nat. Bank,* 273 U. S. 561 (1927). It was argued in that case that an equivalence of tax

[19] It is argued that this disregards the fact that bank deposits are liabilities and must be repaid. This contention is without substance for the savings share accounts must, by law, be purchased by the savings and loan association upon a member's withdrawal. Mich. Comp. Laws, 1948, § 489.6. In this respect, therefore, the share accounts and deposits are identical. Both must be repaid.

between national banks and other moneyed capital existed because, if the tax rate applicable to other moneyed capital was applied to the assets of the bank without deducting liabilities, the ultimate tax would be approximately the same. However, Mr. Justice (later Chief Justice) Stone, writing for the Court, rejected that argument because it "ignores the fact that the tax authorized by § 5219 is against the holders of the bank shares and is measured by the value of the shares, and not by the assets of the bank without deduction of its liabilities . . . ." At 564. However, that case was decided on the authority of *First Nat. Bank* v. *Hartford,* 273 U. S. 548, which Mr. Justice Stone also wrote and handed down the same day. There the comparison between the widespread capital exempted and that of national banks which was taxed, led to the invalidation of Wisconsin's tax statute. The error the Court found was that Wisconsin "construed the decisions of this Court as requiring equality in taxation only of moneyed capital invested in businesses substantially identical with the business carried on by national banks." At 555. While Minnesota's Act, as construed, was not so broad, it taxed capital (including state bank shares) other than that invested in national bank shares at a lower rate. Since both national and state banks were permitted to deduct deposits, it followed that it would have been discriminatory to tax one at a lower rate than the other. However, implicit in the ruling is the proposition that if the same base is employed in the valuation of the shares of the competing institutions, as here, and the practical effect of the different rate does not result in a discrimination against moneyed capital in the hands of national banks, when compared with other competing moneyed capital, it does not violate § 5219. "[T]he bank share tax must be compared with . . . the tax on capital invested by individuals in the shares of corporations whose business competes with

that of national banks." *Minnesota* v. *First Nat. Bank, supra,* at 564. In short, resulting discrimination in the effect of the tax is the test.

Moreover, these cases were both handed down prior to congressional enactment of the Home Owners' Loan Act of 1933,[20] which is "in pari materia" with § 5219 and appears "to throw a cross light" [L. Hand in *United States* v. *Aluminium Co. of America,* 148 F. 2d 416, 429 (C. A. 2d Cir. 1945)] on Michigan's savings and loan tax statute. The 1933 Act, permitting the creation of federal savings and loan associations, contained a provision respecting local taxation which stated in part:

> ". . . no State . . . shall impose any tax on such [federal] associations or their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions." 48 Stat. 134.

Unless Congress had recognized that States taxing national bank shares were free, in spite of § 5219, to exempt their own savings and loan associations from local taxation, it would have used language similar or referring to § 5219, as it did in other federal statutes creating different types of thrift institutions.[21] To insure that the federal creatures received the same benefits, if any, as state agencies, Congress tied the taxation limitations to state action affecting the latter rather than to § 5219. Although the federal statute was enacted prior to Michigan's savings and loan tax statute, its accommodation to such state measures, actual or potential, illustrates the assimilation by Congress of state savings and loan associations to their federal analogues, and not to the very

[20] 48 Stat. 128, as amended, 12 U. S. C. §§ 1461–1468.

[21] 42 Stat. 1469, 12 U. S. C. § 1261 (National Agricultural Credit Corporations); 39 Stat. 380, 12 U. S. C. § 932 (joint-stock land banks).

different national fiscal institutions which national banks are. Furthermore, the power of the State to grant liberal tax treatment to its own associations, viewed even without the light of congressional action, is amply supported by the exemption doctrine of *Mercantile Bank, supra,* recognized as still vital long after Michigan's law of 1887 under which the savings and loan associations of that State are organized. These considerations weigh heavily in evaluating Michigan's enactment under § 5219.

Under this standard, Michigan's tax structure does not, in practical effect, result in any discrimination. Its system looks to the moneyed capital controlled by the shareholder. If it is a share in a bank—either federal or state—the legislature considers the deposits available for investment and fixes a rate commensurate with that increased earning and investment power of the shareholder. The resulting tax is not on the assets of the bank, nor on deposits, but on the control the shareholder has in the moneyed capital market. Thus, controlling some 21 times the cash value of his share, a Michigan National shareholder pays the higher rate. On the other hand, a savings and loan shareholder controls no deposits. He has only the cash value of his share (and the comparatively minute reserves allowed by law), insofar as the moneyed capital market is concerned. Consequently he pays the lower rate. As the Michigan Bankers Association has indicated, this approach is realistic from a business standpoint, does not result in discrimination, is economically sound and is fair to each type of taxpayer. If it results, as it did in 1952, in giving Michigan National a tax advantage, it cannot complain.

It may be that at some future time, although the statistics indicate it to be improbable,[22] the bank deposits may

[22] From its organization in 1941 to the end of 1951, Michigan National's total assets grew from $67,600,000 to $272,500,000, an average annual increase of some $20,500,000. By 1957, its assets

fall to such a level that the 5½-mill rate would be violative of § 5219. But here we are concerned with only one year, 1952, and for that year the tax levied does not approach the permissible maximum. Such a possibility, however, may account for the action of the Legislature in setting the taxes at the lower than maximum levels now applied.

Having assumed the element of competition between Michigan National and the savings and loan associations, a prerequisite to the application of § 5219, and in the light of both the clear doctrine of our earlier cases and the phenomenal growth and earning power of appellant despite Act No. 9, we cannot say that its burden in 1952 was so heavy as would "prevent the capital of individuals from freely seeking investment" in its shares.

We have considered appellant's other points and have concluded each is without merit.

Affirmed.

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

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

I respectfully but resolutely dissent. Exposition of my reasons will require a rather full and careful statement of the facts and the applicable law.

A State is without power to tax national bank shares except as Congress consents and then only in conformity with the conditions of such consent. See, *e. g., First National Bank* v. *Anderson,* 269 U. S. 341, 347, and *Des Moines National Bank* v. *Fairweather,* 263 U. S. 103, 106.

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totaled $481,000,000, showing an average annual growth of almost $34,800,000 during the years since Act No. 9 was passed. Similarly, deposits increased, on the average, by $18,800,000 each year between 1941 and 1951. Since that time, they have grown at the average rate of $30,700,000 a year.

By § 5219 of the Revised Statutes of the United States (Act of June 3, 1864, c. 106, 13 Stat. 111, as amended by the Act of February 10, 1868, 15 Stat. 34, the Act of March 4, 1923, 42 Stat. 1499, and the Act of March 25, 1926, 44 Stat. 223), Congress has consented that:

> "The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:
>
> "1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others . . . ."
>
> "(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks . . . ."

Pursuant to that consent, Michigan passed its Intangibles Tax Act (Act 301, Public Acts of 1939; Mich. Comp. Laws, 1948, § 205.132; Mich. Stat. Ann., 1950, § 7.556 (2)) imposing, upon the owners, an annual tax (1) of 3% of the income from, but not less than 1/10 of 1% of the face or par value of, national bank shares, and (2) of 4 cents per $100 of the "paid-in value" of savings and loan association shares. By another statute, Michigan imposed, in addition, a privilege tax of 2½ cents per $100 on the value of the capital and legal reserves of state (but not federal) savings and loan associations (Mich. Comp. Laws, 1948, § 450.304a; Mich. Stat. Ann. § 21.206)—thus

making a total tax of 6½ cents per $100 of the value of state, and 4 cents per $100 of the value of federal, savings and loan shares.

In obedience to that Intangibles Tax Act, appellant, Michigan National Bank, having offices and doing business in seven cities in Michigan,[1] paid to the State, on behalf of its shareholders, the taxes thereby imposed on its shares for the year 1952. Thereafter, by Act No. 9 of the Public Acts of Michigan for 1953 (§ 205.132a, Mich. Comp. Laws, 1948, 1956 Supp.; Mich. Stat. Ann., 1959 Cum. Supp., § 7.556 (2a)), the State amended its Intangibles Tax Act as respects bank shares, but without touching the provisions respecting savings and loan association shares, to provide, in pertinent part, as follows:

> "For the calendar year 1952 . . . and for each year thereafter, . . . there is hereby levied upon each . . . owner of shares of stock of national banking associations located in this state and banks and trust companies organized under the laws of this state, and there shall be collected from each such owner an annual specific tax . . . equal in the case of a share of common stock to 5½ mills upon each dollar of the capital account of such association, bank or trust company represented by such share, and equal in the case of a share of preferred stock to 5½ mills upon the par value of such share." [2]

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[1] Appellant's main bank is located in the City of Lansing. It maintains branch banks in the Cities of Battle Creek, Flint, Grand Rapids, Marshall, Port Huron and Saginaw.

[2] Act 9 contains a further relevant provision which, in pertinent part, reads:

"'Capital account' as referred to herein shall be determined by adding the common capital, surplus and undivided profits accounts . . . , and the dollar amount of the capital account represented by each share of its common stock shall be determined by dividing such capital account by the number of shares of such common stock . . . ."

Acting under the provisions of the amended statute ("Act 9"), the State imposed an additional tax upon the owners of appellant's "shares" for the year 1952 of $49,929.27. After paying that additional tax under protest, appellant brought this action in the Michigan Court of Claims for its recovery. The ground of its suit was that the State's action in taxing the "shares" of national banks at a rate of 55 cents per $100 of their value, while taxing the "shares" of savings and loan associations at a rate of 6½ cents per $100 of their value, taxed the former "at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks," and therefore violated § 5219. After trial, the Michigan Court of Claims held that the assessment and collection of the additional tax did not violate § 5219 and entered judgment for the State.

On appeal, the Michigan Supreme Court, though conceding that Act 9 placed the shares of "both State and national banks in a special and more heavily taxed category" than the shares of savings and loan associations, held, *inter alia,* (1) that because savings and loan associations are "different in character, purpose and organization from national banks," operate "in a narrow, restricted field," and are not permitted to receive deposits, they could not, as a matter of law, come "into competition with the business of national banks" within the meaning of § 5219, (2) that inasmuch as Michigan lawfully might entirely exempt some entities or activities from taxation without offending § 5219, it may prefer the shares of savings and loan associations, by granting their owners a lower tax rate than it grants to the owners of shares of national banks, without thereby violating § 5219, and (3) that when the value of the total assets, rather than the value of the shares, of the two types of financial institutions is considered (thus putting out of consideration

the liability of the banks to repay their deposits and other debts), the ratio of the total dollar tax burden to total assets is approximately the same in Michigan—.091 for banks and .089 for savings and loan associations—and this, it said, "establishes that there was practical equality of the total tax imposed upon building and loan associations and upon national banks." It therefore affirmed the judgment, 358 Mich. 611, 101 N. W. 2d 245, and we noted probable jurisdiction of the bank's appeal. 364 U. S. 810.

This Court today substantially adopts the latter conclusion, and on that basis affirms the judgment. In doing so, I must say, with respect, that the Court ignores both the provisions of § 5219 and Michigan's mode, plainly expressed in its Act 9, of valuing national bank shares and the shares of savings and loan associations for the purposes of its tax upon them, and effectively defaces and departs from a long line of this Court's decisions, hammered out, case by case, over the course of nearly a century, that are squarely in point and specifically decisive of every question in the case.

The admitted difference in the rates of tax—55 cents per $100 of the value of national bank shares as opposed to 6½ cents per $100 of the value of savings and loan shares—leaves, of course, no doubt that the former are taxed "at a greater rate than" the latter—more than eight times greater. Therefore, the only questions that can possibly be open here under § 5219 are (1) whether savings and loan shares are "other moneyed capital in the hands of individual citizens," (2) whether that moneyed capital is "coming into competition with [some substantial phase [3] of] the business of national banks," and

[3] In *First National Bank* v. *Hartford*, 273 U. S. 548, 556, 557, this Court held the phrase "some substantial phase," in the context here used, to be implicit in § 5219.

(3) whether it is "substantial in amount when compared with the capitalization of national banks." The latter being an element that this Court has held to be implicit in the statute. *First National Bank* v. *Hartford,* 273 U. S. 548, 558.

Surely it cannot now be doubted that shares owned by individual citizens in a savings and loan association, which engages in the business of making residential mortgage loans for profit, are "other moneyed capital in the hands of individual citizens," within the meaning of § 5219. This Court has long since settled the question. The term "include[s] shares of stock or other interests owned by individuals in all enterprises in which the capital employed in carrying on its business is money, where the object of the business is the making of profit by its use as money." *Mercantile Bank* v. *New York,* 121 U. S. 138, 157. "By its terms the [statute] excludes from moneyed capital only those personal investments which are not in competition with the business of national banks." *First National Bank* v. *Hartford, supra,* at 557. See also *Minnesota* v. *First National Bank,* 273 U. S. 561, 564; *First National Bank* v. *Anderson, supra,* at 348, and cases cited.

Whether such moneyed capital is being used in "competition with [some substantial phase of] the business of national banks" and is "substantial in amount when compared with the capitalization of national banks" are mixed questions of law and fact, "and in dealing with [them] we may review the facts in order correctly to apply the law." *First National Bank* v. *Hartford, supra,* at 552.

Here the relevant facts are not in dispute. The uncontroverted evidence shows that, as a part or phase of its general banking business conducted in seven cities in Michigan, appellant is extensively engaged in the business of making residential mortgage loans. In those

cities, there are 16 savings and loan associations which are also extensively engaged in that business. Competition between them and appellant for such loans is keen and continuous. Both appellant and those loan associations extensively advertise for and solicit such loans from all classes and in every economic strata of the people in those communities. They make these loans on the same kinds of residential properties and in the same areas—one type of institution often refinancing and retiring a loan of the other. The rates, terms and conditions of the loans, being competitive, are substantially the same, and in many cases—particularly in the cases of F. H. A. and V. A. loans—they are of precisely the same terms and on exactly the same forms—forms prepared and furnished by the Federal Government.

Directed specifically to the question whether moneyed capital of savings and loan associations was being used, in significant amounts, in "competition with [some substantial phase of] the business of national banks" in Michigan, the uncontroverted evidence shows that in the year in question, 1952, the savings and loan associations in Michigan held $433,000,000 of residential mortgage loans, while the national banks in that State held $301,000,000 of such loans—which constituted 30% of their total loans and discounts. In the same year, the 16 savings and loan associations that were most directly competing with appellant made 6,498 residential mortgage loans aggregating about $32,000,000 (of which $6,273,000 were F. H. A. and V. A. and $26,058,000 were conventional loans) which brought their total holdings in such loans to $97,000,000. Whereas, in the same year, appellant made 2,728 residential mortgage loans aggregating about $18,500,000 (of which $10,869,000 were F. H. A., $456,000 were V. A. and $7,245,000 were conventional loans) which brought its total holdings in such loans to $60,000,000. Those loans amounted to 40% of

appellant's total loans and discounts, constituted 20% of its assets and yielded 26% of its income.

Upon the question whether the moneyed capital of savings and loan associations that was used in making residential mortgage loans in Michigan was "substantial in amount when compared with the capitalization of national banks" in that State, the uncontroverted evidence shows that in the year in question the savings and loan associations in Michigan held a total of $433,000,000 of such loans, whereas the total capitalization of all national banks in that State was $166,724,000. And the 16 savings and loan associations that were most directly competing with appellant held, in the same period, $97,000,000 of such loans, whereas appellant's capitalization was $13,038,000.

Certainly these undisputed facts establish that "moneyed capital" of savings and loan associations was being used in very significant "competition with [a substantial phase of] the business of national banks" in Michigan, and that such competition was "substantial in amount when compared with the capitalization of national banks" in that State.

It thus seems altogether clear to me that these uncontroverted facts establish every essential element of appellant's case. It cannot be denied that the plain words of § 5219 prohibit the States from taxing the shares of national banks "at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with [some substantial phase [4] of] the business of national banks." Yet, here Michigan taxed national bank shares at a rate of 55 cents per $100 of value, but it taxed savings and loan shares at a rate of only 6½ cents per $100 of value. Did it not plainly thus tax national bank shares "at a greater

[4] See note 3.

rate" than it taxed savings and loan shares? Certainly the latter were "other moneyed capital in the hands of individual citizens of such State." See, *e. g., Mercantile Bank* v. *New York, supra,* at 157; *First National Bank* v. *Hartford, supra,* at 557. Does not the uncontroverted evidence, which we have summarized in some detail, show that such "other moneyed capital" was used in Michigan in very significant "competition with [a substantial phase of] the business of national banks" and that such competition was "substantial in amount when compared with the capitalization of national banks" in Michigan? Do not these facts establish every element of appellant's case? Respondents do not, nor does the Court, point to any essential element that is missing. Why, then, is appellant not entitled to recover?

The only reasons advanced by respondents are those it successfully urged upon the Michigan Supreme Court. Every one of those contentions is opposed to the plain terms of § 5219 on the facts of this record, and also has been specifically decided adversely to respondents, on similar facts, by this Court, as I shall show.

First. Respondents argue that, because they may not receive "deposits," create "checkbook money" or engage in "banking," but must operate "in a narrow, restricted field," savings and loan associations are so "different in character, purpose and organization from national banks" that—regardless of the actual facts shown in this record—they cannot, as a matter of law, come "into competition with the business of national banks" within the meaning of § 5219.

This argument, upon analysis, comes down to the contention that the restriction of § 5219 was directed only against discrimination in favor of state banks. For they, so the argument runs, are the only state-created institutions that lawfully may engage in "banking business" similarly to national banks and hence, respondents

conclude, only the moneyed capital of state banks can constitute "other moneyed capital . . . coming into competition with the business of national banks," within the meaning of § 5219.

A similar question arose in *First National Bank* v. *Anderson,* 269 U. S. 341. There "[t]he defendants took the position [in the state court] that the congressional restriction [of § 5219] was directed only against discrimination in favor of state banking associations." This Court said the contention was ". . . untenable by reason of settled rulings to the contrary . . . ." *Id.,* at 349. After summarizing its earlier cases, the Court declared that "[t]he purpose of the restriction is to render it impossible for any State, in taxing the shares, to create and foster an unequal and unfriendly competition with national banks, by favoring shareholders in state banks or individuals interested in private banking *or engaged in operations and investments normally common to the business of banking. Mercantile National Bank* v. *New York,* 121 U. S. 138, 155; *Des Moines National Bank* v. *Fairweather, supra* [263 U. S. 103], 116." 269 U. S., at 347–348. (Emphasis added.) And it held that "Moneyed capital is brought into such competition [not only] where it is invested in shares of state banks or in private banking . . . [but] also where it is employed, *substantially as in the loan and investment features of banking, in making investments, by way of loan, discount or otherwise, in notes, bonds or other securities with a view to sale or repayment and reinvestment. Mercantile National Bank* v. *New York, supra,* 155–157; *Palmer* v. *McMahon,* 133 U. S. 660, 667–668; *Talbot* v. *Silver Bow County,* 139 U. S. 438, 447." 269 U. S., at 348. (Emphasis added.)

Respondents' contention that "other moneyed capital" does not come into competition with the business of

national banks unless it is employed in a business substantially identical with all phases of the business carried on by national banks was squarely met and rejected by this Court, in words about as plain as it is possible to conceive, in *First National Bank* v. *Hartford, supra.* There, the Wisconsin Supreme Court "apparently construed the decisions of this Court as requiring equality in taxation only of moneyed capital invested in businesses substantially identical with the business carried on by national banks. Consequently, since that class of business must under the Wisconsin statutes be carried on in corporate form and capital invested in it is taxed at the same rate as national bank shares, other moneyed capital, as defined in § 5219, within the state, it thought, was not favored." 273 U. S., at 555–556. That view, if logically pursued, would mean that "other moneyed capital" invested in businesses engaged in some but not all of the activities of national banks could not be considered in determining the question of competition. In rejecting that contention, this Court said:

> "But this Court has recently had occasion, in reviewing the earlier decisions dealing with this subject, to point out that the requirement of approximate equality in taxation is not limited to investment of moneyed capital in shares of state banks or to competing capital employed in private banking. The restriction applies as well where the competition exists only with respect to *particular features* of the business of national banks or where moneyed capital 'is employed, substantially as in the loan and investment features of banking, in making investments by way of loan, discount or otherwise, in notes, bonds or other securities, with a view to sale or repayment and reinvestment.' *First National Bank* v. *Anderson, supra,* 348. In so doing, it followed the

holding in *Mercantile Bank* v. *New York,* 121 U. S. 138, 157 . . . ." 273 U. S., at 556. (Emphasis added.)

The Court then proceeded to declare the law in such clear and ringing terms as have settled the question for the intervening 34 years—from 1927 until today. It said:

"Competition may exist between other moneyed capital and capital invested in national banks, serious in character and therefore well within the purpose of § 5219, *even though the competition be with some but not all phases of the business of national banks.* Section 5219 is not directed merely at discriminatory taxation which favors a competing banking business. Competition in the sense intended *arises not from the character of the business of those who compete but from the manner of the employment of the capital at their command.* No decision of this Court appears to have so qualified § 5219 as to permit discrimination in taxation in favor of moneyed capital such as is here contended for. To so restrict the meaning and application of § 5219 would defeat its purpose. It was intended to prevent the fostering of unequal competition with the business of national banks by the aid of discriminatory taxation in favor of *capital invested by institutions or individuals engaged either in similar businesses or in particular operations or investments like those of national banks.* . . . Our conclusion is that § 5219 is violated wherever capital, substantial in amount when compared with the capitalization of national banks, is employed either in a business or by private investors in the same sort of transactions as those in which national banks engage and in the same locality in which they do business." 273 U. S., at 557–558. (Emphasis added.)

Identical conclusions were again announced by the Court on the same day in *Minnesota* v. *First National Bank,* 273 U. S. 561.[5]

Here, there is no question about the fact that the making of residential mortgage loans was a substantial phase of the business of national banks in Michigan. Such loans amounted to $301,000,000 and constituted 30% of their total loans and discounts. Nor can there be any question about the fact that moneyed capital of savings and loan associations was being used in significant competition with the residential mortgage loan phase of the business of national banks in Michigan. Those loan associations held $433,000,000 of such loans. That amount was certainly substantial "when compared with the capitalization of national banks" in Michigan of $166,724,000. These facts, under the rule of the *Hartford* and *Minnesota* cases, would seem to leave no doubt that appellant's shares were discriminatorily taxed in violation of § 5219.

Second. Respondents argue that savings and loan associations are similar in character and purpose to the, now largely historical, small mutual savings banks that were common in the last century. On that assumption, they argue that inasmuch as this Court has held that taxation of national bank shares at a greater rate than was assessed against such mutual savings banks did not offend § 5219

[5] Since this Court's decisions in *First National Bank* v. *Hartford, supra,* and *Minnesota* v. *First National Bank, supra,* in 1927, several proposals to limit state taxes on national bank shares to such as are imposed by the State on state banks—thus permitting other competing moneyed capital, including that of savings and loan associations, to be taxed at a lower rate by the State—have been made to and rejected by Congress. Hearings before the Senate Banking and Currency Committee on S. 1573, 70th Cong., 1st Sess. (1928); Hearings on H. R. 8727 before the House Committee on Banking and Currency, 70th Cong., 1st Sess. (1928); S. 3009, 73d Cong., 2d Sess.; H. R. 9045, 73d Cong., 2d Sess.

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(see, *e. g., Mercantile Bank* v. *New York,* 121 U. S. 138 (1887); *Davenport Bank* v. *Davenport Board of Equalization,* 123 U. S. 83 (1887); *Bank of Redemption* v. *Boston,* 125 U. S. 60 (1888); *Aberdeen Bank* v. *Chehalis County,* 166 U. S. 440 (1897)), it should follow that the taxation of national bank shares at a greater rate than savings and loan shares does not offend the statute.

That argument, too, was specifically answered by the *Hartford* case. With unmistakable reference to those cases, the Court said: "Some of the cases dealing with the technical significance of the term competition in this field *were decided before national banks were permitted to invest in mortgages as they are now.* Act of December 23, 1913, c. 6, § 24, 38 Stat. 251, 273; Act of September 7, 1916, c. 461, 39 Stat. 752, 754; Act of February 25, 1927, § 24.[6] And others go no further than to hold that in the

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[6] A historical review of § 24, Federal Reserve Act (12 U. S. C. § 371), which prescribed the authority of national banks to make real estate mortgage loans, reveals that, prior to 1916, national banks were not authorized to loan money on the security of real estate, with the exception of certain farm land. By the Act of September 7, 1916 (39 Stat. 754), Congress first authorized national banks to make residential mortgage loans, but limited them to an amount not exceeding 50% of the actual value of the property and to run for a term not longer than one year. By the Act of February 25, 1927 (44 Stat. 1232), Congress authorized such residential mortgage loans to run for a period of five years. By the Act of June 27, 1934 (48 Stat. 1263), Congress authorized national banks to make mortgage loans under Title II, National Housing Act (12 U. S. C. § 1701 *et seq.*), commonly known as F. H. A. mortgages. By the Act of August 23, 1935 (49 Stat. 706), amending § 24 of the Federal Reserve Act, national banks were authorized to make conventional residential mortgage loans in amounts not exceeding 60% of the appraised value of the property for a term of 10 years if 40% of the principal be amortized in that term. By decision of the Comptroller of the Currency in 1944, national banks were authorized to participate in the V. A. (or G. I.) home loan program. By the 1950 Amendment to § 24 (64 Stat. 80), national banks were authorized to make Title I, F. H. A. home

absence of allegation and proof of competition with national banking capital, it cannot be said that an offending discrimination exists." 273 U. S., at 558. Then, squarely rejecting the theory of respondents' argument, the Court said:

> "With the great increase in investments by individuals and the growth of concerns engaged in particular phases of banking shown by the evidence in this case and in *Minnesota* v. *First National Bank of St. Paul,* today decided, *post,* p. 561, discrimination with respect to capital thus used could readily be carried to a point where the business of national banks would be seriously curtailed. Our conclusion is that § 5219 is violated wherever capital, substantial in amount when compared with the capitalization of national banks, is employed either in a business or by private investors in the same sort of transactions as those in which national banks engage and in the same locality in which they do business." 273 U. S., at 558.

Surely nothing more need be said.

Third. Respondents argue that inasmuch as this Court has held that a State may entirely exempt some entities or activities from taxation—*i. e.,* churches, charities, small mutual savings banks, municipal bonds, and the like—without offending § 5219 (see, *e. g., Hepburn* v. *School Directors,* 23 Wall. 480; *Adams* v. *Nashville,* 95 U. S. 19; *Mercantile Bank* v. *New York, supra; Davenport Bank* v. *Davenport Board of Equalization, supra; Bank of Redemption* v. *Boston, supra; Aberdeen Bank* v. *Chehalis County, supra*), it follows that a State may prefer the

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improvements loans. It thus appears that, by 1952, national banks were authorized to make F. H. A. mortgage and home modernization loans and also V. A. mortgage loans identical to those made by savings and loan associations, and conventional mortgage loans comparable to those made by such associations.

shares of savings and loan associations, by granting their owners a lower tax rate than it grants to the owners of shares of national banks—even though the former are used in significant competition with a substantial phase of the business of the latter—without thereby violating § 5219.

Despite the strongest of implications to the contrary, we have no occasion here to consider whether the State might, under conditions shown by this record, entirely exempt the shares of savings and loan associations from taxation, while taxing the shares of national banks, for it has not done so. The State taxes savings and loan shares, although at only about ⅛ of the rate it levies on national bank shares.

In these circumstances, respondents' argument runs in the very teeth of this Court's holding in the *Hartford* case that "Competition in the sense intended [by § 5219] arises not from the character of the business of those who compete but from the manner of the employment of the capital at their command" (273 U. S., at 557), and "that § 5219 is violated wherever capital, substantial in amount when compared with the capitalization of national banks, is employed either in a business or by private investors in the same sort of transactions as those in which national banks engage and in the same locality in which they do business." 273 U. S., at 558. A more direct and conclusive answer cannot readily be perceived.

Fourth. Respondents argue, and the Court agrees, that when the value of the total assets, rather than the value of the shares, of the two types of financial institutions is considered, the ratio of the total dollar tax burden to total assets is approximately the same in Michigan—.091 for banks and .089 for savings and loan associations—and therefore national bank shares are not really taxed at a greater rate than savings and loan shares.

This brings us to the heart of our disagreement with the Court. After correctly observing that "There are other considerations [than rates] to be weighed in determining the actual burden of the tax, one of which is the mode of valuing bank shares—by adopting 'book values' [capital, surplus and undivided profits]—which may be more or less favorable than the method adopted in valuing other kinds of personal property," *Amoskeag Savings Bank* v. *Purdy,* 231 U. S. 373, 392; see also *Hepburn* v. *School Directors,* 23 Wall. 480, 484; *Tradesmens National Bank* v. *Oklahoma Tax Comm'n,* 309 U. S. 560, 567, and that it is not the rate alone but the practical effect of the tax that determines whether there is discrimination, the Court says: "[I]t is obvious that the taxable value of the shares in these two types of financial institutions is determined by different methods . . . ." This conclusion is demonstrably wrong. In plain and simple terms Act 9 provides that the value of bank shares "shall be determined by dividing such capital account [capital, surplus and undivided profits] by the number of shares of such common stock . . . ." (see note 2), and the shares of savings and loan associations are valued at the "paid-in value." In each case, therefore, corporate liabilities are deducted and the tax is imposed upon the *book value* of the shares. Hence, it could hardly be plainer "that the taxable value of the shares in these two types of financial institutions is determined by" exactly the same, not "different," methods. One cannot profitably elaborate a truth so simple.

Then, the Court comes to the real basis of its decision. It says "[Michigan's] system looks to the moneyed capital *controlled* by the shareholder. If it is a share in a bank—either federal or state—the legislature considers the *deposits* available for investment and fixes a rate commensurate with *that increased earning and investment power of the shareholder"; that* "a dollar invested in

national bank shares *controls* many more dollars of moneyed capital, *the measuring rod of § 5219.* On the other hand, the same dollar invested in a savings and loan share *controls* no more moneyed capital than its face value. The bank share has the power and *control* of its proportionate interest in all of the money available to the bank for investment purposes. In the case of Michigan National, this control is more than 21 times greater than the share's proportionate interest in the capital stock, surplus and undivided profits"; that "Since Michigan National's share owner's investment has the equivalent *profit-making power* of an amount 21 times greater than itself and the investor in savings and loan share[s] . . . has no similarly multiplied power, the national bank share would not be 'unfavorably' treated unless it was taxed in excess of 21 times the levy on savings and loan share[s] . . . . Here the ratio is *only* 13.8 to one . . . ." (Emphasis added.)

I respectfully submit that this is an egregious error. Nothing in the Michigan statute provides or contemplates that the amount of capital "controlled" by the shares of a national bank, or the amount of the bank's "deposits," is a relevant factor in determining the value of bank shares for the purposes of this tax. Nor are "increased [values] to the shareholder," by reason of capital "controlled" by the bank or its "deposits," made relevant factors. Quite specifically to the contrary, Act 9 provides that " 'Capital account' as referred to herein shall be determined by adding the common capital, surplus and undivided profits accounts . . . , and the dollar amount of the capital account represented by each share of its common stock shall be determined by dividing such capital account by the number of shares of such common stock . . . ." How could it more plainly be said that bank shares must be valued, for the purposes of this tax, solely upon their *book value*—without regard to

the bank's "deposits" or to the capital "controlled by the shareholder"? It is surely clear that the Michigan tax is not imposed upon national banks or upon their *assets;* instead, it is imposed upon the owners of the bank's shares, measured *solely* by the value of those shares—"determined by dividing [the] capital account by the number of shares of such common stock." See note 2.

Respondents' argument, and the Court's decision, put out of consideration the liability of national banks to repay their deposits and other debts, and would impose the tax on their *gross assets,* in direct opposition to the plain terms of the Michigan statute.

Precisely the same argument was rejected by this Court in *Minnesota* v. *First National Bank, supra:*

> "Petitioner argues that in its actual operation, the tax on national bank shares is no greater than the tax on credits, since under the statute individuals are taxed at the rate of three mills upon the full value of their credits without deducting their liabilities, whereas in taxing bank shares, the liabilities of the banks are deducted from their assets in ascertaining the forty per cent. valuation of their shares. Therefore, it is urged, if bank shares were taxed at the same rate without deducting the bank's liabilities in ascertaining the value of their shares, the amount of the tax would be approximately the same. This argument ignores the fact that the tax authorized by § 5219 is against the holders of the bank shares and is measured by the value of the shares, and not by the assets of the bank without deduction of its liabilities, *Des Moines National Bank* v. *Fairweather,* 263 U. S. 103 . . . ." 273 U. S., at 564.

It would indeed be novel, even in the absence of the contrary provisions of Act 9, *to add liabilities* to assets in determining book value of corporate shares—a simple contradiction in terms. It is likewise idle to observe the

obvious fact that savings and loan associations have no "deposits," and hence no deposit liabilities to deduct,[7] or to argue that they, in valuing their shares for the purposes of this tax, should be allowed to deduct the amounts paid in by their "shareholders" for their "shares," as the resulting figure would be zero, and the effect would be to tax those shares only in fiction. Nothing in either Act 9 or in § 5219 authorizes such double talk.

Here, Michigan values national bank shares and savings and loan association shares, for the purposes of this tax, by exactly the same method, *i. e.,* the value of the shares. Yet it taxes bank shares at a rate of 55 cents per $100 of their value, while taxing savings and loan shares at 6½ cents per $100 of their value. Does not that conduct violate the provision of § 5219 that national bank shares "shall not be [taxed] at a greater rate than is assessed upon other moneyed capital . . . coming into competition with the business of national banks"?

If the Court's argument, that a tax upon the bank's "deposits" at the rate applied to the shares of savings and loan associations would produce a greater tax than results from application of the higher bank share rate to the value of its shares, has any relevance to any issue in this case, it can only be to demonstrate that including "deposits" in the valuation of bank shares would be to tax not just the bank's "shares," as authorized by § 5219, but *both* the "shares" *and* the "deposits" of the bank, and not at the lower rate applicable to savings and loan shares but at the eight times higher one applicable to the shares of national banks. Similarly, the Court's argument that

[7] The Michigan Supreme Court itself has recognized "that investors in savings and loan associations are subscribers to, or purchasers of, stock therein. . . ."—and are not "depositors" or "creditors" thereof. *Michigan Savings & Loan League* v. *Municipal Finance Commission of the State of Michigan* (1956), 347 Mich. 311, 322, 79 N. W. 2d 590, 595.

appellant, despite this tax discrimination, has phenomenally prospered seems wholly irrelevant, for the criterion of § 5219 is not whether national banks may prosper, despite state tax discrimination, but is rather that their shares "shall not be [taxed] at a greater rate than is assessed upon other moneyed capital . . . coming into competition with the business of national banks." But, if the Court's argument has any relevance, it should be observed that Michigan national banks have not increased assets proportionately to savings and loan associations in that State since the passage of Act 9 in 1953, for the amount of residential mortgage loans then held by such associations in that State of $433,000,000 has now grown to $1,700,000,000.

Finally, respondents argue that Congress, in restricting state taxation of federal savings and loan associations to a rate not "greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions," 12 U. S. C. § 1464 (h), evidenced its understanding and intention that savings and loan shares might be taxed at a lower rate than the shares of national banks, and thus impliedly repealed or modified § 5219 so far as competition with the business of national banks from that source is concerned.

There is no basis for an assumption that Congress, in so restricting state taxation of federal savings and loan associations, intended, so lightly and collaterally, to repeal or modify § 5219 by implication. It is obvious that, by § 1464 (h), Congress only restricted state taxation of federal savings and loan associations to a rate not greater than that assessed by the State against similar state associations. Therefore, if, as seems entirely clear from § 5219 and our cases, a State may not tax national bank shares at a greater rate than it taxes state savings and loan association shares, when the latter are used in significant competition with a substantial phase of the former's business,

it accordingly may not tax national bank shares at a greater rate than it taxes the shares of federal savings and loan associations which are similarly competing with a substantial phase of the business of national banks. For it may not, in such circumstances, lawfully prefer either over national bank shares with which they so compete. In other words, by § 1464 (h), Congress restricted the States from taxing federal savings and loan associations at a greater rate than state savings and loan associations, and by § 5219 it restricted the States from taxing national bank shares at a greater rate than they assess "upon other moneyed capital . . . coming into competition with the business of national banks." Hence, if a State taxes national bank shares at a greater rate than it assesses against the "moneyed capital" of savings and loan associations—state or federal—which is used in significant competition with a substantial phase of the business of such banks, it violates § 5219. That is exactly what Michigan has done here.

The proper interpretation and application of § 5219 to particular fact situations has been hammered out by the decisions of this Court, case by case, over the course of nearly a century. They have squarely met and decided, adversely to respondents, every question in this case. Finally, the *Hartford* and *Minnesota* cases brought a settled peace to this field that has endured until today—for 34 years. The obvious reason, I submit, is that they are right. There is, I respectfully submit, no call or reason to depart or deface those cases. And doing either will only again unsettle the law in a field where certainty of the applicable rules is nearly as important as their substance.

Under the law, settled for at least the last 34 years, appellant has proved every element of its case, and is entitled to recover. I would therefore reverse the judgment.

SILVERMAN ET AL. *v.* UNITED STATES.

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

No. 66. Argued December 5, 1960.—
Decided March 6, 1961.

At the trial in a federal district court in which petitioners were convicted of gambling offenses under the District of Columbia Code, there was admitted in evidence over their objection testimony of police officers describing incriminating conversations engaged in by petitioners at their alleged gambling establishment, which the officers had overheard by means of an electronic listening device pushed through the party wall of an adjoining house until it touched heating ducts in the house occupied by petitioners. *Held:* Such testimony should not have been admitted in evidence, and the convictions must be set aside. Pp. 506–512.

(a) Although much of what the officers heard and testified about consisted of petitioners' share of telephone conversations, it cannot be said that the officers intercepted those conversations and divulged their contents in violation of § 605 of the Communications Act of 1934. Pp. 507–508.

(b) On the record in this case, the eavesdropping was accomplished by means of an unauthorized physical penetration into the premises occupied by petitioners, which violated their rights under the Fourth Amendment. *Goldman* v. *United States,* 316 U. S. 129, and *On Lee* v. *United States,* 343 U. S. 747, distinguished. Pp. 509–512.

107 U. S. App. D. C. 144, 275 F. 2d 173, reversed.

Edward Bennett Williams argued the cause for petitioners. With him on the briefs was *Agnes A. Neill.*

John F. Davis argued the cause for the United States. On the briefs were *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg, J. F. Bishop* and *Julia P. Cooper.*

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioners were tried and found guilty in the District Court for the District of Columbia upon three counts of an indictment charging gambling offenses under the District of Columbia Code. At the trial police officers were permitted to describe incriminating conversations engaged in by the petitioners at their alleged gambling establishment, conversations which the officers had overheard by means of an electronic listening device. The convictions were affirmed by the Court of Appeals, 107 U. S. App. D. C. 144, 275 F. 2d 173, and we granted certiorari to consider the contention that the officers' testimony as to what they had heard through the electronic instrument should not have been admitted into evidence. 363 U. S. 801.

The record shows that in the spring of 1958 the District of Columbia police had reason to suspect that the premises at 408 21st Street, N. W., in Washington, were being used as the headquarters of a gambling operation. They gained permission from the owner of the vacant adjoining row house to use it as an observation post. From this vantage point for a period of at least three consecutive days in April 1958, the officers employed a so-called "spike mike" to listen to what was going on within the four walls of the house next door.

The instrument in question was a microphone with a spike about a foot long attached to it, together with an amplifier, a power pack, and earphones. The officers inserted the spike under a baseboard in a second-floor room of the vacant house and into a crevice extending several inches into the party wall, until the spike hit something solid "that acted as a very good sounding board." The record clearly indicates that the spike made contact with a heating duct serving the house occupied

by the petitioners, thus converting their entire heating system into a conductor of sound. Conversations taking place on both floors of the house were audible to the officers through the earphones, and their testimony regarding these conversations, admitted at the trial over timely objection, played a substantial part in the petitioners' convictions.[1]

Affirming the convictions, the Court of Appeals held that the trial court had not erred in admitting the officers' testimony. The court was of the view that the officers' use of the spike mike had violated neither the Communications Act of 1934, 47 U. S. C. § 605, cf. *Nardone* v. *United States,* 302 U. S. 379, nor the petitioners' rights under the Fourth Amendment, cf. *Weeks* v. *United States,* 232 U. S. 383.

In reaching these conclusions the court relied primarily upon our decisions in *Goldman* v. *United States,* 316 U. S. 129, and *On Lee* v. *United States,* 343 U. S. 747. Judge Washington dissented, believing that, even if the petitioners' Fourth Amendment rights had not been abridged, the officers' conduct had transgressed the standards of due process guaranteed by the Fifth Amendment. Cf. *Irvine* v. *California,* 347 U. S. 128.

As to the inapplicability of § 605 of the Communications Act of 1934, we agree with the Court of Appeals. That section provides that ". . . no person not being

[1] Alleging that the conversations thus overheard had been the basis for a search warrant under which other incriminating evidence was discovered at 408 21st Street, N. W., the petitioners sought unsuccessfully to suppress the evidence obtained upon execution of the warrant. It is the Government's position that there were ample grounds to support the search warrant, even without what was overheard by means of the spike mike. We deal here only with the admissibility at the trial of the officers' testimony as to what they heard by means of the listening device, leaving a determination of the warrant's validity to abide the event of a new trial.

authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person . . . ." While it is true that much of what the officers heard consisted of the petitioners' share of telephone conversations, we cannot say that the officers intercepted these conversations within the meaning of the statute.

Similar contentions have been rejected here at least twice before. In *Irvine* v. *California,* 347 U. S. 128, 131, the Court said: "Here the apparatus of the officers was not in any way connected with the telephone facilities, there was no interference with the communications system, there was no interception of any message. All that was heard through the microphone was what an eavesdropper, hidden in the hall, the bedroom, or the closet, might have heard. We do not suppose it is illegal to testify to what another person is heard to say merely because he is saying it into a telephone." In *Goldman* v. *United States,* 316 U. S. 129, 134, it was said that "The listening in the next room to the words of [the petitioner] as he talked into the telephone receiver was no more the interception of a wire communication, within the meaning of the Act, than would have been the overhearing of the conversation by one sitting in the same room."

In presenting here the petitioners' Fourth Amendment claim, counsel has painted with a broad brush. We are asked to reconsider our decisions in *Goldman* v. *United States, supra,* and *On Lee* v. *United States, supra.* We are told that re-examination of the rationale of those cases, and of *Olmstead* v. *United States,* 277 U. S. 438, from which they stemmed, is now essential in the light of recent and projected developments in the science of electronics. We are favoured with a description of "a device known as the parabolic microphone which can pick up a conversation three hundred yards away." We are told of a

"still experimental technique whereby a room is flooded with a certain type of sonic wave," which, when perfected, "will make it possible to overhear everything said in a room without ever entering it or even going near it." We are informed of an instrument "which can pick up a conversation through an open office window on the opposite side of a busy street." [2]

The facts of the present case, however, do not require us to consider the large questions which have been argued. We need not here contemplate the Fourth Amendment implications of these and other frightening paraphernalia which the vaunted marvels of an electronic age may visit upon human society. Nor do the circumstances here make necessary a re-examination of the Court's previous decisions in this area. For a fair reading of the record in this case shows that the eavesdropping was accomplished by means of an unauthorized physical penetration into the premises occupied by the petitioners. As Judge Washington pointed out without contradiction in the Court of Appeals: "Every inference, and what little direct evidence there was, pointed to the fact that the spike made contact with the heating duct, as the police admittedly hoped it would. Once the spike touched the heating duct, the duct became in effect a giant microphone, running through the entire house occupied by appellants." 107 U. S. App. D. C., at 150, 275 F. 2d, at 179.

Eavesdropping accomplished by means of such a physical intrusion is beyond the pale of even those decisions in

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[2] See Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, 85th Cong., 2d Sess., on Wiretapping, Eavesdropping, and the Bill of Rights; Hearings before Subcommittee No. 5 of the Committee on the Judiciary, House of Representatives, 84th Cong., 1st Sess., on Wiretapping; Dash, Schwartz and Knowlton, The Eavesdroppers (Rutgers University Press, 1959), pp. 346–358.

which a closely divided Court has held that eavesdropping accomplished by other electronic means did not amount to an invasion of Fourth Amendment rights. In *Goldman* v. *United States, supra,* the Court held that placing a detectaphone against an office wall in order to listen to conversations taking place in the office next door did not violate the Amendment. In *On Lee* v. *United States, supra,* a federal agent, who was acquainted with the petitioner, entered the petitioner's laundry and engaged him in an incriminating conversation. The agent had a microphone concealed upon his person. Another agent, stationed outside with a radio receiving set, was tuned in on the conversation, and at the petitioner's subsequent trial related what he had heard. These circumstances were held not to constitute a violation of the petitioner's Fourth Amendment rights.

But in both *Goldman* and *On Lee* the Court took pains explicitly to point out that the eavesdropping had not been accomplished by means of an unauthorized physical encroachment within a constitutionally protected area. In *Goldman* there had in fact been a prior physical entry into the petitioner's office for the purpose of installing a different listening apparatus, which had turned out to be ineffective. The Court emphasized that this earlier physical trespass had been of no relevant assistance in the later use of the detectaphone in the adjoining office. 316 U. S., at 134–135. And in *On Lee,* as the Court said, ". . . no trespass was committed." The agent went into the petitioner's place of business "with the consent, if not by the implied invitation, of the petitioner." 343 U. S., at 751–752.

The absence of a physical invasion of the petitioner's premises was also a vital factor in the Court's decision in *Olmstead* v. *United States,* 277 U. S. 438. In holding that the wiretapping there did not violate the Fourth Amendment, the Court noted that "[t]he inser-

tions were made without trespass upon any property of the defendants. They were made in the basement of the large office building. The taps from house lines were made in the streets near the houses." 277 U. S., at 457. "There was no entry of the houses or offices of the defendants." 277 U. S., at 464. Relying upon these circumstances, the Court reasoned that "[t]he intervening wires are not part of [the defendant's] house or office any more than are the highways along which they are stretched." 277 U. S., at 465.

Here, by contrast, the officers overheard the petitioners' conversations only by usurping part of the petitioners' house or office—a heating system which was an integral part of the premises occupied by the petitioners, a usurpation that was effected without their knowledge and without their consent. In these circumstances we need not pause to consider whether or not there was a technical trespass under the local property law relating to party walls.[3] Inherent Fourth Amendment rights are not inevitably measurable in terms of ancient niceties of tort or real property law. See *Jones* v. *United States,* 362 U. S. 257, 266; *On Lee* v. *United States, supra,* at 752; *Hester* v. *United States,* 265 U. S. 57; *United States* v. *Jeffers,* 342 U. S. 48, 51; *McDonald* v. *United States,* 335 U. S. 451, 454.

The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion. *Entick* v. *Carrington,* 19 Howell's State Trials 1029, 1066; *Boyd* v. *United States,* 116 U. S. 616, 626–630.[4] This

[3] See *Fowler* v. *Koehler,* 43 App. D. C. 349.

[4] William Pitt's eloquent description of this right has been often quoted. The late Judge Jerome Frank made the point in more contemporary language: "A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure

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Court has never held that a federal officer may without warrant and without consent physically entrench into a man's office or home, there secretly observe or listen, and relate at the man's subsequent criminal trial what was seen or heard.

A distinction between the detectaphone employed in *Goldman* and the spike mike utilized here seemed to the Court of Appeals too fine a one to draw. The court was "unwilling to believe that the respective rights are to be measured in fractions of inches." But decision here does not turn upon the technicality of a trespass upon a party wall as a matter of local law. It is based upon the reality of an actual intrusion into a constitutionally protected area. What the Court said long ago bears repeating now: "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure." *Boyd* v. *United States,* 116 U. S. 616, 635. We find no occasion to re-examine *Goldman* here, but we decline to go beyond it, by even a fraction of an inch.

Reversed.

MR. JUSTICE DOUGLAS, concurring.

My trouble with *stare decisis* in this field is that it leads us to a matching of cases on irrelevant facts. An electronic device on the outside wall of a house is a permissible invasion of privacy according to *Goldman* v. *United States,* 316 U. S. 129, while an electronic device that penetrates the wall, as here, is not. Yet the invasion

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in the knowledge that they cannot get at him without disobeying the Constitution. That is still a sizable hunk of liberty—worth protecting from encroachment. A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle." *United States* v. *On Lee,* 193 F. 2d 306, 315–316 (dissenting opinion).

of privacy is as great in one case as in the other. The concept of "an unauthorized physical penetration into the premises," on which the present decision rests, seems to me to be beside the point. Was not the wrong in both cases done when the intimacies of the home were tapped, recorded, or revealed? The depth of the penetration of the electronic device—even the degree of its remoteness from the inside of the house—is not the measure of the injury. There is in each such case a search that should be made, if at all, only on a warrant issued by a magistrate. I stated my views in *On Lee* v. *United States,* 343 U. S. 747, and adhere to them. Our concern should not be with the trivialities of the local law of trespass, as the opinion of the Court indicates. But neither should the command of the Fourth Amendment be limited by nice distinctions turning on the kind of electronic equipment employed. Rather our sole concern should be with whether the privacy of the home was invaded. Since it was invaded here, and since no search warrant was obtained as required by the Fourth Amendment and Rule 41 of the Federal Rules of Criminal Procedure, I agree with the Court that the judgment of conviction must be set aside.

MR. JUSTICE CLARK and MR. JUSTICE WHITTAKER, concurring.

In view of the determination by the majority that the unauthorized physical penetration into petitioners' premises constituted sufficient trespass to remove this case from the coverage of earlier decisions, we feel obliged to join in the Court's opinion.

EGAN *v.* CITY OF AURORA ET AL.

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

No. 121. Decided March 6, 1961.

Under 42 U. S. C. §§ 1983 and 1985, petitioner brought an action in a federal district court against a municipality and certain of its officials to recover damages for the deprivation of rights secured to him by the Constitution. The District Court dismissed the complaint and the Court of Appeals affirmed. *Held:* Certiorari granted; judgment in favor of the municipality affirmed; judgment in favor of the individual defendants vacated and the cause as to them remanded to the Court of Appeals for reconsideration. *Monroe* v. *Pape, ante,* p. 167. Pp. 514–515.

275 F. 2d 377, affirmed in part and vacated and remanded in part.

Joseph Keig, Sr., Edwin R. Armstrong and *Sol R. Friedman* for petitioner.

William C. Murphy for respondents.

PER CURIAM.

Petitioner, Mayor of the City of Aurora, brought this suit in the District Court against the City and certain of its officials for damages for deprivation of rights secured to him by the Constitution. He alleges unlawful action by the city and by individuals who are or who purport to be its officials (see 42 U. S. C. § 1983) and a conspiracy (see 42 U. S. C. § 1985). The District Court granted the motions to dismiss, 174 F. Supp. 794, and the Court of Appeals affirmed, 275 F. 2d 377, both decisions being prior to our opinion in *Monroe* v. *Pape, ante,* p. 167.

The dismissal as to the City of Aurora was correct, for we held in *Monroe* v. *Pape, supra,* that a municipality was not a "person" within the meaning of 42 U. S. C. § 1983. Insofar as any right claimed stems from petitioner's status as mayor under Illinois law it is precluded

from assertion here by *Snowden* v. *Hughes*, 321 U. S. 1. But as we read the complaint, the rights which petitioner claims he was deprived of are those that derive from the Fourteenth Amendment, particularly the right of free speech and assembly. The opinion of the Court of Appeals is not explicit as respects the grounds for dismissing the complaint under 42 U. S. C. § 1985. See *Snowden* v. *Hughes*, 321 U. S. 1; *Collins* v. *Hardyman*, 341 U. S. 651. The Court of Appeals, in affirming the judgment of the District Court on grounds other than the ones relied on by that court, seems to have decided the case on a construction of 42 U. S. C. § 1983 that apparently is inconsistent with the view we took in *Monroe* v. *Pape*, *supra*.

Accordingly we grant the petition for certiorari, affirm the judgment in favor of the City of Aurora, vacate the judgment of the Court of Appeals in favor of the individual respondents and remand the cause as respects them to the Court of Appeals for reconsideration in light of this opinion.

THORNTON *v.* OHIO.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 373, Misc. Decided March 6, 1961.

Appeal dismissed and certiorari denied.
Reported below: 171 Ohio St. 220, 168 N. E. 2d 410.

Albert E. Savoy for appellant.

PER CURIAM.

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

LAURENS FEDERAL SAVINGS & LOAN ASSN. *v.* SOUTH CAROLINA TAX COMMISSION ET AL.

CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA.

No. 126. Argued March 2, 1961.—Decided March 20, 1961.

Section 13 of the Federal Home Loan Bank Act, which exempts federal home loan banks and their "advances" from state taxation, bars a State from requiring a federal savings and loan association to pay documentary stamp taxes on promissory notes executed by the association in favor of a federal home loan bank to cover loans from the bank to the association. Pp. 518–524.

(a) The immunity granted to "advances" of a federal home loan bank by § 13 of the Federal Home Loan Bank Act is broad enough to bar state stamp taxes on such a loan. *Pittman* v. *Home Owners' Loan Corp.*, 308 U. S. 21. Pp. 519–522.

(b) Section 5 (h) of the Home Owners' Loan Act of 1933, which provides that no State shall tax a federal savings and loan association at a higher rate than it taxes other similar local mutual or cooperative thrift and home financing institutions, did not expressly or impliedly repeal § 13 of the Federal Home Loan Bank Act, which exempts "advances" of federal home loan banks from state taxation. Pp. 522–524.

236 S. C. 2, 112 S. E. 2d 716, reversed.

Frank K. Sloan argued the cause for petitioner. With him on the brief was *Ernest L. Folk III.*

James M. Windham, Assistant Attorney General of South Carolina, argued the cause for respondents. With him on the briefs were *Daniel R. McLeod,* Attorney General, and *Wm. H. Smith, Jr.,* Assistant Attorney General.

Solicitor General Rankin, Assistant Attorney General Rice, I. Henry Kutz, James P. Turner, Myron C. Baum and *William Massar* filed briefs for the United States, as *amicus curiae,* urging reversal.

MR. JUSTICE BLACK delivered the opinion of the Court.

The question presented is whether the State of South Carolina has power to require a Federal Savings and Loan Association located in that State to pay documentary stamp taxes on promissory notes executed by the Association in favor of a Federal Home Loan Bank to cover loans from the Bank to the Association.

Petitioner is a Federal Savings and Loan Association organized under the Home Owners' Loan Act of 1933 [1] and doing business in Laurens, South Carolina. It is also a member, with borrowing privileges, of the Federal Home Loan Bank of Greensboro, North Carolina, which was established under the Federal Home Loan Bank Act of 1932.[2] For the purpose of making mortgage money available in the community which it serves, petitioner Federal Savings and Loan Association has since August 12, 1953, secured "advances," or loans, from the Federal Home Loan Bank of Greensboro totalling $5,675,000, for which petitioner executed written promissory notes to the Bank as required by the 1932 Act. The State assessed against petitioner documentary stamp taxes on these notes of $2,270 under a state statute imposing a stamp tax on promissory notes at the rate of four cents on each $100.[3] Petitioner paid these taxes under protest and then brought the present action in the state court for refund of the payment,[4] claiming that the imposition of the taxes constituted an unlawful attempt by the State to tax the "advances" of the Federal Home Loan Bank of Greensboro in violation of the provision of the 1932

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[1] 48 Stat. 128, 12 U. S. C. §§ 1461–1468.

[2] 47 Stat. 725, 12 U. S. C. §§ 1421–1449.

[3] Code of Laws of South Carolina, § 65–688 (1952).

[4] Such suits are authorized by Code of Laws of South Carolina, § 65–2662 (1952).

Act exempting such banks from state taxation. This provision states, in pertinent part:

> "The bank, including its franchise, its capital, reserves, and surplus, *its advances,* and its income, shall be exempt from all taxation now or hereafter imposed by the United States . . . or *by any State* . . . ." 12 U. S. C. § 1433. (Emphasis supplied.)

The Supreme Court of South Carolina affirmed the judgment upholding the State's taxing power, basing its affirmance on two grounds.[5] It was of the opinion, first, that the exemption provision of the 1932 Act, although completely exempting the loans of the Federal Home Loan Bank from state taxation, did not cover the stamp taxes on the promissory notes securing the loans because these taxes were imposed upon the borrowing Savings and Loan Association rather than upon the lending Home Loan Bank and for this reason should not be considered taxes on the Bank's loans within the meaning of the 1932 provision. Secondly, the state court held that regardless of the original scope of the 1932 exemption, that exemption was implicitly repealed as to transactions like this one by the taxation provision of the Home Owners' Loan Act of 1933. We granted certiorari in order to determine whether the State has imposed a tax forbidden by Congress.[6]

The first question is whether the immunity granted "advances" of the Federal Home Loan Bank by the 1932 Act is broad enough to bar state stamp taxes on this loan transaction. We decided a very similar question in *Pittman* v. *Home Owners' Loan Corp.,* 308 U. S. 21. There the State of Maryland imposed a stamp tax upon the

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[5] 236 S. C. 2, 112 S. E. 2d 716.

[6] 364 U. S. 812.

recording of mortgages at the rate of 10 cents for each $100 of the principal amount of the mortgage indebtedness. The Home Owners' Loan Corporation sought to record a mortgage upon payment of the ordinary recording fee without payment of the additional state stamp tax. The mortgage had been issued to it as security for a loan which the Corporation had made under now defunct provisions of the Home Owners' Loan Act of 1933. Section 4 (c) of that Act provided that "[t]he Corporation, including . . . its loans" shall be exempt "from all taxation . . . now or hereafter imposed . . . by any State" except for real estate taxes. We unanimously affirmed the holding of the state court that this exemption provision, practically identical in language and substance to the exemption in 12 U. S. C. § 1433, precluded application of the recording tax to mortgages securing loans from the Corporation.

The state court in the present case, although drawing no distinction between the terms "loans" and "advances," nevertheless thought the *Pittman* decision inapplicable here because in that case the mortgage was presented for recording by the exempt lender itself (the Home Owners' Loan Corporation) while here the South Carolina tax was assessed against the borrowing petitioner association rather than against the exempt lender (the Home Loan Bank). We distinctly said in *Pittman,* however, that the fact that the state taxing statute did not require payment of the tax by the lender has "no determining significance," our reason being that " 'whoever pays it it is a tax upon the mortgage and that is what is forbidden by the law of the United States.' " [7] We went on in *Pittman* to recognize that the real question was whether the

[7] 308 U. S., at 31, citing *Federal Land Bank* v. *Crosland,* 261 U. S. 374, 378–379.

"critical term . . . '*loans*' . . . should be construed as covering the entire process of lending, the debts which result therefrom and the mortgages given . . . as security." [8] The question here is the same as to the synonymous term "advances" [9] and as to the promissory notes securing the advances, since the language of the exemption is equally broad. The factors given weight in the *Pittman* opinion in deciding that the exemption covered the entire loan transaction are also present here. The Act under consideration there required that the loans "be secured by a duly recorded home mortgage" just as here the Act requires the advances to be secured by the note or obligation of the borrower. Here, as we said in *Pittman,* therefore, the documents sought to be taxed "were indispensable elements in the lending operations authorized by Congress" [10] and were required for the protection of the lending institution. The tax in *Pittman* was "graded according to the amount of the loan" [11] and here too the face value of the notes is the measure of the tax.

While the question of the breadth of the exemption of "advances" in the 1932 Act thus is persuasively answered by our reasoning in *Pittman,* the same conclusion is called for by the language and legislative history of that Act as a whole. It set up a system of federally chartered

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[8] 308 U. S., at 31.

[9] The fact that the term used throughout the 1932 Act with reference to these transactions is "advances" rather than "loans" is not a significant distinction from *Pittman* but merely represents a congressional choice between synonyms, as was indicated by Senator Reed in introducing on the Senate floor the amendment which added the word "advances" to the exemption provision:

"MR. REED. We should not, of course, put the *loans* of this new bank in the position of being taxable in the several States." 75 Cong. Rec. 14659. (Emphasis supplied.)

[10] 308 U. S., at 32.

[11] 308 U. S., at 31.

Home Loan Banks for the purpose, as stated in the House and Senate Committee Reports, of placing "long-term funds in the hands of local institutions" in order to alleviate the pressing need of home owners for "low-cost, long-term, installment mortgage money" and to "decrease costs of mortgage money" with a "resulting benefit to home ownership in the form of lower costs and more liberal loans." [12] It is to this end that the Act authorizes the Federal Home Loan Banks to make "advances" of funds to eligible borrower institutions "upon the note or obligation" of the borrower secured primarily by mortgages on homes.[13] The exemption of these "advances" from taxation obviously is in keeping with the Act's overall policy of making these mortgage funds available at low cost to home owners. Regardless of who pays the documentary stamp taxes here at issue, the necessary effect of the taxes is to increase the cost of obtaining the advances of funds from the Home Loan Bank to be used in making loans to home owners. In its impact, therefore, this tax, whether nominally imposed on the Bank or on the petitioner, is bound to increase the cost of loans to home owners and thus contravene the basic purpose of Congress in insulating these advances from state taxation. We hold that it was error to construe the exemption provision of the 1932 Act as not broad enough to bar imposition of the State's stamp taxes on the notes which were an integral part of these loan transactions.

This leaves for consideration the state court's holding that, in instances where the borrower is a Federal Savings and Loan Association such as petitioner, the exemption conferred upon the entire loan transaction by the 1932 Act was impliedly repealed by the taxation provision in

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[12] H. R. Rep. No. 1418, 72d Cong., 1st Sess., pp. 8–10; S. Rep. No. 837, 72d Cong., 1st Sess., pp. 9–11.

[13] 12 U. S. C. §§ 1429–1430b.

the Home Owners' Loan Act of 1933. The court based this holding upon the following language of the 1933 Act:

> ". . . [N]o State . . . or local taxing authority shall impose any tax on such associations or their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions." 12 U. S. C. § 1464 (h).

This provision unequivocally bars discriminatory state taxation of the Federal Savings and Loan Associations. The state court held that this prohibition of discriminatory taxes also impliedly authorizes all nondiscriminatory state taxes imposed on these Federal Associations, thereby to that extent repealing the 1932 exemption. We agree with petitioner, however, that in enacting § 1464 (h) in 1933 Congress did not, either expressly or impliedly, repeal the provision of the 1932 Act which had exempted these loan transactions from state taxation. Clearly there is no express language providing for such repeal, and it is signficant that when other provisions of the 1932 Act were to be superseded by the 1933 Act they were repealed expressly and not by implication.[14] It also would be difficult to think of less apt circumstances for the finding of an implied repeal. These two Acts, both designed to provide home owners with easy credit at low cost, were passed within a year of each other on the basis of the same hearings and when read together form a consistent scheme in which the 1932 exemption provision contributes to the major purpose of low-cost credit precisely as it did before passage of the 1933 Act. Nor is there even an intimation in the legislative history of the 1933 Act of any intention to reduce the scope of the exempt status of Home Loan Banks. Indeed, the only

[14] See 48 Stat. 129; H. R. Rep. No. 55, 73d Cong., 1st Sess., p. 1; S. Rep. No. 91, 73d Cong., 1st Sess., p. 1.

comment that would seem to have any bearing on the matter is the statement in the House and Senate Committee Reports that the 1933 Act was to provide new means of "direct relief to home owners" without "otherwise disturb[ing] the functioning of the Federal home-loan bank system." [15] Moreover, a construction of the 1933 Act to permit state taxation of these loan transactions when the borrower is a Federal Savings and Loan Association would bring about an incongruous result. The States would still be barred by the exemption provision of the 1932 Act from taxing these transactions when the borrower is a state-chartered association.[16] To contend that the 1933 Act allows the State to tax Federal Associations on the loan transactions when it is barred by the 1932 Act from similarly taxing state-chartered associations is to urge the very kind of discriminatory taxation which the 1933 Act itself emphatically prohibits. And surely it would be completely unwarranted to construe the 1933 Act, which concerns only Federal Savings and Loan Associations, as eliminating the exemption on Home Loan Bank "advances" when the borrower is a state-chartered institution.

For all these reasons, the more sensible as well as the more natural conclusion is that in the 1933 Act Congress left unimpaired the exemption of these loan transactions from state taxation conferred by the 1932 Act. The judgment of the state court therefore is reversed and the cause remanded for proceedings not inconsistent with this opinion.

Reversed and remanded.

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[15] H. R. Rep. No. 55, 73d Cong., 1st Sess., p. 1; see S. Rep. No. 91, 73d Cong., 1st Sess., p. 1.

[16] The 1932 exemption of Home Loan Bank "advances" obviously does not in any way depend upon the fact that the borrower is a Federal Savings and Loan Association, as is made all the more evident by the fact that such Federal Associations did not come into existence until passage of the 1933 Act.

REYNOLDS *v.* COCHRAN, DIRECTOR OF DIVISION OF CORRECTIONS.

CERTIORARI TO THE SUPREME COURT OF FLORIDA.

No. 115. Argued March 2, 1961.—Decided March 20, 1961.

In his petition for habeas corpus, filed in a State Supreme Court, petitioner alleged that, after he had finished serving his terms for two separate felonies of which he had been convicted and after he had been released, he was arrested by state authorities, taken to another county, and there brought to trial two days after his arrest on a charge of being a "second offender" in violation of a state statute. He further alleged that he told the trial court that he had already retained counsel for his own defense, that his counsel was on the way and was due to arrive on the day of the trial, and that he asked that his trial be postponed until his counsel arrived; but that the court denied a continuance and proceeded to convict him on the record of his two previous convictions and his admission that he had been guilty of those offenses, and he was sentenced to imprisonment. The State Supreme Court dismissed his petition without a hearing. *Held:* The judgment is reversed and the cause is remanded for further proceedings. Pp. 526–533.

(a) Petitioner was entitled to an opportunity to prove his claim that he had been deprived of due process by the refusal of the trial judge to grant his motion for a continuance in order that he might have the assistance of the counsel he had retained in the proceedings against him. *Chandler* v. *Fretag*, 348 U. S. 3. Pp. 527–531.

(b) If the trial court erred in denying petitioner's motion for a continuance, that error was not harmless under the facts of this case. Pp. 531–533.

Reversed and remanded.

Claude Pepper, acting under appointment by the Court, 363 U. S. 824, argued the cause and filed a brief for petitioner.

George R. Georgieff, Assistant Attorney General of Florida, argued the cause for respondent. With him on the brief was *Richard W. Ervin*, Attorney General.

MR. JUSTICE BLACK delivered the opinion of the Court.

In 1956 petitioner was convicted of grand larceny in the Criminal Court of Polk County, Florida, and sentenced to serve two years in prison. In December 1957, with time for good behavior, petitioner was released from prison and discharged from custody as an absolutely free man. Some two months after his release and discharge, the Polk County prosecutor filed an information against petitioner charging that he "has been convicted of two (2) felonies under the laws of the State of Florida, contrary to Section 775.09, Florida Statutes, 1957 [1] . . . and against the peace and dignity of the State of Florida." The two convictions referred to were the 1956 conviction for grand larceny and a 1934 conviction for robbery for which petitioner had also completely served his sentence. Upon the filing of this information, petitioner was promptly arrested, arraigned and, according to the judgment of the trial court, "did then and there freely and voluntarily plead guilty to the Information filed." The court then proceeded to find petitioner "guilty of the offense of Second Offender" and ordered that for "said offense, [he] be confined in the State Prison of Florida at hard labor for a term of Ten (10) Years." [2] Petitioner later brought this

[1] "A person who, after having been convicted within this state of a felony or an attempt to commit a felony, or under the laws of any other state, government or country, of a crime which, if committed within this state would be a felony, commits any felony within this state is punishable upon conviction of such second offense as follows: If the subsequent felony is such that upon a first conviction the offender would be punishable by imprisonment for any term less than his natural life then such person must be sentenced to imprisonment for a term no less than the longest term nor more than twice the longest term prescribed upon a first conviction. . . ." Fla. Stat., 1957, § 775.09.

[2] The theory used by the State in its proceedings against petitioner, as disclosed by the quoted recitals of the information and judgment, seems to be completely at variance with that upon which multiple-

original petition for habeas corpus in the Supreme Court of Florida challenging his confinement under this judgment on the ground that it was not authorized by the Florida second-offender statute and that it violated both the State and the Federal Constitutions in several different respects. Despite the fact that none of the charges made by petitioner were denied by the State, the Florida court dismissed his petition without a hearing.[3] We granted certiorari to consider the correctness of this peremptory denial of the petition in view of the serious nature of the charges made.[4]

Since it is conceded by the State that the federal questions presented here were properly raised and passed on below, and since it is clear that for the purposes of this proceeding the facts set forth by petitioner must be accepted as true,[5] we go directly to the charges made in

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offender proceedings are normally based. For normally the punishment provided for in a multiple-offender statute is viewed as increased punishment for the last offense in the sequence. Here, on the other hand, the theory seems to have been that petitioner, by virtue of his convictions for two previous offenses, has committed a third and entirely separate offense—to quote the judgment, "the offense of Second Offender." Because of the disposition we make of this case on other grounds, however, we need not reach the questions posed as to the constitutionality of confinement based upon such a theory. In any event, prior opinions of the Supreme Court of Florida indicate that there might be room for considerable doubt whether § 775.09 authorizes confinement on such a theory. See *Cross* v. *State,* 96 Fla. 768, 119 So. 380; *Washington* v. *Mayo,* 91 So. 2d 621.

[3] The Supreme Court of Florida issued no opinion, the case being disposed of with the following order: "The above-named petitioner has filed a petition for writ of habeas corpus to be issued to the respondent in the above entitled cause, and upon consideration thereof, it is ordered that said petition be and the same is hereby denied."

[4] 363 U. S. 801.

[5] *Cash* v. *Culver,* 358 U. S. 633, 634; *Hawk* v. *Olson,* 326 U. S. 271, 273.

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the petition. Those charges were clearly stated by petitioner himself in the following excerpt from his rather crudely drawn application for habeas corpus:

> "Your petitioner would show this Honorable Court that at the time of his arrest he was living in Valusia County, DeLand Florida, that he was arrested without a warrant, that he was arrested on strength of a pick up order from Sheriff Office, Bartow, Polk County, Florida, that the arresting officer, a deputy sheriff of Volusia County did not know why he was arresting your petitioner and did not have a warrant to make a legal arrest, further that your petitioner was taken against his will across five (5) county lines. The said county lines being Volusia, Seminole, Orange, Osceala, into Polk County all of State of Florida, without his knowing why he was arrested or the arresting officer knowing why or what charge he was making arrest for; Your petitioner, was taken across the afore said counties by the arresting officer, a deputy sheriff of Volusia County, Florida.
>
> "Your petitioner contends that once he was in the clutches of the Criminal Court of Record in and for Polk County Florida; he was a convicted person before he was ever tried.
>
> "To support the above statement your petitioner would show that he was forced to go before the court against his will; that once before the court your petitioner informed the court that he then had legal counsel on the way to represent him in what ever charge may be; a better description of afore said known by Mrs. Sadie M. Bradley, 317 West Minncasata Avenue, DeLand Volusia County, Florida, and, D. C. Laird; attorney at Law, Lakeland Polk Florida. That petitioner had been arrested on the 18th day of February 1958 in Valusia County, and

> his attorney was to arrive this morning this date being the 20th day of February 1958, that after being so informed 'the trial court so stated to your petitioner 'you do not need counsel in this case.' Counsel would not be of any assistance you your petitioner, 'No point in calling a Doctor to a man already dead.'
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> "The trial court then proceeded to read off two (2) convictions from your petitioners record and then asked, You are guilty of these two convictions, are you not? Petitioner saying yes your Honor, but the court, I find, you guilty of being a 'second offender' and sentence you Stephen Franklin Reynolds to ten (10) years in State Prison . . . ."

On the basis of these facts, petitioner contends, among other things, that his confinement is not authorized by the Florida second-offender statute because he had already served the sentences imposed upon each of his prior convictions,[6] and that such confinement violates the state and federal constitutional prohibitions against *ex post facto* laws and against double jeopardy. It would, of course, be entirely inappropriate under the circumstances of this case for this Court to consider the

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[6] Section 775.09, set forth in n. 1, *supra*, is supplemented by a provision which, on its face at least, appears to condone imposition of second-offender penalties even at such a late date: "If *at any time* after sentence or conviction it shall appear that a person convicted of a felony has previously been convicted of crimes as set forth either in § 775.09 or § 775.10 the prosecuting attorney of the county in which such conviction was had, shall file an information accusing said person of such previous convictions, whereupon the court in which such conviction was had shall cause said person, *whether confined in prison or otherwise*, to be brought before it and shall inform him of the allegations contained in such information and of his right to be tried as to the truth thereof, according to law, and shall require such offender to say whether he is the same person as charged in such information or not." Fla. Stat., 1957, § 775.11. (Emphasis supplied.)

questions posed under state law. Nor do we find it necessary to consider these particular questions raised under the Federal Constitution beyond the observation that they certainly cannot fairly be characterized as frivolous.[7] For we think it clear that this case must be reversed for a hearing in order to afford petitioner an opportunity to prove his allegations with regard to another constitutional claim—that he was deprived of due process by the refusal of the trial judge to grant his motion for a continuance in order that he might have the assistance of the counsel he had retained in the proceeding against him.[8]

In *Chandler* v. *Fretag*,[9] we made it emphatically clear that a person proceeded against as a multiple offender has a constitutional right to the assistance of his own counsel in that proceeding. Under the facts of this case, as alleged in the petition filed before the Florida Supreme Court, the decision in *Chandler* is squarely in point and controlling. Under those facts, the statement of this Court in *Powell* v. *Alabama*,[10] which provided the basis of our holding in *Chandler*,[11] is wholly applicable: "If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be

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[7] The problem presented by these questions is rather dramatically stated by petitioner himself in his petition for habeas corpus: "In the instant case how can your petitioner know when in his life he is no longer subject to have his liberty translated to imprisonment, even after expiration of the present sentence, can he again be imprisoned without committing another crime as in the instant case?? Surely this Honorable Court will not condone this practice . . . ."

[8] As in *Chandler* v. *Fretag*, n. 9, *infra*, the petitioner here also alleged a denial of due process in that he was not given pretrial notice of the charge against him. But as in *Chandler*, we find it unnecessary to pass upon this contention. See 348 U. S. 3, 5–6, n. 4.

[9] 348 U. S. 3.

[10] 287 U. S. 45, 69.

[11] 348 U. S., at 9–10.

doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense."

The State seeks to avoid the application of the holding in *Chandler* on the basis of a contention that even if it was error for the trial judge to deny petitioner's motion for a continuance, that error was harmless under the facts of this case. The argument offered in support of this contention is that since petitioner admitted the only fact at issue in the proceeding—that he had been convicted of a previous felony in 1934 as charged in the information—a lawyer would have been of no use to him. We find this argument totally inadequate to meet the decision in *Chandler*. Even assuming, which we do not, that the deprivation to an accused of the assistance of counsel when that counsel has been privately employed could ever be termed "harmless error," [12] it is clear that such deprivation was not harmless under the facts as presented in this case. In the first place, petitioner asked for a continuance to enable him to consult with counsel before he admitted the truth of the charge of prior felony conviction. Thus, if petitioner had been allowed the assistance of his counsel when he first asked for it, we cannot know that counsel could not have found defects in the 1934 conviction that would have precluded its admission in a multiple-offender proceeding.[13]

Secondly, and perhaps even more importantly, the State's contention that this factual issue was the only

[12] It is significant that in *Chandler* we did not require any showing that the defendant there would have derived any particular benefit from the assistance of counsel.

[13] The proof of prior convictions in a second-offender proceeding may raise difficult evidentiary problems. See, *e. g., Shargaa* v. *State,* 102 So. 2d 809. Moreover, it can be presumed that if an accused second offender were able to make a successful collateral attack upon his first conviction, § 775.09 would not be applied. Cf. *Fields* v. *State,* 85 So. 2d 609.

issue in the proceeding seems to constitute an oversimplification of the matter. For, in addition to the constitutional issues mentioned above, able counsel appointed to represent petitioner in this Court has also pointed out that the proceeding involved a difficult question of statutory construction under Florida law. Counsel has pointed out, for example, that the Florida Supreme Court has never had occasion to pass upon the question whether the second-offender statute may be applied to reimprison a person who has completely satisfied the sentence imposed upon his second conviction and has been discharged from custody. In one case in which that question was argued, the Florida court found that it was not properly presented by the facts of the case before it and then went on to say: "On this question there is a difference of opinion among the members of the Court but, as it is not ripe for determination under the record here, no useful purpose could be served by discussing it." [14] Moreover, another decision of that court has indicated that the statute permitting the filing of an information against a second offender "at any time" [15] would not necessarily be interpreted so mechanically as to allow the second-offender statute to hang over a defendant's head to the end of his natural life.[16]

We of course express no opinion as to how this question of statutory construction should eventually be decided by the Florida courts. But its mere existence dramatically illustrates that even in the most routine-appearing proceedings the assistance of able counsel may be of

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[14] *Milan* v. *State*, 102 So. 2d 595, 596.

[15] See n. 6, *supra*.

[16] In *Ard* v. *State*, 91 So. 2d 166, the Florida Supreme Court held that the second-offender statute did not apply to a person who had concededly committed two felonies but who had been on probation for five years between the date of his conviction of the second felony and the filing of the second-offender information.

inestimable value. Plainly, such assistance might have been of great value to petitioner here. The allegations of his petition for habeas corpus indicated, if true, that he had been denied the assistance of counsel he had retained. He is entitled to a hearing to establish the truth of those allegations. The case must therefore be and is reversed and remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

ROGERS *v.* RICHMOND, WARDEN.

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

No. 40. Argued November 8–9, 1960.—Decided March 20, 1961.

At the trial in a state court in which petitioner was convicted of murder, two confessions which he claimed had been obtained by coercion were admitted in evidence over his objection. In determining that the confessions were "voluntary," both the trial court and the State Supreme Court, which affirmed the conviction, gave consideration to the question whether or not the confessions were reliable. Petitioner applied to a Federal District Court for a writ of habeas corpus, claiming that his conviction violated the Due Process Clause of the Fourteenth Amendment. On the basis of the record in the state trial court and that court's finding that the confessions were "voluntary," the District Court denied the writ and the Court of Appeals affirmed. *Held:* The admissibility of the confessions was not determined in accordance with standards satisfying the Due Process Clause of the Fourteenth Amendment; the judgment is reversed and the case is remanded to the Court of Appeals to be held in order to give the State an opportunity to retry petitioner, in the light of this opinion, within a reasonable time. In default thereof, petitioner is to be discharged. Pp. 534–549.

271 F. 2d 364, reversed.

Louis H. Pollak and *Jacob D. Zeldes* argued the cause and filed a brief for petitioner.

Abraham S. Ullman, State's Attorney for Connecticut, and *Robert C. Zampano* argued the cause for respondent. With them on the brief was *Arthur T. Gorman,* Assistant State's Attorney.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This case has a long history. It must be told with some particularity in order to unravel issues ensnarled in protracted litigation in both state and federal courts, turning essentially on the admissibility of confessions.

The Trial.—Petitioner was found guilty of murder by a jury in the Superior Court, New Haven County, Connecticut. The undisputed evidence leading to the conviction may be briefly told. On January 9, 1954, New Haven, Connecticut, police arrested petitioner on charges of committing attempted robbery and other crimes on that day at a local hotel. At the time of his arrest petitioner had in his possession a revolver. Subsequent ballistic tests tended to show that this weapon, which had been reported stolen from the home of petitioner's nephew, was used in a fatal shooting during a liquor store robbery in West Haven, Connecticut, on November 21, 1953, the same day its disappearance was discovered.

Petitioner was lodged in the New Haven County Jail pending trial on the charges that prompted his arrest. On January 30, 1954, he was transported without court order from the jail to the office of the State's Attorney for questioning in connection with the West Haven killing. The interrogation commenced at approximately 2 p. m. of that day and continued throughout the afternoon and evening. During the interrogation petitioner was allowed to smoke, was brought a sandwich and coffee, and was at no time subjected to violence or threat of violence.

After petitioner had been intermittently questioned without success by a team of at least three police officers from 2 p. m. to 8 p. m., New Haven Assistant Chief of Police Eagan was called in to conduct the investigation. When petitioner persisted in his denial that he had done the shooting, Chief Eagan pretended, in petitioner's hearing, to place a telephone call to police officers, directing them to stand in readiness to bring in petitioner's wife for questioning. After the passage of approximately one hour, during which petitioner remained silent, Chief Eagan indicated that he was about to have petitioner's wife taken into custody. At this point petitioner

announced his willingness to confess and did confess in a statement which was taken down in shorthand by an official court reporter.

The following morning the Coroner of New Haven County issued an order that petitioner be held incommunicado at the jail. When a lawyer associated with counsel whom petitioner had previously retained to defend him on the attempted robbery charge called at the jail to see petitioner, he was turned away on the authority of the Coroner's order. Petitioner was then transported to the County Court House for interrogation by the Coroner, who had been informed of his confession of the previous night. There he was put on oath to tell the truth but warned that he might refuse to say anything further and advised that he might obtain the assistance of counsel. Petitioner again confessed to the shooting in a statement recorded by the same official court reporter.

Petitioner's defense at the trial was directed toward discrediting the confessions as the product of coercion. In accordance with Connecticut practice, see, *e. g., State* v. *Willis,* 71 Conn. 293, 41 A. 820; *State* v. *Guastamachio,* 137 Conn. 179, 75 A. 2d 429, the trial judge heard the evidence bearing on admissibility of the confessions without the jury present. At this hearing petitioner testified that shortly after the commencement of the interrogation he asked to see a lawyer but was never permitted to do so. He also testified, with reference to Chief Eagan's pretense of bringing petitioner's wife in for questioning, that this move took the form of a threat to do so unless he confessed and that in making this threat Chief Eagan told him that he would be "less than a man" if he failed to confess and thereby caused her to be taken into custody. According to petitioner his wife suffered from arthritis, and he confessed to spare her being transported to the scene of the interrogation.

The State met petitioner's account with the testimony of Chief Eagan. He testified that petitioner made no request to see a lawyer during his presence in the room. However, it will be recalled that Chief Eagan did not arrive until the questioning had run a course of six hours and that petitioner claimed to have requested counsel during that period. Chief Eagan also denied that he had framed his remarks about bringing petitioner's wife in for questioning as a threat or that he had suggested that petitioner would be "less than a man," etc.

On the basis of the evidence summarized, the trial judge concluded that the confessions were voluntary and allowed them to go to the jury for consideration of the weight to be given them under all the circumstances that led to them. Conviction of petitioner for murder followed.

Review by the Connecticut Supreme Court.—On appeal, the Supreme Court of Errors of Connecticut, finding no error in the trial judge's admission of the confessions, affirmed the conviction, *State* v. *Rogers,* 143 Conn. 167, 120 A. 2d 409.

First Federal Habeas Corpus Proceeding.—In August of 1956, after satisfying the rule of *Darr* v. *Burford,* 339 U. S. 200, petitioner sought a federal writ of habeas corpus, basically on the ground that since the confessions were secured under circumstances rendering them constitutionally inadmissible, he was denied due process of law under the Fourteenth Amendment. The United States District Court for the District of Connecticut held a hearing based on the evidence offered by the parties. This evidence included excerpts from the record of the state proceedings as well as testimony of petitioner and various state officials. Neither petitioner nor respondent submitted the entire transcript of the state proceedings and the district judge did not call for it. Petitioner again testified that before he confessed he had requested an oppor-

tunity to confer with his lawyer. His testimony was flatly contradicted by three police officers called by the State's Attorney, none of whom had testified at the trial.

On the testimony before him, the district judge made findings which differed from those of the state trial judge in several important respects. He accepted petitioner's testimony that during the police interrogation he had asked to see his lawyer before he yielded to Chief Eagan's efforts to have him confess. He also found that the confession before the Coroner was the product of fear that repudiation of the earlier confession would lead the police to take his wife and foster children into custody. Accordingly, he concluded that "The confessions were the result of pressure overcoming Rogers' powers of resistance and were not voluntary on his part." *United States ex rel. Rogers* v. *Cummings,* 154 F. Supp. 663, 665. He therefore set aside the judgment of conviction.

First Court of Appeals Review.—On appeal, the United States Court of Appeals for the Second Circuit vacated the District Court's judgment, finding that it was error to hold a hearing *de novo* on issues of basic evidentiary fact that had been considered and adjudicated by the state courts. Relying on *Brown* v. *Allen,* 344 U. S. 443, the Court of Appeals concluded that the district judge should have called for the entire state record before reaching his decision. It held

> "that in the case now before us the nature of the issues presented and proper regard for the delicate balance of federal-state relationships required the District Judge to obtain and examine the State proceedings . . . . Only on an adequate state record can the District Court determine if a vital flaw exists which warrants correction by extrinsic evidence." *United States ex rel. Rogers* v. *Richmond,* 252 F. 2d 807, 810, 811.

The Court of Appeals remanded the case to the District Court with the following instructions:

> "Unless the judge below shall find in the record thus before him material which he deems to constitute 'vital flaws' and 'unusual circumstances' within the meaning of Brown v. Allen, we hold that he should make the necessary constitutional determinations exclusively on the basis of the historical facts as found by the State trial court." 252 F. 2d, at 811.

Certiorari Proceeding.—The petitioner sought certiorari here and we denied the petition with this *per curiam* opinion:

> "The petition for writ of certiorari is denied. We read the opinion of the Court of Appeals as holding that while the District Judge may, unless he finds a vital flaw in the State Court proceedings, accept the determination in such proceedings, he need not deem such determination binding, and may take testimony. See *Brown* v. *Allen,* 344 U. S. 443, 506, *et seq." Rogers* v. *Richmond,* 357 U. S. 220.

Second Federal Habeas Corpus Proceeding.—On remand, the district judge had before him the entire transcript of the state proceedings and on the basis of it dismissed the petition. *United States ex rel. Rogers* v. *Richmond,* 178 F. Supp. 69. While he adhered to his belief in petitioner's testimony in the first habeas corpus hearing, he now considered himself obliged to accept the state court's "Findings," rather than his own, on all points of historical fact "unless some vital flaw or unusual circumstance exists or some other basis appears for consideration of testimony outside the record." 178 F. Supp., at 71–72. The district judge found no such "flaw" or "circumstance" to permit retrial of the issue of the voluntariness of the confessions. He thus stated his position:

> "The issue of whether request for counsel was made and the issue of voluntary character of the confessions

> were fully and conscientiously tried by an experienced judge. Subsequent disagreement with his weighing of essentially similar evidence is not in itself sufficient under the limitations now imposed in the interest of proper balance in our dual court system, to permit consideration of the matter heard at the trial of the issue de novo here." 178 F. Supp., at 73.

On this basis the district judge could not find that the confessions were the product of coercion.

Second Court of Appeals Review.—The Court of Appeals for the Second Circuit affirmed this judgment, one judge dissenting. *United States ex rel. Rogers* v. *Richmond,* 271 F. 2d 364. The court held that the district judge was correct in restricting himself to the state court's "Findings" regarding petitioner's request to see his lawyer before confessing, and agreed with him that the facts in the record did not justify the conclusion that petitioner's confessions were not voluntary.

Because issues concerning the appropriate procedure for dealing with petitions for federal habeas corpus in relation to state convictions were urged, we brought the case here. 361 U. S. 959.

A critical analysis of the Connecticut proceedings leads to disposition of the case on a more immediate issue. For it compels the conclusion that the trial judge in admitting the confessions as "voluntary," and the Supreme Court of Errors in affirming the conviction into which the confessions entered, failed to apply the standard demanded by the Due Process Clause of the Fourteenth Amendment for determining the admissibility of a confession.

Our decisions under that Amendment have made clear that convictions following the admission into evidence of confessions which are involuntary, *i. e.,* the product of coercion, either physical or psychological, cannot stand. This is so not because such confessions are unlikely to be

true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth. See *Chambers* v. *Florida,* 309 U. S. 227; *Lisenba* v. *California,* 314 U. S. 219, 236; *Rochin* v. *California,* 342 U. S. 165, 172–174; *Spano* v. *New York,* 360 U. S. 315, 320–321; *Blackburn* v. *Alabama,* 361 U. S. 199, 206–207. And see *Watts* v. *Indiana,* 338 U. S. 49, 54–55. To be sure, confessions cruelly extorted may be and have been, to an unascertained extent, found to be untrustworthy. But the constitutional principle of excluding confessions that are not voluntary does not rest on this consideration. Indeed, in many of the cases in which the command of the Due Process Clause has compelled us to reverse state convictions involving the use of confessions obtained by impermissible methods, independent corroborating evidence left little doubt of the truth of what the defendant had confessed. Despite such verification, confessions were found to be the product of constitutionally impermissible methods in their inducement. Since a defendant had been subjected to pressures to which, under our accusatorial system, an accused should not be subjected, we were constrained to find that the procedures leading to his conviction had failed to afford him that due process of law which the Fourteenth Amendment guarantees.

In the present case, while the trial judge ruled that each of petitioner's confessions was "freely and voluntarily made and accordingly was admissible in evidence," he reached that conclusion on the basis of considerations that undermine its validity. He found that the pretense of bringing petitioner's wife in for questioning "had no tendency to produce a confession that was not in accord

with the truth." Again, in his charge to the jury, he thus enunciated the reasoning which had guided him in admitting the confessions for its consideration:

> "No confession or admission of an accused is admissible in evidence unless made freely and voluntarily and not under the influence of promises or threats. The fact that a confession was procured by the employment of some artifice or deception does not exclude the confession if it was not calculated, that is to say, if the artifice or deception was not calculated to procure an untrue statement. The motive of a person in confessing is of no importance provided the particular confession does not result from threats, fear or promises made by persons in actual or seeming authority. The object of evidence is to get at the truth, and a trick or device which has no tendency to produce a confession except one in accordance with the truth does not render the confession inadmissible . . . . The rules which surround the use of a confession are designed and put into operation because of the desire expressed in the law that the confession, if used, be probably a true confession."

The same view—that the probable reliability of a confession is a circumstance of weight in determining its voluntariness—entered the opinion of the Supreme Court of Errors of Connecticut in sustaining the trial judge's admission of the confession:

> "If we concede that this [petitioner's claims of illegal removal from jail and incommunicado detention] was all true and that such conduct was unlawful, it does not, standing alone, render the defendant's confessions inadmissible. The question is whether, under these and other circumstances of the case, that conduct induced the defendant to confess falsely that he

> had committed the crime being investigated. Unless it did, it cannot be said that its illegality vitiated his confessions." 143 Conn., at 173; 120 A. 2d, at 412.

And again:

> "Proper court authorization should have been secured before the defendant was removed from the jail. There is nothing about his illegal removal, however, to demonstrate that he was thereby forced to make an untrue statement. The same can be said concerning the refusal to admit counsel to see the defendant on the morning of January 31 before he was brought before the coroner." 143 Conn., at 173–174; 120 A. 2d, at 412.

Concerning the feigned phone call that petitioner's wife be brought in to headquarters, the Supreme Court concluded:

> "Here again, the question for the court to decide was whether this conduct induced the defendant to make an involuntary and hence untrue statement." 143 Conn., at 174; 120 A. 2d, at 412.

From a fair reading of these expressions, we cannot but conclude that the question whether Rogers' confessions were admissible into evidence was answered by reference to a legal standard which took into account the circumstance of probable truth or falsity.[1] And this is not a

[1] We find support for this conclusion in a line of Connecticut cases, some of which are cited by the Supreme Court of Errors in *Rogers*. See *State* v. *Willis*, 71 Conn. 293, 307–312, 41 A. 820, 824–826; *State* v. *Cross*, 72 Conn. 722, 727, 46 A. 148, 150; *State* v. *DiBattista*, 110 Conn. 549, 563, 148 A. 664, 669; *State* v. *Palko*, 121 Conn. 669, 680, 186 A. 657, 662; *State* v. *Tomassi*, 137 Conn. 113, 127–128, 75 A. 2d 67, 74; *State* v. *Guastamachio*, 137 Conn. 179, 182, 75 A. 2d 429, 431; *State* v. *Lorain*, 141 Conn. 694, 700, 109 A. 2d 504, 507. But see *State* v. *Wakefield*, 88 Conn. 164, 90 A. 230; *State* v. *Castelli*, 92 Conn. 58, 101 A. 476; *State* v. *Zukauskas*, 132 Conn. 450, 45 A. 2d 289; *State* v. *Buteau*, 136 Conn. 113, 68 A. 2d 681; *State* v. *Malm*,

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permissible standard under the Due Process Clause of the Fourteenth Amendment. The attention of the trial judge should have been focused, for purposes of the Federal Constitution, on the question whether the behavior of the State's law enforcement officials was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined—a question to be answered with complete disregard of whether or not petitioner in fact spoke the truth. The employment instead, by the trial judge and the Supreme Court of Errors, of a standard infected by the inclusion of references to probable reliability resulted in a constitutionally invalid conviction, pursuant to which Rogers is now detained "in violation of the Constitution." [2] A defendant has the right to be

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142 Conn. 113, 111 A. 2d 685, containing no reference to a "truth-falsity" test. Connecticut case law regarding the admissibility of confessions allegedly secured under circumstances which render them involuntary, or by means of promises, "artifices," "deception" or illegal police practices not amounting to coercion, is not free from uncertainty. We need not now endeavor to ascertain the extent to which, or the circumstances under which, Connecticut courts generally look to reliability as the criterion, alone or in conjunction with other criteria, of admissibility. If petitioner in the present case has been convicted through the use of a constitutionally impermissible standard, it is indifferent that Connecticut law, in its operation in other cases, may be unimpeachable. What that law does reveal of relevance here is that conceptions of probable truth or probable falsity have had and appear still to have a place in the reasoning of Connecticut judges in classes of cases having similarities to *Rogers* and relied on therein. Without meaning to consider the validity of such reasoning, under the Fourteenth Amendment, in any applications but the one now before us, we do derive from its currency in a continuing line of Connecticut decisions confirmation of our conclusion that the language of the trial judge and of the Supreme Court of Errors in the *Rogers* case is not the product of mere verbal inadvertence or unreflective phraseology, but an accurate embodiment of the mode of reasoning which led to holding that petitioner's confessions were admissible as "voluntary."

[2] 28 U. S. C. § 2241 (c)(3).

tried according to the substantive and procedural due process requirements of the Fourteenth Amendment. This means that a vital confession, such as is involved in this case, may go to the jury only if it is subjected to screening in accordance with correct constitutional standards. To the extent that in the trial of Rogers evidence was allowed to go to the jury on the basis of standards that departed from constitutional requirements, to that extent he was unconstitutionally tried and the conviction was vitiated by error of constitutional dimension.[3]

It is not for this Court, any more than for a Federal District Court, in habeas corpus proceedings, to make an independent appraisal of the legal significance of facts gleaned from the record after such a conviction. We are barred from speculating—it would be an irrational process—about the weight attributed to the impermissible consideration of truth and falsity which, entering into the Connecticut trial court's deliberations concerning the admissibility of the confessions, may well have distorted, by putting in improper perspective, even its findings of historical fact. Any consideration of this "reliability" element was constitutionally precluded, precisely because the force which it carried with the trial judge cannot be known.

As a matter of abstract logic it is arguable that Rogers may not have been deprived of a constitutional right, nor held in custody in violation of the Constitution, within 28 U. S. C. § 2241 (c)(3), solely because the Connecticut trial court applied an impermissible constitutional stand-

[3] Determination of the admissibility of confessions is, of course, a matter of local procedure. But whether the question of admissibility is left to the jury or is determinable by the trial judge, it must be determined according to constitutional standards satisfying the Due Process Clause of the Fourteenth Amendment. If the question of admissibility is left to the jury, they must not be misdirected by wrong constitutional standards; if the question is decided by the trial judge, he must not misdirect himself.

ard in admitting his confession—that Rogers was not so deprived, or so held, unless "in fact" his confession was coerced, a "fact" to be ascertained from the state record on direct review here, or *de novo* by a federal district judge in habeas corpus proceedings. Such a view ignores both the volatile and amorphous character of "fact" as fact is found by courts, and the distributive functions of the dual judicial system in our federalism for the finding of fact and the application of law to fact. In coerced confession cases coming directly to this Court from the highest court of a State in which review may be had, we look for "fact" to the undisputed, the uncontested evidence of record. See *Watts* v. *Indiana,* 338 U. S. 49, 50–52. This is all that we may look to, in the absence of detailed state-court findings of historical fact, because this Court cannot sit as a trial tribunal to hear and assess the credibility of witnesses. Of course, so-called facts and their constitutional significance may be so blended that they cannot be severed in consideration. And in any event, there must be a foundation in fact for the legal result. See *Thompson* v. *Louisville,* 362 U. S. 199. With due regard to these considerations, it would be manifestly unfair, and afford niggardly protection for federal constitutional rights, were we to sustain a state conviction in which the trial judge or trial jury—whichever is charged by state law with the duty of finding fact pertinent to a claim of coercion—passes upon that claim under an erroneous standard of constitutional law.[4] In such a case, to look

[4] A different question was implicitly presented in *Stroble* v. *California,* 343 U. S. 181. In that case the trial judge permitted the confessions to go to the jury under instructions which told it to disregard them if it found that they were not voluntarily made, and which adequately defined the "voluntariness" required by due process. See *Lyons* v. *Oklahoma,* 322 U. S. 596, 601. Thus, there was no flaw in the verdict as rendered. An erroneous legal standard for determining the admissibility of allegedly coerced confessions was interjected into the proceeding only at the level of the Supreme

to the wholly undisputed evidence, in the event conflicting evidence is presented, would deprive the state criminal defendant of the benefit of whatever credit his testimony might have been given by the state judge or the state jury, had the judge or jury employed a proper legal standard. Nor, in a case where specific findings are made concerning the allegedly coercive circumstances, can those findings be fairly looked to for the "facts," since findings of fact may often be (to what extent, in a particular case, cannot be known) influenced by what the finder is looking for. Historical facts "found" in the perspective framed by an erroneous legal standard cannot plausibly be expected to furnish the basis for correct conclusions if and merely because a correct standard is later applied to them.

Of course, where the issue of coercion is raised not on direct review in this Court but by petition for habeas corpus in a Federal District Court, one alternative method of proceeding impossible on direct review is available. The District Court might conceivably hold a hearing *de novo* on the issue of coercion. But such a procedure would neither adequately protect the federal rights of state criminal defendants nor duly take account of the large leeway which must be left to the States in their administration of their own criminal justice. A state defendant should have the opportunity to have all issues which may be determinative of his guilt tried by a state judge or a state jury under appropriate state procedures

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Court of California. Had the State Supreme Court, under similar circumstances reversed the conviction, not on the basis of local law but solely by reason of a misinterpretation of this Court's principles governing coerced confessions, and had the case been brought here for review on certiorari, the jury's verdict would have had to be reinstated. In any event, the question presented in *Stroble* was not faced squarely, and in illuminating isolation, in that case. Compare *Lee* v. *Mississippi*, 332 U. S. 742, with *Stroble*.

which conform to the requirements of the Fourteenth Amendment. Where he has not had that opportunity he should not be required to establish in a Federal District Court, before a federal district judge who must consider the issue of the voluntariness of the confession in a certain abstraction from the whole, living complex of a criminal trial, and perhaps many years after the occurrence of the events surrounding the confession, facts establishing coercion. On the other hand, the State, too, has a weighty interest in having valid federal constitutional criteria applied in the administration of its criminal law by its own courts and juries. To require a federal judge exercising habeas corpus jurisdiction to attempt to combine within himself the proper functions of judge and jury in a state trial—to ask him to approximate the sympathies of the defendant's peers or to make the rulings which the state trial judge might make, within the exercise of his discretion concerning the admission of evidence at the borderline of constitutional permissibility—is potentially to prejudice state defendants claiming federal rights and to pre-empt functions that belong to state machinery in the administration of state criminal law.

In view, therefore, of the constitutionally inadequate test applied by the Connecticut courts for determining whether the confessions were voluntarily given, we need not, on this record, consider whether the circumstances of the interrogation and the manner in which it was pressed barred admissibility of the confessions as a matter of federal law.[5] In the case before us, the state trial court

[5] We do not deal in this case with a situation in which the record—taking all of petitioner's evidence, and the inferences reasonably to be drawn from it, in the light most favorable to him—nevertheless fails to make out a claim of coercion. Since the issue of voluntariness might fairly have gone either way on the whole of the testimony, petitioner has clearly been prejudiced by the application of an erroneous standard to his federal claim by the state trial judge in allowing the confessions to go to the jury.

misconstrued the applicable law of the Constitution and was sustained in doing so by Connecticut's Supreme Court. It was error for the court below to affirm the District Court's denial of petitioner's application for habeas corpus. The case is remanded to the Court of Appeals to be held in order to give the State opportunity to retry petitioner, in light of this opinion, within a reasonable time. In default thereof the petitioner is to be discharged.

Reversed.

MR. JUSTICE STEWART, whom MR. JUSTICE CLARK joins, dissenting.

Although the matter is not free from doubt, I accept the Court's conclusion that both state courts gave some weight to the probable truth of the confessions in determining that they were voluntary.* But I cannot accept the proposition that the petitioner is entitled to his release by way of federal habeas corpus merely because of the state courts' failure properly to verbalize the correct Fourteenth Amendment test of admissibility. Cf. *Stroble* v. *California,* 343 U. S. 181.

The writ can be extended to Rogers only if he is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U. S. C. § 2241 (c)(3). See *Johnson* v. *Zerbst,* 304 U. S. 458, 465–468; *Hawk* v. *Olson,* 326 U. S. 271, 274–276. In the context of the present case this means that the writ should be granted, if, and

*In Connecticut the jury plays no part in determining the voluntariness of a confession. Connecticut follows the orthodox rule of leaving the determination of admissibility exclusively to the trial judge. *State* v. *McCarthy,* 133 Conn. 171, 177, 49 A. 2d 594, 597; *State* v. *Guastamachio,* 137 Conn. 179, 182, 75 A. 2d 429, 431; *State* v. *Lorain,* 141 Conn. 694, 699, 109 A. 2d 504, 507. Compare *Stein* v. *New York,* 346 U. S. 156. If a confession is admitted, the jury is left to weigh its truthfulness as it weighs other evidence. There is no claim in this case of any error in the instructions to the jury.

only if, a coerced confession was in fact admitted at the trial. See *Leyra* v. *Denno,* 347 U. S. 556. I think, as did the District Court, that in deciding that question the appropriate inquiry for the habeas corpus court is not what test of admissibility the State applied or purported to apply, but whether a confession was admitted which was in fact involuntary under Fourteenth Amendment standards.

I would, therefore, remand the case to the District Court for a plenary hearing to determine this question. Where, as here, the state trial court's determination of admissibility was at least partly affected by the impermissible factor of probable reliability, I think there can be no question of the federal court's duty to hold such a hearing. While the state court's failure to enunciate the correct standard was not itself an error of constitutional dimensions, it did make impossible the federal court's unquestioning reliance on the trial court's findings of fact. Even the most narrow view of what was said in *Brown* v. *Allen,* 344 U. S. 443, would require a plenary hearing in these circumstances.

MILANOVICH ET UX. *v.* UNITED STATES.

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

No. 79. Argued February 20, 1961.—Decided March 20, 1961.

Petitioners, husband and wife, were both convicted in a Federal District Court for stealing government property in violation of 18 U. S. C. § 641, and the wife was convicted also on a separate count for receiving and concealing part of the same property in violation of the same section. On the larceny conviction, the husband was sentenced to imprisonment for five years and the wife for ten years. In addition, the wife received a five-year concurrent sentence on the receiving count. The Court of Appeals sustained both convictions on the larceny count; but it reversed the wife's conviction on the receiving count. It set aside the wife's five-year sentence for receiving; but it let stand her ten-year sentence for larceny. *Held:* The judgment as to the husband is affirmed; but the judgment as to the wife is set aside and the cause is remanded to the District Court for a new trial. Pp. 552–556.

(a) The wife could not validly be convicted under 18 U. S. C. § 641 both for stealing government property and for receiving and concealing the same property. *Heflin* v. *United States,* 358 U. S. 415. Pp. 553–554.

(b) The trial judge erred in not charging that the jury could convict the wife of either larceny or receiving, but not of both. Pp. 554–555.

(c) Since there is no way of knowing whether a properly instructed jury would have found the wife guilty of larceny or of receiving or of neither, the mere setting aside of the shorter concurrent sentence for receiving did not suffice to cure any prejudice resulting from the judge's failure to instruct the jury properly. Pp. 555–556.

275 F. 2d 716, affirmed in part and set aside in part.

J. Hubbard Davis and *Raymond W. Bergan* argued the cause for petitioners. *Russell T. Bradford* was on the petition for certiorari. *Mr. Davis* filed a brief on the merits.

J. F. Bishop 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 STEWART delivered the opinion of the Court.

The petitioners are husband and wife. They were both convicted in a Federal District Court for stealing several thousand dollars in currency from a commissary store at a United States Naval Base. The wife was convicted also on a separate count for receiving and concealing the stolen currency.[1] Both petitioners were sentenced to prison on the larceny conviction, the husband for a term of five years, and the wife for a ten-year term. In addition, the wife received a five-year concurrent sentence on the receiving count.

Throughout the trial counsel for the petitioners consistently maintained the position that a thief could not be convicted of receiving from himself.[2] Although direct-

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[1] The statute under which the petitioners were convicted is 18 U. S. C. § 641. It provides:

"Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

"Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both."

[2] "[W]e feel, sir—for the jury to be considering both receiving and stealing—that both charges are inconsistent and if the evidence is to

ing an acquittal on the receiving count in the husband's case, the trial judge overruled a similar motion on behalf of the wife. Counsel then clearly indicated his intention to request that the jury be instructed that it could not find the wife guilty of both stealing and receiving.[3] The trial judge responded by pointing out that the Fourth Circuit had decided, in *Aaronson* v. *United States,* 175 F. 2d 41, that "it is possible that as long as the person did not actually participate in the actual taking of the goods, that same person may be found guilty of receiving and concealing and may also be found guilty as an accessory before the fact or as an aider and an abetter of the actual charge of theft." Faced with this controlling Fourth Circuit authority, counsel did not engage in the futile exercise of submitting a more formal request for such instructions.

When the case reached the Court of Appeals, that court put aside its decision in the *Aaronson* case, in the light of this Court's decision in *Heflin* v. *United States,* 358 U. S. 415, which had been announced in the meantime. In *Heflin* we held that a defendant could not be convicted and cumulatively sentenced under 18 U. S. C. § 2113 for both robbing a bank and receiving the proceeds of the robbery. Relying on that decision, the court set aside the sentence imposed upon the wife for receiving. 275 F. 2d 716. It was the court's view that "in the absence of a contrary indication by Congress, a defendant charged with offenses under statutes of this character may not be convicted and punished for steal-

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be believed that these people are participants, then they cannot be guilty of receiving, and if they are guilty of receiving, they cannot be guilty of participating."

[3] "Your Honor, we will ask the Court to instruct the jury that inasmuch as they are inconsistent counts that they can only come back, if they come back with a verdict of guilty, as to one or the other, but not both."

ing and also for receiving the same goods." 275 F. 2d, at 719. Although *Heflin* involved a different section of the criminal code, the court found "no differences between the two statutes or their legislative histories justifying divergent interpretations in respect to the issue before us."

In this view we think that the Court of Appeals was correct. As the court recognized, the question is one of statutory construction, not of common law distinctions. Compare *Metcalf* v. *State,* 98 Fla. 457, 124 So. 427; *Smith* v. *State,* 59 Ohio St. 350, 52 N. E. 826; *Jenkins* v. *State,* 62 Wis. 49, 21 N. W. 232; *Regina* v. *Hilton,* Bell C. C. 20, 169 Eng. Rep. 1150, with *Allen* v. *State,* 76 Tex. Cr. R. 416, 175 S. W. 700; *Regina* v. *Perkins,* 2 Den. C. C. 458, 169 Eng. Rep. 582; *Regina* v. *Coggins,* 12 Cox C. C. 517. With respect to the receiving statute before us in *Heflin,* we decided that "Congress was trying to reach a new group of wrongdoers, not to multiply the offense of the . . . robbers themselves," 358 U. S., at 420. We find nothing in the language or history of the present statute which leads to a different conclusion here. As in *Heflin,* the provision of the statute which makes receiving an offense came into the law later than the provision relating to robbery.[4]

It is now contended that setting aside the sentence on the receiving count was not enough—that the conviction on the larceny count must also be reversed, and the case remanded for a new trial. The argument is that although the evidence was sufficient to support a conviction for either larceny or receiving,[5] the judge should have in-

[4] The paragraph making it an offense to steal government property had its genesis in the Act of March 2, 1863, c. 67, 12 Stat. 696, 698. The paragraph as to receivers originated in the Act of March 3, 1875, c. 144, § 2, 18 Stat. 479.

[5] It is acknowledged here that the evidence was sufficient to support a jury finding that both petitioners aided and abetted the larceny, and thus were guilty as principals under 18 U. S. C. § 2. It is also

structed the jury that a guilty verdict could be returned upon either count but not both. It is urged that since it is now impossible to say what verdict would have been returned by a jury so instructed, and thus impossible to know what sentence would have been imposed, a new trial is in order. This was the view of Chief Judge Sobeloff, dissenting in the Court of Appeals. 275 F. 2d, at 721.

We think that the point is well taken. In *Heflin* we were not concerned with the correctness of jury instructions, since that case arose out of a collateral proceeding to correct an illegal sentence where the petitioner was asking only that the cumulative punishment imposed for receiving be set aside. In this case, by contrast, a direct review of the conviction brings here the entire record of the trial. We hold, based on what has been said as to the scope of the applicable statute, that the trial judge erred in not charging that the jury could convict of either larceny or receiving, but not of both.

Though setting aside the shorter concurrent sentence imposed upon the wife for receiving, the Court of Appeals left standing a ten-year prison term for larceny, double the punishment that had been imposed upon the husband for the identical offense. Yet there is no way of knowing whether a properly instructed jury would have found the wife guilty of larceny or of receiving (or, conceivably, of neither). Thus we cannot say that the mere setting aside of the shorter concurrent sentence sufficed to cure any prejudice resulting from the trial judge's failure to instruct the jury properly. It may well be, as the Court of Appeals assumed, that the jury, if given the choice, would have rendered a verdict of guilty on the larceny count, and

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conceded that the evidence was sufficient to support the wife's conviction for receiving and concealing the stolen property (a substantial amount of silver currency having been found in a suitcase in her home two weeks after the robbery).

that the trial judge would have imposed the maximum ten-year sentence on that count alone. But for a reviewing court to make those assumptions is to usurp the functions of both the jury and the sentencing judge.

We find no merit in the petitioners' argument as to the trial court's conduct with respect to cautionary instructions to the witnesses for the Government. Accordingly, the judgment as to Mike Milanovich is affirmed. For the reasons stated, the judgment as to Virginia Milanovich is set aside, and her case remanded to the District Court for proceedings consistent with this opinion.

It is so ordered.

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

This is a prosecution brought under 18 U. S. C. § 641 [1] upon an indictment containing several counts. One charged the defendant Virginia Milanovich, petitioner herein, with the theft of government property; another charged her with receiving the stolen property with an intent to convert it to her own use. Both counts were allowed to go to the jury which explicitly found the defendant guilty on each of the two counts.

[1] "Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

"Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—

"Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both."

This was the evidence on which the jury must have based their verdict against the defendant. She and her husband, as owners of an automobile, transported three others under an arrangement whereby the three were to break into a United States naval commissary building with a view to stealing government funds. Defendant and her husband were to remain outside for the return of their accomplices after the accomplishment of the theft. In fact, for one reason or another, husband and wife drove off without awaiting the return of their friends. Not finding the automobile where they had left it, the thieves buried the booty. No share of the stolen money ever touched the hand of petitioner or was in any sense received by her until seventeen days later when, after she had removed some of the booty from the base, it was soon after discovered by FBI agents during a legal search of the premises. Since she herself was not an active participant in the breaking in and thieving, she was amenable to § 641 because she, as an accessory, was legally deemed a principal under 18 U. S. C. § 2.[2] On this basis the trial judge submitted the case to the jury and the jury was enabled to find her guilty of the substantive offense of stealing government property, as well as to return a verdict of guilty on the receiving charge. The trial judge then sentenced the defendant on each of the counts. Because of the extensive criminal record of the defendant, he imposed a sentence of ten years on the thieving count and five years on the receiving count, the sentences to run concurrently.

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[2] "(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

"(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

The Court of Appeals, drawing on our decision in *Heflin* v. *United States,* 358 U. S. 415, deemed it necessary to set aside the sentence imposed on the receiving count. It read *Heflin* as holding that the crime of receiving was solely directed to those who were not convicted of stealing; the latter conviction was therefore invalidated. The Court, likewise relying on *Heflin,* today holds that since the jury should have been instructed that they had power to return a verdict of guilty on only one count, the proceedings against the defendant must start all over again, since a reviewing court cannot predict what the jury would have done under proper instructions.

Both of these conclusions rest, I believe, on a wholly unwarranted reliance on *Heflin.* They disregard the only issue that was before the Court in that case, and thereby misconceive its holding. Today's decision reflects the common-law doctrine of merger and the consequences of such merger on the requirements of criminal procedure—specifically, what separate counts may be laid in an indictment and the duty of a trial judge in charging the jury the kind of a verdict they may return to an indictment of multiple counts.

It is hornbook law that a thief cannot be charged with committing two offenses—that is, stealing and receiving the goods he has stolen. *E. g., Cartwright* v. *United States,* 146 F. 2d 133; *State* v. *Tindall,* 213 S. C. 484, 50 S. E. 2d 188; see 2 Wharton, Criminal Law and Procedure, § 576; 136 A. L. R. 1087. And this is so for the commonsensical, if not obvious, reason that a man who takes property does not at the same time give himself the property he has taken. In short, taking and receiving, as a contemporaneous—indeed a coincidental—phenomenon, constitute one transaction in life and, therefore, not two transactions in law. It also may well be that a person who does not himself take but is a contemporaneous par-

ticipant as an aider and abettor in the taking is also a participant in a single transaction and therefore has committed but a single offense. *Regina* v. *Coggins,* 12 Cox C. C. 517; *Regina* v. *Perkins,* 2 Den. C. C. 458, 169 Eng. Rep. 582; *Rex* v. *Owen,* 1 Moody C. C. 96, 168 Eng. Rep. 1200. In such a case, the jury must be told that the taking and receiving, being but a single transaction, constitute, of course, only one crime. See *Commonwealth* v. *Haskins,* 128 Mass. 60. (This, of course, does not bar Congress from outlawing and punishing as separate offenses the severable ingredients of one compound transaction. See *Gore* v. *United States,* 357 U. S. 386.)

The case before us presents a totally different situation—not a coincidental or even a contemporaneous transaction, in the loosest conception of contemporaneity. Here we have two clearly severed transactions. The case against the defendant—and the only case—presented two behaviors or transactions by defendant clearly and decisively separated in time and in will. The intervening seventeen days between defendant's accessorial share in the theft and her conduct as a recipient left the amplest opportunities for events outside her control to frustrate her hope of sharing in the booty, or ample time for her to change her criminal purpose and avail herself of a *locus poenitentiae.* Two larcenies, separated in time, would not be merged; what legal difference between the two situations here?

It surely is fair to say that in the common understanding of men such disjointed and discontinuous behaviors by Mrs. Milanovich—(1) bringing thieves to the scene of their projected crime and departing without further ado before the theft had been perpetrated, and (2) taking possession seventeen days later of part of the booty—cannot be regarded as a single, merged transaction in any intelligible use of English. And that which makes no sense to the common understanding surely is not required

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by any fictive notions of law or even by the most sentimental attitude toward criminals. I venture to believe that not a single case concerned with a situation comparable to that now before the Court can be found in the law reports of England, of any of the States of this country, or of the federal courts, in which it was held or suggested that two disjointed, decisively separated manifestations of conduct constitute as a matter of law a single, fused transaction. An ample canvass of the reports has certainly not revealed the existence of such a case, and one reads the opinion of the Court in vain to find a suggestion that any such precedent is available.

One can say with confidence that *Heflin* is no warrant for the conclusion pronounced by the Court. There was not the remotest suggestion in the petition that brought that case here, in the briefs that were submitted before argument, in the oral argument, or in the opinion which formulated the decision, that the case was concerned with the power of the court to submit the several counts to the jury and the right of the jury to convict on separate counts for conduct charging separate transactions clearly separated in fact. In *Heflin,* the jury convicted defendant on separate counts of bank robbery and receiving stolen money. We held that we could find "no purpose of Congress to pyramid penalties for lesser offenses following the robbery," and therefore ruled against the cumulation of punishments, but found no impropriety in submitting both counts to the jury. I find not a word, not a hint, not a subtle innuendo suggesting that the case dealt with criminal procedure—that is, with submission of different counts to a jury, with the appropriateness of the judge's charge to the jury, or with the right of a jury to bring in separate verdicts on separate counts on the basis of evidence justifying such submission and such verdicts.

Heflin is one of a recent series of cases having to do with what the Court in *Prince* v. *United States,* 352 U. S.

322, 325, called "fragmentation of crimes for purposes of punishment." Beginning with *Bell* v. *United States,* 349 U. S. 81, these cases concerned the propriety of cumulative sentences within different statutory frameworks.[3] "It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment . . . [when] Congress does not fix the punishment for a federal offense clearly and without ambiguity . . . ." *Bell* v. *United States, supra,* at 83–84. In not one of these cases will there be found a word having to do with how crimes should be charged, how submitted to the jury, or what verdicts the jury may return. *Heflin,* like the rest of these cases, was concerned with the duty of the trial judge in sentencing after the jury was through with its job. Indeed, in all these cases, there were several counts on which the jury found a verdict and the issue arose not as to the propriety of leaving all the counts to the jury, but what sentence should be imposed after the verdict had been returned.

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[3] In *Bell,* the defendant pleaded guilty to an indictment under the Mann Act which charged him in two counts with transporting two women, respectively, for immoral purposes on one trip. This Court held that Congress did not intend to make "simultaneous transportation of more than one woman in violation of the Mann Act liable to cumulative punishment for each woman so transported." 349 U. S., at 82–83.

In *Prince,* two counts of an indictment charging, respectively, entering a bank with intent to rob and robbery were submitted to the jury, which returned verdicts of guilty on both. The Court held that the sentences could not be cumulated and remanded the case to the District Court for resentencing, but made no reference to the fact that two counts were laid and found by the jury.

In *Callanan* v. *United States,* 364 U. S. 587, defendant was convicted on separate counts for conspiracy and extortion. In view of the historic distinctiveness of a conspiracy from the substantive offense which is its object, we held that Congress had made allowable consecutive sentences under the applicable statute.

To draw from *Heflin* the doctrine that an aider and abettor to a theft who at an appreciably later time receives some of the stolen goods may not be charged on separate counts for both transactions, or that a judge may not leave both counts for a jury verdict of guilt on either one or both, when no such question was in issue or adverted to in *Heflin,* is to disregard the whole philosophy of our law based on precedents. It is to base reliance on a case for a new doctrine when that case affords no sustenance for it.

I agree with the District Court in the imposition of two sentences to run concurrently.[4]

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

My duty here is to help fashion rules which will assure that every person charged with an offense receives a fair and impartial trial. But that obligation does not require my ferreting out of the record technical grounds for reversing a particular conviction, grounds which could not possibly have affected the jury's verdict of guilt as a factual determination. If the Government perseveres, the Court's order contemplates a new trial for one of five safecrackers who beyond any evidentiary doubt is guilty of aiding and abetting in looting a government safe of about $14,000, and of thereafter receiving part of the proceeds. The case was tried before a jury for 10 days with scrupulous adherence to proper procedure. Judge Hoffman gave a clear and, I think, correct charge to which petitioner made no objection on the ground upon which the Court now bases its reversal. Nor did petitioner offer a proposed instruction covering that issue. Furthermore, the motion for new trial, as

[4] I agree with this Court that the husband's claim of trial error is without merit.

set forth in the record, urged no such ground as error. Nonetheless, the Court reverses, saying that "counsel for the petitioners consistently maintained the position" throughout the trial "that a thief could not be convicted of receiving from himself." Judge Hoffman did not try the case, nor was it submitted to the jury, on that theory. The record shows, as my Brother FRANKFURTER points out, that beyond question Mrs. Milanovich took no part in the actual physical looting of the safe, and first received any of the stolen money more than two weeks later, not from herself, but from where the safecrackers had buried it. It was on that theory, to which petitioner made no objection, that Judge Hoffman submitted the case to the jury.

With all deference I must point out that in support of its view as to Mrs. Milanovich the Court has quoted merely an excerpt from a statement of this petitioner's counsel, *ante*, p. 552, n. 2, made in chambers on his motion to require the United States Attorney to elect as between the two counts of aiding and abetting, and receiving. Admittedly, this motion was not well taken. However, during that presentation counsel stated: "we *will* ask the Court to instruct the jury" that it cannot find petitioner guilty on both counts. (Emphasis supplied.) But, after the motion to elect was denied, no such instruction was offered nor was there made on that ground any objection to the charge omitting such instruction. Now petitioners have chosen to abandon a claim of error in the denial of their motion to elect, and rely instead upon error in the charge, although no objection had been made on that ground.

Moreover, the charge as given could not possibly have prejudiced Mrs. Milanovich on sentence. She was found guilty both of aiding and abetting, and of thereafter receiving part of the stolen loot. She now stands, after the action of the Court of Appeals, sentenced only on the

aiding and abetting count. Each count carried the same possible penalty, and, even if the case had been submitted to the jury as is now required, it seems rather unreal for us to consider as anything more than so remotely possible as to be highly improbable, that in sentencing this petitioner on the single count the trial judge, who would nonetheless have heard all the evidence on both counts, would be more likely to impose a lesser sentence than the 10 years already given.

The Court does not mention the dilemma which its ruling produces. It says the jury should have been instructed that a guilty verdict could be returned on either count, but not both. This would require the jury to return a not guilty verdict on one count. Here, where the jury had in fact found Mrs. Milanovich guilty of both offenses, it could yet be required to return a false verdict, *i. e.*, false in fact even if true in law, on one of them. Except for its imperfect analogy to the case of factually inconsistent counts charging lesser-included offenses of the main count (as in first degree murder), in which the trial judge gives the jury instructions to be applied successively, the rule suggested today is unheard of in our jurisprudence. For here the jury is invited to consider counts not factually inconsistent, and in such sequence as it chooses, with no more reason to convict on one rather than another except its election on how to characterize the grounds supporting petitioner's imprisonment. Since such a result is required by the present disposition, it would have been better to rule that the prosecutor must elect between the counts, as petitioner originally wished.

As I see the case, however, the jury could not on the evidence here have found the petitioner not guilty, as a matter of fact, on the aiding and abetting count, and guilty on the receiving one. To be guilty of receiving she must have had knowledge of the stolen character of the money taken from the safe. In this case the only

means through which the fact of this requisite knowledge was demonstrated was the clear and convincing proof given by her partners in the crime whose testimony beyond any peradventure proved her guilty of both offenses. How, I ask, could she have been harmed by the jury finding her guilty of both offenses rather than choosing between the two?

To me it is clear that where the evidence is sufficient the jury should be left free, as it always has been, to find the fact of guilt. If in law the verdicts so found, although proper determinations of fact, are not all enforceable, the dilemma is adequately resolved by requiring the trial judge to forego sentencing on the unenforceable verdicts.

For these reasons, and those of my Brother FRANKFURTER, whom I join, I dissent.

YALE TRANSPORT CORP. ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 584. Decided March 20, 1961.

185 F. Supp. 96, affirmed.

Herbert Burstein for appellants.

Solicitor General Cox, Acting Assistant Attorney General Kirkpatrick, Richard A. Solomon, Robert W. Ginnane and *H. Neil Garson* for the United States and the Interstate Commerce Commission, and *Bernard G. Segal, Irving R. Segal* and *S. Harrison Kahn* for United Parcel Service, Inc., appellees.

PER CURIAM.

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

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

BURD *v.* WILKINS, WARDEN.

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

No. 716, Misc. Decided March 20, 1961.

PER CURIAM.

The appeal is dismissed.

JERROLD ELECTRONICS CORP. ET AL. *v.* UNITED STATES.

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

No. 631. Decided March 20, 1961.

187 F. Supp. 545, affirmed.

Israel Packel for appellants.

Solicitor General Cox, Acting Assistant Attorney General Kirkpatrick and *Richard A. Solomon* for the United States.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed. Points 1 and 3, *Northern Pacific R. Co.* v. *United States,* 356 U. S. 1; *International Salt Co.* v. *United States,* 332 U. S. 392. Points 2 and 6, *United States* v. *W. T. Grant Co.,* 345 U. S. 629, 633. Point 4, *Schine Theatres* v. *United States,* 334 U. S. 110, 119.

LOUISIANA EX REL. ALLEN *v.* WALKER, WARDEN.

APPEAL FROM THE SUPREME COURT OF LOUISIANA.

No. 655, Misc. Decided March 20, 1961.

Appeal dismissed because notice thereof was not filed within statutory period.

Jack N. Rogers and *Robert H. Reiter* for appellant.

PER CURIAM.

The appeal is dismissed for the reason that the notice thereof was not filed within the time provided by law.

CITY OF KANSAS CITY, KANSAS, ET AL. *v.* UNITED STATES ET AL.

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

No. 657. Decided March 20, 1961.

192 F. Supp. 179, affirmed.

Joseph P. Jenkins for appellants.

Solicitor General Cox and *Roger P. Marquis* for the United States et al.

PER CURIAM.

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

MILLER *v.* CALIFORNIA.

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

No. 719, Misc. Decided March 20, 1961.

Appeal dismissed and certiorari denied.

Reported below: 185 Cal. App. 2d 59, 8 Cal. Rptr. 91.

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.

ORLEANS PARISH SCHOOL BOARD ET AL. *v.* BUSH ET AL.

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

No. 589. Decided March 20, 1961.*

187 F. Supp. 42, 188 F. Supp. 916, affirmed.

Samuel I. Rosenberg, Peter H. Beer and *Robert G. Polack* for Orleans Parish School Board et al. in No. 589; *Jack P. F. Gremillion,* Attorney General of Louisiana, *M. E. Culligan, Weldon A. Cousins, L. K. Clement, John M. Currier, George S. Hesni, Robert S. Link, Jr., Dorothy N. Wolbrette, John E. Jackson, Jr., Wm. P. Schuler* and *Henry J. Roberts, Jr.,* Assistant Attorneys General, and *George Ponder* for Orleans Parish School Board et al. in No. 613; and *W. Scott Wilkinson* and *Thompson L. Clarke* for the Legislature of Louisiana et al. in No. 706, appellants.

A. P. Tureaud and *Thurgood Marshall* for appellees.

PER CURIAM.

The motions to affirm are granted and the judgments are affirmed.

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*Together with No. 613, *Orleans Parish School Board et al.* v. *Bush et al.*, and No. 706, *Legislature of Louisiana et al.* v. *Bush et al.*, also on appeals from the same Court.

FERGUSON *v.* GEORGIA.

APPEAL FROM THE SUPREME COURT OF GEORGIA.

No. 44. Argued November 14–15, 1960.—Decided March 27, 1961.

The Georgia Code, § 38–416, makes a person charged with a criminal offense incompetent to testify under oath in his own behalf at his trial; but § 38–415 gives him the right to make an unsworn statement to the jury without subjecting himself to cross-examination. At the trial in a state court in which appellant was convicted of murder, his counsel was denied the right to ask him any questions when he took the stand to make his unsworn statement. *Held:* This application of § 38–415 denied appellant the effective assistance of his counsel at a crucial point in his trial, and it violated the Due Process Clause of the Fourteenth Amendment. Pp. 570–596.

215 Ga. 117, 109 S. E. 2d 44, reversed.

Paul James Maxwell argued the cause and filed a brief for appellant.

Dan Winn, Solicitor General of Georgia, argued the cause for appellee. With him on the brief were *Eugene Cook,* Attorney General, *John T. Ferguson,* Deputy Assistant Attorney General, *John T. Perrin,* Assistant Solicitor General, and *Robert J. Noland.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The State of Georgia is the only State—indeed, apparently the only jurisdiction in the common-law world—to retain the common-law rule that a person charged with a criminal offense is incompetent to testify under oath in his own behalf at his trial. Georgia in 1866 abolished by statute the common-law rules of incompetency for most other persons. However, the statute, now Georgia Code § 38–416, expressly retained the incompetency rule as to persons "charged in any criminal proceeding with the

commission of any indictable offense or any offense punishable on summary conviction . . . ." Two years later, in 1868, Georgia allowed the criminal defendant to make an unsworn statement. The statute enacted for that purpose, as amended, is now Georgia Code § 38–415, and provides: "In all criminal trials, the prisoner shall have the right to make to the court and jury such statement in the case as he may deem proper in his defense. It shall not be under oath, and shall have such force only as the jury may think right to give it. They may believe it in preference to the sworn testimony in the case. The prisoner shall not be compelled to answer any questions on cross-examination, should he think proper to decline to answer."

In this case a jury in the Superior Court, Douglas County, Georgia, convicted the appellant of murder, and he is under sentence of death. After the State rested its case at the trial, the appellant's counsel called him to the stand, but the trial judge sustained the State's objection to counsel's attempt to question him. To the argument that to deny counsel the "right to ask the defendant any questions on the stand . . . violates . . . [Amendment] VI . . . [and] the Fourteenth Amendment to the Constitution of the United States . . . [because] it deprives the defendant of the benefit of his counsel asking him questions at the most important period of the trial . . . ," the trial judge answered that under § 38–415, ". . . you do not have the right to do anything more than instruct your client as to his rights, and . . . you have no right to question him on direct examination." In affirming the conviction and sustaining this ruling, the Supreme Court of Georgia said:

> "The constitutional provisions granting to persons charged with crime the benefit and assistance of counsel confer only the right to have counsel per-

> form those duties and take such actions as are permitted by the law; and to require counsel to conform to the rules of practice and procedure, is not a denial of the benefit and assistance of counsel. It has been repeatedly held by this court that counsel for the accused cannot, as a matter of right, ask the accused questions or make suggestions to him when he is making his statement to the court and jury." 215 Ga. 117, 119, 109 S. E. 2d 44, 46–47.

On appeal brought here under 28 U. S. C. § 1257 (2), we noted probable jurisdiction. 362 U. S. 901.

The only question which the appellant properly brings before us is whether this application by the Georgia courts of § 38–415 denied the appellant "the guiding hand of counsel at every step in the proceedings against him," *Powell* v. *Alabama,* 287 U. S. 45, 69, within the requirements of due process in that regard as imposed upon the States by the Fourteenth Amendment. See also *Chandler* v. *Fretag,* 348 U. S. 3.

Appellant raises no question as to the constitutional validity of § 38–416, the incompetency statute.[1] However, decision of the question which is raised under § 38–415 necessarily involves consideration of both statutes. Historically these provisions have been inter-

[1] It is suggested in the concurring opinions that we should nevertheless adjudicate the validity of § 38–416. Apart from the incongruity of passing upon the statute the appellant expressly refrained from attacking, and disregarding his challenge to the statute he did call in question, such a course would be disrespectful of the State's procedures. For it appears that the Georgia Supreme Court would not have entertained an attack on § 38–416, since the appellant did not offer himself to be sworn as a witness. See *Holley* v. *Lawrence,* 194 Ga. 529, 22 S. E. 2d 154; appeal here was dismissed on the express ground that "the judgment of the court below rests upon a nonfederal ground adequate to support it, namely, that the failure to tender such testimony at the trial barred any later claim of the alleged constitutional right . . . ." 317 U. S. 518.

twined. For § 38–416 is a statutory declaration of the common-law rule disqualifying criminal defendants from testifying, and § 38–415, also with its roots in the common law, was an attempt to mitigate the rigors of that incompetency.

The disqualification of parties as witnesses characterized the common law for centuries. Wigmore traces its remote origins to the contest for judicial hegemony between the developing jury trial and the older modes of trial, notably compurgation and wager of law. See 2 Wigmore, Evidence, pp. 674–683. Under those old forms, the oath itself was a means of decision. See Thayer, Preliminary Treatise on Evidence, pp. 24–34. Jury trial replaced decision by oath with decision of the jurors based on the evidence of witnesses; with this change "[T]he party was naturally deemed incapable of being such a witness." 2 Wigmore, p. 682. Incompetency of the parties in civil cases seems to have been established by the end of the sixteenth century. See 9 Holdsworth, History of English Law, p. 194. In time the principal rationale of the rule became the possible untrustworthiness of the party's testimony; for the same reason disqualification was applied in the seventeenth century to interested nonparty witnesses.[2]

Its firm establishment for criminal defendants seems to have come somewhat later. In the sixteenth century it was necessary for an accused to conduct his own defense,

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[2] Wigmore concludes that "the principle of parties' disqualification would have been the direct root of the disqualification by interest in general." 2 Wigmore, p. 680. "[A]fter Coke's time and probably under the influence of his utterances, the rule for a party was extended by analogy to interested persons in general." Pp. 682–683. Coke listed a number of disqualifications: if the witness "becometh infamous, . . . Or if the witnesse be an infidell, or of non-sane memory, or not of discretion, or a partie interested, or the like." I Coke Upon Littleton, 6. b.

since he was neither allowed to call witnesses in his behalf nor permitted the assistance of counsel. 1 Stephen, History of the Criminal Law of England, p. 350. The criminal trial of this period has been described as "a long argument between the prisoner and the counsel for the Crown, in which they questioned each other and grappled with each other's arguments with the utmost eagerness and closeness of reasoning." Stephen, *supra,* p. 326. In the process the defendant could offer by way of explanation material that would later be characterized as testimony. 2 Wigmore, p. 684. In the seventeenth century, however, he was allowed to call witnesses in his behalf; the right to have them sworn was accorded by statute for treason in 1695 and for all felony in 1701. 7 Will. III, c. 3; 1 Anne, St. 2, c. 9. See Thayer, *supra,* pp. 157–161, and n. 4; 2 Wigmore, pp. 685–686. A distinction was drawn between the accused and his witnesses—they gave evidence but he did not. See 2 Wigmore, pp. 684–685, and n. 42; 9 Holdsworth, *supra,* pp. 195–196. The general acceptance of the interest rationale as a basis for disqualification reinforced this distinction, since the criminal defendant was, of course, *par excellence* an interested witness. "The old common law shuddered at the idea of any person testifying who had the least interest." *State* v. *Barrows,* 76 Me. 401, 409. See *Benson* v. *United States,* 146 U. S. 325, 336–337.

Disqualification for interest was thus extensive in the common law when this Nation was formed. 3 Bl. Comm. 369.[3] Here, as in England, criminal defendants were deemed incompetent as witnesses. In *Rex* v. *Lukens,* 1 Dall. 5, 6, decided in 1762, a Pennsylvania court refused

[3] There Blackstone stated the then-settled common-law rule to be that "[a]ll witnesses, of whatever religion or country, that have the use of their reason, are to be received and examined, except such as are *infamous,* or such as are *interested* in the event of the cause."

to swear a defendant as a witness, holding that the issue there in question "must be proved by indifferent witnesses." Georgia by statute adopted the common law of England in 1784, and ". . . the rules of evidence belonging to it . . . [were] in force there . . . ." *Doe* v. *Winn,* 5 Pet. 233, 241. Georgia therefore followed the incompetency rule for criminal defendants long before it was given statutory form by the Act of 1866. See *Jones* v. *State,* 1 Ga. 610; *Roberts* v. *State,* 189 Ga. 36, 40–41, 5 S. E. 2d 340, 343.[4]

Broadside assaults upon the entire structure of disqualifications, particularly the disqualification for interest, were launched early in the nineteenth century in both England and America. Bentham led the movement for reform in England, contending always for rules that would not exclude but would let in the truth. See Rationale of Judicial Evidence, bk. IX, pt. III, c. III (Bowring ed.), pp. 393–406. The basic ground of the attack was, as Macaulay said, that "[A]ll evidence should be taken at what it may be worth, that no consideration which has a tendency to produce conviction in a rational mind should be excluded from the consideration of the tribunals." Lord Macaulay's Legislative Minutes, 1835, pp. 127–128. The qualification in civil cases of nonparty witnesses despite interest came first. See Lord Denman's Act of 1843, 6 & 7 Vict., c. 85. The first general exception in England for party witnesses in civil cases was the County Courts Act of 1846, 9 & 10 Vict., c. 95, although there had

[4] By the Act of February 25, 1784, the Georgia Legislature provided that the common laws of England should remain in force in Georgia, "so far as they are not contrary to the constitution, laws, and form of government now established in this State." Prince's Digest (1837), p. 570. Section 3772 of the Code of 1863, which codified the statutory and decisional law of the State, stated: "Witnesses are incompetent . . . Who are interested in the event of the suit."

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been earlier grants of capacity in certain other courts. Best, Evidence (Lely ed. 1893), pp. 158–159. Lord Brougham's Act of 1851, 14 & 15 Vict., c. 99, virtually abolished the incompetency of parties in civil cases.[5]

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[5] The history of the transition in one American jurisdiction is traced in Thayer, A Chapter of Legal History in Massachusetts, 9 Harv. L. Rev. 1. The first American statute removing the disability of interested nonparty witnesses seems to have been Michigan's in 1846, and Connecticut was first to abolish the general incapacity of parties in 1849. The Field reforms in New York State were influential in leading other American jurisdictions to discard the incapacity of both witnesses and parties in civil cases. For an account of the development in the United States, see 2 Wigmore, pp. 686–695.

The preamble to the 1866 Georgia legislation expressed the legislative aim in extending competency: "Whereas, the inquiry after truth in courts of justice is often obstructed by incapacities created by the present law, and it is desirable that full information as to the facts in issue, both in civil and criminal cases, should be laid before the persons who are to decide upon them, and that such persons should exercise their judgment on the *credit* of the witnesses adduced for the truth of testimony." The first section of the Act forbade the exclusion of witnesses, "by reason of incapacity from crime or interest, or from being a party"; it also contained a "dead man's statute" proviso. The remaining sections enumerated the exceptions to the extension of competency; they were in effect a statutory declaration that certain of the common-law incapacities should remain intact. See *Roberts* v. *State,* 189 Ga. 36, 5 S. E. 2d 340; *Wilson* v. *State,* 138 Ga. 489, 492, 75 S. E. 619, 620; *Howard* v. *State,* 94 Ga. 587, 20 S. E. 426. The second section contained the original of § 38–416, stating: "But nothing herein contained shall render any person, who, in any criminal proceeding, is charged with the commission of any indictable offence, or any offence punishable on summary conviction, competent or compellable, to give evidence for or against himself, or herself, or shall render any person compellable to answer any question tending to criminate himself or herself; or shall in any criminal proceeding render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband; nor shall any attorney be compellable to give evidence for or against his client." Ga. Laws 1866,

The qualification of criminal defendants to give sworn evidence if they wished came last. The first statute was apparently that enacted by Maine in 1859 making defendants competent witnesses in prosecutions for a few crimes. Maine Acts 1859, c. 104. This was followed in Maine in 1864 by the enactment of a general competency statute for criminal defendants, the first such statute in the English-speaking world. The reform was largely the work of John Appleton of the Supreme Court of Maine, an American disciple of Bentham. Within 20 years most of the States now comprising the Union had followed Maine's lead. A federal statute to the same effect was adopted in 1878, 20 Stat. 30, 18 U. S. C. § 3481. Before the end of the century every State except Georgia had abolished the disqualification.[6]

Common-law jurisdictions outside the United States also long ago abolished the disqualification. This change

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pp. 138–139. Save for the provision as to the attorney-client privilege, added during the debate in the Georgia Senate, see Senate Journal, Dec. 5, 1866, p. 266, the second section was verbatim the same as § III of Lord Brougham's Act.

[6] The dates on which the general competency statutes of the States were enacted are: Alabama, 1885; Alaska, 1899; Arizona, 1871; Arkansas, 1885; California, 1866; Colorado, 1872; Connecticut, 1867; Delaware, 1893; Florida, 1895; Hawaii, 1876; Idaho, 1875; Illinois, 1874; Indiana, 1873; Iowa, 1878; Kansas, 1871; Kentucky, 1886; Louisiana, 1886; Maine, 1864; Maryland, 1876; Massachusetts, 1866; Michigan, 1881; Minnesota, 1868; Mississippi, 1882; Missouri, 1877; Montana, 1872; Nebraska, 1873; Nevada, 1867; New Hampshire, 1869; New Jersey, 1871; New Mexico, 1880; New York, 1869; North Carolina, 1881; North Dakota, 1879; Ohio, 1867; Oklahoma, 1890; Oregon, 1880; Pennsylvania, 1885; Rhode Island, 1871; South Carolina, 1866; South Dakota, 1879; Tennessee, 1887; Texas, 1889; Utah, 1878; Vermont, 1866; Virginia, 1886; Washington, 1871; West Virginia, 1881; Wisconsin, 1869; Wyoming, 1877.

The current citations to these statutes are collected in the Appendix to this opinion, *post*, p. 596.

came in England with the enactment in 1898 of the Criminal Evidence Act, 61 & 62 Vict., c. 36.[7] Various States of Australia had enacted competency statutes even before the mother country, as did Canada and New Zealand. Competency was extended to defendants in Northern Ireland in 1923, in the Republic of Ireland in 1924, and in India in 1955.[8]

The lag in the grant of competency to the criminally accused was attributable in large measure to opposition from those who believed that such a grant threatened erosion of the privilege against self-incrimination and the presumption of innocence. "[I]f we were to hold that a prisoner offering to make a statement must be sworn in the cause as a witness, it would be difficult to protect his constitutional rights in spite of every caution, and would often lay innocent parties under unjust suspicion where they were honestly silent, and embarrassed and over-

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[7] Parliament had enacted a number of specialized competency statutes prior to 1898, the first in 1872. About 25 others had been passed by the time of the enactment of the general competency statute. See 56 Hansard, Parliamentary Debates, 4th Series, pp. 977–978. The most important was the Criminal Law Amendment Act of 1885, 48 & 49 Vict., c. 69, which made defendants competent in certain felony prosecutions. Most of the other statutes involved offenses created by regulatory legislation, which were generally misdemeanors. See generally Best, *supra*, pp. 571–572; 2 Taylor, Evidence (12th ed.), 862–863.

[8] Canada and New Zealand adopted competency statutes in 1893. Canada Evidence Act, see Rev. Stat. Can. (1952), c. 307, § 4 (1); New Zealand Criminal Code Act, § 398, see N. Z. Repr. Stat., Evidence Act 1908, § 5. For an account of the Australian development, see 6 Res Judicatae 60. The statute in Northern Ireland is the Criminal Evidence Act (Northern Ireland); the Irish statute is the Criminal Justice (Evidence) Act.

For the Indian statute, see Code of Criminal Procedure (Amendment) Act, 1955, § 61, in 42 A. I. Rep. [1955], Indian Acts Section p. 91.

whelmed by the shame of a false accusation. . . . [It would result in] . . . the degradation of our criminal jurisprudence by converting it into an inquisitory system, from which we have thus far been happily delivered." *People* v. *Thomas,* 9 Mich. 314, 320–321 (concurring opinion). See also *Ruloff* v. *People,* 45 N. Y. 213, 221–222; *People* v. *Tyler,* 36 Cal. 522, 528–530; *State* v. *Cameron,* 40 Vt. 555, 565–566; 1 Am. L. Rev. 443; Maury, Validity of Statutes Authorizing the Accused to Testify, 14 Am. L. Rev. 753.[9]

The position of many who supported competency gave credence to these fears. Neither Bentham nor Appleton was a friend of the privilege against self-incrimination.[10] While Appleton justified competency as a necessary pro-

[9] Opposition on this score was marked in Great Britain. Said one member of Parliament in the 1898 debates: "[W]hy is this change to be made in the law? The English Revolution is against it, three centuries of experience is against it; and the only argument adduced in its favor is the suggestion that an honest man is occasionally convicted of a crime of which he is innocent. . . . it would be a degradation to your great judicial tribunals that, though a guilty man may not, an innocent man may be placed in a position of embarrassment and peril—for the first time under the British Constitution—far greater than any ancient law designed." 56 Hansard, *supra,* pp. 1022, 1024. Said another: "[F]or centuries the criminal law of England has been administered on the principle that if you want to hang a man you must hang him on somebody else's evidence. This is a Bill to hang a man on his own evidence . . . ." *Id.,* at 1030. There had been particular opposition on the part of Irish members, who contended that competency would become a means of oppression of defendants there; as a result Ireland was excluded from the coverage of the Act. See 60 Hansard, *supra,* pp. 721–742. Other members were hostile because of fear that the statute would have an adverse effect on laborers who became criminal defendants. See 60 Hansard, *supra,* pp. 546–547, 574–578.

[10] See Bentham, Rationale of Judicial Evidence, bk. IX, pt. IV, c. III, pp. 445–468; Appleton, The Rules of Evidence, pp. 126–134.

tection for the innocent, he also believed that incompetency had served the guilty as a shield and thus disserved the public interest. Competency, he thought, would open the accused to cross-examination and permit an unfavorable inference if he declined to take the stand to exculpate himself.[11]

This controversy left its mark on the laws of many jurisdictions which enacted competency. The majority of the competency statutes of the States forbid comment by the prosecution on the failure of an accused to testify, and provide that no presumption of guilt should arise from his failure to take the stand. The early cases particularly emphasized the importance of such limitations. See, *e. g., Staples* v. *State,* 89 Tenn. 231, 14 S. W. 603; *Price* v. *Commonwealth,* 77 Va. 393; *State* v. *Taylor,* 57 W. Va. 228, 234–235, 50 S. E. 247, 249–250. Cf. 1 Cooley, Constitutional Limitations (8th ed.), pp. 658–661. See generally, Reeder, Comment Upon Failure of Accused to Testify, 31 Mich. L. Rev. 40. For the treatment of the accused as a witness in Canada, see 12 Can. Bar Rev. 519, 13 Can. Bar Rev. 336; in Australia, see 6 Res Judicatae 60; and in Great Britain, see 2 Taylor, Evidence (12th ed.) 864–865; 51 L. Q. Rev. 443; 58 L. Q. Rev. 369.

Experience under the American competency statutes was to change the minds of many who had opposed them. It was seen that the shutting out of his sworn evidence could be positively hurtful to the accused, and that inno-

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[11] "That then the accused, if *guilty,* should object being placed in an attitude so dangerous to him, *because* he is guilty, is what might have been expected. . . . His objection to testifying, is an objection to punishment." Appleton, *supra,* p. 131. See also *State* v. *Cleaves,* 59 Me. 298; cf. *State* v. *Bartlett,* 55 Me. 200, 215–221. For a note on Appleton's role in the movement to extend competency, see Thayer, A Chapter of Legal History in Massachusetts, 9 Harv. L. Rev. 1, 12. See also 14 Am. L. Reg. 705.

cence was in fact aided, not prejudiced, by the opportunity of the accused to testify under oath. An American commentator discussing the Massachusetts statute in the first year of its operation said: "We have always been of opinion, that the law permitting criminals to testify would aid in the detection of guilt; we are now disposed to think that it will be equally serviceable for the protection of innocence." 1 Am. L. Rev. 396. See also 14 Am. L. Reg. 129.

This experience made a significant impression in England and helped to persuade Parliament to follow the American States and other common-law jurisdictions in granting competency to criminal defendants. In the debates of 1898, the Lord Chancellor quoted a distinguished English jurist, Russell Gurney: "[A]fter what he had seen there [in America], he could not entertain a doubt about the propriety of allowing accused persons to be heard as witnesses on their own behalf." 54 Hansard, *supra,* p. 1176. Arthur Balfour reported to the Commons that "precisely the same doubts and difficulties which beset the legal profession in this country on the suggestion of this change were felt in the United States, but the result of the experiment, which has been extended gradually from State to State, is that all fears have proved illusory, that the legal profession, divided as they were before the change, have now become unanimous in favor of it, and that no section of the community, not even the prisoners at the bar, desire to see any alteration made in the system." 60 Hansard, *supra,* pp. 679–680.[12]

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[12] For other comments on the impact of the competency statutes, see Alverstone, Recollections of Bar and Bench, pp. 176–180; Biron, Without Prejudice; Impressions of Life and Law, p. 218; Train, The Prisoner at the Bar, pp. 205–211; Sherman, Some Recollections of a Long Life, p. 234; 1933 Scots Law Times 29; 2 Fortnightly L. J. 41.

A particularly striking change of mind was that of the noted authority on the criminal law, Sir James Stephen. Writing in 1863, Stephen opposed the extension of competency to defendants. He argued that it was inherent that a defendant could not be a real witness: "[I]t is not in human nature to speak the truth under such a pressure as would be brought to bear on the prisoner, and it is not a light thing to institute a system which would almost enforce perjury on every occasion." A General View of the Criminal Law of England, p. 202. Competency would put a dangerous discretion in the hands of counsel. "By not calling the prisoner he might expose himself to the imputation of a tacit confession of guilt, by calling him he might expose an innocent man to a cross-examination which might make him look guilty." *Ibid.* Allowing questions about prior convictions "would indirectly put the man upon his trial for the whole of his past life." *Id.*, p. 203. Twenty years later, Stephen, after many years' experience on the criminal bench, was to say: "I am convinced by much experience that questioning, or the power of giving evidence, is a positive assistance, and a highly important one, to innocent men, and I do not see why in the case of the guilty there need be any hardship about it. . . . A poor and ill-advised man . . . is always liable to misapprehend the true nature of his defence, and might in many cases be saved from the consequences of his own ignorance or misfortune by being questioned as a witness." 1 Stephen, History of the Criminal Law of England, pp. 442, 444.

In sum, decades ago the considered consensus of the English-speaking world came to be that there was no rational justification for prohibiting the sworn testimony of the accused, who above all others may be in a position to meet the prosecution's case. The development of the unsworn-statement practice was itself a recognition of the harshness of the incompetency rule. While its origins

antedated the nineteenth century,[13] its strong sponsorship by English judges of that century is explained by their desire for a mitigation of the rigors of that rule. Baron Alderson said: "I would *never* prevent a prisoner from making a statement, though he has counsel. He may make any statement he pleases before his counsel addresses the jury, and then his counsel may comment upon that statement as a part of the case. If it were otherwise, the most monstrous injustice might result to prisoners." *Reg.* v. *Dyer,* 1 Cox C. C. 113, 114. See also *Reg.* v. *Malings,* 8 Car. & P. 242; *Reg.* v. *Walkling,* 8 Car. & P. 243; *Reg.* v. *Manzano,* 2 F. & F. 64; *Reg.* v. *Williams,* 1 Cox C. C. 363. Judge Stephen's sponsorship of the practice was especially influential. See *Reg.* v. *Doherty,* 16 Cox C. C. 306. See also *Reg.* v. *Shimmin,* 15 Cox C. C. 122; 60 Hansard, *supra,* p. 657. It became so well established in England that it was expressly preserved in the Criminal Evidence Act of 1898.[14]

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[13] The origins probably lie in the necessity for the prisoner to defend himself during the early development of English criminal law. See p. 573, *supra.* Even after the defendant was allowed to have witnesses in his behalf in England, he still had no right to be heard by counsel, except for treason, until the act of 1836, and his participation in the trial remained of major importance; as before, "a prisoner was obliged, in the nature of the case, to speak for himself." *Reg.* v. *Doherty,* 16 Cox C. C. 306, 309. Although the practice developed in the eighteenth century of allowing counsel to advise the accused during the trial and to cross-examine the Crown's witnesses, counsel was still not permitted to address the jury. Stephen, *supra,* p. 424. The defendant continued to do this in his own behalf. See 1 Chitty, Criminal Law (5th Am. ed.), p. 623; Bentham, *supra,* bk. IX, pt. V, c. III, p. 496. See generally 26 Austral. L. J. 166.

[14] Criminal Evidence Act, § 1 (h). Some English judges had sought to curtail the practice after defendants were statutorily accorded full benefit of counsel by the act of 1836, 6 & 7 Will. 4, c. 114. In *Reg.* v. *Boucher,* 8 Car. & P. 141, Coleridge, J., held that because defense counsel had addressed the jury, the accused could not make a statement. See also *Reg.* v. *Beard,* 8 Car. & P. 142; *Reg.* v. *Rider,*

The practice apparently was followed in this country at common law in a number of States and received statutory recognition in some. Michigan passed the first such statute in 1861; unlike the Georgia statute of 1868, it provided that the prisoner should be subject to cross-examination on his statement. See *People* v. *Thomas,* 9 Mich. 314.[15] The Georgia Supreme Court, in one of the early

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8 Car. & P. 539. In *Reg.* v. *Taylor,* 1 F. & F. 535, Byles, J., said that the prisoner or his counsel would be permitted to address the jury, but not both. At least a remnant of this judicial hostility to the statement lingered almost until the time of the grant of competency. See *Reg.* v. *Millhouse,* 15 Cox C. C. 622.

In addition to its statutory preservation in Great Britain, it survives in other common-law jurisdictions recognizing the defendant's competency. *E. g.,* New Zealand, see *Rex* v. *Perry,* [1920] N. Z. L. R. 21; *Kerr* v. *Reg.,* [1953] N. Z. L. R. 75, 28 N. Z. L. J. 305; Australia, see *Rex* v. *McKenna,* [1951] Q. S. R. 299; Ireland, see *People* v. *Riordan,* [1948] I. R. 416, 94 Irish Law Times, Feb. 20, 1960, p. 43, Feb. 27, 1960, p. 49, March 5, 1960, p. 55; South Africa, see *Rex* v. *de Wet,* [1933] S. A. L. R. 68, 64 So. Afr. L. J. 374.

[15] In some States recognizing the statement at common law, the defendant was confined to arguing the law and commenting on the evidence of the witnesses; he could not state facts. See *Ford* v. *State,* 34 Ark. 649; *Wilson* v. *State,* 50 Tenn. 232. In other States, the prisoner appears to have been allowed more latitude. See *People* v. *Lopez,* 2 Edmonds' Sel. Cases 262 (N. Y.). In Massachusetts, the right of a defendant with counsel to make a statement seems to have been recognized only in capital cases. See the historical review in *Commonwealth* v. *Stewart,* 255 Mass. 9, 151 N. E. 74; see also *Commonwealth* v. *McConnell,* 162 Mass. 499, 39 N. E. 107; *Commonwealth* v. *Burrough,* 162 Mass. 513, 39 N. E. 184; *Commonwealth* v. *Dascalakis,* 246 Mass. 12, 32, 140 N. E. 470, 479. For other considerations of the common-law statement, see *State* v. *Taylor,* 57 W. Va. 228, 50 S. E. 247; *Hanoff* v. *State,* 37 Ohio St. 178 (dissenting opinion) 184–185; *O'Loughlin* v. *People,* 90 Colo. 368, 384–385, 10 P. 2d 543, 549; *State* v. *Louviere,* 169 La. 109, 124 So. 188; cf. *Reg.* v. *Rogers,* [1888] 1 B. C. L. R. pt. 2, p. 119. Alabama gave the unsworn statement statutory sanction in 1882. Previously the right had been confined there to an argument on the evidence, *State* v. *McCall,* 4 Ala. 643, but the statute was construed to allow the state-

decisions considering the unsworn-statement statute, stressed the degree of amelioration expected to be realized from the practice, thereby implicitly acknowledging the disadvantages for the defendant of the incompetency rule. The Court emphasized "the broad and liberal purpose which the legislature intended to accomplish. . . . This right granted to the prisoner is a modern innovation upon the criminal jurisprudence of the common law, advancing to a degree hitherto unknown the right of the prisoner *to give his own narrative* of the accusation against him to the jurors, who are permitted to believe it in preference to the sworn testimony of the witnesses." *Coxwell* v. *State,* 66 Ga. 309, 316–317.[16]

But the unsworn statement was recognized almost everywhere else as simply a stopgap solution for the

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ment of matters in the nature of evidence. See *Blackburn* v. *State,* 71 Ala. 319; *Chappell* v. *State,* 71 Ala. 322. Wyoming gave a statutory right of unsworn statement in 1869. See *Anderson* v. *State,* 27 Wyo. 345, 196 P. 1047. Florida in 1866 gave the accused in the discretion of the court an opportunity to make a sworn statement on which he could not be cross-examined. This was made an absolute right in 1870. See *Miller* v. *Florida,* 15 Fla. 577. All these States, of course, subsequently made defendants fully competent.

[16] It is doubtful how far the practice had been followed at common law in Georgia. See *Roberts* v. *State,* 189 Ga. 36, 41, 5 S. E. 2d 340, 343. Initially there seems to have been considerable opposition to giving the unsworn statement statutory sanction. The bill that became the predecessor of present § 38–415 was originally tabled in the House and then passed after reconsideration, and was originally defeated in the Senate. See House Journal, Aug. 8, 10, 13, 1868, pp. 158, 160, 173; Senate Journal, Oct. 3, 1868, p. 492. As passed, it provided that in cases of felony the prisoner should have the right to make an unsworn statement; he was not subject to cross-examination on it and the jury was empowered to give it such force as they thought right. Ga. Laws 1868, p. 24. In 1874 the right was extended to all criminal defendants. Ga. Laws 1874, pp. 22–23. In 1879 the jury was explicitly empowered to believe the statement in preference to the sworn testimony, Ga. Laws 1878–1879, pp. 53–54, and the statute took its present form.

serious difficulties for the accused created by the incompetency rule. "The system of allowing a prisoner to make a statement had been introduced as a mere makeshift, by way of mitigating the intolerable hardship which occasionally resulted from the prisoner not being able to speak on his own behalf." 60 Hansard, *supra,* p. 652. "The custom grew up in England out of a spirit of fairness to give an accused, who was otherwise disqualified, an opportunity to tell his story in exculpation." *State* v. *Louviere,* 169 La. 109, 119, 124 So. 188, 192. The abolition of the incompetency rule was therefore held in many jurisdictions also to abolish the unsworn-statement practice. "In such cases the unsworn statement of an accused becomes secondary to his right of testifying under oath and cannot be received." *State* v. *Louviere, supra,* 169 La., at 119, 124 So., at 192. "The privilege was granted to prisoners because they were debarred from giving evidence on oath, and for that reason alone. When the law was changed and the right accorded to them to tell their story on oath as any other witness the reason for making an unsworn statement was removed." *Rex* v. *Krafchenko,* [1914] 17 D. L. R. 244, 250 (Man. K. B.).[17]

Where the practice survives outside America, little value has been attached to it. "If the accused does not elect to call any evidence or to give evidence himself, he very often makes an unsworn statement from the dock.

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[17] See also *Clarke* v. *State,* 78 Ala. 474; *Harris* v. *State,* 78 Ala. 482; *Hart* v. *State,* 38 Fla. 39, 20 So. 805; *Copeland* v. *State,* 41 Fla. 320, 26 So. 319; *O'Loughlin* v. *People,* 90 Colo. 368, 10 P. 2d 543.

In Wyoming, the defendant had the option to make an unsworn statement even after the grant of competency, since the competency statute expressly preserved the statement. In 1925 the reservation of the right of statement was removed. See *Anderson* v. *State,* 27 Wyo. 345, 196 P. 1047. Massachusetts thus appears to be the only American jurisdiction still explicitly allowing a defendant in some cases to give either sworn testimony or an unsworn statement. See *Commonwealth* v. *Stewart,* 255 Mass. 9, 151 N. E. 74.

It is well understood among lawyers that such a statement has but little evidential value compared with the sworn testimony upon which the accused can be cross-examined . . . ." *Rex* v. *Zware,* [1946] S. A. L. R. 1, 7–8. "How is a jury to understand that it is to take the statement for what it is worth, if it is told that it cannot regard it as evidence (*i. e.,* proof) of the facts alleged?" 68 L. Q. Rev. 463. The unsworn statement "is seldom of much value, since it is generally incoherent and leaves open many doubts which cannot be resolved by cross-examination." 69 L. Q. Rev. 22, 25. "The right of a prisoner to make an unsworn statement from the dock still exists . . . but with greatly discounted value." 1933 Scots Law Times 29. Commentators and judges in jurisdictions with statutory competency have suggested abrogation of the unsworn-statement right. See 94 Irish Law Times, March 5, 1960, p. 56; 68 L. Q. Rev. 463; *Rex* v. *McKenna,* [1951] Q. S. R. 299, 308.

Georgia judges, on occasion, have similarly disparaged the unsworn statement. "Really, in practice it is worth, generally, but little if anything to defendants. I have never known or heard of but one instance where it was supposed that the right had availed anything. It is a boon that brings not much relief." *Bird* v. *State,* 50 Ga. 585, 589. "The statement stands upon a peculiar footing. It is often introduced for the mere purpose of explaining evidence, or as an attempt at mitigation; the accused and his counsel throw it in for what it may happen to be worth and do not rely upon it as a substantive ground of acquittal." *Underwood* v. *State,* 88 Ga. 47, 51, 13 S. E. 856, 858.

The unsworn statement has anomalous characteristics in Georgia practice. It is not treated as evidence or like the testimony of the ordinary sworn witness. "The statement may have the effect of explaining, supporting, weakening or overcoming the evidence, but still it is something

different from the evidence, and to confound one with the other, either explicitly or implicitly, would be confusing and often misleading. . . . The jury are to deal with it on the plane of statement and not on the plane of evidence, and may derive from it such aid as they can in reaching the truth. The law fixes no value upon it; it is a legal blank. The jury may stamp it with such value as they think belongs to it." *Vaughn* v. *State,* 88 Ga. 731, 739, 16 S. E. 64, 66. Because the statement is not evidence, even the charge in the strict terms of the statute favored by the Georgia Supreme Court, see *Garrett* v. *State,* 203 Ga. 756, 765, 48 S. E. 2d 377, 383; *Emmett* v. *State,* 195 Ga. 517, 541, 25 S. E. 2d 9, 23, calls attention to the fact that the defendant is not under oath. Moreover, charge after charge going beyond the terms of the statute has been sustained. Thus in *Garrett* v. *State, supra,* the trial judge instructed that while the defendants were "allowed" to make a statement, "they are not under oath, not subject to cross-examination, and you are authorized to give to their statement just such weight and credit as you think them entitled to receive." In *Emmett* v. *State,* 195 Ga., at 540, 25 S. E. 2d, at 22, the instruction was that the statement might be believed in preference to the sworn testimony "if you see proper to give it that weight and that place and that importance in the trial of this case." In *Douberly* v. *State,* 184 Ga. 573, 575, 192 S. E. 223, 225, the jury were told they might credit the statement "provided they believe it to be true." In *Allen* v. *State,* 194 Ga. 430, 436, 22 S. E. 2d 65, 68, the charge was: "There is no presumption attached to the defendant's statement. No presumption that it is true, nor any presumption that it is not true. In other words, it goes to you without a presumption either for or against him. You have the right to reject the statement entirely if you do not believe it to be true." In many cases the trial judges have been sustained in specifically pointing out

that defendants were not subject to the sanction for perjury with respect to their unsworn statements. "[I]f he failed to tell you the truth, he incurred no penalty by reason of such failure." *Darden* v. *State,* 171 Ga. 160, 161, 155 S. E. 38, 40. "[T]he defendant's statement is not under oath; no penalty is prescribed for making a false statement . . . ." *Klug* v. *State,* 77 Ga. 734, 736. "Surely there can be no wrong in calling the attention of the jury to circumstances which should impair the force of such testimony or which should enable them to give it the weight to which it is entitled." *Poppell* v. *State,* 71 Ga. 276, 278. See also *Grimes* v. *State,* 204 Ga. 854, 51 S. E. 2d 797; *Thurmond* v. *State,* 198 Ga. 410, 31 S. E. 2d 804; *Willingham* v. *State,* 169 Ga. 142, 149 S. E. 887; *Millen* v. *State,* 175 Ga. 283, 165 S. E. 226.

Because it is not evidence, the statement is not a foundation supporting the offer of corroborative evidence. *Chapman* v. *State,* 155 Ga. 393, 117 S. E. 321; *Medlin* v. *State,* 149 Ga. 23, 98 S. E. 551. "The statute is silent as to corroborating the mere statement of the accused, and while it allows the jury to believe it in preference to the sworn testimony, it seems to contemplate that the statement shall compete with sworn testimony single-handed, and not that it shall have the advantage of being reinforced by facts which do not weaken the sworn evidence otherwise than by strengthening the statement opposed to it." *Vaughn* v. *State,* 88 Ga. 731, 736, 16 S. E. 64, 65. Similarly the statement is not an independent basis for authenticating and introducing documents. *Sides* v. *State,* 213 Ga. 482, 99 S. E. 2d 884; see also *Register* v. *State,* 10 Ga. App. 623, 74 S. E. 429. In the absence of a specific request, the trial judge need not charge the law applicable to a defense presented by the statement but not supported in sworn testimony. *Prater* v. *State,* 160 Ga. 138, 143, 127 S. E. 296, 298; *Cofer* v. *State,* 213 Ga. 22, 96 S. E. 2d 601; *Willingham* v. *State,* 169 Ga. 142, 149

S. E. 887; *Holleman* v. *State,* 171 Ga. 200, 154 S. E. 906; *Darby* v. *State,* 79 Ga. 63, 3 S. E. 663. In contrast the trial judge may *sua sponte* instruct the jury to treat the accused's explanation as not presenting a defense in law; "[i]n proper cases the jury may be guarded by a charge from the court against giving the statement an undue effect in favor of the prisoner . . . ." *Underwood* v. *State,* 88 Ga. 47, 51, 13 S. E. 856, 858; *Fry* v. *State,* 81 Ga. 645, 8 S. E. 308.

It is said that an advantage of substance which the defendant may realize from the distinction is that the contents of his statement are not circumscribed by the ordinary exclusionary rules of evidence. *Prater* v. *State,* 160 Ga. 138, 142–147, 127 S. E. 296, 298–300; *Richardson* v. *State,* 3 Ga. App. 313, 59 S. E. 916; *Birdsong* v. *State,* 55 Ga. App. 730, 191 S. E. 277; *Tiget* v. *State,* 110 Ga. 244, 34 S. E. 1023. However, "The prisoner must have some regard to relevancy and the rules of evidence, for it was never intended that in giving his narrative of matters pertaining to his defense he should attempt to get before the jury wholly immaterial facts or attempt to bolster up his unsworn statement by making profert of documents, letters, or the like, which if relevant might be introduced in evidence on proof of their genuineness." *Nero* v. *State,* 126 Ga. 554, 555, 55 S. E. 404. See also *Saunders* v. *State,* 172 Ga. 770, 158 S. E. 791; *Montross* v. *State,* 72 Ga. 261; *Theis* v. *State,* 45 Ga. App. 364, 164 S. E. 456; *Vincent* v. *State,* 153 Ga. 278, 293–294, 112 S. E. 120, 127.

The situations in which the Georgia cases do assimilate the defendant to an ordinary witness emphasize the anomalous nature of the unsworn statement. If he admits relevant facts in his statement the prosecution is relieved of the necessity of proving them by evidence of its own. "The prisoner's admission in open court, made as a part of his statement on the trial, may be treated by

the jury as direct evidence as to the facts." *Hargroves* v. *State,* 179 Ga. 722, 725, 177 S. E. 561, 563. "It is well settled that the statement of a defendant to a jury is a statement made in judicio and is binding on him. Where the defendant makes an admission of a fact in his statement, such admission is direct evidence, and the State need not prove such fact by any other evidence." *Barbour* v. *State,* 66 Ga. App. 498, 499, 18 S. E. 2d 40, 41; *Dumas* v. *State,* 62 Ga. 58. And admissions in a statement will open the door to introduction of prosecution evidence which might otherwise be inadmissible. *McCoy* v. *State,* 124 Ga. 218, 52 S. E. 434. Admissions in a statement at one trial are admissible against the accused in a later trial. *Cady* v. *State,* 198 Ga. 99, 110, 31 S. E. 2d 38, 46; *Dumas* v. *State, supra.* The prosecution may comment on anything he says in the statement. *Frank* v. *State,* 141 Ga. 243, 277, 80 S. E. 1016. Although it has been held that the mere making of a statement does not put the defendant's character in issue, *Doyle* v. *State,* 77 Ga. 513, it is settled that "A defendant's statement may be contradicted by testimony as to the facts it narrates, and his character may be as effectively put in issue by his statement as by witnesses sworn by him for this purpose." *Jackson* v. *State,* 204 Ga. 47, 56, 48 S. E. 2d 864, 870; *Barnes* v. *State,* 24 Ga. App. 372, 100 S. E. 788. The prosecution may introduce rebuttal evidence of alleged false statements. *Johnson* v. *State,* 186 Ga. 324, 197 S. E. 786; *Camp* v. *State,* 179 Ga. 292, 175 S. E. 646; *Morris* v. *State,* 177 Ga. 106, 169 S. E. 495.

Perhaps any adverse consequences resulting from these anomalous characteristics might be in some measure overcome if the defendant could be assured of the opportunity to try to exculpate himself by an explanation delivered in an organized, complete and coherent way. But the Georgia practice puts obstacles in the way of this. He

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must deliver a finished and persuasive statement on his first attempt, for he will probably not be permitted to supplement it. Apparently the situation must be most unusual before the exercise by the trial judge of his discretion to refuse to permit the defendant to make a supplemental statement will be set aside. See *Sharp* v. *State,* 111 Ga. 176, 36 S. E. 633; *Jones* v. *State,* 12 Ga. App. 133, 76 S. E. 1070. Even after the State has introduced new evidence to rebut the statement or to supplement its own case, leave to make a supplemental statement has been denied. *Fairfield* v. *State,* 155 Ga. 660, 118 S. E. 395; *Johnson* v. *State,* 120 Ga. 509, 48 S. E. 199; *Knox* v. *State,* 112 Ga. 373, 37 S. E. 416; *Boston* v. *State,* 94 Ga. 590, 21 S. E. 603; *Garmon* v. *State,* 24 Ga. App. 586, 101 S. E. 757. If the subject matter of the supplementary statement originates with counsel and not with the defendant, it has been held that this is sufficient reason to refuse to permit the making of a supplemental statement. *August* v. *State,* 20 Ga. App. 168, 92 S. E. 956. And the defendant who may have a persuasive explanation to give has no effective way of overcoming the possible prejudice from the fact that he may not be subjected to cross-examination without his consent, for he has no right to require cross-examination. *Boyers* v. *State,* 198 Ga. 838, 844–845, 33 S. E. 2d 251, 255–256. Of course, even in jurisdictions which have granted competence to defendants, the prosecution may decline to cross-examine. But at least the defendants in those jurisdictions have had the advantage of having their explanation elicited through direct examination by counsel. In Georgia, however, as was held in this case, counsel may not examine his client on direct examination except in the discretion of the trial judge. The refusal to allow counsel to ask questions rarely seems to be reversible error. See, *e. g., Corbin* v. *State,* 212 Ga. 231, 91 S. E. 2d 764; *Brown* v. *State,* 58 Ga. 212. "This discretion is to be sparingly exercised,

but its exercise will not be controlled except in cases of manifest abuse." *Whitley* v. *State,* 14 Ga. App. 577, 578, 81 S. E. 797. Indeed, even where the defendant has been cross-examined on his statement, it has been held that defense counsel has no right to ask a question, *Lindsay* v. *State,* 138 Ga. 818, 76 S. E. 369. Nor may counsel call the attention of the defendant to a material omission in his statement without permission of the trial court. *Echols* v. *State,* 109 Ga. 508, 34 S. E. 1038; *Clark* v. *State,* 43 Ga. App. 384, 159 S. E. 135.

This survey of the unsworn-statement practice in Georgia supports the conclusion of a Georgia commentator: "The fact is that when the average defendant is placed in the witness chair and told by his counsel or the court that nobody can ask him any questions, and that he may make such statement to the jury as he sees proper in his own defense, he has been set adrift in an uncharted sea with nothing to guide him, with the result that his statement in most cases either does him no good or is positively hurtful." 7 Ga. B. J. 432, 433 (1945).[18]

[18] For other Georgia comments on the practice, see 17 Ga. B. J. 120; 15 Ga. B. J. 342; 14 Ga. B. J. 362, 366; 3 Mercer L. Rev. 335; cf. 5 Ga. B. J., Feb. 1943, p. 47. The Georgia Bar Association has in the past supported a proposal in the legislature to make defendants competent. See, *e. g.,* 1952 Ga. Bar Assn. Rep. 31. Recent study of the problem by the Association's Committee on Criminal Law and Procedure resulted in a report recommending against change on grounds that it would "aid the prosecution and conviction of the defendant and would be of no material benefit to any defendant in a criminal case. Those who are on trial for their lives and liberty cannot possibly think and testify as clearly as a disinterested witness, and of course, it is agreed that a shrewd prosecutor could create, by expert cross examination, in the minds of the jury, an unfavorable impression of a defendant." 1957 Ga. Bar Assn. Rep. 182. However, since that time the Committee has twice recommended competency for criminal defendants and has prepared draft legislation for that purpose. See 1960 Ga. Bar Assn. Rep. 109, 115, 116, 119.

[*Footnote 18 continued on p. 594.*]

The tensions of a trial for an accused with life or liberty at stake might alone render him utterly unfit to give his explanation properly and completely. Left without the "guiding hand of counsel," *Powell* v. *Alabama, supra,*

Georgia's adherence to the rule of incompetency of criminal defendants contrasts with the undeviating trend away from exclusion of evidence that has characterized the development of the State's law since the nineteenth century. The Code of 1863 indicates that the limitations on and exceptions to disqualifications in the common law were numerous even before the Act of 1866. See, *e. g.*, §§ 3772 (5), 3779, 3780, 3781, 3782, 3783, 3785, 4563. The Georgia Arbitration Act of 1856 had made the parties competent in arbitration proceedings. See *Golden* v. *Fowler,* 26 Ga. 451, 458. Judge Lumpkin declared: "[A]s jurors have become more capable of exercising their functions intelligently, the Judges both in England and in this country, are struggling constantly to open the door wide as possible . . . to let in all facts calculated to affect the minds of the jury in arriving at a correct conclusion. . . . Truth, common sense, and enlightened reason, alike demand the abolition of all those artificial rules which shut out any fact from the jury, however remotely relevant, or from whatever source derived, which would assist them in coming to a satisfactory verdict." *Johnson* v. *State,* 14 Ga. 55, 61–62.

A policy favoring the reception of evidence has consistently characterized the decisions of the Georgia courts and Acts of the legislature since the 1866 Act. See, *e. g., Blount* v. *Beall,* 95 Ga. 182, 22 S. E. 52; *Myers* v. *Phillips,* 197 Ga. 536, 29 S. E. 2d 700; *Manley* v. *Combs,* 197 Ga. 768, 781–782, 30 S. E. 2d 485, 493–494; *Sisk* v. *State,* 182 Ga. 448, 453, 185 S. E. 777, 781; *Berry* v. *Brunson,* 166 Ga. 523, 531–533, 143 S. E. 761, 765; *Polk* v. *State,* 18 Ga. App. 324, 89 S. E. 437; *Watkins* v. *State,* 19 Ga. App. 234, 91 S. E. 284. The legislature has removed some of the exceptions retained in the 1866 Act. See Ga. Laws 1935, p. 120, allowing parties to testify in breach-of-promise actions. In 1957 the legislature removed the incompetency of a wife to testify for or against her husband. Ga. Laws 1957, p. 53, amending § 38–1604. Ga. Code § 38–101 sums up this policy: "The object of all legal investigation is the discovery of truth. The rules of evidence are framed with a view to this prominent end, seeking always for pure sources and the highest evidence."

Moreover, in the case of defendants jointly tried, Georgia allows one codefendant to testify as a sworn witness for the other, although his testimony may serve to acquit himself if believed. See, *e. g.,*

p. 69, he may fail properly to introduce, or to introduce at all, what may be a perfect defense. ". . . though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." *Ibid.* The treatment accorded the unsworn statement in the Georgia courts increases this peril for the accused. The words of Cooley, J., in his opinion for the Michigan Supreme Court in *Annis* v. *People,* 13 Mich. 511, 519–520, fit his predicament.

> "But to hold that the moment the defendant is placed upon the stand he shall be debarred of all assistance from his counsel, and left to go through his statement as his fears or his embarrassment may enable him, in the face of the consequences which may follow from imperfect or unsatisfactory explanation, would in our opinion be to make, what the statute designed as an important privilege to the accused, a trap into which none but the most cool and self-possessed could place himself with much prospect of coming out unharmed. An innocent man, charged with a heinous offence, and against whom evidence of guilt has been given, is much more likely to be overwhelmed by his situation, and embarrassed, when called upon for explanation, than the offender, who is hardened in guilt; and if he is unlearned, unaccustomed to speak in public assem-

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Staten v. *State,* 140 Ga. 110, 78 S. E. 766; *Cofer* v. *State,* 163 Ga. 878, 137 S. E. 378. It may even be error in such a situation for the court to treat such testimony as if it were an unsworn statement and to fail to give sufficient emphasis in the charge to the jury as to its effect as evidence. *Staten* v. *State, supra; Burnsed* v. *State,* 14 Ga. App. 832, 82 S. E. 595; *Roberson* v. *State,* 14 Ga. App. 557, 81 S. E. 798; cf. *O'Berry* v. *State,* 153 Ga. 880, 113 S. E. 203. And a defendant is allowed to give sworn testimony as to matters in his trial not going to the issue of his guilt. See *Thomas* v. *State,* 81 Ga. App. 59, 58 S. E. 2d 213.

blies, or to put together his thoughts in consecutive order any where, it will not be surprising if his explanation is incoherent, or if it overlooks important circumstances." [19]

We therefore hold that, in effectuating the provisions of § 38–415, Georgia, consistently with the Fourteenth Amendment, could not, in the context of § 38–416, deny appellant the right to have his counsel question him to elicit his statement. We decide no more than this. Our decision does not turn on the facts that the appellant was tried for a capital offense and was represented by employed counsel. The command of the Fourteenth Amendment also applies in the case of an accused tried for a noncapital offense, or represented by appointed counsel. For otherwise, in Georgia, "the right to be heard by counsel would be of little worth." *Chandler* v. *Fretag,* 348 U. S. 3, 10.

The judgment is reversed and the cause is remanded for proceedings not inconsistent with this opinion.

Reversed and remanded.

APPENDIX TO OPINION OF THE COURT.

Ala. Code, 1940, Tit. 15, § 305.
Alaska Comp. Laws Ann., 1949, § 66–13–53.
Ariz. Rev. Stat. Ann., 1956, § 13–163.
Ark. Stat., 1947, § 43–2016.
Cal. Pen. Code § 1323.5. See also Cal. Pen. Code § 1323; Cal. Const., Art. I, § 13.
Colo. Rev. Stat. Ann., 1953, § 39–7–15.
Conn. Gen. Stat., 1958, § 54–84.

[19] There the Michigan Supreme Court reversed a conviction because the trial judge refused to let counsel remind the defendant that he had omitted a material fact from his unsworn statement. The quoted excerpt immediately follows an observation that the Michigan statute permitting an unsworn statement evidently did not contemplate an ordinary direct examination.

Del. Code Ann., 1953, Tit. 11, § 3501.
Fla. Stat., 1959, § 918.09.
Hawaii Rev. Laws, 1955, § 222–15.
Idaho Code Ann., 1948, § 19–3003.
Ill. Rev. Stat., 1959, c. 38, § 734.
Ind. Ann. Stat., 1956, § 9–1603.
Iowa Code, 1958, § 781.12. See also Iowa Code § 781.13.
Kan. Gen. Stat. Ann., 1949, § 62–1420.
Ky. Rev. Stat., 1960, § 455.090.
La. Rev. Stat., 1950, § 15.461. See also La. Rev. Stat. § 15.462.
Me. Rev. Stat. Ann., 1954, c. 148, § 22.
Md. Ann. Code, 1957, Art. 35, § 4.
Mass. Gen. Laws Ann., 1959, c. 233, § 20.
Mich. Comp. Laws, 1948, § 617.64.
Minn. Stat., 1957, § 611.11.
Miss. Code Ann., 1942, § 1691.
Mo. Rev. Stat., 1959, § 546.260. See also Mo. Rev. Stat. § 546.270.
Mont. Rev. Codes Ann., 1947, § 94–8803.
Neb. Rev. Stat., 1956, § 29–2011.
Nev. Rev. Stat., 1957, § 175.170. See also Nev. Rev. Stat. § 175.175.
N. H. Rev. Stat. Ann., 1955, § 516.31. See also N. H. Rev. Stat. Ann. § 516.32.
N. J. Rev. Stat., 1951, § 2A:81–8.
N. M. Stat. Ann., 1953, § 41–12–19.
N. Y. Code Crim. Proc. § 393.
N. C. Gen. Stat., 1953, § 8–54.
N. D. Rev. Code, 1943, § 29–2111.
Ohio Rev. Code Ann., 1953, § 2945.43.
Okla. Stat., 1951, Tit. 22, § 701.
Ore. Rev. Stat., 1953, § 139.310.
Pa. Stat., 1930, Tit. 19, § 681. See also Pa. Stat., Tit. 19, § 631.
R. I. Gen. Laws Ann., 1956, § 12–17–9.

S. C. Code, 1952, § 26–405.
S. D. Code, 1939, § 34.3633.
Tenn. Code Ann., 1955, § 40–2402. See also Tenn. Code Ann. § 40–2403.
Tex. Code Crim. Proc., 1948, Art. 710.
Utah Code Ann., 1953, § 77–44–5.
Vt. Stat. Ann., 1959, § 13–6601.
Va. Code Ann., 1950, § 19.1–264.
Wash. Rev. Code, 1951, § 10.52.040.
W. Va. Code Ann., 1955, § 5731.
Wis. Stat., 1959, § 325.13.
Wyo. Stat., 1957, § 7–244.

MR. JUSTICE FRANKFURTER'S separate opinion for reversing the conviction, in which MR. JUSTICE CLARK joins.

Georgia in 1784 adopted the common law of England, Act of February 25, 1784, Prince's Digest 570 (1837). This adoption included its rules of competency for witnesses, whereby an accused was precluded from being a witness in his own behalf. It is doubtful whether and to what extent the common-law privilege of an accused, barred as a witness, to address the jury prevailed in Georgia, but it is a fair guess that the practice was far less than uniform. See *Roberts* v. *State,* 189 Ga. 36, 41, 5 S. E. 2d 340, 343. While the common-law rigors of incompetency were alleviated by an enactment of 1866 because "the inquiry after truth in courts of justice is often obstructed by incapacities created by the present law," * Georgia retained the incompetency of an accused to testify in his own defense. In 1868, for the first time a statutory provision granted the accused the privilege of making an unsworn statement to the jury. Ga. Laws

*Ga. Laws 1866, p. 138.

1868, p. 24. The sum of all this legislative history is that the defendant in a criminal prosecution in Georgia was disqualified as a witness, but was given opportunity to say his say to the jury. These two aspects of the legal situation in which Georgia placed the accused were made consecutive sections of the penal code in 1895, Ga. Code, 1895, §§ 1010, 1011, and have thus remained through their present form as §§ 38–415 and 38–416.

(1) It would seem to be impossible, because essentially meaningless as a matter of reason, to consider the constitutional validity of § 38–415 without impliedly incorporating the Georgia law which renders the defendant incompetent to present testimony in his own behalf under oath. This is not a right-to-counsel case. As the Georgia Supreme Court correctly stated: "The constitutional provisions . . . confer only the right to have counsel perform those duties and take such actions as are permitted by the law; and to require counsel to conform to the rules of practice and procedure, is not a denial of the benefit . . . of counsel." 215 Ga. 117, 119, 109 S. E. 2d 44, 46. What is in controversy here is the adequacy of an inextricably unified scheme of Georgia criminal procedure. The right to make an unsworn statement, provided by § 38–415, is an attempt to ameliorate the harsh consequences of the incompetency rule of the section following. Standing alone, § 38–415 raises no constitutional difficulty. Only when considered in the context of the incompetency provision does it take on meaning. If Georgia may constitutionally altogether bar an accused from establishing his innocence as a witness, it goes beyond its constitutional duty if it allows him to make a speech to the jury whether or not aided by counsel. Alternatively, if § 38–416 is unconstitutional—a legal nullity—a Georgia accused can insist on being sworn as a competent witness, and the privilege also to

make an unsworn statement without benefit of counsel would constitute an additional benefit of which he may or may not choose to avail himself. If, as is the truth, § 38–415 has meaning only when applied in the context of § 38–416's rule of incompetency, surely we are not so imprisoned by any formal rule governing our reviewing power that we cannot consider the two parts of a dissever-able, single whole because petitioner has not asked us in terms to review both halves. It is formalism run riot to find that the division into two separate sections of what is organically inseparable may not for reviewing purpose be treated as a single, appealable unit. This Court, of course, determines the scope of its reviewing power over a state court judgment.

(2) But if limitations on our power to review prevent us from considering and ruling upon the constitutionality of the application of Georgia's incompetency law—which alone creates the significant constitutional issue—then I should think that what is left of this mutilation should be dismissed for want of a substantial federal question. Considered *in vacuo,* § 38–415 fails, as has been pointed out, to present any reasonable doubts as to its constitutionality, for it provides only an additional right. If appellant had in fact purposefully chosen not to be a witness, had agreed to the validity of the incompetency provisions, and had intentionally limited his attack to § 38–415 as applied, he would be presenting an issue so abstract that the Court would not, I believe, entertain it.

Perhaps the accused failed to offer himself as a witness because he thought it would be a futile endeavor under settled Georgia law, while the opportunity to have the aid of counsel in making an unsworn statement pursuant to § 38–415 would be a discretionary matter for Georgia judges. Since I cannot assume that appellant purposefully intended to waive his constitutional claim concerning his incompetency—though he may not explicitly have

asserted this claim—I have no difficulty in moving from the Court's oblique recognition of the relevance to this controversy of § 38–416 to the candid determination that that section is unconstitutional.

MR. JUSTICE CLARK, whom MR. JUSTICE FRANKFURTER joins, concurring.

Because, as applied by the Georgia court, § 38–415 grants criminal defendants the opportunity to make unsworn statements in their own behalf, but withholds from the same defendants the assistance of their counsel in eliciting perhaps more effective statements, the Court today strikes down that section. It is held to be unconstitutional "in the context of § 38–416" which renders criminal defendants incompetent as witnesses at their own trials. The Court does not, however, treat § 38–416 as anything more substantial than *"context,"* and, while rendering its validity doubtful, fails to pass upon its constitutionality. The Court's hesitancy to reach that question appears to be due to appellant's tactic, at the trial, of offering his statement under § 38–415 and, in so doing, demanding the aid of his counsel, but not offering himself as a competent witness or challenging his exclusion under § 38–416. This has proven to be a perfect cast of appellant's line, for the Court has risen to the bait exactly as anticipated. The resulting advantage of the Court's present holding to the criminal defendant in Georgia is obvious—as matters now stand, the defendant may make an unsworn statement as articulate and convincing as the aid of counsel can evoke, but the prosecution may not cross-examine.

It is true that merely to defeat such a result is insufficient justification for this Court to reach out and decide additional constitutional questions otherwise avoidable. Nevertheless, the problem appellant poses under § 38–415 is so historically and conceptually intertwisted with the

rule of § 38–416 that not only must they be considered together, as the Court expressly recognizes, but they must be allowed to stand or fall together, as a single unitary concept, uncircumscribed by the accident of divisive codification. The section today struck down, § 38–415, is not even intelligible except in terms of the incompetency imposed by § 38–416.* Were the latter rule not codified, its proscription would have to be understood as § 38–415's operative premise of common-law disability. The purported boon of § 38–415 was founded on that disability, against the hardships of which, nowhere else presently imposed, it was intended to at least partially relieve. I would not withhold adjudication because of the fact of codification, nor merely on account of the procedural dodge resorted to by counsel.

Reaching the basic issue of incompetency, as I feel one must, I do not hesitate to state that in my view § 38–416 does not meet the requirements of due process and that, as an unsatisfactory remnant of an age gone by, it must fall as surely as does its palliative, § 38–415. Until such time as criminal defendants are granted competency by the legislature, the void created by rejection of the codified common-law rule of Georgia may be filled by state trial judges who would have to recognize, as secured by the Fourteenth Amendment, the right of a criminal defendant to choose between silence and testifying in his own behalf. In the same manner the state courts presently implement other federal rights secured to the accused, and therefore the fact that a void of local policy would be created is not an insuperable obstacle to the disposition I propose. Nor would past convictions be automatically rendered subject to fatal constitutional attack unless, as

*I agree with my Brother FRANKFURTER that if § 38–415 is to be isolated from the incompetency provision of § 38–416, "what is left of this mutilation should be dismissed for want of a substantial federal question."

was, in my view, done here, the proper challenge had been preserved by appropriate objection to active operation of the concept embodied in the incompetency rule in either of its phases. In view of the certain fact that criminal prosecutions will continue to be had in Georgia, and that some defendant, if not appellant himself at his new trial, will demand the right to testify in his own behalf, in strict compliance with the procedural standard adhered to today, we will sooner or later have the question of the validity of § 38–416 back on our doorstep. The result, predictably, will be the same as that reached under § 38–415 today. If that proves in fact to be the Court's future disposition of the claim I anticipate, the stability of interim convictions may well be jeopardized where related constitutional claims are preserved but, perhaps, not pressed. So too, on the reverse side of the coin, there may well be interim convictions where, had defendants been permitted to testify under oath in their own behalf, verdicts of acquittal would have been returned. This Court should not allow the administration of criminal justice to be thus frustrated or unreasonably delayed by such a fragmentation of the critical issue through procedural niceties made solely in the hope of avoiding a controlling decision on a question of the first magnitude.

For these reasons I deem it impractical as well as unwise to withhold for a future date a decision by the Court on the constitutionality of § 38–416.

Disagreeing with the distorted way by which the Court reverses the judgment, I join in its reversal only on the grounds stated here and in the opinion of my Brother FRANKFURTER which I join.

NEWSOM *v.* SMYTH, SUPERINTENDENT, VIRGINIA STATE PENITENTIARY.

CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 116. Argued January 16–17, 1961.—Decided March 27, 1961.

Certiorari was granted in this case because it was believed to present the question whether the Due Process Clause of the Fourteenth Amendment requires a State to appoint counsel to assist an indigent prisoner in prosecuting his appeal from a state conviction of murder. After oral argument and full consideration, *held* the record does not adequately establish that the State Supreme Court found or was required to find that the federal claim was presented to it; the case fails to present a federal question; and the writ of certiorari is dismissed as improvidently granted. Pp. 604–605.

Writ dismissed.

Armistead L. Boothe, acting under appointment by the Court, 363 U. S. 833, argued the cause and filed a brief for petitioner.

Reno S. Harp III, Assistant Attorney General of Virginia, argued the cause for respondent. With him on the brief was *A. S. Harrison, Jr.,* Attorney General.

PER CURIAM.

A writ of certiorari to review the judgment of the Supreme Court of Appeals of the Commonwealth of Virginia was granted in this case, 363 U. S. 802, in the belief that it duly presented for the Court's consideration the question whether the Due Process Clause of the Fourteenth Amendment to the Federal Constitution requires that the State must, in appropriate circumstances, appoint counsel to assist an indigent prisoner under sentence of conviction for a state crime in prosecuting his appeal. After hearing oral argument, and upon full consideration of the case, we find that the record does not adequately establish that the Virginia

court found or was required to find that there was presented to it the federal claim on which the case was brought here. The case thus fails to present a federal question, and the writ must be dismissed as improvidently granted.

So ordered.

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

In April 1953 petitioner was found guilty of murder in the first degree and was sentenced to life imprisonment in the state penitentiary. At the trial, petitioner had been represented by counsel, although at allocution he had complained that his counsel had failed to present relevant evidence. On April 18, 1953, petitioner wrote to the trial judge at his trial,[1] noting an appeal within the time allowed therefor under Virginia law. In a second letter written five days later,[2] petitioner requested "that

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[1] "April 18, 1953

"Honorable M. Ray Doubles
"Hustings Court Part II
"Richmond 24, Virginia

"Your Honor:

"In lue of any known action on the part of my attorney, I am taking this method of respectfully noting an appeal from the 'life sentence' imposed upon me in your Court on April 10, 1953.

"I will within the alloted time attempt to get Counsel to complete the appeal."

[2] "April 23, 1953

"Honorable Mr. Ray Doubles
"Hustings Court Part II
"Richmond, Va.

"Your Honor:

"Due to circumstances beyond my control, I have been unable to complete arrangements with an attorney to complete my appeal.

"Therefore, I respectfully request that you appoint me counsel to appeal my case to the State Supreme Court of Appeals."

you appoint me counsel to appeal my case to the State Supreme Court of Appeals." To neither letter did he receive any reply. He took no further steps to appeal his conviction.

In January 1959 he filed in the Virginia court a petition for a writ of *habeas corpus*. The Law and Equity Court of Richmond concluded that the petition did not allege "a failure of the trial court to accord to the accused those procedural safeguards guaranteed to him by the state and federal constitutions," and accordingly denied the writ. Petitioner sought review by the Supreme Court of Appeals, and that court refused to issue a writ of error. Then petitioner sought review here, and certiorari was granted. 363 U. S. 802.

The question raised by petitioner is substantial: Does the Federal Constitution obligate the several States to appoint counsel to assist indigent defendants to pursue whatever appellate remedies the States may offer? Cf. *Griffin* v. *Illinois*, 351 U. S. 12.

The opinion of the Law and Equity Court of Richmond discussed the problem of this case in those terms. After an extended discussion of the right of indigents to counsel, that court quoted from 55 A. L. R. 2d, at p. 1085, 2 L. Ed. 2d, at p. 1649, the following:

> ". . . Thus, the establishment of the rule that a state must, as a matter of federal constitutional law, provide indigents with the assistance of counsel to prosecute appeals in criminal cases would appear to be no more than a logical extension of the Griffin doctrine."

It then added:

> "Whether this view be correct or incorrect is, of course, the question in the instant case."

And the Supreme Court of Appeals in refusing a petition for writ of error said that the judgment was "plainly right." Regardless of whether the courts below were "required to find" that petitioner had adequately stated his federal claim, those courts in fact did so find as the adjudication was on the issues exposed in the record.[3]

The question whether the Equal Protection Clause of the Fourteenth Amendment requires appointment of counsel for indigents to represent them on appeal from state court judgments of conviction is present and ripe for decision. I dissent from the dismissal of the certiorari.

[3] The judgment of the Supreme Court of Appeals read: "The petition of Stuart W. Newsom for a writ of error . . . having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of the opinion that the said judgment is plainly right, doth reject such petition, and refuse said writ of error, the effect of which is to affirm the judgment [of the court below]."

581322 O–61—43

ALLISON *v.* INDIANA.

APPEAL FROM THE SUPREME COURT OF INDIANA.

No. 696. Decided March 27, 1961.

Appeal dismissed and certiorari denied.
Reported below: —— Ind. ——, 166 N. E. 2d 171.

William C. Erbecker for appellant.

PER CURIAM.

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

FLORIDA EX REL. ISRAEL *v.* CANOVA ET AL., FLORIDA BOARD OF PHARMACY.

APPEAL FROM THE SUPREME COURT OF FLORIDA.

No. 697. Decided March 27, 1961.

Appeal dismissed for want of a substantial federal question.
Reported below: 123 So. 2d 672.

Robert H. Givens, Jr. for appellant.

PER CURIAM.

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

VAN HOOK *v.* UNITED STATES.

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

No. 705. Decided March 27, 1961.

Certiorari granted; judgment reversed; and case remanded.
Reported below: 284 F. 2d 489.

Francis Heisler for petitioner.

Solicitor General Cox, Assistant Attorney General Miller and *Beatrice Rosenberg* for the United States.

PER CURIAM.

The petition for writ of certiorari is granted. The judgment is reversed and the case remanded for resentencing in compliance with Rule 32 of the Federal Rules of Criminal Procedure. *Green* v. *United States*, 365 U. S. 301.

HITCHCOCK *v.* ARIZONA.

APPEAL FROM THE SUPREME COURT OF ARIZONA.

No. 718, Misc. Decided March 27, 1961.

Appeal dismissed and certiorari denied.
Reported below: 87 Ariz. 277, 350 P. 2d 681.

PER CURIAM.

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

CHAPMAN *v.* UNITED STATES.

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

No. 175. Argued February 23, 1961.—Decided April 3, 1961.

State police officers, acting without a warrant but with the consent of petitioner's landlord, who had summoned them after detecting the odor of whiskey mash on the premises, entered petitioner's rented house in his absence through an unlocked window and there found an unregistered still and a quantity of mash. When petitioner returned and entered the house, he was arrested by a state officer. Federal officers, also without warrants, arrived soon thereafter and took custody of petitioner, samples of the mash and the still. The evidence so seized was admitted over petitioner's objection at his trial in a federal court and he was convicted of violating the federal liquor laws. *Held:* The search and seizure were unlawful, and the judgment affirming the conviction is reversed. Pp. 610–618.

272 F. 2d 70, reversed.

J. Sewell Elliott argued the cause and filed a brief for petitioner.

Robert S. Erdahl argued the cause for the United States. On the brief were *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Kirby W. Patterson.*

MR. JUSTICE WHITTAKER delivered the opinion of the Court.

Acting without a warrant but with the consent of the petitioner's landlord, Georgia law enforcement officers entered—through an unlocked window—and searched petitioner's rented house, in his absence, and there found and seized an unregistered "distillery" and 1,300 gallons of "mash." Soon afterward petitioner was indicted in

the District Court for the Middle District of Georgia for violations of the federal liquor laws.[1] He promptly moved the court for an order suppressing the use of the seized items as evidence at his impending criminal trial on the ground that they were obtained by an unlawful search and seizure. After hearing evidence, the court held that the search and seizure were lawful under federal standards and denied the motion.

At the subsequent trial, the evidence sought to be suppressed was offered and received, over petitioner's renewed objections. Upon that evidence, the jury found petitioner guilty, and the court sentenced him to imprisonment for a year and a day. On appeal, the Court of Appeals for the Fifth Circuit affirmed. 272 F. 2d 70. To examine petitioner's claim that the courts below violated the standards governing admissibility of timely challenged evidence in federal courts, we granted certiorari. 363 U. S. 836.

The relevant evidence is not controverted. It shows the following: One Bridgaman, and another, owned a dwelling house in a wooded area near the Macon, Georgia, airport, which they commonly rented through a rental agency. Understanding that the house had been rented to a new tenant, Bridgaman, on Sunday, February 16, 1958, went to the house for the purpose of inviting the tenants to attend church. Upon arrival he noted a strong "odor of mash" about the house. There was no response to his knock, and, although he tried to do so, he was unable to see into the house. He then returned to his home and, by telephone, advised the local police department of his observations. Soon afterward two local police officers, Harbin and Chance, arrived at Bridgaman's home, and the three then went to the rented

[1] 26 U. S. C. §§ 5601, 5606.

house. They noticed a strong odor of "whiskey mash" coming from the house. After their knock at the door failed to produce a response, they walked around the house and tried to look into it but were unable to do so because the shades were down. They found that all of the windows were locked, save one in the bathroom. The officers testified that Bridgaman told them "to go in the window and see what['s] what in there." Bridgaman's version of what he said was: "If it's what I think it is, what it smells like, yes, you can have my permission to go in." Thereupon they opened the bathroom window and, with the assistance of Bridgaman and Chance, Harbin entered the house through that opening. Upon entering the house he saw a complete and sizable distillery and 1,300 gallons of mash located in the living room. Apart from some accessories, containers and firewood, there was nothing else in the house. Harbin then called to Chance that he had found a large still and asked him "to go get some help." Chance immediately left—dropping Bridgaman at his home—to call the federal officers. While the federal officers were en route to the house, petitioner drove up, unlocked the front door, entered the house and was immediately arrested by Harbin. The federal officers soon arrived and took custody of petitioner. They also saved samples of the mash, took various pictures of the scene and then destroyed the still and its contents. Neither the state nor the federal officers had any warrant of any kind.

Although the decisions below were rendered prior to this Court's decision in *Elkins* v. *United States*, 364 U. S. 206, the doctrine of that case is not here involved, as the lower courts explicitly rested their determinations on the ground that the search and seizure, though made by state officers, were valid under federal standards. Hence, the only question here is whether those determinations were correct. We believe that they were not.

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Until *Agnello* v. *United States,* 269 U. S. 20, this Court had never directly decided, but had always assumed, "that one's house cannot lawfully be searched without a search warrant, except as an incident to a lawful arrest therein" (*id.,* at 32), but that case explicitly decided that "Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. And such searches are . . . unlawful notwithstanding facts unquestionably showing probable cause." *Id.,* at 33.

At least two decisions of this Court are closely relevant. *Taylor* v. *United States,* 286 U. S. 1, and *Johnson* v. *United States,* 333 U. S. 10. In the *Taylor* case, Federal agents had received "complaints" respecting activities at a certain garage in Baltimore and decided to "investigate." As they "approached the garage they got the odor of whiskey coming from within." Looking through a small opening, they saw a number of cardboard cases. Although they had no warrant of any kind, they "broke the fastening upon a door, entered and found one hundred twenty-two cases of whiskey. No one was within the place and there was no reason to think otherwise. While the search progressed, Taylor came from his house and was put under arrest. The search and seizure were undertaken with the hope of securing evidence upon which to indict and convict him." *Id.,* at 5.

In condemning that search and seizure, this Court said that the officers "had abundant opportunity [to obtain a warrant] and to proceed in an orderly way even after the odor had emphasized their suspicions; there was no probability of material change in the situation during the time necessary to secure such warrant. Moreover, a short period of watching would have prevented any such possibility. . . . Prohibition officers may rely on a distinctive odor as a physical fact indicative of possible crime; but its presence alone does not strip the owner of a building of constitutional guarantees against unreasonable search." The Court concluded that "in any view, the action of the agents was inexcusable and the seizure unreasonable. The evidence was obtained unlawfully and should have been suppressed." *Id.*, at 6.

In the *Johnson* case, state narcotic agents, while in the hallway of a hotel, recognized a strong odor of burning opium coming from a particular room. Without knowing who was occupying the room, they knocked and, after some delay, the door was opened. The agents then entered the room and told the occupant "to consider [herself] under arrest because we are going to search the room." The search produced incriminating opium and smoking apparatus which was warm from recent use. The District Court refused to suppress that evidence and admitted it over defendant's objection at the trial and she was convicted. In reversing, this Court said:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

> Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. . . . The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.
>
> "There are exceptional circumstances in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate's warrant for search may be dispensed with. But this is not such a case." 333 U. S., at 13–15.

Here, as in that case, "No reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate. These are never very convincing reasons and, in these circumstances, certainly are not enough to by-pass the constitutional requirement. No suspect was fleeing or likely to take flight. The search was of permanent premises, not of a movable vehicle. No evidence or contraband was threatened with removal or destruction, except perhaps the fumes which we suppose in time would disappear." 333 U. S., at 15.

We think it must be concluded here, as it was in *Johnson,* that "If the officers in this case were excused from the constitutional duty of presenting their evidence to a mag-

istrate, it is difficult to think of a case in which it should be required." 333 U. S., at 15. See also *Lustig* v. *United States,* 338 U. S. 74; *United States* v. *Rabinowitz,* 339 U. S. 56; *United States* v. *Jeffers,* 342 U. S. 48; *Jones* v. *United States,* 357 U. S. 493.

Actually, the Government does not contend in this Court that this search and seizure, as such, met the standards of the Fourth Amendment. Instead, it says: "Our position is that when the landlord, paying a social call, found good reason to believe that the leased premises were being wasted and used for criminal purposes, he had authority to enter as a matter of right and to bring officers with him for this purpose." It says that, under the common law, a landlord has an absolute right to enter the demised premises "to view waste," and that he should be able to exercise that right through law enforcement officers to whom he has delegated his authority. But it cites no Georgia or other case holding that a landlord, in the absence of an express covenant so permitting, has a right forcibly to enter the demised premises without the consent of the tenant "to view waste." And, so far as our research discloses, no Georgia case so holds.

The only relevant authority cited by the Government is a statement from Tiffany, Landlord and Tenant (1910 ed.), § 3. b. (2), p. 9, that "It has also been said that [the landlord] may enter to 'view waste,' that is, to determine whether waste has been committed, *provided at least that this does not involve the breaking of windows or doors . . . .*" [2] (Emphasis added.) There are several answers to this contention. First, here the landlord and the officers forced open a window to gain entry to the premises. Second, "their purpose in entering was [not to view waste but] to search for distilling equipment . . . ." *Jones* v. *United States, supra,* at 500. Third, to uphold

[2] Only ancient English cases are cited in support of the text.

such an entry, search and seizure "without a warrant would reduce the [Fourth] Amendment to a nullity and leave [tenants'] homes secure only in the discretion of [landlords]." *Johnson* v. *United States, supra,* at 14. Moreover, "it is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical. . . . [W]e ought not to bow to them in the fair administration of the criminal law. To do so would not comport with our justly proud claim of the procedural protections accorded to those charged with crime." *Jones* v. *United States,* 362 U. S. 257, 266–267.

After pointing to the fact that a Georgia statute (Title 58 Ga. Code § 106) provides that the unlawful manufacture of distilled liquor on rented premises shall work a forfeiture of the rights of the tenant, at the option of the landlord, and that another (Title 58 Ga. Code § 109) provides that use of a structure for that purpose constitutes a nuisance, the Government argues that, inasmuch as he used the demised premises for the illicit manufacture of distilled liquor, petitioner had forfeited all rights in the premises, and the landlord thus acquired the right forcibly to enter to abate the nuisance, and that he could and did delegate that right to the officers. But it is clear that, before the officers made the forcible entry, the landlord did not know that the premises were being used for the manufacture of liquor, nor had he exercised his statutory option to forfeit the tenancy for such a cause. And the Supreme Court of Georgia has held that a proceeding to abate a nuisance under § 109 "must proceed for the public on information filed by the solicitor-general of the circuit." *Kilgore* v. *Paschall,* 202 Ga. 416, 417, 43 S. E. 2d 520, 521.

It follows that this search was unlawful, and since evidence obtained through that search was admitted at the trial, the judgment of the Court of Appeals must be

Reversed.

MR. JUSTICE BLACK concurs in the result.

MR. JUSTICE FRANKFURTER, concurring in the judgment.

Since searches and seizures play such a frequent role in federal criminal trials, it is most important that the law on searches and seizures by which prosecutors and trial judges are to be guided should be as clear and unconfusing as the nature of the subject matter permits. The course of true law pertaining to searches and seizures, as enunciated here, has not—to put it mildly—run smooth. The Court's opinion in this case is hardly calculated, I regret to say, to contribute to clarification. The reasoning by which the Court reaches its result would be warranted were *Trupiano* v. *United States,* 334 U. S. 699 (1948), still law. While the Court does not explicitly rely on it, underlying the present decision is the approach of *Trupiano.* That decision was a short-lived deviation from the course of decisions preceding it and it was specifically overruled by *United States* v. *Rabinowitz,* 339 U. S. 56, 66 (1950). Since the *Rabinowitz* case expresses the prevailing view, the decision in this case runs counter to it. The Court does rely on *Johnson* v. *United States,* 333 U. S. 10, although that case was seriously impaired by *Rabinowitz,* 339 U. S., at 66, dissenting opinion, at 85.

Surely it is fair to say that the lower courts and prosecutors have a right to proceed on the assumption, on the basis of controlling decisions, that whether or not a search is "unreasonable" turns on the circumstances presented by a particular situation, as a matter of substantive determination. On that test, I find it very difficult to conclude that a police officer may not deem adequate

the authorization of a landlord to enter his house without a search warrant where he has solid ground for believing that his lessee is utilizing the house as an illegal distillery. It seems to me that it is not at all "unreasonable" not to charge a local police officer with knowledge of the law of Georgia regarding the power of a landlord to abate a nuisance in his house. Apart from charging a policeman with knowledge of the local law relating to landlord and tenant, he certainly would not acquire that knowledge by reading the only Georgia case to which the Court's opinion refers, *Kilgore* v. *Paschall,* 202 Ga. 416, 43 S. E. 2d 520, a case which deals with the procedure of a solicitor general of a Georgia circuit in abating a nuisance by an injunction and tells nothing about the remedy of self-help by a landlord.

In joining the Court's judgment, I do so on the basis of the views set forth in my dissents in *Davis* v. *United States,* 328 U. S. 582, 594; *Zap* v. *United States,* 328 U. S. 624, 630; *Harris* v. *United States,* 331 U. S. 145, 155; *United States* v. *Rabinowitz, supra,* at 68. As these opinions elucidate, the Fourth Amendment incorporates a guiding history that gives meaning to the phrase "unreasonable searches and seizures" contained within it far beyond the meaning of the phrase in isolation and taken from the context of that history and its gloss upon the Fourth Amendment. The Amendment in its entirety in the setting of that history decidedly does not leave the phrase "unreasonable searches and seizures" at large.

MR. JUSTICE CLARK, dissenting.

The Constitution condemns only an *unreasonable* search. As my Brother FRANKFURTER says, that determination "turns on the circumstances presented by a particular situation." [1]

[1] I join in his opinion except for the last paragraph in which he concurs in the judgment of the Court.

As I read the record, Bridgaman had rented a house to Chapman. On a Sunday morning he called at the house to invite Chapman to church services. However, Bridgaman found Chapman gone, the house locked up and an "awful scent" of whiskey mash all over the place, including an open but empty cellar. He reported these facts to state officers and, at his suggestion, two officers accompanied him to the house. They too smelled, as the Court says, "a strong odor of 'whiskey mash' coming from the house."

Under Georgia law, the use of premises for the manufacture or the keeping of liquor for disposition works "a forfeiture of the rights of any lessee or tenant under any lease or contract for rent . . . ."[2] Bridgaman advised the officers he was the owner of the house, had it leased out, and "instructed" officer Harbin to enter it and "see what['s] what in there." The officers found a bathroom window unlocked. Bridgaman "told" the officers "to go in the window" and assisted in "boosting" officer Harbin into the window and on into the house. Inside, the officer found a still set up for operation and 1,300 gallons of whiskey mash in the vats. There was neither household furniture nor other evidence of residential occupancy.

The Court sets aside Chapman's conviction on the ground that this search without a warrant was "unreasonable." For the life of me I cannot see why this is true. I agree with a unanimous Court of Appeals that "under the circumstances of the search here made by the State officers, no illegality was shown."

The "reasonableness" of the search hinges on the rights of the landlord under Georgia law in such a situation.

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[2] 58 Ga. Code Ann., § 106. Aside from eviction, there are no statutory procedural requirements as to forfeiture, the forfeit operating by virtue of § 106 at the option of the landlord.

This Court refuses to honor the clear language of § 106, apparently because the Government "cites no Georgia or other case" holding that a landlord may, under the circumstances here, enter on his premises. Instead, it bases its reversal on *Taylor* v. *United States,* 286 U. S. 1, and *Johnson* v. *United States,* 333 U. S. 10, involving entry by officers, unaccompanied by the landlord, into a *home* without a search warrant when there was ample time to secure one. This doctrine, established by *Trupiano* v. *United States,* 334 U. S. 699 (1948), was repudiated and specifically overruled only two years later in *United States* v. *Rabinowitz,* 339 U. S. 56, at 66. Furthermore, none of the cases cited by the Court involve the landlord-tenant circumstance controlling here.

As to Georgia law, the Court itself finds that "no Georgia case" holds that landlords have a right of entry as was exercised by Bridgaman here. It says that, first, the window was forced, second, the entry was for purposes of search and, third, affirmance would " 'leave [tenants'] homes secure only in the discretion of [landlords]' " (quoting from *Johnson, supra*). The obvious answer to that is: "Chapman was a tenant no more!" The statute provided for the forfeiture of his lease at his lessor's option when he began making whiskey on the premises. And Bridgaman so elected when he directed the officers to enter the house. It was Chapman who was the trespasser, not Bridgaman. The latter was merely repossessing his property, not abating a nuisance. Therefore, § 109 of the Georgia Code, cited by the Court, has no bearing here for that statute merely provides that the Attorney General "may" abate such a nuisance. It has no reference to landlords *qua* landlords. Indeed, the officers here could have abated the nuisance without judicial help by destroying the still and all of its paraphernalia under authority of 58 Ga. Code Ann. (Cum.

Supp. 1958) § 207.[3] Likewise, *Kilgore* v. *Paschall,* 202 Ga. 416, 43 S. E. 2d 520, also cited by the Court, is entirely inapposite. That case merely holds that the special statutory authorization, under an entirely different provision of the Georgia Code, § 110, to close up "blind tigers," *i. e.,* public places of disrepute where gambling, drinking, etc., are carried on, must be brought by the Solicitor of the county wherein they are located. But even if it did hold that actions under § 109 must be brought by the Solicitor, that ruling would have no effect here, precisely because the present factual situation does not come under § 109 but under § 106 and § 207, *supra.*

Furthermore, there was ample reason for not getting a warrant here. It was Sunday afternoon and, as the Georgia officer testified, he had "never got one on Sunday." "I don't think you can." And this was buttressed by his further statements: "Well, I didn't feel no call to get one." "The man that owned the house, he was there and he told us to go in the window and see what['s] what in there, so we went on in." This shows a complete reliance by the officers on Bridgaman's direction to enter the house. This, I say, made the search entirely reasonable and therefore valid under the Fourth Amendment.

Every moment of every day, somewhere in the United States, a law enforcement officer is faced with the problem of search and seizure. He is anxious to obey the rules that circumscribe his conduct in this field. It is the duty of this Court to lay down those rules with such clarity and understanding that he may be able to follow them. For some years now the field has been muddy, but today the Court makes it a quagmire. It fashions a novel rule, supporting it with an old theory long since over-

[3] Section 207 provides in pertinent part:
"[W]henever said apparatus [for making liquor is] . . . found or discovered by any sheriff, . . . the same shall be summarily destroyed and rendered useless by him without any formal order of the court."

ruled. If *Rabinowitz* is no longer law the Court should say so. It is disastrous to law enforcement to leave at large the inconsistent rules laid down in these cases. It turns the wellsprings of democracy—law and order—into a slough of frustration. It turns crime detection into a game of "cops and robbers." We hear much these days of an increasing crime rate and a breakdown in law enforcement. Some place the blame on police officers. I say there are others that must shoulder much of that responsibility.

581322 O–61—44

UNITED STATES *v.* VIRGINIA ELECTRIC & POWER CO.

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

No. 49. Argued November 10, 1960.—Decided April 3, 1961.

In connection with the construction of a dam and reservoir on a navigable river, the United States acquired by condemnation a flowage easement over a tract of fast land adjacent to one of its navigable tributaries. That tract included a smaller tract of fast land over which respondent owned a perpetual and exclusive flowage easement, which was destroyed by the Government's appropriation. *Held:*

1. Respondent is entitled to compensation for the value of its easement which is not attributable to the flow of the stream but to the depreciative impact of the easement upon the nonriparian uses of the land. Pp. 627–631.

2. The value of respondent's easement is the nonriparian value of the subservient land discounted by the improbability of the easement's exercise, and, in assessing this improbability, no weight should be given to the prospect of governmental appropriation. Pp. 631–636.

270 F. 2d 707, judgment vacated and cause remanded.

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

Ralph H. Ferrell, Jr. argued the cause for respondent. With him on the brief were *George D. Gibson* and *Francis V. Lowden, Jr.*

MR. JUSTICE STEWART delivered the opinion of the Court.

In 1944 Congress authorized the construction of a dam and reservoir on the Roanoke River in Virginia and North Carolina. For purposes of that project the Government

acquired by condemnation a flowage easement over 1840 acres of fast lands adjacent to the Dan River, a navigable tributary of the Roanoke. This 1840-acre tract was part of a 7400-acre estate. The respondent owned a perpetual and exclusive flowage easement over 1540 acres within the easement taken by the Government. The only question presented by this case concerns the compensation awarded to the respondent for the destruction of its easement.

The respondent's easement had been purchased from the owner of the estate and had been conveyed to the respondent's predecessors in title by various deeds over a period of many years, beginning in 1907. Along with the easement the fee owner had also expressly granted by deed the release of all claims for damage to the residue of the estate resulting from the exercise of rights under the easement.

In 1951, after extended negotiations, the owner of the estate agreed to convey to the Government a flowage easement over the 1840-acre tract in return for the payment of one dollar.[1] This agreement was expressly made subject to "such water, flowage, riparian and other rights, if any," as the respondent owned in the tract. The agreement also provided that the Government could elect to acquire its easement by a condemnation proceeding, in which event the agreed consideration of one dollar would be "the full amount of the award of just compensation inclusive of interest." Exercising this election, the Government instituted condemnation proceedings in the District Court to acquire a flowage easement over the 1840 acres in question, depositing one dollar as the estimated just compensation for the property to be taken.

[1] The record indicates that the owner was willing to accept this nominal amount because of her interest in developing the balance of the estate as a wild game preserve, a use which presumably would be enhanced by a contiguous artificial lake.

The fee owner acknowledged the settlement contract previously made and agreed to the one dollar compensation. The respondent, whose easement was to be destroyed, intervened in the proceedings to contest "the issue of just compensation."

The District Court made a substantial award to the respondent as compensation for the taking of its flowage easement. The judgment was affirmed by the Court of Appeals for the Fourth Circuit, on the authority of that court's decision in *United States* v. *Twin City Power Co.*, 215 F. 2d 592. 218 F. 2d 524. After the judgment in the *Twin City* case was reversed by this Court, 350 U. S. 222, we vacated the judgment in this litigation and remanded the case to the Court of Appeals for further consideration in the light of our *Twin City* decision. 350 U. S. 956. The Court of Appeals in turn remanded the case to the District Court with instructions that, in computing the amount of compensation to be awarded for the taking of the respondent's easement, there should be eliminated "any element of value arising from the availability of the land for water power purposes due to its being situate on a navigable stream." 235 F. 2d 327, 330, rehearing denied 237 F. 2d 165.

On remand the District Court proceeded in accordance with these directions. Commissioners were appointed and given detailed instructions to follow in computing the compensation to be awarded the respondent. These instructions included an explicit direction to exclude from the computation any element of value arising from the availability of the land for water power purposes attributable to its location on a navigable stream.[2] The Commissioners found that, under the criteria imposed by the

[2] The detailed instructions were otherwise based upon a traditional method of valuing what the Government appropriated, *i. e.*, the difference in the value of the servient land before and after the Government's easement was imposed.

court, the value of the respondent's easement was $65,520. The district judge accepted these findings, and in accordance with them awarded the respondent that sum. On appeal the judgment was affirmed. 270 F. 2d 707.

We granted certiorari to consider the Government's claim that the respondent's easement had no compensable value when appropriated by the United States. 362 U. S. 947. For the reasons that follow we reject that argument in the extreme form it has been presented, but we have concluded that the judgment must nonetheless be set aside for a redetermination of the compensation award.

It is indisputable, as the Government acknowledges, that a flowage easement is "property" within the meaning of the Fifth Amendment. See *United States* v. *Welch,* 217 U. S. 333; *Panhandle Co.* v. *Highway Comm'n,* 294 U. S. 613, 618; *Western Union Tel. Co.* v. *Penn. R. Co.,* 195 U. S. 540, 570. Similarly, there can be no question that the Government's destruction of that easement would ordinarily constitute a taking of property within the meaning of the Fifth Amendment. See *Pumpelly* v. *Green Bay Co.,* 13 Wall. 166, 181; *United States* v. *Cress,* 243 U. S. 316, 327–329; *United States* v. *Kansas City Ins. Co.,* 339 U. S. 799, 809–811. Nevertheless, it is argued that the Government cannot be required to pay compensation for the destruction of the easement in the present case because the easement was subject to the overriding navigational servitude of the United States.

This navigational servitude—sometimes referred to as a "dominant servitude," *Federal Power Comm'n* v. *Niagara Mohawk Power Corp.,* 347 U. S. 239, 249, or a "superior navigation easement," *United States* v. *Grand River Dam Authority,* 363 U. S. 229, 231—is the privilege to appropriate without compensation which attaches to the exercise of the "power of the government to control and

regulate navigable waters in the interest of commerce." *United States* v. *Commodore Park,* 324 U. S. 386, 390. The power "is a dominant one which can be asserted to the exclusion of any competing or conflicting one." *United States* v. *Twin City Power Co.,* 350 U. S. 222, 224–225; *United States* v. *Willow River Co.,* 324 U. S. 499, 510. A classic description of the scope of the power and of the privilege attending its exercise is to be found in the Court's opinion in *United States* v. *Chicago, M., St. P. & P. R. Co.:*

> "The dominant power of the federal Government, as has been repeatedly held, extends to the entire bed of a stream, which includes the lands below ordinary high-water mark. The exercise of the power within these limits is not an invasion of any private property right in such lands for which the United States must make compensation. [Citing cases.] The damage sustained results not from a taking of the riparian owner's property in the stream bed, but from the lawful exercise of a power to which that property has always been subject." 312 U. S. 592, 596–597.

Since the privilege or servitude only encompasses the exercise of this federal power with respect to the stream itself and the lands beneath and within its high-water mark, the Government must compensate for any taking of fast lands which results from the exercise of the power. This was the rationale of *United States* v. *Kansas City Ins. Co.,* 339 U. S. 799, where the Court held that when a navigable stream was raised by the Government to its ordinary high-water mark and maintained continuously at that level in the interest of navigation, the Government was liable "for the effects of that change [in the water level] upon private property beyond the bed of the stream." 339 U. S., at 800–801. See also *United States* v. *Willow River Co.,* 324 U. S. 499, 509.

But though the Government's navigational privilege does not extend to lands beyond the high-water mark of the stream, the privilege does affect the measure of damages when such land is taken. In *United States* v. *Twin City Power Co.,* 350 U. S. 222, we held that the compensation awarded for the taking of fast lands should not include the value of the land as a site for hydroelectric power operations. It was pointed out that such value, derived from the location of the land, is attributable in the end to the flow of the stream—over which the Government has exclusive dominion. 350 U. S., at 225–227. Thus, just as the navigational privilege permits the Government to reduce the value of riparian lands by denying the riparian owner access to the stream without compensation for his loss, *United States* v. *Commodore Park,* 324 U. S. 386, 390–391; *Scranton* v. *Wheeler,* 179 U. S. 141, 162–165; *Gibson* v. *United States,* 166 U. S. 269, 276, it also permits the Government to disregard the value arising from this same fact of riparian location in compensating the owner when fast lands are appropriated.

The Government's argument is that the rationale of *Twin City* makes payment of any compensation for the destruction of the respondent's easement unnecessary in the present case. This argument is based on the theory that the respondent's easement had no value save in conjunction with water power development. The respondent acknowledges that the courts below were correct in excluding any value of the easement derived from the availability of the land for water power purposes. It argues, however, that the easement had other value, derived from uses of the land not dependent upon the flow of the stream. If the easement did have such value, then the Government must compensate for the easement's destruction under the rule of *Kansas City Ins. Co., supra,* since the easement was a property right in fast lands. The basic issue is thus whether the respondent's easement

might be found to have value other than in connection with the flow of the stream.

We think such a finding might be warranted. The evidence was that the highest and best use of the servient land (unconnected with riparian uses) was for agriculture, timber and grazing purposes. The respondent had an exclusive and perpetual property right to destroy those uses and the value which they created. This right was an attribute of a transferable, commercial easement with intrinsic value. It had been acquired for a valuable consideration. It had a marketability roughly commensurate with the marketability of the subservient fee. Only an adventurous purchaser would have acquired the underlying fee interest in the 1540-acre tract for any purpose whatever, without also purchasing the easement.

If easements to flood fast lands were worthless as a matter of law when taken by the United States, it would follow that when the Government took such an easement from the owner of an unencumbered tract of land, the Government would have to pay the owner nothing. That is not the law. *United States* v. *Kansas City Ins. Co.*, 339 U. S. 799. The Government itself acknowledges that it must pay such a landowner for the value of the property which does not stem from the flow of the stream, the value based upon the nonriparian uses of the property.

It follows that the Government must likewise compensate the easement owner for that aspect of the easement's value which is attributable not to water power, but to the depreciative impact of the easement upon the nonriparian uses of the property. The valuation of an easement upon the basis of its destructive impact upon other uses of the servient fee is a universally accepted method of determining its worth. See, *e. g.*, *Olson* v. *United States*, 292 U. S. 246, 253; *Karlson* v. *United States*, 82 F. 2d 330, 337; Jahr, Eminent Domain, 252 and n. 6 (collecting cases); 4 Nichols, Eminent Domain, § 12.41 [2], n. 27

(collecting cases) (1951 ed.); 1 Orgel, Valuation under Eminent Domain, § 106, at 454 (2d ed.); Saxon, Appraising Flowage Easements, 24 Appraisal Journal 490, 494.

But the Government contends that the market value of the easement to those interested in developing the nonriparian uses of the fee can be ignored. It is claimed that, despite the general principle of indemnification underlying the Fifth Amendment, see *Olson* v. *United States,* 292 U. S. 246, 255, no compensation should be allowed for this value because it represents the "destructive function" of the easement. Cf. *Roberts* v. *New York,* 295 U. S. 264, 283. It is argued that equitable principles prohibit compensation for such value. But equity works the other way. At the very least, the Government's argument would mean, in a case like this one, that compensation could be denied the fee owner because he had already conveyed the flowage easement, cf. *United States* v. *Sponenbarger,* 308 U. S. 256, 265–266, and denied the owner of the easement because it was valueless against condemnation by the United States. The Government would thus destroy the entire property interest in fast lands without compensation. "The word 'just' in the Fifth Amendment evokes ideas of 'fairness' and 'equity' . . . ." *United State* v. *Commodities Corp.,* 339 U. S. 121, 124; see *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 324–326. The result contended for by the Government would hardly comport with those standards. The District Court and the Court of Appeals were correct in holding that a flowage easement over fast lands adjoining a navigable stream is property which cannot be appropriated without compensating the owner.

The remaining question is whether the District Court's method of determining the amount of compensation to be awarded was correct. The court was clearly right in excluding all value attributable to the riparian location of the land. *United States* v. *Twin City Power Co.,*

350 U. S. 222. There can be no quarrel either with the court's procedure in directing the Commissioners to appraise first the easement taken by the Government, and then to apportion its value between the respondent and the owner of the subservient fee.[3] *United States* v. *Dunnington,* 146 U. S. 338, 343–345, 350–354. And the court adopted an acceptable method of appraisal, indeed the conventional method, in valuing what was acquired by the Government by taking the difference between the value of the property before and after the Government's easement was imposed. See *Olson* v. *United States,* 292 U. S. 246, 253.[4] For these reasons we think that the court followed an entirely acceptable procedure in valuing the totality of what was appropriated by the Government.

In apportioning the respondent's share of this value, however, we think that the court erred.[5] The court

[3] The owner of the fee, having agreed to convey her interest for one dollar, would, of course, not receive any larger amount apportioned to her interest. See *Albrecht* v. *United States,* 329 U. S. 599.

[4] In determining the value of the Government's easement, the court assumed its proportions to be limited to 1540 acres, rather than to the 1840 acres actually taken. This was entirely permissible. Since the owner of the fee was making no claim, the only objective of the proceedings in the District Court was to determine the amount of compensation to be awarded the respondent. It was quite logical, therefore, to appraise only that part of the Government's easement which coincided with the respondent's property interest, and thereafter to apportion to the respondent its share of what was taken by that much of the Government's appropriation.

[5] The court did not err, however, in including in the award to the respondent an amount for damages to the residue of the estate. The respondent was the record owner of the right to damage the residue, a right which the owner had expressly conveyed by separate deed for a valuable consideration. This was a property right in the residue, measurable by a monetary award to cover damages to the same. The amount of this portion of the award would depend upon the probability of the respondent's easement being exercised. See accompanying text, *infra.*

apparently was of the view that the subservient fee interest in the 1540 acres was without value, and accordingly awarded to the respondent the entire value of what the Government appropriated in that acreage. The respondent was thus compensated as though it were the owner, not of an easement, but of an unencumbered fee, as the Court of Appeals recognized. 270 F. 2d, at 712. The record does not support such an apportionment.

The guiding principle of just compensation is reimbursement to the owner for the property interest taken. "He is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more." *Olson* v. *United States,* 292 U. S. 246, 255. In many cases this principle can readily be served by the ascertainment of fair market value—"what a willing buyer would pay in cash to a willing seller." *United States* v. *Miller,* 317 U. S. 369, 374. See *United States* v. *Commodities Corp.,* 339 U. S. 121, 123; *United States* v. *Cors,* 337 U. S. 325, 333. But this is not an absolute standard nor an exclusive method of valuation. See *United States* v. *Commodities Corp., supra,* at 123; *United States* v. *Cors, supra,* at 332; *United States* v. *Miller, supra,* at 374–375; *United States* v. *Toronto Nav. Co.,* 338 U. S. 396.

The record in the present case, as might be expected, contains no evidence of a market in flowage easements of the type here involved. In the absence of such evidence, the court valued the flowage easement as the equivalent of the value of the servient lands for agricultural, forestry, or grazing use. The court thus ascribed a maximum value to the respondent's easement, a value not supported by the record.

We think the correct approach to the problem of valuation in a case of this kind was formulated by the Court of Appeals for the Fifth Circuit in *Augusta Power*

Co. v. *United States,* 278 F. 2d 1. The basic issues in that case were virtually indistinguishable from those presented here.[6] We are content to adopt the language of Judge Rives' opinion with respect to the standard to be followed in valuing flowage easements of this character:

> "If [the] Power Company had been successful in assembling the necessary lands, and in securing approval of the Federal Power Commission, and thereafter had actually exercised its easements by permanently flooding the lands, their value for agricultural and forestry purposes would have been destroyed. If, with that status, the United States had condemned the lands, the compensation due would be payable to [the] Power Company. That compensation would not include the hydroelectric power value, but it would embrace [the Power Company's] property right to destroy the value of the lands for agricultural and forestry purposes.
>
> "At the other extreme, if factors such as difficulty of assemblage of all necessary lands, the increasing economic advantage of steam plants over hydroelectric plants, the need for additional power in the particular area, etc., had made it certain that the flowage easements would never be exercised by the . . . Power Company or its assigns, *excluding the United States,* then such compensation as might be due would be payable to the owners of the fee title and nothing to the . . . Power Company.

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[6] In that case the Government had also argued upon the basis of our *Twin City* decision, that a private flowage easement over fast lands is valueless as a matter of law when taken by the Government for navigational purposes. The argument was unambiguously rejected: "Very clearly, the United States is in error when it claims . . . that it 'has a dominant servitude which it can exercise in its discretion and without compensation.' " 278 F. 2d, at 4.

"Between the two extremes just illustrated, the respective values of the fee and of the easement would fluctuate from time to time depending on the probability or improbability of actual exercise of the easement by the . . . Power Company or its assigns. If all interested parties were before the Court, the *maximum* which the United States would be required to pay would be the value of the lands, not including their value for hydroelectric power purposes. That is, however, a *maximum,* and not necessarily the measure of what the United States would have to pay under any and all circumstances. . . .

. . . . . .

". . . It seems to us that the *maximum* compensation payable for the flowage easement under any conceivable circumstances is so much of the value of the lands for agricultural and forestry purposes and for any other uses, not including hydroelectric power value, as the easement owner has a right to destroy or depreciate. That *maximum* is more simply expressed in the criterion adopted by the Commission, i. e., 'the difference in the value of the land with and without the flowage easement.' Subject to that *maximum,* the actual *measure* of compensation payable for the flowage easement is the value of the easement to its owner. 'The question is, What has the owner lost? not, What has the taker gained?' 1 Orgel on Valuation Under Eminent Domain, p. 352." *Augusta Power Co.* v. *United States,* 278 F. 2d 1, 4–5. (Footnotes omitted.)

In a word, the value of the easement is the nonriparian value of the servient land discounted by the improbability of the easement's exercise. It is to be emphasized that in assessing this improbability, no weight should be given

to the prospect of governmental appropriation. The value of the easement must be neither enhanced nor diminished by the special need which the Government had for it. *United States* v. *Cors,* 337 U. S. 325, 332–334; *United States* v. *Miller,* 317 U. S. 369; *Olson* v. *United States,* 292 U. S. 246, 261; *United States* v. *Chandler-Dunbar Water Power Co.,* 229 U. S. 53, 76. The court must exclude any depreciation in value caused by the prospective taking once the Government "was committed" to the project. *United States* v. *Miller, supra,* at 376–377; see *United States* v. *Cors, supra,* at 332. Accordingly, the impact of that event upon the likelihood of actual exercise of the easement cannot be considered. As one writer has pointed out, "[i]t would be manifestly unjust to permit a public authority to depreciate property values by a threat . . . [of the construction of a government project] and then to take advantage of this depression in the price which it must pay for the property" when eventually condemned. 1 Orgel, Valuation under Eminent Domain, § 105, at 447 (2d ed.); see *Congressional School of Aeronautics* v. *State Roads Comm'n,* 218 Md. 236, 249–250, 146 A. 2d 558, 565.

The judgment is vacated, and the case remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE DOUGLAS, concurring.

If the 1,840 acres in question lay between low and high water, the United States by keeping the water level at the ordinary high-water contour would not in my view appropriate any private property. For that is use of the bed of the stream pursuant to the navigation servitude. Most of our cases deal with that. It was in that domain

that *United States* v. *Kansas City Ins. Co.*, 339 U. S. 799, arose.

If the 1,840 acres were a dam site, any of their value for such a purpose would be noncompensable within the ruling of *United States* v. *Twin City Power Co.*, 350 U. S. 222. Dam-site value is water-power value. And the flow of the stream in its natural state or through a structure that is low or high provides "a head of water" (*United States* v. *Willow River Co.*, 324 U. S. 499, 502) that often has great value. But when it is in a navigable stream, it is not a property right subject to private ownership and compensation under the Fifth Amendment. There is "no private property in the flow" of this navigable stream. *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 427.

Yet if the Federal Government builds a dam that raises the water above the ordinary high-water mark by a foot, by a hundred feet, or by five hundred feet, it asserts dominion over property not within its navigational servitude. As we said in *United States* v. *Willow River Co.*, *supra*, 509, "High-water mark bounds the bed of the river. Lands above it are fast lands and to flood them is a taking for which compensation must be paid."

It is in the latter domain that the present controversy lies. The flowage rights being condemned are rights to flood a part of the 1,840-acre tract that lies above the "usual water line" which I understand to mean land above the ordinary high-water mark.

Whatever may be the reason why this particular interest in the uplands was acquired, the owner stands in the shoes of his predecessor in title. The owner of the easement is entitled, as the Court holds, to no water-power value. The owner is, in other words, entitled to nothing that gains value from the flow of the stream, from any head of water, or from the strategic location of his land

for hydroelectric development of the river. But the owner of the easement and the owner of the subservient fee have all the other parts of the bundle of rights that represent "property" within the meaning of the Fifth Amendment.

Hence, I join the opinion of the Court.

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

In the hope that it might eventually acquire from the Federal Government a license to construct a power dam across a navigable river, the power company acquired, by conveyances from the fee owners, easements permanently to flood 1,540 acres of fast lands adjacent to the river. It did not own any other estate or interest in those lands, and the exercise of its easement to flood them was, of course, necessarily subject to the prior issuance of a federal license authorizing the private damming of the river, for without such a license the power company could not dam the river, see § 4 of the Federal Power Act, 41 Stat. 1065, 16 U. S. C. § 797, and thus back its waters upon those lands, and it had no right to use the lands for any other purpose.

No federal license to dam the river at or near this point was ever issued. Instead, the Federal Government itself determined to construct a power dam at this point in the river, and as a necessary consequence to inundate these lands as a part of the resulting reservoir. To that end, it brought this condemnation action against the power company, and therein filed its declaration of taking, and took, the latter's easement to back flow these lands, and the question here is: What value, if any, did that easement have *to the power company at the time* the Government took it?

We think that, as a matter of fact and of law, it did not have any value whatever at that time. This is so because: (1) The sole and only right the power company ever had

in these lands was the right to dam and back the river's waters upon them; (2) the exercise of that right was always contingent and dependent upon the prior issuance of a federal license authorizing the private damming of the river (16 U. S. C. § 797(e)), for the Government's power over the flow of a navigable stream "is a dominant one which can be asserted to the exclusion of any competing or conflicting one," *United States* v. *Twin City Power Co.*, 350 U. S. 222, 224–225; and (3) when the Government determined to construct the power dam and appurtenant facilities for its own benefit, it necessarily "displace[d] all competing interests and appropriate[d] the entire flow of the river for the declared public purpose," *United States* v. *Twin City Power Co., supra,* at 225. (4) Therefore, at the time the Government took this easement, there was no possibility that the power company could ever dam and back the river's waters upon these lands and, inasmuch as it had no estate in or right to use the lands for any other purpose, it must follow that the easement was wholly without value to the power company for any purpose at the time the Government took it.

However, the Court, after adverting to the power company's argument that "the easement had other value, derived from uses of the land not dependent upon the flow of the stream," says: "We think such a finding might be warranted." It finds such value to exist in the "right to destroy [agricultural, timber and grazing] uses and the value which they created."

But the right to "destroy" agricultural uses, although a proper consideration in determining the damages to be paid to the owner of the unencumbered fee when an easement to flow is being condemned and taken from him, *United States* v. *Kansas City Ins. Co.*, 339 U. S. 799; *Olson* v. *United States,* 292 U. S. 246, 253–254, is not a thing of value—even of recognizable "hold up" value—to the owner of the easement, *United States* v. *Chandler-*

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Dunbar Co., 229 U. S. 53, 79–80, except for the authorized flooding use, or possibly as against the owner of the subservient fee who might be willing to pay for the riddance of the easement and restoration of his original right to make agricultural uses of the land. See *Roberts* v. *New York City*, 295 U. S. 264, 282–283. At all events, the clincher is that any right of the power company to "destroy" agricultural uses of these lands consisted solely of its right to dam and back the river's waters upon them, and when the Government determined to construct the dam for its own benefit even that nebulous "right" was gone. Hence, the easement had no possible value—not even a nuisance value—to the power company at the time the Government took it.

It is settled that the "just compensation" required by the Fifth Amendment to be paid for the taking of private property for public use is the value at the very time of the taking to the person from whom taken. "The value should be fixed as of the date of the proceedings and with reference to the loss the owner sustains, considering the property in its condition and situation at the time it is taken and not as enhanced by the purpose for which it was taken. *Kerr* v. *Park Commissioners*, 117 U. S. 379, 387; *Shoemaker* v. *United States*, 147 U. S. 282, 304, 305." *United States* v. *Chandler-Dunbar Co., supra*, at 76.

The Fifth Amendment "merely requires that an owner of property taken should be paid for what is taken from him. . . . And the question is what has the owner lost, not what has the taker gained." *Boston Chamber of Commerce* v. *Boston*, 217 U. S. 189, 195. See also *United States* v. *Twin City Power Co., supra*, at 228. At the time of this taking, the Government had determined to build the dam itself, thus precluding any possibility that the power company could ever dam and back the river's waters upon these lands, and, inasmuch as it had no right

to use them for any other purpose, it must follow that the easement had no possible value to the power company at the time the Government took it. Surely "the Government cannot be justly required to pay for an element of value which did not [then] inhere in [the easement]." *United States* v. *Chandler-Dunbar Co., supra,* at 76.

Nor does the Fifth Amendment contemplate a disregard of separate estates and interests in land. It contemplates only that the condemnee shall be paid "just compensation" for the particular estate or interest that he owned and that was taken from him. In *Boston Chamber of Commerce* v. *Boston, supra,* the city condemned for public street purposes a part of a tract of land owned in fee by the Chamber of Commerce, but over a large portion of the part condemned a wharf company owned "an easement of way, light and air." The Chamber of Commerce and the wharf company agreed between themselves to claim, and they sought, damages to both estates "in a lump sum." If this could be done, it was agreed that the estate, considered as the sole unencumbered estate of a single person, was worth 12 times more than if the damage should be assessed according to the condition of the title at the time. The city's contention that the several estates should be separately valued was sustained by the trial court, and this Court, speaking through Mr. Justice Holmes, affirmed, saying:

> "But the Constitution does not require a disregard of the mode of ownership—of the state of the title. It does not require a parcel of land to be valued as an unencumbered whole when it is not held as an unencumbered whole. It merely requires that an owner of property taken should be paid for what is taken from him. . . . And the question is what has the owner lost, not what has the taker gained." 217 U. S., at 195.

The Government cannot here, just as the city could not there, "be made to pay for a loss of theoretical creation, suffered by no one in fact," *id.*, at 194, for there is "no justice in [requiring the Government to pay] for a loss suffered by no one in fact." *United States* v. *Chandler-Dunbar Co., supra,* at 76.

Here the power company rests solely upon a claimed right to back the river's waters upon these lands. It thus necessarily depends upon and claims a right in and to use the waters of the river for that purpose. This Court held in the *Twin City* case, *supra,* that the owner of adjoining fast lands has no interest in the waters of a navigable river, and that those waters do not, as against the Government, attribute to the value of such lands. It said:

> "If the owner of the fast lands can demand water-power value as part of his compensation, he gets the value of a right that the Government in the exercise of its dominant servitude can grant or withhold as it chooses. The right has value or is an empty one dependent solely on the Government. What the Government can grant or withhold and exploit for its own benefit has a value that is peculiar to it and that no other user enjoys." 350 U. S., at 228.

The Government, by determining to exploit its stream for its own benefit, "displace[d] all competing interests and appropriate[d] the entire flow of the river for the declared public purpose." *Id.*, at 225. In these circumstances, "[t]o require the United States to pay for this water-power value would be to create private claims in the public domain." *Id.*, at 228.

The *Twin City* and *Chandler-Dunbar* cases, *supra,* seem clearly to require the conclusion, on the facts here, that the easement to flood these lands had no value to the power company at the time the Government took it.

It was its failure to obtain a federal license to dam the river—not the taking of its easement to flow—that hurt the power company, for once the Government determined to construct the power dam for its own use and benefit no possibility remained that the power company could ever use the easement, and hence its entire value was gone.

To the Court's observation that "the Government's argument would mean, in a case like this one, that compensation could be denied the fee owner because he had already conveyed the flowage easement, . . . and denied the owner of the easement because it was valueless against condemnation by the United States," the law requires us to say: Exactly so. The fee owners had sold and conveyed, for consideration satisfactory to them, the right permanently to flood these lands and no longer owned any interest in *that estate*. Indeed, they claim none. That estate in these lands was not taken by the Government from them. Not having taken anything from the fee owners, the Government does not owe them "just compensation" for anything. This also demonstrates the Court's further error in remanding the case for "apportionment" of the "damages" between the owner of the easement and the owners of the fee. In no event could there be anything to apportion to the fee owners. What the Government took was the easement. It belonged solely to the power company, and if it had any value at the time it was taken by the Government, that value belonged solely to the power company. But the easement had no value to the power company at the time it was taken by the Government. The power company's sole estate in these lands was an easement to back the river's waters upon them. The exercise—and hence the value—of that easement was always contingent upon the prior issuance of a federal license authorizing the private dam-

ming of the river. No such license was ever issued. Instead, the Government determined to construct the dam and appurtenant facilities for its own benefit. This left no possibility that the power company could ever dam and back the river's waters upon these lands, and inasmuch as it had no right to use them for any other purpose, it seems clearly to follow that the easement was wholly without value to the power company for any purpose at the time the Government took it.

It is of course true, as already stated, that if the Government had taken the right to flow these lands from the owner of the unencumbered fee, the law would require it to pay his damages resulting from that deprivation of his right to make agricultural and similar surface uses of these lands. *United States* v. *Kansas City Ins. Co., supra.* From that premise it is argued that the owner of the easement to flow, having acquired it from the owner of the unencumbered fee, "stands in the shoes of his predecessor in title" and is thus entitled to like damages from the Government when it takes that easement from him. But that premise is erroneous. The error lies in the obvious fact that the power company never acquired or owned any right to make agricultural uses of these lands. Hence it did not suffer, and is not entitled to recover, any damages for the destruction of such uses. Quite distinguishable from an unencumbered fee, the only estate of the power company in these lands was the right to store the river's waters upon them. Once the Government determined to construct the power dam for its own use no possibility remained that the power company could ever use the lands for that purpose and, having no right to use the lands for any other purpose, it must follow that the easement was wholly without value to the power company for any purpose at the time the Government took it.

We believe that the Fifth Amendment's command that "private property [shall not] be taken for public use, without just compensation" should be liberally construed in favor of the condemnee, but that does not mean that the Government should be required to pay something for nothing.

For these reasons, we think the judgment should be reversed with directions to enter judgment for the Government.

SALDANA *v.* UNITED STATES.

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

No. 176. Argued March 20, 1961.—Decided April 3, 1961.

Petitioner was convicted on four counts of a five-count indictment charging offenses under the narcotics laws. The Solicitor General suggested to this Court that the combination of circumstances in the case, beginning with one judge's clearly expressed intention to impose a five-year sentence and ending with another judge's imposition of a twenty-year sentence, was not consistent with the orderly administration of criminal justice in the federal courts. *Held:* A due regard for the fair administration of justice requires that the convictions under Counts 3, 4 and 5 be set aside; but the conviction under Count 2, to which petitioner originally pleaded guilty, is affirmed. Pp. 646–647.

274 F. 2d 352, affirmed in part and reversed in part.

Stephen R. Reinhardt, acting under appointment by the Court, 364 U. S. 807, and *Herbert A. Bernhard,* by special leave of Court, *pro hac vice,* argued the cause and filed a brief for petitioner.

Solicitor General Cox argued the cause for the United States. With him on the brief were *Acting Assistant Attorney General Foley, Beatrice Rosenberg* and *Theodore George Gilinsky.*

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

PER CURIAM.

The petitioner was convicted on four counts of a five-count indictment charging offenses under the narcotics laws. 21 U. S. C. § 174. He complains of a number of alleged trial errors. In addition, he points to a series of events occurring during the course of the prosecution

which, he says, operated to deprive him of constitutionally guaranteed rights. It is unnecessary to detail here the course of those proceedings, since we are advised that a change in the calendar system of the District Court for the Southern District of California insures that what occurred in this case will not occur again.

During oral argument in this Court the Solicitor General suggested that the combination of circumstances in this case, beginning with one judge's clearly expressed intention to impose a five-year sentence, and ending with another judge's imposition of a twenty-year sentence under the indictment, was not consistent with that regularity and fairness which should characterize the administration of criminal justice in the federal courts. In the light of the Solicitor General's suggestion, and upon an independent examination of the record, we have concluded that a due regard for the fair administration of justice requires that the convictions under counts 3, 4, and 5 of the indictment be set aside. 28 U. S. C. § 2106; see *Communist Party* v. *Subversive Activities Control Board,* 351 U. S. 115, 124; *Mesarosh* v. *United States,* 352 U. S. 1, 14; *Marshall* v. *United States,* 360 U. S. 310. Cf. *Petite* v. *United States,* 361 U. S. 529. The conviction under count 2, to which the petitioner originally pleaded guilty, is affirmed.

Because of this disposition of the case, we do not reach for consideration the alleged trial errors with respect to limitation of cross-examination, sufficiency of the evidence of a "sale" under count 5, and instructions to the jury as to entrapment.

So ordered.

VILLAGE OF RIDGEFIELD PARK ET AL. *v.* BERGEN COUNTY BOARD OF TAXATION ET AL.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

No. 674. Decided April 3, 1961.

Appeal dismissed for want of a substantial federal question.

Reported below: 31 N. J. 420, 157 A. 2d 829; 33 N. J. 262, 163 A. 2d 144.

William R. Morrison for appellants.

David D. Furman, Attorney General of New Jersey, *Theodore I. Botter,* Assistant Attorney General, and *Milton T. Lasher* for appellees.

PER CURIAM.

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

UTAH CITIZENS RATE ASSOCIATION ET AL. *v.* UNITED STATES ET AL.

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

No. 712. Decided April 3, 1961.

192 F. Supp. 12, affirmed.

Calvin L. Rampton for appellants.

Solicitor General Cox, Acting Assistant Attorney General Kirkpatrick, Charles H. Weston, Robert W. Ginnane and *Charlie H. Johns, Jr.* for the United States and the Interstate Commerce Commission, and *A. U. Miner, L. W. Hobbs, Bryan P. Leverich* and *Ernest P. Porter* for the Denver & Rio Grande Western Railroad Co. et al., appellees.

PER CURIAM.

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

BOYDEN *v.* CALIFORNIA.

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

No. 344, Misc. Decided April 3, 1961.

Appeal dismissed and certiorari denied.
Reported below: 181 Cal. App. 2d 48, 4 Cal. Rptr. 869.

Petitioner *pro se.*

Stanley Mosk, Attorney General of California, *William E. James,* Assistant Attorney General, and *David R. Caldwell,* Deputy Attorney General, for respondent.

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.

Syllabus.

LOCAL 60, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL–CIO, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD.

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

No. 68. Argued February 28, March 1, 1961.—
Decided April 17, 1961.

An employer entered into a contract with the Brotherhood of Carpenters to employ members of the union and to abide by the rules and regulations of the union applicable to the locality where work was done. Upon undertaking work in a certain locality, the employer agreed to hire workers on referral from petitioner local union. Two applicants from another local union were denied employment because they could not get referral from petitioner local union. The National Labor Relations Board found that the unions had violated § 8 (b) (1) (A) and § 8 (b) (2) of the National Labor Relations Act, as amended, by maintaining and enforcing an agreement which established closed-shop preferential hiring conditions and by causing the employer to refuse to hire the two applicants. There was no evidence, however, that they had coerced any employee to become or remain a member. *Held:* On the record in this case, the Board was not authorized under § 10 (c) to require the unions to refund dues and fees paid to them by their members. *Virginia Electric Co.* v. *Labor Board,* 319 U. S. 533, distinguished. Pp. 652–656.

273 F. 2d 699, reversed.

Bernard Dunau argued the cause for petitioners. With him on the brief was *Francis X. Ward.*

Norton J. Come argued the cause for respondent. With him on the brief were *Stuart Rothman, Dominick L. Manoli* and *Duane B. Beeson.*

J. Albert Woll, Theodore J. St. Antoine and *Thomas E. Harris* filed a brief for the American Federation of Labor and Congress of Industrial Organizations, as *amicus curiae,* urging reversal.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioner, United Brotherhood, entered into a contract with Mechanical Handling Systems, Inc. (which we will call the Company), whereby the Company agreed to work the hours, pay the wages, abide by the rules and regulations of the union applicable to the locality where the work is done, and employ members of the union.

The Company, undertaking work at Indianapolis, agreed to hire workers on referral from a local union, one of the petitioners in this case. Two applicants from another local union were denied employment by the Company because they could not get referral from petitioner local union.

The Board found that petitioners had violated § 8 (b)(1)(A) and § 8 (b)(2) of the National Labor Relations Act, as amended by the Taft-Hartley Act, 61 Stat. 136, 141, as amended, 29 U. S. C. § 158, in maintaining and enforcing an agreement which established closed-shop preferential hiring conditions and in causing the Company to refuse to hire the two applicants. 122 N. L. R. B. 396.

After granting other relief the Board said:

> "[A]s we find that dues, nonmembership dues, assessments, and work permit fees,[1] were collected under the illegal contract as the price employees paid in order to obtain or retain their jobs, we do not believe it would effectuate the policies of the Act to permit the retention of the payments which have been unlawfully exacted from the employees."

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[1] The monthly dues payable to the local union were $3.50 and the initiation fee $125. Dues and fees in lesser amounts were payable by apprentices. A member who is working within the jurisdiction of a district council who has not transferred his membership to a local union of the council pays for a working permit that is not less than 75 cents a month nor more than the local monthly dues.

It added that the remedial provisions "are appropriate and necessary to expunge the coercive effect" of petitioners' unfair labor practices.

On application of the Board, the Court of Appeals enforced the order. 273 F. 2d 699. The case is here on a writ of certiorari, 363 U. S. 837, in which petitioners challenge no part of the Board's order except the refund provision.

The provision for refund in this case is the product of a rule announced by the Board in the *Brown-Olds* case, 115 N. L. R. B. 594, which involved the use of a closed-shop agreement despite the ban in the Taft-Hartley Act. In that case a panel of three members of the five-member Board found a violation of the closed-shop provision of the Act. Two of the three agreed to an order of reimbursement to all employees for any assessments collected by the union within the period starting from six months prior to the date of the filing of the charge. One member, Ivar H. Peterson, dissented, saying that the reimbursement was inappropriate since there was an absence of "specific evidence of coercion and evidence that payments were required as a condition of employment." *Id.,* 606. Later that remedy was extended to hiring arrangements, which though not operating in connection with a closed shop, were felt by the Board to have a coercive influence on applicants for work to join the union. *Los Angeles-Seattle Motor Express, Inc.,* 121 N. L. R. B. 1629.

In neither of those cases nor in the present case was there any evidence that the union membership, fees, or dues were coerced. The Board as well as the Court of Appeals held that fact to be immaterial. Both said that the case was governed by *Virginia Electric Co.* v. *Labor Board,* 319 U. S. 533; and the Court of Appeals added that coercion was to be inferred as "there was present an implicit threat of loss of job if those fees were not paid." 273 F. 2d, at 703. The Board argues, in support of

that position, that reimbursement of dues where hiring arrangements have been abused is protective of rights vindicated by the Act and authorized by § 10 (c).[2]

We do not think this case is governed by *Virginia Electric Co.* v. *Labor Board, supra.* That case involved a company union whose very existence was unlawful. There were, indeed, findings that the union "was not the result of the employees' free choice" (319 U. S., at 537), and that the employees had to remain members of the union to retain their jobs. *Id.,* 540. Return of dues was one of the means for disestablishing an unlawful union. *Id.,* 541. Cf. *Labor Board* v. *Mine Workers,* 355 U. S. 453, 458–459.

The unions in the present case were not unlawfully created. On the record before us they have engaged in prohibited activity. But there is no evidence that any of them coerced a single employee to join the union ranks or to remain as members. All of the employees affected by the present order were union members when employed on the job in question. So far as we know, they may have been members for years on end. No evidence was offered to show that even a single person joined the union with the view of obtaining work on this project. Nor was there any evidence that any who had voluntarily joined the union was kept from resigning for fear of retaliatory measures against him. This case is therefore quite different from *Radio Officers* v. *Labor Board,* 347 U. S.

[2] Section 10 (c) provides in relevant part:

". . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: . . ."

17, 48, where, discrimination having been shown, the inferences to be drawn were left largely to the Board.

The Board has broad discretion to adapt its remedies to the needs of particular situations so that "the victims of discrimination" may be treated fairly. See *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, 194. But the power of the Board "to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act." *Consolidated Edison Co.* v. *Labor Board,* 305 U. S. 197, 236. Where no membership in the union was shown to be influenced or compelled by reason of any unfair practice, no "consequences of violation" are removed by the order compelling the union to return all dues and fees collected from the members; and no "dissipation" of the effects of the prohibited action is achieved. *Labor Board* v. *Mine Workers, supra,* 463. The order in those circumstances becomes punitive and beyond the power of the Board.[3] Cf. *Republic Steel Corp.* v. *Labor Board,* 311 U. S. 7, 10. As Judge Pope said in *Morrison-Knudsen Co.* v. *Labor Board,* 276 F. 2d 63, 76, "reimbursing a lot of old-time union men" by refunding their dues is not a remedial measure in the competence of the Board to impose, unless there is sup-

[3] Accord: *Morrison-Knudsen Co.* v. *Labor Board,* 275 F. 2d 914 (C. A. 2d Cir.); *Labor Board* v. *United States Steel Corp.,* 278 F. 2d 896 (C. A. 3d Cir.); *Labor Board* v. *Local Union No. 85,* 274 F. 2d 344 (C. A. 5th Cir.); *Labor Board* v. *International Union,* 279 F. 2d 951 (C. A. 8th Cir.); *Morrison-Knudsen Co.* v. *Labor Board,* 276 F. 2d 63 (C. A. 9th Cir.); *Local 357* v. *Labor Board,* 107 U. S. App. D. C. 188, 275 F. 2d 646. Cf. *Labor Board* v. *Carpenters Local,* 276 F. 2d 583 (C. A. 1st Cir.); *Perry Coal Co.* v. *Labor Board,* 284 F. 2d 910 (C. A. 7th Cir.).

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port in the evidence that their membership was induced, obtained, or retained in violation of the Act. It would be difficult, even with hostile eyes, to read the history of trade unionism except in terms of voluntary associations formed to meet pressing needs in a complex society.[4]

Reversed.

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

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, concurring.

While I agree with the Court that *Virginia Electric & Power Co.* v. *Labor Board,* 319 U. S. 533, does not justify the Board's "Brown-Olds" remedy as it has been applied in this and other cases, I think the Board is entitled to be informed more fully why that should be so, since it may fairly be said that *Virginia Electric* could be taken as having invited the course the Board has been following. In joining the Court's opinion I shall therefore add some further views.

The Brown-Olds remedy is an order made under § 10 (c) of the National Labor Relations Act which authorizes the Board, after finding an unfair labor practice, not only to issue a cease and desist order but also "to take such affirmative action . . . as will effectuate the policies of this Act . . . ." The remedy, which seems only to be applied if the unfair labor practice amounts either to employer domination of a union [§ 8 (a)(2)] or discrimination in favor of union membership by an agreement between employer and union [§ 8 (a)(3); § 8 (b)(2)], typically requires that either the union or the employer reimburse all employees in the amount of

[4] See Millis and Montgomery, Organized Labor, Vol. III (1945), c. VIII.

all moneys paid in dues, assessments, etc., since six months before the unfair labor practice charge was filed. The Board does not admit defensive evidence that some employees voluntarily made such payments. An illegal closed shop or discriminatory hiring practices create an irrebuttable presumption of coercion. See, *e. g., Brown-Olds Plumbing & Heating Corp.,* 115 N. L. R. B. 594; *Saltsman Construction Co.,* 123 N. L. R. B. 1176; *Nassau & Suffolk Contractors' Assn.,* 123 N. L. R. B. 1393; *Lummus Corp.,* 125 N. L. R. B. 1161.

The provision that the Board was to be allowed "to take such affirmative action . . . as will effectuate the policies of this Act . . ." did not pass the Wagner Act Congress without objection to the uncontrolled breadth of this power. See Hearings before Senate Committee on Education and Labor on S. 1958, 74th Cong., 1st Sess. 448–449. This Court's construction of the scope of the power has reflected a similar concern. The Board has been told that it is without power to "effectuate the policies of this Act" by assessing punishments upon those who commit unfair labor practices. *Republic Steel Corp.* v. *Labor Board,* 311 U. S. 7, 11, 12. The primary purpose of the provision for other affirmative relief has been held to be to enable the Board to take measures designed to recreate the conditions and relationships that would have been had there been no unfair labor practice. *Consolidated Edison Co.* v. *Labor Board,* 305 U. S. 197, 236. Thus in *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, this Court reversed the Board for refusing to allow an employer to show in mitigation of a back-pay order that the employee unjustifiably refused to take desirable new employment during the period. In *Republic Steel, supra,* the Court refused to enforce an order requiring the employer to pay the full amount of back pay to an employee who had been paid to work for the Work Projects Administration in the meantime. In *Labor*

Board v. *Seven-Up Co.*, 344 U. S. 344, the Court indicated that even an otherwise sensible procedure for computing back pay of an employee discriminatorily discharged must provide exceptions where the scheme would more than compensate the employee because of the seasonal nature of the employer's business.

The Board now emphasizes that its Brown-Olds remedy has a substantial tendency to deter employer-union encouragement of union membership in violation of §§ 8 (a)(3) and 8 (b)(2). But it also correctly recognizes that in light of the *Republic Steel* case, *supra*, it must show more than that the remedy will tend to deter unfair labor practices. The Board must establish that the remedy is a reasonable attempt to put aright matters the unfair labor practice set awry. As I understand its contentions, the Board attempts to make this showing by arguing that wherever there has been a not insignificant unlawful encouragement to union membership all members should be taken to have been under the influence of coercion, whether or not they were aware of this influence or would have acted differently without it. The employees are said to have been coerced in much the same sense that a man contentedly sitting in the living room of his house may be said to be imprisoned by the barring of the doors whether or not he wants to leave.[1] Accordingly, the Board has considered unnecessary an

[1] It is but another formulation of the same argument when the Board, in its brief, states that actual coercion is not required so long as the dues are collected pursuant to an illegal system: "[T]he validity of a reimbursement order is not contingent upon a showing that the employees paid monies to the union unwillingly. If the money were paid pursuant to an arrangement which violated the statute, it can be ordered refunded provided this would best effectuate the statutory policies. . . . That the money may have been collected anyhow by a legal means does not privilege the use of an illegal procedure to obtain it."

actual showing of employee unwillingness to belong to the union.

What we must decide, then, is whether it is within the power of the Board to provide dues-reimbursement relief for this type of imputed coercion, or, as the Board alternatively states its case, for the employee's loss of his statutory right to decide freely whether or not he shall be a union member. This issue is not satisfactorily resolved by simply pointing out that there has been no showing of forced payment of dues an employee was unwilling to pay, for, unless I misunderstand the Board, it is arguing that even a willing union member loses something when there is a violation of § 8 (b)(2), namely the freedom of choice which the statute assures him. Nor, once we have recognized that a tendency to deter unfair labor practices is not alone sufficient justification for a Board order of affirmative relief, does the concept of punitiveness really advance a solution. Deterrence is certainly a desirable even though not in itself a sufficiently justifying effect of a Board order.

I think the Board should be denied the use of its Brown-Olds remedy in situations where, as here, it is not unlikely that a substantial number of employees were willing to pay dues for union membership because, as I see it, the amount of dues or other exactions paid is not a tenable way of estimating the value a willing union member would place on his right to choose freely whether or not he would be or remain a union member—as it were, on his right to change his mind. The amount of dues paid does perhaps provide a means of estimating the value of benefits received from the union. Or the amount of dues paid does perhaps measure the cost coercion imposes upon an employee who, if free to choose, would be unwilling to join the union (although even in this case a proper adjustment might have to take some account of the union

benefits the employee would not have received had he been merely a nonunion employee in a unionized bargaining unit). But I can find no rational relationship at all between the amount of dues paid and the value an employee who is willing to join a union would place on his freedom to change his mind.[2] In the absence of a showing of such a relationship, the Board's Brown-Olds order can no more be sustained than could its orders in the *Phelps Dodge* or *Republic Steel* cases.

A different result might follow in this case if *Virginia Electric* had held that such a relationship exists. But I think that case held only that, as a matter of statutory policy, an employee could not *ever* be deemed a willing member of a company-dominated union, cf. *Matter of The Carpenter Steel Co.*, 76 N. L. R. B. 670, and that, on considerations of practicality, the employer who had violated the Act should bear the unapportionable costs of sustaining a union that served the employer's forbidden purposes at least as much as it served the employee's legitimate ones.

MR. JUSTICE WHITTAKER, dissenting.

The contract involved here not only required persons seeking employment in the unit to be members of the union, but also required each of them to obtain from the "Council" and present to the "union steward" on the job a "work permit" before going to work. That this closed-shop hiring arrangement "coerce[d] employees in the exercise of the rights guaranteed in section 7," and "cause[d] [the] employer to discriminate against . . . employee[s] in violation of subsection (a)(3)" of the

[2] For example, an employee may be more willing to join a union which charges high dues and provides substantial benefits than a union which charges little and gives little. But the Board formula declares that in the case where the dues are higher the value of the loss of freedom of choice is greater.

Act, contrary to the explicit provisions of §§ 8 (b)(1)(A) and 8 (b)(2) of the Act, 29 U. S. C. § 158, is not here denied.

To assure protection and enforcement of the rights it had guaranteed to employees by the Act, Congress provided in § 10 (c) that, upon the finding of an "unfair labor practice," "the Board shall state its findings of fact and shall issue . . . an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies" of the Act.

Finding that the closed-shop hiring arrangement involved here violated §§ 8 (b)(1)(A) and 8 (b)(2) of the Act and thus constituted an unfair labor practice, the Board, in fashioning a remedy which it deemed "necessary to expunge the coercive effect" of the violations and to "effectuate the policies of the Act," ordered the unions not only to cease the violations but also "to refund to the employees involved the dues . . . and work permit fees, paid by the employees as a price for their employment." The only question here is whether that remedy was within the Board's power. Like the Court of Appeals, I think it was.

Congress knew, of course, that it could not foresee the nature of all possible violations of the Act, and accordingly did not undertake to specify the precise remedy to be visited upon offenders for particular violations.

> "[I]n the nature of things Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration. The exercise of the process was committed to the Board, subject to limited judicial review. Be-

> cause the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion . . . .
>
> "The Act does not create rights for individuals which must be vindicated according to a rigid scheme of remedies. It entrusts to an expert agency the maintenance and promotion of industrial peace." *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, 194.

To hold that the Board is without power to do more than order the unions not to violate the Act in the future would be to deny any remedy whatever for violations. It is certain that Congress did not intend by the Act "to hold out to [employees] an illusory right for which it was denying them a remedy." *Graham* v. *Brotherhood of Firemen,* 338 U. S. 232, 240. In directing the Board to order "such affirmative action . . . as will effectuate the policies of this Act," Congress seems clearly to have directed the Board to fashion and enforce a remedy "which it . . . deem[s] adequate to that end." *Republic Steel Corp.* v. *Labor Board,* 311 U. S. 7, 12.

In "fashioning remedies to undo the effects of violations of the Act, the Board must draw on enlightenment gained from experience." *Labor Board* v. *Seven-Up Bottling Co.,* 344 U. S. 344, 346. And see *Radio Officers' Union* v. *Labor Board,* 347 U. S. 17, 49. Based on its long experience up to 1956, that, despite the ban which the Taft-Hartley Amendments had imposed nine years earlier, closed-shop practices were still being followed in some industries,[1] the Board concluded that a remedy more

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[1] As two apparently disinterested authorities have noted: "[By 1945], the closed shop had become one of the basic features of industrial relations in the building industry. This situation has largely remained true in practice up to the present time, despite

effective than a cease-and-desist order was required. And, following the teaching of this Court's opinion in *Virginia Electric & Power Co.* v. *Labor Board*, 319 U. S. 533, the Board decided that an appropriate additional remedy would be to require that the monies paid to the union under the illegal arrangement be refunded to the employees, and it accordingly so held in 1956 in *United Association of Journeymen, etc.*, and *Brown-Olds Plumbing & Heating Corp.*, 115 N. L. R. B. 594.[2]

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the passage of legislation in 1947 prohibiting this type of provision from being included in collective agreements.

". . . In all of the strongly unionized areas studied during the summer of 1952, employment arrangements equivalent to those under a closed shop were in effect. Membership in the union was almost universally regarded as a prerequisite for obtaining employment; in most instances men were employed directly or indirectly through the union itself. *Both parties viewed this as standard practice and showed little or no concern for the illegality of the arrangement.*" Haber and Levinson, Labor Relations and Productivity in the Building Trades (Univ. of Michigan, 1956), pp. 62, 71. (Emphasis added.)

[2] The Board there stated:

". . . [T]he Taft-Hartley amendments have made unlawful all closed-shop contracts as contrary to public policy, proscribing such conduct by unions as unfair labor practices. The dues required and collected under such a contract . . . contravene that public policy. It is no longer required by the Act that the union be company-dominated in order for collection of dues to be unlawful under a closed-shop contract. Here, the dues and the assessments were required and collected pursuant to a contract which clearly contravened the public policy of the Act. Dues and assessments here collected constituted the price these employees paid in order to retain their jobs. We therefore conclude that the remedy of reimbursement of all such monies is appropriate and necessary to expunge the illegal effects of the unfair labor practices found here.

"It is our view that, where payment of dues is required under a closed-shop contract, as where assessments are required under an otherwise valid agreement, reimbursement of such monies actually

In *Virginia Electric & Power Co.* v. *Labor Board, supra,* this Court had upheld an identical remedy as within the Board's power. There an employer had committed an unfair labor practice by dominating a plant union in violation of § 8 (1), (2) and (3) of the Act. In fashioning a remedy that it deemed necessary to effectuate the policies of the Act, the Board ordered the employer not only to cease the practice but also to reimburse its employees for the dues withheld from their wages, pursuant to their signed authorizations, and paid to the union. Rejecting the employer's contention that this remedy was in excess of the Board's power, this Court said:

> "[T]he Board has wide discretion in ordering affirmative action; its power is not limited to the illustrative example of one type of permissible affirmative order, namely, reinstatement with or without back pay. *Phelps Dodge Corp.* v. *Labor Board,* 313 U. S. 177, 187–89. The particular means by which the effects of unfair labor practices are to be expunged are matters 'for the Board not the courts to determine.' *I. A. of M.* v. *Labor Board, supra,* at p. 82; *Labor Board* v. *Link-Belt Co., supra,* at p. 600. Here the Board, in the exercise of its informed discretion, has expressly determined that reimbursement in full of the checked-off dues is necessary to effectuate the policies of the Act. We give considerable weight to that administrative determination. It should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act. There is no such showing here." 319 U. S., at 539–540.

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collected will best effectuate the policies of the Act. Otherwise the very fruits of the unfair labor practice itself will remain in the hands of the respondent. . . ." 115 N. L. R. B., at 600–601.

Such an order, said the Court, "returns to the employees what has been taken from them" and restores to them "that truly unfettered freedom of choice which the Act demands." 319 U. S., at 541. Surely, it is as correct to say here, as it was there, that "An order such as this, which deprives [a union] of advantages accruing from a particular method of subverting the Act, is a permissible method of effectuating the statutory policy," *ibid.*, and that is all the order here purports to do.

It is argued that the *Virginia* case is distinguishable on the ground that it dealt with an employer-dominated union. But the question is one of power. The fact that the unfair labor practice there was by the employer rather than by the union, as here, is not a distinguishing difference. Nor does the fact that employees' rights were there infringed by a violation of § 8 (1), (2) and (3) of the Act, whereas they are here infringed by a violation of §§ 8 (b)(1)(A) and 8 (b)(2) of the Act, make any difference. In each instance the violation constituted an unfair labor practice, and the question is whether, in fashioning a remedy to effectuate the policies of the Act, the Board has power, in its informed discretion, to order reimbursement of the dues paid under the illegal arrangement. It would seem that if the Board had power so to order in the *Virginia* case, as this Court held, it similarly has power so to order in this case. Nothing in the *Virginia* case appears to limit the Board's power of restitution to cases involving employer-dominated unions or to any other particular type of violation, but the power seems clearly enough to be invocable in any appropriate case, in the informed discretion of the Board, and such has been the understanding of the courts.[3]

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[3] *Labor Board* v. *Revere Metal Art Co.*, 280 F. 2d 96, 101 (C. A. 2d Cir.); *Labor Board* v. *Local 294, International Brotherhood of Teamsters*, 279 F. 2d 83, 86–88 (C. A. 2d Cir.); *O'Neill Intl. Detective Agency* v. *Labor Board*, 46 L. R. R. M. 2503 (C. A. 3d Cir.); *Dixie Bedding Co.* v. *Labor Board*, 268 F. 2d 901, 907 (C. A. 5th Cir.).

The contentions that such an order of restitution is beyond the Board's power because the employees received some benefits from the union, despite the illegal hiring arrangement, and that to allow restitution of the dues collected by the union under the illegal arrangement would be to enforce a "penalty" which the Board has no power to assess, were fully answered to the contrary in the *Virginia* case, 319 U. S., at 542–543.

To require specific proof of individual injury to all employees "would impose impossible administrative burdens," *Labor Board* v. *Revere Metal Art Co., supra,* at 101, and prevent effective enforcement of the Act. Hence that character and fullness of proof is not required. See *Radio Officers' Union* v. *Labor Board,* 347 U. S. 17, 48–52. And inasmuch as the General Counsel of the Board may issue complaints only upon charges filed with him, *id.,* at 53, and the Board's experience seems to have proved that only a few employees will be sufficiently daring and determined overtly to complain regardless of the nature of the violation, it would seem that the Board, in the exercise of its informed discretion, may reasonably conclude, even in the absence of specific proof of injury to all the employees, that full restitution of the dues collected by the union under an illegal arrangement is necessary to effectuate the policies of the Act.

For these reasons, I think the Board acted within its power in ordering restitution of the dues collected under the admittedly illegal arrangement here, that the Court of Appeals correctly enforced the order, and that its judgment should be affirmed.

LOCAL 357, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *v.* NATIONAL LABOR RELATIONS BOARD.

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

No. 64. Argued February 28, 1961.—Decided April 17, 1961.*

An association of motor truck operators entered into a collective bargaining agreement with the Brotherhood of Teamsters and several of its local unions, which, in effect, required the operators to employ casual employees "on a seniority basis" through a hiring hall operated by one of the unions, "irrespective of whether such employee is or is not a member of the Union." A union member obtained casual employment with an operator independently of the union and the hiring hall, and he was discharged when the union complained. The National Labor Relations Board held that the hiring-hall arrangement was unlawful *per se* and that the employer had violated § 8 (a) (1) and § 8 (a) (3) and the union had violated § 8 (b) (2) and § 8 (b) (1) (A) of the National Labor Relations Act, as amended. It ordered them, *inter alia,* to reimburse all casual employees for fees and dues paid to the union during the period covered by the complaint. *Held:*

1. The Board was not authorized under § 10 (c) to require reimbursement of dues and fees paid to the union. *Carpenters Local 60* v. *Labor Board, ante,* p. 651. Pp. 670–671.

2. The Board erred in holding that the hiring-hall arrangement was unlawful *per se,* since such arrangements are not unlawful unless they in fact result in discriminations prohibited by the Act. Pp. 671–677.

107 U. S. App. D. C. 188, 275 F. 2d 646, affirmed in part and reversed in part.

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*Together with No. 85, *National Labor Relations Board* v. *Local 357, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,* also on certiorari to the same Court.

Herbert S. Thatcher argued the cause for the Union. With him on the brief was *David Previant.*

Norton J. Come argued the cause for the National Labor Relations Board. With him on the brief were *Solicitor General Rankin, Stuart Rothman, Dominick L. Manoli* and *Duane B. Beeson.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioner union (along with the International Brotherhood of Teamsters and a number of other affiliated local unions) executed a three-year collective bargaining agreement with California Trucking Associations, which represented a group of motor truck operators in California. The provisions of the contract relating to hiring of casual or temporary employees were as follows:

> "Casual employees shall, wherever the Union maintains a dispatching service, be employed only on a seniority basis in the Industry whenever such senior employees are available. An available list with seniority status will be kept by the Unions, and employees requested will be dispatched upon call to any employer who is a party to this Agreement. Seniority rating of such employees shall begin with a minimum of three months service in the Industry, *irrespective of whether such employee is or is not a member of the Union.*
>
> "Discharge of any employee by any employer shall be grounds for removal of any employee from seniority status. No casual employee shall be employed by any employer who is a party to this Agreement in violation of seniority status if such employees are available and if the dispatching service for such employees is available. The employer shall first call the Union or the dispatching hall designated

by the Union for such help. In the event the employer is notified that such help is not available, or in the event the employees called for do not appear for work at the time designated by the employer, the employer may hire from any other available source." (Emphasis added.)

Accordingly the union maintained a hiring hall for casual employees. One Slater was a member of the union and had customarily used the hiring hall. But in August 1955 he obtained casual employment with an employer who was party to the hiring-hall agreement without being dispatched by the union. He worked until sometime in November of that year, when he was discharged by the employer on complaint of the union that he had not been referred through the hiring-hall arrangement.

Slater made charges against the union and the employer. Though, as plain from the terms of the contract, there was an express provision that employees would not be discriminated against because they were or were not union members, the Board found that the hiring-hall provision was unlawful *per se* and that the discharge of Slater on the union's request constituted a violation by the employer of § 8 (a)(1) and § 8 (a)(3) and a violation by the union of § 8 (b)(2) and § 8 (b)(1)(A) of the National Labor Relations Act, as amended by the Taft-Hartley Act, 61 Stat. 140–141, as amended, 29 U. S. C. § 158.[1] The

[1] Section 8 provides in relevant part:

"(a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

. . . . . .

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .

. . . . . .

[*Footnote 1 continued on p. 670.*]

Board ordered, *inter alia,* that the company and the union cease giving any effect to the hiring-hall agreement; that they jointly and severally reimburse Slater for any loss sustained by him as a result of his discharge; and that they jointly and severally reimburse all casual employees for fees and dues paid by them to the union beginning six months prior to the date of the filing of the charge. 121 N. L. R. B. 1629.

The union petitioned the Court of Appeals for review of the Board's action, and the Board made a cross-application for enforcement. That court set aside the portion of the order requiring a general reimbursement of dues and fees. By a divided vote it upheld the Board in ruling that the hiring-hall agreement was illegal *per se.* 107 U. S. App. D. C. 188, 275 F. 2d 646. Those rulings are here on certiorari, 363 U. S. 837, one on the petition of the union, the other on petition of the Board.

Our decision in *Carpenters Local 60* v. *Labor Board,* decided this day, *ante,* p. 651, is dispositive of the petition

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

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 . . .

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership . . . ."

Section 7 provides:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3)."

of the Board that asks us to direct enforcement of the order of reimbursement. The judgment of the Court of Appeals on that phase of the matter is affirmed.

The other aspect of the case goes back to the Board's ruling in *Mountain Pacific Chapter,* 119 N. L. R. B. 883. That decision, rendered in 1958, departed from earlier rulings [2] and held, Abe Murdock dissenting, that the hiring-hall agreement, despite the inclusion of a nondiscrimination clause, was illegal *per se:*

> "Here the very grant of work at all depends solely upon union sponsorship, and it is reasonable to infer that the arrangement displays and enhances the Union's power and control over the employment status. Here all that appears is unilateral union determination and subservient employer action with no aboveboard explanation as to the reason for it, and it is reasonable to infer that the Union will be guided in its concession by an eye towards winning compliance with a membership obligation or union fealty in some other respect. The Employers here have surrendered all hiring authority to the Union and have given advance notice via the established hiring hall to the world at large that the Union is arbitrary master and is contractually guaranteed to remain so. From the final authority over hiring vested in the Respondent Union by the three AGC chapters, the inference of encouragement of union membership is inescapable." *Id.,* 896.

The Board went on to say that a hiring-hall arrangement to be lawful must contain protective provisions. Its views were stated as follows:

> "We believe, however, that the inherent and unlawful encouragement of union membership that stems from unfettered union control over the hiring process

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[2] See *Hunkin-Conkey Constr. Co.,* 95 N. L. R. B. 433, 435.

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would be negated, and we would find an agreement to be nondiscriminatory on its face, only if the agreement explicitly provided that:

"(1) Selection of applicants for referral to jobs shall be on a nondiscriminatory basis and shall not be based on, or in any way affected by, union membership, bylaws, rules, regulations, constitutional provisions, or any other aspect or obligation of union membership, policies, or requirements.

"(2) The employer retains the right to reject any job applicant referred by the union.

"(3) The parties to the agreement post in places where notices to employees and applicants for employment are customarily posted, all provisions relating to the functioning of the hiring arrangement, including the safeguards that we deem essential to the legality of an exclusive hiring agreement." *Id.*, 897.

The Board recognizes that the hiring hall came into being "to eliminate wasteful, time-consuming, and repetitive scouting for jobs by individual workmen and haphazard uneconomical searches by employers." *Id.*, 896, n. 8. The hiring hall at times has been a useful adjunct to the closed shop.[3] But Congress may have thought that it need not serve that cause, that in fact it has served well both labor and management—particularly in the maritime field and in the building and construction industry.[4] In the latter the contractor who frequently is a stranger to the area where the work is done requires a "central source" for his employment needs; [5] and a man

[3] Fenton, Union Hiring Halls Under the Taft-Hartley Act, 9 Lab. L. Jour. 505, 506 (1958).

[4] Cf. *id.*, at 507. For expression of such view see S. Rep. No. 1827, 81st Cong., 2d Sess., pp. 4–8; Goldberg, The Maritime Story (1958), pp. 277–282.

[5] Fenton, *op. cit.*, *supra*, note 3, at 507.

looking for a job finds in the hiring hall "at least a minimum guarantee of continued employment." [6]

Congress has not outlawed the hiring hall, though it has outlawed the closed shop except within the limits prescribed in the *provisos* to § 8 (a) (3).[7] Senator Taft made clear his views that hiring halls are useful, that they are not illegal *per se*, that unions should be able to operate them so long as they are not used to create a closed shop:

> "In order to make clear the real intention of Congress, it should be clearly stated that the hiring hall is not necessarily illegal. The employer should be able to make a contract with the union as an employment agency. The union frequently is the best employment agency. The employer should be able

[6] *Id.*, at 507.

[7] Those *provisos* read:

"*Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) unless following an election held as provided in section 9 (e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a conditon of acquiring or retaining membership . . . ."

to give notice of vacancies, and in the normal course of events to accept men sent to him by the hiring hall. He should not be able to bind himself, however, to reject nonunion men if they apply to him; nor should he be able to contract to accept men on a rotary-hiring basis. . . .

. . . . . .

". . . The National Labor Relations Board and the courts did not find hiring halls as such illegal, but merely certain practices under them. The Board and the court found that the manner in which the hiring halls operated created in effect a closed shop in violation of the law. Neither the law nor these decisions forbid hiring halls, even hiring halls operated by the unions as long as they are not so operated as to create a closed shop with all of the abuses possible under such an arrangement, including discrimination against employees, prospective employees, members of union minority groups, and operation of a closed union." S. Rep. No. 1827, 81st Cong., 2d Sess., pp. 13, 14.

There being no express ban of hiring halls in any provisions of the Act, those who add one, whether it be the Board or the courts, engage in a legislative act. The Act deals with discrimination either by the employers or unions that encourages or discourages union membership.[8] As respects § 8 (a)(3) we said in *Radio Officers* v. *Labor Board,* 347 U. S. 17, 42–43:

"The language of § 8 (a)(3) is not ambiguous. The unfair labor practice is for an employer to encourage or discourage membership by means of discrimination. Thus this section does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished

[8] See §§ 7 and 8, *supra,* note 1.

> by discrimination is prohibited. Nor does this section outlaw discrimination in employment as such; only such discrimination as encourages or discourages membership in a labor organization is proscribed."

It is the "true purpose" or "real motive" in hiring or firing that constitutes the test. *Id.*, 43. Some conduct may by its very nature contain the implications of the required intent; the natural foreseeable consequences of certain action may warrant the inference. *Id.*, 45. And see *Republic Aviation Corp.* v. *Labor Board,* 324 U. S. 793. The existence of discrimination may at times be inferred by the Board, for "it is permissible to draw on experience in factual inquiries." *Radio Officers* v. *Labor Board, supra,* 49.

But surely discrimination cannot be inferred from the face of the instrument when the instrument specifically provides that there will be no discrimination against "casual employees" because of the presence or absence of union membership. The only complaint in the case was by Slater, a union member, who sought to circumvent the hiring-hall agreement. When an employer and the union enforce the agreement against union members, we cannot say without more that either indulges in the kind of discrimination to which the Act is addressed.

It may be that the very existence of the hiring hall encourages union membership. We may assume that it does. The very existence of the union has the same influence. When a union engages in collective bargaining and obtains increased wages and improved working conditions, its prestige doubtless rises and, one may assume, more workers are drawn to it. When a union negotiates collective bargaining agreements that include arbitration clauses and supervises the functioning of those provisions so as to get equitable adjustments of grievances, union membership may also be encouraged. The truth is that the union is a service agency that probably encourages

membership whenever it does its job well. But, as we said in *Radio Officers* v. *Labor Board, supra,* the only encouragement or discouragement of union membership banned by the Act is that which is "accomplished by discrimination." P. 43.

Nothing is inferable from the present hiring-hall provision except that employer and union alike sought to route "casual employees" through the union hiring hall and required a union member who circumvented it to adhere to it.

It may be that hiring halls need more regulation than the Act presently affords. As we have seen, the Act aims at every practice, act, source or institution which in fact is used to encourage and discourage union membership by discrimination in regard to hire or tenure, term or condition of employment. Perhaps the conditions which the Board attaches to hiring-hall arrangements will in time appeal to the Congress. Yet, where Congress has adopted a selective system for dealing with evils, the Board is confined to that system. *Labor Board* v. *Drivers Local Union,* 362 U. S. 274, 284–290. Where, as here, Congress has aimed its sanctions only at specific discriminatory practices, the Board cannot go farther and establish a broader, more pervasive regulatory scheme.

The present agreement for a union hiring hall has a protective clause in it, as we have said; and there is no evidence that it was in fact used unlawfully. We cannot assume that a union conducts its operations in violation of law or that the parties to this contract did not intend to adhere to its express language. Yet we would have to make those assumptions to agree with the Board that it is reasonable to infer the union will act discriminatorily.

Moreover, the hiring hall, under the law as it stands, is a matter of negotiation between the parties. The Board has no power to compel directly or indirectly that the hiring hall be included or excluded in collective agree-

ments. Cf. *Labor Board* v. *American Ins. Co.*, 343 U. S. 395, 404. Its power, so far as here relevant, is restricted to the elimination of discrimination. Since the present agreement contains such a prohibition, the Board is confined to determining whether discrimination has in fact been practiced. If hiring halls are to be subjected to regulation that is less selective and more pervasive, Congress not the Board is the agency to do it.

Affirmed in part and reversed in part.

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

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, concurring.

I join the Court's opinion upon considerations which, though doubtless implicit in what my Brother DOUGLAS has written, in my view deserve explicit articulation.

The Board's condemnation of these union "hiring hall" procedures as violative of §§ 8 (a)(1), 8 (a)(3), 8 (b)(1), and 8 (b)(2) of the National Labor Relations Act, as amended by the Taft-Hartley Act,[1] ultimately rests on a now well-established line of circuit court cases to the effect that a clause in a collective bargaining agreement may, without more, constitute forbidden discrimination. See, *e. g., Red Star Express Lines* v. *Labor Board,* 196 F. 2d 78. While seeming to recognize the validity of the proposition that contract terms which are equivocal on their face should ordinarily await an independent evaluation of their actual meaning and effect[2] before being

[1] Set forth in note 1 of the Court's opinion, *ante,* pp. 669–670.

[2] As determined, for example, from the parties' actions under them, through grievance procedures, or by arbitration, if so provided in the collective bargaining agreement.

deemed to give rise to an unfair labor practice, such cases have justified short-circuiting that course upon these considerations: The mere existence of a clause that on its face appears to declare preferential rights for union members encourages union membership among employees or job applicants, persons not privy to the undisclosed intent of the parties, yet affected by the apparent meaning of the contract. Hence the mere possibility that such a clause may actually turn out not to have been administered by the parties so as to favor union members is not enough to save it from condemnation as an unlawful discrimination.

I think this rationale may have validity under certain circumstances, but that it does not carry the day for the Board in these cases. The Board recognizes, as it must, that something more than simply actual encouragement or discouragement of union members must be shown to make out an unfair labor practice, whether the action involved be that of agreeing to a contract term or discharging an employee or anything else. In this regard, it contends that the action of agreeing to the union "hiring" clause should be treated like any other employer or union action and that, on this premise, all that the Board must show in the light of *Radio Officers' Union* v. *Labor Board,* 347 U. S. 17, is that the tendency to encourage or discourage union membership was *foreseeable* to the employer or union. Since one is presumed to intend the foreseeable consequences of his acts, and since acting in order to encourage or discourage union membership is forbidden, the Board's case is said to be made by a simple showing that such encouragement or discouragement is the foreseeable result of employer or union action. The Board then concludes with a showing that encouragement of union membership is a foreseeable consequence of the acts of agreeing to or operating a union-run hiring hall.

Though, as will appear (*infra,* p. 681), I believe the Board erroneously construed this Court's decision in *Radio Officers,* I do not think we can reverse its finding of "encouragement." While I agree with the opinion of the Court that the Board could not infer from the mere existence of the "hiring hall" clause an intent on the part of employer or union to discriminate in favor of union status, I think it was within the realm of Board expertness to say that the natural and foreseeable effect of this clause is to make employees and job applicants think that union status will be favored. For it is surely scarcely less than a fact of life that a certain number of job applicants will believe that joining the union would increase their chances of hire when the union is exercising the hiring function.

What in my view is wrong with the Board's position in these cases is that a mere showing of foreseeable encouragement of union status is not a sufficient basis for a finding of violation of the statute. It has long been recognized that an employer can make reasonable business decisions, unmotivated by an intent to discourage union membership or protected concerted activities, although the foreseeable effect of these decisions may be to discourage what the act protects. For example, an employer may discharge an employee because he is not performing his work adequately, whether or not the employee happens to be a union organizer. See *Labor Board* v. *Universal Camera Corp.,* 190 F. 2d 429. Yet a court could hardly reverse a Board finding that such firing would foreseeably tend to discourage union activity. Again, an employer can properly make the existence or amount of a year-end bonus depend upon the productivity of a unit of the plant, although this will foreseeably tend to discourage the protected activity of striking. *Pittsburgh-Des Moines Steel Co.* v. *Labor Board,* 284 F. 2d 74. A

union, too, is privileged to make decisions which are reasonably calculated to further the welfare of all the employees it represents, nonunion as well as union, even though a foreseeable result of the decision may be to encourage union membership.

This Court's interpretation of the relevant statutory provisions has recognized that Congress did not mean to limit the range of either employer or union decision to those possible actions which had *no* foreseeable tendency to encourage or discourage union membership or concerted activities. In general, this Court has assumed that a finding of a violation of § 8 (a)(3) or § 8 (b)(2) requires an affirmative showing of a *motivation* of encouraging or discouraging union status or activity. See, *e. g., Labor Board* v. *Jones & Laughlin Co.,* 301 U. S. 1, 45–46; *Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474. There have, to be sure, been exceptions to this requirement, but they have been narrow ones, usually analogous to the exceptions made to the requirements for a showing of discrimination in other contexts. For example, in *Republic Aviation Corp.* v. *Labor Board,* 324 U. S. 793, the Court affirmed a Board decision that a company "no solicitation" rule was overbroadly applied to prevent solicitation of union membership on company property during periods when employees were otherwise free to do as they pleased. A finding of a motivation to discourage union membership was there held unnecessary because there was no employer showing of a nondiscriminatory purpose for applying the rule to union solicitation during the employees' free time. A similar absence of a significant business justification for the employer's acts which tended to discourage union activity explains the dispensability of proof of discriminatory motivation in *Allis-Chalmers Mfg. Co.* v. *Labor Board,* 162 F. 2d 435, *Cusano* v. *Labor Board,* 190 F. 2d 898, and *Labor Board* v. *Industrial Cotton Mills,* 208 F. 2d 87.

Another field of exceptions to the requirement of a showing of a purpose to encourage or discourage union activity is found in the Court's affirmance of the Second Circuit in *Gaynor News Co., Inc.,* v. *Labor Board,* 347 U. S. 17, a companion case to *Radio Officers:* If a union or employer is to be permitted to take action which substantially—though unintentionally—encourages or discourages union activity, the union or employer ends served by the action must not only be of some significance, but they must also be legitimate, or at least not otherwise forbidden by the National Labor Relations Act. In *Gaynor* an employer who, pursuant to a nondiscriminatory business end of paying the least wages possible, agreed with the union which was the statutory representative of the employees to give certain benefits only to union members, was prevented from asserting the justifying business reasons for thus encouraging union membership because of his complicity in the union's breach of its duties as agent for *all* the employees. Indeed, the fact that a nondiscriminatory business purpose forbidden by the Act cannot be used by an employer to justify an action which incidentally encourages union membership, seems to me to be the true basis of the Court's holding in *Radio Officers* that an employer violates § 8 (a)(3) when a union forces him to take actions in order to encourage union membership. The employer's nondiscriminatory reason for encouraging union membership—to avoid the economic pressure the union could impose upon him—was surely no longer intended to be a justification for such employer action after the passage of § 8 (b)(2), a statutory provision the very wording of which presupposed that union coercion can cause a violation of § 8 (a)(3).

There is no reason to decide now whether there are other contexts in which a showing of an actual motivation of encouraging or discouraging union activity might be unnecessary to a finding of a union or employer unfair

labor practice. For present purposes, it is sufficient to note that what is involved in the general requirement of finding of forbidden motivation, as well as in the limited scope of the heretofore recognized exceptions to this general requirement, is a realization that the Act was not intended to interfere significantly with those activities of employer and union which are justified by nondiscriminatory business purposes, or by nondiscriminatory attempts to benefit *all* the represented employees. It is against this policy that we should measure the Board's action in finding forbidden the incorporation in collective bargaining contracts of the "hiring hall" clause. We must determine whether the Board's action is consistent with the balance struck by the Wagner and Taft-Hartley Acts between protection of employee freedom with respect to union activity and the privilege of employer and union to make such nondiscriminatory decisions as seem to them to satisfy best the needs of the business and the employees.

The legislative background to § 8 (a)(3) of the Act is quite clear in its indications of where this balance was to be struck. The Senate Report on this section of the original Wagner Act states:

> "The fourth unfair labor practice [then § 8 (3)] is a corollary of the first unfair labor practice. An employer, of course, need not hire an incompetent man and is free to discharge an employee who lacks skill or ability. But if the right to join or not to join a labor organization is to have any real meaning for an employee, the employer ought not to be free to discharge an employee *merely* because he joins an organization or to refuse to hire him *merely* because of his membership in an organization. Nor should an employer be free to pay a man a higher

> or lower wage *solely* because of his membership or nonmembership in a labor organization. The language of the bill creates safeguards against these possible dangers." S. Rep. No. 1184 on S. 2926, 73d Cong., 2d Sess. 6. (Emphasis added.)

And similarly:

> "Of course nothing in the bill prevents an employer from discharging a man for incompetence; from advancing him for special aptitude; or from demoting him for failure to perform. But if the right to be free from employer interference in self organization or to join or refrain from joining a labor organization is to have any practical meaning, it must be accompanied by assurance that its exercise will not result in discriminatory treatment or loss of the opportunity for work." S. Rep. No. 573 on S. 1958, 74th Cong., 1st Sess. 11.

To the same effect was the view of Senator Walsh:

> ". . . The employer has the economic power; he can discharge any employee or any group of employees when their *only* offense may be to seek to form a legitimate organization among the workers for the purpose of collective bargaining. This bill declares that is wrong. It declares that the employee has the right to engage in collective bargaining, and it says, 'Mr. Employer, you must keep your hands off; you shall not use that effective power of dismissal from employment which you have and destroy the organization of the employees by the dismissal of one or more of your employees *when they are objectionable on no other ground than that they belong to or have organized a labor union.*'" Statement of Senator Walsh, 79 Cong. Rec. 7658. (Emphasis added.)

And further, the House Report on the bill stated:

> "Nothing in this subsection prohibits interference with the normal exercise of the right of employers to select their employees or to discharge them. All that is intended is that the employer shall not by discriminatory treatment in hire or tenure of employment or terms or conditions of employment, interfere with the exercise by employees of their right to organize and choose representatives. It is for this reason that the employer is prohibited from encouraging or discouraging membership in any labor organization by such discrimination." H. R. Rep. No. 1147 on S. 1958, 74th Cong., 1st Sess. 19.

Considered in this light, I do not think we can sustain the Board's holding that the "hiring hall" clause is forbidden by the Taft-Hartley Act. The Board has not found that this clause was without substantial justification in terms of legitimate employer or union purposes. Cf. *Republic Aviation* v. *Labor Board, supra; Gaynor News Co. Inc.,* v. *Labor Board, supra.* Whether or not such a finding would have been supported by the record is not for us now to decide. The Board has not, in my view, made the type of showing of an actual motive of encouraging union membership that is required by *Universal Camera* v. *Labor Board, supra.* All it has shown is that the clause will tend to encourage union membership, and that without substantial difficulty the parties to the agreement could have taken additional steps to isolate the valid employer or union purposes from the discriminatory effects of the clause.[3] I do not think

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[3] In connection with such clauses, the Board would have "The parties to the agreement post in places where notices to employees and applicants for employment are customarily posted, all provisions relating to the functioning of the hiring arrangement, including the safeguards that we deem essential to the legality of an exclusive hiring

that these two elements alone can justify a Board holding of an unfair labor practice unless we are to approve a broad expansion of the power of the Board to supervise nondiscriminatory decisions made by employer or union. Whether or not such an expansion would be desirable, it does not seem to me consistent with the balance the labor acts have struck between freedom of choice of management and union ends by the parties to a collective bargaining agreement and the freedom of employees from restraint or coercion in their exercise of rights granted by § 7 of the Act.[4]

I therefore agree with the Court that the Board's holding that the clause in question is invalid cannot be sustained.

MR. JUSTICE CLARK, dissenting in part.[1]

I cannot agree with the casual treatment the Court gives to the "casual employee" who is either unable to get employment or is fired therefrom because he has not been cleared by a union hiring hall. Inasmuch as the record, and the image of a hiring hall which it presents, are neglected by the Court, a short résumé of the facts is appropriate.

Lester Slater, the complainant, became a "casual employee" in the truck freight business in 1953 or early

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agreement." These safeguards, which are also to be made contract terms, provide that:

"(1) Selection of applicants for referral to jobs shall be on a nondiscriminatory basis and shall not be based on, or in any way affected by, union membership, bylaws, rules, regulations, constitutional provisions, or any other aspect or obligation of union membership, policies, or requirements.

"(2) The employer retains the right to reject any job applicant referred by the union."

[4] Set forth in note 1 of the Court's opinion, *ante*, pp. 669–670.

[1] I agree with the Court's disposition of that part of the Board's petition seeking direct enforcement of the order of reimbursement.

1954. He approached an employer but was referred to the union hiring hall. There the dispatcher told him to see Barney Volkoff, an official of the union, whose office in the union headquarters building was some three miles away. Describing his visit to Volkoff, Slater stated that "[I] just give him [Volkoff] the money to send back East to pay up my dues back there for the withdrawal card, . . . and I went right to the [hiring] hall and went to work." However, this was but the beginning of Slater's trouble with the hall. After some difficulty with one of his temporary employers (Pacific Intermountain Express), the hall refused to refer Slater to other employers. In order to keep employed despite the union hall's failure to dispatch him, Slater relied on a letter from John Annand, an International Representative of the union, stating that "you may seek work wherever you can find it in the freight industry without working through the hiring hall." It was this letter that obtained Slater his employment with Los Angeles-Seattle Motor Express, where he was characterized by its dock foreman as being "a good worker." After a few months employment, the Business Agent of the union (Victor Karaty) called on the Los Angeles-Seattle Motor Express, advising that it could not hire Slater "any longer here without a referral card"; that the company would "have to get rid of Slater, and if [it] . . . didn't, that he was going to tie the place up in a knot, [that he] would pull the men off." Los Angeles-Seattle Motor Express fired Slater, telling him that "[We] . . . can't use you now until you get this straightened out with the union. Then come back; we will put you to work." He then went to the union, and was again referred to Volkoff who advised, "I can't do anything for you because you are out. You are not qualified for this job." Upon being shown the Annand letter, Volkoff declared "I am the union." On later occasions when Slater attempted to get clearance

from Volkoff he was asked "How come you weren't out on that—didn't go out on the picket line?" (Apparently the union had been on a strike.) Slater testified, "I told him that nobody asked me to. I was out a week. I thought the strike was on. The hall was closed. The guys told me there weren't no work." The landlady of Slater also approached Volkoff in an effort to get him cleared and she testified that "I asked Mr. Barney Volkoff what he had against Lester Slater and why he was doing this to him." And she quoted him as saying: "For a few reasons, one is about the P. I. E. [Pacific Intermountain Express] . . . [a]nother thing, he is an illiterate." She further testified that "he [Volkoff] didn't like the way he dressed. And he [Volkoff] fussed around and fussed around." He therefore refused to "route," as the Court calls it, Slater through the union hiring hall.

The Court finds that the National Labor Relations Act does not ban hiring halls *per se* and that therefore they are illegal only if they discriminate on the basis of union membership. It holds that no such actual discrimination was shown and that none is inferable from the face of the contract since it has a protective clause. Collaterally it holds, quoting Senator Taft, that hiring halls are "useful"; that they save time and eliminate waste and, finally, that the Court "cannot assume that a union conducts its operations in violation of law." [2]

I do not doubt for a moment that men hired through such arrangements are saved the expense and delay of making the rounds of prospective employers on their own. Nor do I doubt their utility to employers with varying

[2] Interestingly enough, the Board in its Twenty-Third Annual Report (1958) characterized its holding in *Mountain Pacific Chapter*, 119 N. L. R. B. 883, in the following language: "It may reasonably be inferred, the Board held, that a union to which an employer has so delegated hiring powers will exercise its power with a view to securing compliance with membership obligations and union rules." At p. 68.

employee demands. And I accept the fact that Congress has outlawed only closed shops and allowed hiring halls to remain in operation. But just as those observations are not, in the final analysis, relied upon by the Court today in reaching its decision, my acquiescence in them is only a prologue to my dissent from the remaining considerations upon which its decision actually rests. These considerations are dependent upon the construction given § 8 (a)(3) and I therefore first turn to that section.

Section 8 (a)(3) provides, in part, that it shall be an unfair labor practice for an employer

> "*by discrimination* in regard to hire or tenure of employment or any term or condition of employment *to encourage or discourage* membership in any labor organization . . . ." (Emphasis added.)

As I view this prohibition, which by § 8 (b)(2) is also applied to unions when causing or attempting to cause any employer to violate this section, two factors must be present before there is an unfair labor practice: (1) discrimination in the hiring or tenure of employees which is intended to, or inherently tends to, result in (2) encouragement or discouragement of membership in a union.

The word "discrimination" in the section, as the Board points out and I agree, includes not only distinctions contingent upon "the presence or absence of union membership," *ante,* p. 675, but all differences in treatment regardless of their basis. This is the "cause" portion of the section. But § 8 (a)(3) also includes an "effect" clause which provides that the intended or inherent effect of the discrimination must be "to encourage or discourage [union] membership." The section has, therefore, a divided structure. Not all discriminations violate the section, but only those the effect of which is encouragement or discouragement of union membership. Cf. *Radio*

Officers v. *Labor Board,* 347 U. S. 17, at 43: "Nor does this section outlaw discrimination in employment as such; only such discrimination as encourages or discourages membership in a labor organization is proscribed." Each being a requirement of the section, both must be present before an unfair labor practice exists. On the other hand, the union here contends, and the Court agrees, that there can be no "discrimination" within the section *unless it is based on* union membership, *i. e.,* members treated one way, nonmembers another, with further distinctions, among members, based on good standing. Through this too superficial interpretation, the Court abuses the language of the Congress and unduly restricts the scope of the proscription so that it forbids only the most obvious "hard-sell" techniques of influencing employee exercise of § 7 rights.

Even if we could draw no support from prior cases, the plain and accepted meaning of the word "discrimination" supports my interpretation. In common parlance, the word means to distinguish or differentiate. Without good reason, we should not limit the word to mean to distinguish in a particular manner (*i. e.,* on the basis of union membership or activity) so that a finding that the hall dispatched employees without regard to union membership or activity bars a finding of violation. The mere fact that the section *might* be read in the manner suggested by the union does not license such a distortion of the clear intent of the Congress, *i. e.,* to prohibit all auxiliaries to the closed shop, and all pressures on employee free choice, however subtly they are established or applied. Moreover, our interpretation in *Radio Officers* v. *Labor Board, supra,* supports this position. There we said:

> "*The unfair labor practice is for an employer* [*1*] *to encourage or discourage membership* [*2*] *by means*

> *of discrimination.* Thus this section does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished by discrimination is prohibited. *Nor does this section outlaw discrimination in employment as such; only [1] such discrimination [2] as encourages or discourages* membership in a labor organization is proscribed." At pp. 42–43. (Emphasis added.)

The Court's conclusion is in patent conflict with that reasoning.

Given that interpretation of the word "discrimination," it becomes necessary to determine the class of employee involved, and then whether *any* differences in treatment within that class are present. The Board found the class affected by the union hiring hall to be that group which was qualified, in the sense of ability, to do the work required by the employer and who had applied for work through the hiring hall. Obviously, not all of those who apply receive like treatment. Not all applicants receive referral cards. Clearly, then, the class applying to the hiring hall is itself divided into two groups treated differently—those cleared by the union and those who were not. The next question is whether the contract requiring and endorsing that discrimination or differentiation is designed to, or inherently tends to, encourage union membership. If it does, then § 8 (a)(3) has been violated.

I begin with the premise that the Congress has outlawed the closed shop and that, as the Court pointed out, "[t]he policy of the Act is to insulate employees' jobs from their organizational rights," *Radio Officers, supra,* at 40. To test the contract here, I look to probable and anticipated "employee response" to it, *id.,* at 46, recognizing that "[e]ncouragement and discouragement are 'subtle things' requiring 'a high degree of introspective

perception.' " *Id.*, at p. 51. Just as in cases of his interference with protected activities, the escape value of the employer's "true purpose" and "real motive" is to be tested by the "natural consequences" and "foreseeable result" of his resort, however justifiably taken, to an institution so closely allied to the closed shop. I believe, as this Court has recognized, that "the desire of employees to unionize is directly proportional to the advantages *thought to be* obtained . . . ." *Radio Officers, supra,* at 46. (Emphasis added.) I therefore ask, "Does the ordinary applicant for casual employment, who walks into the union hall at the direction of his prospective employer, consider his chances of getting dispatched for work diminished because of his non-union status or his default in dues payment?" Lester Slater testified—and it is uncontradicted—that "He [the applicant] had to be a union member; otherwise he wouldn't be working there . . . you got to have your dues paid up to date and so forth." When asked how he knew this, Slater replied, "I have always knew that." Such was the sum of his impressions gained from contact with the hall from 1953 or 1954 when he started to 1958 when he ended. The misunderstanding—if it is that—of this common worker, who had the courage to complain, is, I am sure, representative of many more who were afraid to protest or, worse, were unaware of their right to do so.

Of the gravity of such a situation the Board is the best arbiter and best equipped to find a solution. It is, after all, "permissible [for the Board] to draw on experience in factual inquiries." *Radio Officers, supra,* at 49. It has resolved the issue clearly, not only here, but also in its 1958 Report which, as I have said, repeated its *Mountain Pacific* position "that a union to which an employer has so delegated hiring powers will exercise its power with a view to securing compliance with member-

ship obligations and union rules." At p. 68. In view of Slater's experience, for one, the idea is certainly not far-fetched. Despite the contract provision as to equal treatment between union and nonunion men after a minimum amount of seniority is obtained, we find here that Slater had to "pay up" his dues in 1953. Despite the seniority rule,[3] dispatch was often made, the record shows, due to favoritism by the employer. Despite the contract's solemn words, the uncontradicted evidence is that lack of intellect, taste in dress and failure to appear on a union picket line prevented an employee from getting a job, although he was a "good worker." Likewise, approaching a union official (who indignantly asserts "I am the union") with a letter from a union "higher-up" may result in loss of work. Such factors are infinitely more persuasive than the self-serving declaration of a union hiring-hall agreement.

However, I need not go so far as to presume that the union has set itself upon an illegal course, conditioning referral on the unlawful criterion of union membership in good standing (which inference the majority today says cannot be drawn), to reach the same result. I need only assume that, by thousands of common workers like Slater, the contract and its conditioning of casual employment upon union referral will work a misunderstanding as to the significance of union affiliation unless the employer's abdication of his role be made less than total and some note of the true function of the hiring hall be posted where all may see and read. The tide of encouragement may not be turned, but it will in part at least be stemmed. As an added dividend, the inherent probability of the free-wheeling operation of the union hiring

[3] The employers did not receive any seniority lists from the union and were unaware of whether this provision of the agreement was being properly administered.

hall resulting in arbitrary dispatching of job seekers would to some significant extent be diminished.

I would hold that there is not only a reasonable likelihood, but that it must inescapably be concluded under this record, that, without the safeguards at issue, a contract conditioning employment *solely upon union referral* encourages membership in the union by that very distinction itself. As the Board expressed it in *Mountain Pacific Chapter, supra,* at 896:

> "[T]he very grant of work at all depends solely upon union sponsorship, and it is reasonable to infer that the arrangement displays and enhances the Union's power and control over the employment status."

A reasonable interpretation of the Act also demands that both the employer and the union be deemed violators. In determining that issue, I say that the Board is the best judge. I say that it has made an "allowable judgment." It is not for the courts to differently assess the hiring hall's "cumulative effect on employees" or job applicants, *Labor Board* v. *Stowe Spinning Co.,* 336 U. S. 226, 231. Its findings here should, therefore, "carry the authority of an expertness which courts do not possess and therefore must respect." *Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474, 488.

Finally, let me say that the Board should not be hamstrung in its effort to enforce the mandate of the Congress that there shall be no closed shop. As Senator Taft stated on the floor of the Senate: [4]

> "Perhaps [the closed shop] is best exemplified by the so-called hiring halls on the west coast, where shipowners cannot employ anyone unless the union sends him to them. . . . Such an arrangement gives the

[4] 93 Cong. Rec. 3836; II Leg. Hist. of the Labor Management Relations Act, 1947, 1010.

> union tremendous power over the employees; furthermore, it abolishes a free labor market. A man cannot get a job where he wants to get it. He has to go to the union first; and if the union says that he cannot get in, then he is out of that particular labor field."

That is where Lester Slater finds himself today. I therefore dissent.

MR. JUSTICE WHITTAKER joins in all except note 1 of this dissent, but would also add the reasons, respecting the Board's powers to make the order in question, that are stated in his dissent in No. 68, *Carpenters Local 60* v. *Labor Board,* decided this day, *ante,* p. 660.

NATIONAL LABOR RELATIONS BOARD *v.* NEWS SYNDICATE CO., INC., ET AL.

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

No. 339. Argued March 1, 1961.—Decided April 17, 1961.

A collective bargaining agreement required employers to comply with union rules "not in conflict with" federal law and provided that foremen must be union members and do the hiring, but that they should be responsible only to the employers. The National Labor Relations Board found that certain union foremen had discriminated against certain nonunion employees, and it concluded that the union and an employer had violated § 8 (b) (1) (A) and (2) and § 8 (a) (1) and (3), respectively, of the National Labor Relations Act, as amended, by their contract arrangements and by operating an unlawful closed shop and preferential hiring system; and it ordered, *inter alia*, that certain employees be reimbursed for dues and assessments paid to the union during the period covered by the complaint. The Court of Appeals denied enforcement of the Board's order. *Held:*

1. The Board was not authorized under § 10 (c) to require reimbursement of dues and assessments paid to the union. *Carpenters Local 60* v. *Labor Board, ante,* p. 651. P. 699.

2. The contract was not unlawful on its face, even though the foremen—who were union members—were required to do the hiring. Pp. 699–700.

3. The requirement that employers comply with union rules "not in conflict with" federal law was not unlawful *per se*. P. 700.

4. The Court of Appeals did not go beyond the scope of review entrusted to it in holding that the record did not support the Board's finding that, in practice, respondents maintained and enforced closed-shop and preferential hiring conditions which violated the Act. Pp. 700–703.

279 F. 2d 323, affirmed.

Dominick L. Manoli argued the cause for petitioner. With him on the brief were *Solicitor General Rankin, Stuart Rothman* and *Norton J. Come.*

John R. Schoemer, Jr. argued the cause for News Syndicate Co., Inc., respondent. With him on the briefs were *Andrew L. Hughes* and *Stuart N. Updike.*

Gerhard P. Van Arkel argued the cause for New York Mailers' Union No. 6, respondent. With him on the brief were *Henry Kaiser* and *David I. Shapiro.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Respondent union, affiliated with the International Typographical Union, entered into collective bargaining agreements with various publishers, including respondent News Syndicate (and Dow Jones & Co.), which contained a provision that "the General Laws of the International Typographical Union . . . not in conflict with this contract or with federal or state law shall govern relations between the parties on conditions not specifically enumerated herein." The contract limited mail-room employment to "journeymen and apprentices." The contract also provided that mail-room superintendents, foremen, and assistant foremen must be members of the union and that the foremen would do the hiring. The General Laws of ITU provided that "foremen or journeymen" should be "active members" of the union, that only union members should operate, maintain, and service any mailing machinery or equipment, that no person should be eligible as a "learner" who is not a union member.

Another provision of the contract stated, however, that "The Union shall not discipline the Foreman for carrying out the instructions of the Publisher or his representatives in accordance with this agreement." It also provided that the foremen "shall be appointed and may be removed by the Publisher."

The foreman at one plant was a union member and the Board found that he discriminated in favor of union men against a nonunion employee named Julius Arrigale. It

also found that the foreman at another plant was a union member and discriminated in favor of union men and against a nonunion employee named Burton Randall. It concluded that the union and the News Syndicate had violated § 8 (b)(1)(A) and (2) and § 8 (a)(1) and (3) of the National Labor Relations Act, as amended by the Taft-Hartley Act, 61 Stat. 136, 140–141, as amended, 29 U. S. C. § 158, respectively, by their contract arrangements and by operating an unlawful closed shop and preferential hiring system.[1] It held that vesting control over

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[1] Section 8 provides in relevant part:

"(a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

. . . . . .

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later . . . . *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

. . . . . .

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

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall

employment in union foremen was a delegation of exclusive control over hiring to the union without the requisite safeguards prescribed by the Board in *Mountain Pacific Chapter,* 119 N. L. R. B. 883. The order of the Board contained various provisions including a direction that all employees in the mail-rooms be reimbursed for dues and assessments paid the union for a period beginning six months before the service of the charges against it; and this duty was made, so far as concerns the news mail-room, a joint and several liability of the union and News Syndicate. 122 N. L. R. B. 818.

The Board petitioned the Court of Appeals for enforcement of the order. That court held that the finding of discrimination against Randall was in part supported by the record; and it refused enforcement of the Board's order, allowing the Board, if it wished, to enter an order directed only to that instance of discrimination the Court of Appeals found the record to show. 279 F. 2d 323. The case is here on petition for a writ of certiorari which

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not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; . . .

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership . . . ."

Section 7 provides:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a)(3)."

we granted along with No. 340, *International Typographical Union* v. *Labor Board, post,* p. 705, because of the conflict between them. 364 U. S. 877, 878.

What we have this day decided in *Carpenters Local 60* v. *Labor Board, ante,* p. 651, is dispositive of the provision in the Board's order requiring respondents to reimburse union members for dues and assessments.

We also believe the Court of Appeals was right in concluding that the contract on its face is not unlawful even though the foremen—who are union members—do the hiring. In the first place, the contract (unlike the General Laws) does not require journeymen and apprentices to be union members. In the second place, the provisions of the contract which we have set forth make the foremen "*solely* the employers' agents," as the Court of Appeals concluded.[2] 279 F. 2d, at 330. Finally, as we said in *Teamsters Local 357* v. *Labor Board,* decided this day, *ante,* p. 667, we will not assume that unions and employers will violate the federal law, favoring discrimination in favor of union members against the clear command of this Act of Congress. As stated by the Court of Appeals, "In the absence of provisions calling explicitly

[2] The 1947 amendments to the Act changed the ruling in *Packard Motor Car Co.* v. *Labor Board,* 330 U. S. 485, which held that foremen were "employees." Section 2 (3) now excludes from the term "employees" one who is "employed as a supervisor." Section 2 (11) defines a "supervisor" as one "having authority, in the interest of the employer, to hire," etc., employees. Section 14 (a) provides:

"Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."

As stated by Senator Taft, under these provisions even a union of foremen could be recognized by an employer, though no employer could be compelled to do so. S. Rep. No. 105, 80th Cong., 1st Sess., p. 5.

for illegal conduct, the contract cannot be held illegal because it failed affirmatively to disclaim all illegal objectives." 279 F. 2d, at 330.

We also agree with the Court of Appeals that the General Laws provision of the contract is not *per se* unlawful. For it has in it the condition that only those General Laws of the union are incorporated which are "not in conflict with this contract or with federal or state law." Any rule or regulation of the union which permitted or required discrimination in favor of union employees would, therefore, be excluded from incorporation in the contract since it would be at war with the Act. We can say with Judge Prettyman in *Honolulu Star-Bulletin* v. *Labor Board,* 107 U. S. App. D. C. 58, 61, 274 F. 2d 567, 570, that while the words "not in conflict with federal . . . law" might in some circumstances be puzzling or uncertain as to meaning, "there could hardly be any uncertainty respecting a closed-shop clause." For the command of § 8 is clear and explicit and the only exception is plainly spelled out in the provisos to § 8 (a)(3).

Whether in practice respondents maintained and enforced closed-shop and preferential hiring conditions raises a distinct question.

The Board's case comes down to the method by which those in the mail-room became journeymen. One could either take an apprentice training program or pass a competency examination. Apprentices were hired by the foremen; but the Court of Appeals found that there were no discriminatory practices in the actual hiring of apprentices. If a person followed the examination route, the contract provided for it to be given "by impartial examiners qualified to judge journeyman competency selected by the parties hereto." The examiners were union officials and the mail-room foremen.

The union proposed and News Syndicate agreed in 1956 to put into the class of a "regular substitute" those

extras who in the prior two years had earned 15 vacation credits, which was another way of describing those who had averaged about three days' work a week. Those who were hired on a day-to-day basis ("shaped for work") included 60 nonunion men. Of these, 31 were invited to take the examination. They passed, were made "regular substitutes," and subsequently became union members. Thereafter each of the new "regular substitutes" was hired prior to Randall, though he had "shaped" at the News longer than many of them. Randall, it appears, had full-time outside jobs that kept him from "shaping" regularly.[3] Arrigale was a nonjourneyman who shaped up for the Wall Street Journal, which had essentially the same hiring setup as the News. The asserted discrimination occurred when "outside cardmen" were hired in preference to Arrigale, although Arrigale was "shaping" steadily and was the oldest nonunion

[3] Burton Randall is neither a union member nor a journeyman within the meaning of the contract between the union and the News. The hiring practices at the News are as follows: The minimum mailing-room staff ("regular situation holders") are both union members and journeymen; they report for work each night and are not required to "shape." To fill in vacancies and to meet added needs, the foreman next turns to "regular substitutes," who are both journeymen and union members. Next in line of priority are those the Board insists are referred to as "outside card men," but who are at any rate both journeymen and union members regularly shaping up for other newspapers, but available for work on the News. The lowest priority category consists of what the Board calls "nonunion shapers" (and the union, "non-journeymen casuals"); at any rate, these men have neither union membership nor journeyman status. Within the category, such men are ranked in seniority running from the date of first shaping up for the News. Burton Randall is a "nonunion shaper" or "non-journeyman casual." He has been turning up for the "shaping" at the News for a good many years; for most of them, he showed only on Fridays and Saturdays since he held another job. From 1950 to 1956, he was third in seniority on the "casual" list; from 1956, he was first on that list.

extra. The foreman testified he took "outside card-men" because he could be sure of their competency, because they would have taken the journeyman test or had served as apprentices. There was no evidence that membership in the union was a condition for the journeyman test, save that all journeymen in fact did become union men.

Respondents, therefore, contend that to accord priority in the hire of extras to men who work regularly for the employer (and who also have the journeyman status) is a hiring system based on competency and legitimate employee qualifications.

The Court of Appeals concluded:

> "We find . . . a dearth of evidence either that a Union journeyman has ever been hired in preference (let alone, an unlawful preference) to a non-union journeyman, or that the qualifying standards for taking a competency examination are discriminatory. The record is barren of even the slightest hint that there has been discrimination in the conduct of the examinations. Availability, dependability and regularity of service, as well as mere competency, are valid nondiscriminatory considerations in determining the order of hire. The fact that one applicant is as competent as another, does not mean that the other may not properly be preferred on the basis of his other qualifications. And the fact that those achieving status as new 'regular substitutes' subsequently became Union members and even indicated their willingness to do so prior to the adoption of the standard, does not indicate, at least on this record, that the standard, seemingly fair, was discriminatory in its effect. Randall admitted that he would have welcomed the opportunity to become a Union member, and for aught that appears in the record, so would the remaining extras who did not meet the established standard.

> "We conclude that the record does not warrant a finding that the hiring system in general, or the competency system in particular, by its discrimination against nonunion applicants, encouraged Union membership." 279 F. 2d, at pp. 333–334.

This finding of the Court of Appeals disposed of Arrigale's complaint and all of Randall's with the exception of the loss of one night's employment as to which the court sustained the Board. The Board drew contrary inferences. But it does not now seriously challenge the foregoing finding of the Court of Appeals. Rather, its main reliance is on the long history of ITU's use of the closed shop, the fact that foremen were union members, and the obscurity of the "not in conflict" clause of the agreement. We think the reversal of the Board on the facts by the Court of Appeals was within the scope of review entrusted to it. See *Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474, 490–491.

Affirmed.

MR. JUSTICE WHITTAKER dissents. See his dissenting opinion in *Carpenters Local 60* v. *Labor Board,* decided this day, *ante,* p. 660.

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

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, concurring.

I join the Court's opinion on the basis of the reasoning set forth in my concurring opinions in No. 68, *ante,* p. 656, and in Nos. 64 and 85, *ante,* p. 677.

Here, as with respect to the "hiring hall" clause in Nos. 64 and 85, I think the Board's finding that the "General Laws" clause "encouraged" union membership must be accepted. I need only add that in light of the

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historic use of such clauses to maintain closed-shop conditions, I would not be willing to overrule the Board's determination that those employed or seeking employment in this newspaper's mail room would regard the innocently worded incorporation of the union's valid "General Laws" as in fact evidencing the employer's and union's intent to allow forbidden union bylaws to govern their relationship as regards employment, until a finding of an unfair labor practice arising therefrom had actually been made.

MR. JUSTICE CLARK, dissenting.

I agree with the Court's disposition of that part of the Board's order requiring respondents to reimburse union members for dues and assessments. However, for the reasons stated in my dissent in Nos. 64 and 85, *ante*, p. 685, I believe that the inclusion in the agreement of the "General Laws" and "Foreman" clauses violated § 8 (b)(1)(A) and (2) and § 8 (a)(1) and (3). I, therefore, dissent from those portions of the Court's opinion.

Syllabus.

INTERNATIONAL TYPOGRAPHICAL UNION, AFL–CIO, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD.

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

No. 340. Argued March 1, 1961.—Decided April 17, 1961.

In collective bargaining negotiations, two unions demanded that the agreement require the employers to comply with union rules "not in conflict with" federal law and that foremen must be union members and do the hiring, but that they should be responsible only to the employers. Union insistence upon these demands led to a deadlock in the negotiations and a strike. The employers filed charges with the National Labor Relations Board, which found that (1) the demand for a contract including these requirements was a refusal to bargain within the meaning of § 8 (b) (3) of the National Labor Relations Act, as amended, (2) striking to force acceptance of those requirements was an attempt to make the employers discriminate in favor of union members contrary to § 8 (b) (2), and (3) striking for the "foreman clause" was restraining and coercing the employers in the selection of their representatives for the adjustment of grievances in violation of § 8 (b) (1) (B). *Held:*

1. The proposed requirement that employers comply with union rules "not in conflict with" federal law was not unlawful *per se*. *Labor Board* v. *News Syndicate Co., ante,* p. 695. P. 707.

2. As to whether the strike to obtain the "foreman clause" was permissible, the Court is equally divided; and the judgment of the Court of Appeals enforcing the Board's order on that phase of the controversy is affirmed. P. 707.

278 F. 2d 6, affirmed in part and reversed in part.

Gerhard P. Van Arkel argued the cause for petitioners. With him on the briefs were *Henry Kaiser* and *David I. Shapiro.*

Dominick L. Manoli argued the cause for respondent. With him on the briefs were former *Solicitor General*

Rankin, Solicitor General Cox, Stuart Rothman and *Norton J. Come.*

Elisha Hanson, Arthur B. Hanson and *Emmett E. Tucker, Jr.* filed a brief for the Worcester Telegram Publishing Co., Inc., as *amicus curiae,* urging affirmance.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case involves a controversy that started in 1956 between petitioner Local 165 and the Worcester Telegram and between petitioner Local 38 and the Haverhill Gazette. The two unions insisted that the collective bargaining agreements that were being negotiated contain clauses or provisions to which each employer objected. The controversy as it reaches here is reduced to two clauses: *first,* that the hiring for the composing room be in the hands of the foreman; that he must be a member of the union; but that the union "shall not discipline the foreman for carrying out written instructions of the publisher or his representatives authorized by this Agreement"; and *second,* that the General Laws of the International Typographical Union shall govern the relations between the parties if they are "not in conflict with state or federal law." The unions' demand that these clauses be included in the agreement led to a deadlock in the negotiations which in turn resulted in a strike.

The employers filed charges with the Board, complaints were issued, the cases consolidated, and hearings held. The Board concluded that the demands for the two clauses and the strikes supporting them were violations of the Act. It found that a demand for a contract that included those clauses was a refusal to bargain collectively within the meaning of § 8 (b)(3) of the National Labor Relations Act, as amended by the Taft-Hartley Act, 61 Stat. 136, 140–141, 29 U. S. C. §158 (b)(3).

It found that striking to force acceptance of those clauses was an attempt to make the employers discriminate in favor of union members contrary to the command of § 8 (b)(2) of the Act. It also found that striking for the "foreman clause" was restraining and coercing the employers in the selection of their representatives for the adjustment of grievances in violation of § 8 (b)(1)(B) of the Act. 123 N. L. R. B. 806. The Court of Appeals enforced the Board's order apart from features not material here. 278 F. 2d 6. The case is here on certiorari, 364 U. S. 878.

What we have said in *Labor Board* v. *News Syndicate Co.*, decided this day, *ante*, p. 695, is dispositive of the clause which incorporates the General Laws of the parent union "not in conflict with state or federal law." On that phase of the case the judgment below must be reversed.

MR. JUSTICE CLARK and MR. JUSTICE WHITTAKER dissent, substantially for the reasons stated by the Court of Appeals, 278 F. 2d 6.

We turn then to the controversy over the "foreman clause." As to whether the strike to obtain the "foreman clause" was permissible, the Court is equally divided. Accordingly the judgment on that phase of the controversy is affirmed.

Reversed in part and affirmed in part.

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

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, concurring.

I join the Court's opinion upon the basis set forth in my concurring opinions in No. 339, *ante*, p. 703, and in Nos. 64 and 85, *ante*, p. 677.

SMITH *v.* BENNETT, WARDEN.

CERTIORARI TO THE SUPREME COURT OF IOWA.

No. 174. Argued March 28, 1961.—Decided April 17, 1961.*

Iowa statutes that require an indigent prisoner of the State to pay a filing fee before his application for a writ of habeas corpus ($4) or the allowance of his appeal ($3) in such proceedings will be docketed in a state court deny him the equal protection of the laws in violation of the Fourteenth Amendment. *Burns* v. *Ohio,* 360 U. S. 252. Pp. 708–714.

Judgments vacated and causes remanded.

Luther L. Hill, Jr., acting under appointment by the Court, 363 U. S. 834, 838, argued the causes and filed a brief for petitioners in both cases.

Evan Hultman, Attorney General of Iowa, argued the causes and filed a brief for respondent in both cases.

MR. JUSTICE CLARK delivered the opinion of the Court.

The issue in these habeas corpus cases concerns the validity, under the Equal Protection Clause of the Fourteenth Amendment, of the requirement of Iowa law that necessitates the payment of statutory filing fees [1] by an indigent prisoner of the State before an application for a writ of habeas corpus or the allowance of an appeal in such proceedings will be docketed. As we noted in *Burns* v. *Ohio,* 360 U. S. 252, 256 (1959), "[t]he State's

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* Together with No. 177, *Marshall* v. *Bennett, Warden,* also on certiorari to the same Court.

[1] Iowa Code Ann. (Cum. Supp. 1960) § 606.15 provides in pertinent part that "[t]he clerk of the district court shall charge and collect . . . [f]or filing any petition . . . and docketing the same, four dollars." Section 685.3 states in relevant part that "[t]he clerk [of the Supreme Court] shall collect . . . [u]pon filing each appeal, three dollars."

commendable frankness in [these] . . . case[s] has simplified the issues." In its brief, the State conceded that "indigent convicted criminals are unable to file a petition for habeas corpus in Iowa." We hold that to interpose any financial consideration between an indigent prisoner of the State and his exercise of a state right to sue for his liberty is to deny that prisoner the equal protection of the laws.

In No. 174, *Neal Merle Smith* v. *John E. Bennett, Warden,* the petitioner was convicted and sentenced to serve 10 years in the state penitentiary for the offense of breaking and entering. In due course he was released on parole. After a short period, however, this was revoked for violation of its conditions. Petitioner was arrested and was thereafter returned to the penitentiary for completion of his sentence. He then forwarded to the Clerk of the District Court of Lee County, Iowa, a petition for a writ of habeas corpus with accompanying motion to proceed *in forma pauperis* and an affidavit of poverty. In the petition he raised constitutional questions as to the validity of the warrant of arrest under which he was taken into custody and returned to the penitentiary. The Clerk refused to docket the petition without payment of the $4 filing fee. Petitioner then filed a motion in the Iowa Supreme Court for leave to appeal *in forma pauperis,* together with a pauper's oath, which the court denied without opinion. On appeal to this Court, we dismissed the appeal but treated the papers as a petition for certiorari, which was granted, limited to the above question, 363 U. S. 834.

In No. 177, *Richard W. Marshall* v. *John E. Bennett, Warden,* the petitioner, who was represented by counsel, pleaded guilty to an information charging the offense of breaking and entering and was sentenced to 10 years' imprisonment at the Iowa State Penitentiary. A year later he forwarded to the Clerk of the District Court of

Lee County, Iowa, a petition for a writ of habeas corpus alleging that he was detained "contrary to the provisions of the 14th Amendment, § 1" because the information to which he pleaded guilty was "fatal on its face" in that "it does not charge Petitioner with 'intent' " and further because his "plea thereon was obtained by coercion and duress." Accompanying the petition was a motion for leave to proceed *in forma pauperis* and a pauper's affidavit. Thereafter, in an unreported written order, the court refused to docket the petition without the payment of the statutory filing fee but, nevertheless, examined the petition and found it "would have to be denied if properly presented to the Court." Petitioner forwarded appeal papers to the Supreme Court of Iowa but that application was also denied. Petitioner's motion for leave to proceed here *in forma pauperis* was granted, as was his petition for certiorari, which was limited to the question posed in the opening paragraph, *supra.* 363 U. S. 838.

In *Burns* v. *Ohio, supra,* we decided that a State could not "constitutionally require . . . an indigent defendant in a criminal case [to] pay a filing fee before permitting him to file a motion for leave to appeal in one of its courts." At p. 253. That decision was predicated upon our earlier holding in *Griffin* v. *Illinois,* 351 U. S. 12 (1956), that an indigent criminal defendant was entitled to a transcript of the record of his trial, or an adequate substitute therefor, where needed to effectively prosecute an appeal from his conviction. The gist of these cases is that because "[t]here is no rational basis for assuming that indigents' motions for leave to appeal will be less meritorious than those of other defendants," *Burns* v. *Ohio, supra,* at 257–258, "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has," *Griffin* v. *Illinois, supra,* at 19, and consequently that "[t]he imposition by the State of financial barriers restricting the availability of appellate

review for indigent criminal defendants has no place in our heritage of Equal Justice Under Law." *Burns* v. *Ohio, supra,* at 258. Iowa had long anticipated the rule announced in these cases, *i. e.,* indigent defendants may appeal from criminal convictions without prior payment of filing fees, Iowa Code § 789.20 (enacted in 1917), and transcripts are provided by the county to be used in such appeals, Iowa Code § 792.8 (enacted in 1878). As the State points out, those cases "were concerned with the rights of a convicted criminal seeking to make a direct attack upon his conviction by appeal . . . ." Habeas corpus, on the other hand, is not an attack on the conviction but on the validity of the detention and is, therefore, a collateral proceeding. The State, however, admits that the Great Writ "is an available post-conviction civil remedy in . . . Iowa" and concedes that a prisoner's inability to pay the $4 fee would render it unavailable to him. The question is therefore clearly posed: Since Iowa does make the writ available to prisoners who have the $4 fee, may it constitutionally preclude its use by those who do not?

The State insists that it may do so for three reasons. First, habeas corpus is a civil action brought by a prisoner to obtain his personal liberty, a civil right, and if it must be made available to indigents free of fees in protection of that right then it must be made available in like manner to all indigents in the protection of every civil right. Second, habeas corpus is a statutory right, Iowa Code § 663.5, and the legislature may constitutionally extend or limit its application. Finally, a habeas corpus action may be brought in the United States District Court because Iowa's fee requirement fulfills the demand of 28 U. S. C. § 2254, that "the existence of circumstances rendering such [state corrective] process ineffective to protect the rights of the prisoner" be present.

While habeas corpus may, of course, be found to be a civil action for procedural purposes, *Ex parte Tom Tong*, 108 U. S. 556 (1883), it does not follow that its availability in testing the State's right to detain an indigent prisoner may be subject to the payment of a filing fee. The State admits that each petitioner here is an indigent and that its requirement as to the $4 fee payment has effectively denied them the use of the writ. While $4 is, as the State says, an "extremely nominal" sum, if one does not have it and is unable to get it the fee might as well be $400—which the State emphasizes it is not. In Iowa, the writ is a post-conviction remedy available to all prisoners who have $4. We shall not quibble as to whether in this context it be called a civil or criminal action for, as Selden has said, it is "the highest remedy in law, for any man that is imprisoned." 3 Howell's State Trials 95 (1628). The availability of a procedure to regain liberty lost through criminal process cannot be made contingent upon a choice of labels. Ever since the Magna Charta, man's greatest right—personal liberty—has been guaranteed, and the procedures of the Habeas Corpus Act of 1679 [2] gave to every Englishman a prompt and effective remedy for testing the legality of his imprisonment. Considered by the Founders as the highest safeguard of liberty, it was written into the Constitution of the United States that its "privilege . . . shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it." Art. I, § 9. Its principle is imbedded in the fundamental law of 47 of our States. It has long been available in the federal courts to indigent prisoners of both the State and Federal Governments to test the validity of their detention. Over the centuries it has been the common law world's "freedom writ" by whose orderly

[2] 31 Car. II, c. 2.

processes the production of a prisoner in court may be required and the legality of the grounds for his incarceration inquired into, failing which the prisoner is set free. We repeat what has been so truly said of the federal writ: "there is no higher duty than to maintain it unimpaired," *Bowen* v. *Johnston,* 306 U. S. 19, 26 (1939), and unsuspended, save only in the cases specified in our Constitution. When an equivalent right is granted by a State, financial hurdles must not be permitted to condition its exercise.

To require the State to docket applications for the post-conviction remedy of habeas corpus by indigent prisoners without the fee payment does not necessarily mean that all habeas corpus or other actions involving civil rights must be on the same footing. Only those involving indigent convicted prisoners are involved here and we pass only upon them.

The Attorney General of Iowa also argues that indigent prisoners in the State's custody may seek "vindication of federal rights alleged to have been denied by the state" in the federal courts. But even though this be true—an additional point not involved or passed upon here—it would ill-behoove this great State, whose devotion to the equality of rights is indelibly stamped upon its history, to say to its indigent prisoners seeking to redress what they believe to be the State's wrongs: "Go to the federal court." Moreover, the state remedy may offer review of questions not involving federal rights and therefore not raisable in federal habeas corpus.

Because Iowa has established such a procedure, we need consider neither the issue raised by petitioners that the State is constitutionally required to offer some type of post-conviction remedy for the vindication of federal rights, nor the State's converse claim that the remedy is a matter of legislative grace. However, the operation of the statutes under attack has, perhaps inadvertently,

made it available only to those persons who can pay the necessary filing fees. This is what it cannot do.

Throughout the centuries the Great Writ has been the shield of personal freedom insuring liberty to persons illegally detained. Respecting the State's grant of a right to test their detention, the Fourteenth Amendment weighs the interests of rich and poor criminals in equal scale, and its hand extends as far to each. In failing to extend the privilege of the Great Writ to its indigent prisoners, Iowa denies them equal protection of the laws. The judgments of the Supreme Court of Iowa are vacated and each cause is remanded to that court for further action consistent with this opinion.

Vacated and remanded.

BURTON *v.* WILMINGTON PARKING AUTHORITY ET AL.

APPEAL FROM THE SUPREME COURT OF DELAWARE.

No. 164. Argued February 21, 23, 1961.—Decided April 17, 1961.

A restaurant located in a publicly owned and operated automobile parking building refused to serve appellant food or drink solely because he was a Negro. The building had been built with public funds for public purposes, and it was owned and operated by an agency of the State of Delaware, from which the private operator of the restaurant leased its premises. Claiming that refusal to serve him abridged his rights under the Equal Protection Clause of the Fourteenth Amendment, appellant sued in a state court for declaratory and injunctive relief against the restaurant and the state agency. The Supreme Court of Delaware held that he was not entitled to relief, on the ground that the restaurant's action was not state action within the meaning of the Fourteenth Amendment and that the restaurant was not required by a Delaware statute to serve all persons entering its place of business. An appeal was taken to this Court on the ground that the state statute had been construed unconstitutionally. *Held:*

1. The appeal is dismissed, since the judgment did not depend for its ultimate support upon a determination of the constitutional validity of the state statute; but, treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is granted, since the case presents an important constitutional question under the Fourteenth Amendment. Pp. 717, 721.

2. In view of all the circumstances of this case, including the facts that the restaurant was physically and financially an integral part of a public building, built and maintained with public funds, devoted to a public parking service, and owned and operated by an agency of the State for public purposes, the State was a joint participant in the operation of the restaurant, and its refusal to serve appellant violated the Equal Protection Clause of the Fourteenth Amendment. Pp. 721–726.

3. When a State leases public property in the manner and for the purpose shown to have been the case here, the proscriptions of

the Fourteenth Amendment must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself. P. 726.

—— Del. ——, 157 A. 2d 894, reversed.

Louis L. Redding argued the cause and filed a brief for appellant.

Clair John Killoran argued the cause and filed a brief for the Wilmington Parking Authority, appellee.

Thomas Herlihy, Jr. argued the cause and filed a brief for Eagle Coffee Shoppe, Inc., appellee.

Solicitor General Cox argued the cause for the United States, as *amicus curiae,* urging reversal. On the memorandum were former *Solicitor General Rankin* and *Assistant Attorney General Tyler.*

Mr. Justice Clark delivered the opinion of the Court.

In this action for declaratory and injunctive relief it is admitted that the Eagle Coffee Shoppe, Inc., a restaurant located within an off-street automobile parking building in Wilmington, Delaware, has refused to serve appellant food or drink solely because he is a Negro. The parking building is owned and operated by the Wilmington Parking Authority, an agency of the State of Delaware, and the restaurant is the Authority's lessee. Appellant claims that such refusal abridges his rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The Supreme Court of Delaware has held that Eagle was acting in "a purely private capacity" under its lease; that its action was not that of the Authority and was not, therefore, state action within the contemplation of the prohibitions contained in that Amendment. It also held that under 24 Del. Code,

§ 1501,[1] Eagle was a restaurant, not an inn, and that as such it "is not required [under Delaware law] to serve any and all persons entering its place of business." —— Del. ——, ——, 157 A. 2d 894, 902 (1960). On appeal here from the judgment as having been based upon a statute construed unconstitutionally, we postponed consideration of the question of jurisdiction under 28 U. S. C. § 1257 (2) to the hearing on the merits. 364 U. S. 810. We agree with the respondents that the appeal should be dismissed and accordingly the motion to dismiss is granted. However, since the action of Eagle in excluding appellant raises an important constitutional question, the papers whereon the appeal was taken are treated as a petition for a writ of certiorari, 28 U. S. C. § 2103, and the writ is granted. 28 U. S. C. § 1257 (3). On the merits we have concluded that the exclusion of appellant under the circumstances shown to be present here was discriminatory state action in violation of the Equal Protection Clause of the Fourteenth Amendment.

The Authority was created by the City of Wilmington pursuant to 22 Del. Code, §§ 501–515. It is "a public body corporate and politic, exercising public powers of the State as an agency thereof." § 504. Its statutory purpose is to provide adequate parking facilities for the convenience of the public and thereby relieve the "parking crisis, which threatens the welfare of the community . . . ." § 501 (7), (8) and (9). To this end the

[1] The statute provides that: "No keeper of an inn, tavern, hotel, or restaurant, or other place of public entertainment or refreshment of travelers, guests, or customers shall be obliged, by law, to furnish entertainment or refreshment to persons whose reception or entertainment by him would be offensive to the major part of his customers, and would injure his business. As used in this section, 'customers' includes all who have occasion for entertainment or refreshment."

Authority is granted wide powers including that of constructing or acquiring by lease, purchase or condemnation, lands and facilities, and that of leasing "portions of any of its garage buildings or structures for commercial use by the lessee, where, in the opinion of the Authority, such leasing is necessary and feasible for the financing and operation of such facilities." § 504 (a). The Act provides that the rates and charges for its facilities must be reasonable and are to be determined exclusively by the Authority "for the purposes of providing for the payment of the expenses of the Authority, the construction, improvement, repair, maintenance, and operation of its facilities and properties, the payment of the principal of and interest on its obligations, and to fulfill the terms and provisions of any agreements made with the purchasers or holders of any such obligations or with the city." § 504 (b)(8). The Authority has no power to pledge the credit of the State of Delaware but may issue its own revenue bonds which are tax exempt. Any and all property owned or used by the Authority is likewise exempt from state taxation.

The first project undertaken by the Authority was the erection of a parking facility on Ninth Street in downtown Wilmington. The tract consisted of four parcels, all of which were acquired by negotiated purchases from private owners. Three were paid for in cash, borrowed from Equitable Security Trust Company, and the fourth, purchased from Diamond Ice and Coal Company, was paid for "partly in Revenue Bonds of the Authority and partly in cash [$934,000] donated by the City of Wilmington, pursuant to 22 Del. C. c. 5 . . . . Subsequently, the City of Wilmington gave the Authority $1,822,827.69 which sum the Authority applied to the redemption of the Revenue Bonds delivered to Diamond Ice & Coal Co. and to the repayment of the Equitable Security Trust Company loan."

Before it began actual construction of the facility, the Authority was advised by its retained experts that the anticipated revenue from the parking of cars and proceeds from sale of its bonds would not be sufficient to finance the construction costs of the facility. Moreover, the bonds were not expected to be marketable if payable solely out of parking revenues. To secure additional capital needed for its "debt-service" requirements, and thereby to make bond financing practicable, the Authority decided it was necessary to enter long-term leases with responsible tenants for commercial use of some of the space available in the projected "garage building." The public was invited to bid for these leases.

In April 1957 such a private lease, for 20 years and renewable for another 10 years, was made with Eagle Coffee Shoppe, Inc., for use as a "restaurant, dining room, banquet hall, cocktail lounge and bar and for no other use and purpose." The multi-level space of the building which was let to Eagle, although "within the exterior walls of the structure, has no marked public entrance leading from the parking portion of the facility into the restaurant proper . . . [whose main entrance] is located on Ninth Street." —— Del., at ——, 157 A. 2d, at 899. In its lease the Authority covenanted to complete construction expeditiously, including completion of "the decorative finishing of the leased premises and utilities therefor, without cost to Lessee," including necessary utility connections, toilets, hung acoustical tile and plaster ceilings; vinyl asbestos, ceramic tile and concrete floors; connecting stairs and wrought iron railings; and wood-floored show windows. Eagle spent some $220,000 to make the space suitable for its operation and, to the extent such improvements were so attached to realty as to become part thereof, Eagle to the same extent enjoys the Authority's tax exemption.

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The Authority further agreed to furnish heat for Eagle's premises, gas service for the boiler room, and to make, at its own expense, all necessary structural repairs, all repairs to exterior surfaces except store fronts and any repairs caused by lessee's own act or neglect. The Authority retained the right to place any directional signs on the exterior of the let space which would not interfere with or obscure Eagle's display signs. Agreeing to pay an annual rental of $28,700, Eagle covenanted to "occupy and use the leased premises in accordance with all applicable laws, statutes, ordinances and rules and regulations of any federal, state or municipal authority." Its lease, however, contains no requirement that its restaurant services be made available to the general public on a nondiscriminatory basis, in spite of the fact that the Authority has power to adopt rules and regulations respecting the use of its facilities except any as would impair the security of its bondholders. § 511.

Other portions of the structure were leased to other tenants, including a bookstore, a retail jeweler, and a food store. Upon completion of the building, the Authority located at appropriate places thereon official signs indicating the public character of the building, and flew from mastheads on the roof both the state and national flags.

In August 1958 appellant parked his car in the building and walked around to enter the restaurant by its front door on Ninth Street. Having entered and sought service, he was refused it. Thereafter he filed this declaratory judgment action in the Court of Chancery. On motions for summary judgment, based on the pleadings and affidavits, the Chancellor concluded, contrary to the contentions of respondents, that whether in fact the lease was a "device" or was executed in good faith, it would not "serve to insulate the public authority from the force and effect of the Fourteenth Amendment." 150 A. 2d 197, 198. He found it not necessary, therefore, to pass upon

the rights of private restaurateurs under state common and statutory law, including 24 Del. Code § 1501. The Supreme Court of Delaware reversed, as we mentioned above, holding that Eagle "in the conduct of its business, is acting in a purely private capacity." It, therefore, denied appellant's claim under the Fourteenth Amendment. Upon reaching the application of state law, it held, contrary to appellant's assertion that Eagle maintained an inn, that Eagle's operation was "primarily a restaurant and thus subject to the provisions of 24 Del. C. § 1501, which does not compel the operator of a restaurant to give service to all persons seeking such." —— Del., at ——, 157 A. 2d, at 902. Delaware's highest court has thus denied the equal protection claim of the appellant as well as his state-law contention concerning the applicability of § 1501.

On the jurisdictional question, we agree that the judgment of Delaware's court does not depend for its ultimate support upon a determination of the constitutional validity of a state statute, but rather upon the holding that on the facts Eagle's racially discriminatory action was exercised in "a purely private capacity" and that it was, therefore, beyond the prohibitive scope of the Fourteenth Amendment.

The *Civil Rights Cases,* 109 U. S. 3 (1883), "embedded in our constitutional law" the principle "that the action inhibited by the first section [Equal Protection Clause] of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." Chief Justice Vinson in *Shelley* v. *Kraemer,* 334 U. S. 1, 13 (1948). It was language in the opinion in the *Civil Rights Cases, supra,* that phrased the broad test of state responsibility under the Fourteenth Amendment, predicting its consequence upon "State action of every kind . . . which denies . . .

the equal protection of the laws." At p. 11. And only two Terms ago, some 75 years later, the same concept of state responsibility was interpreted as necessarily following upon "state participation through any arrangement, management, funds or property." *Cooper* v. *Aaron,* 358 U. S. 1, 4 (1958). It is clear, as it always has been since the *Civil Rights Cases, supra,* that "Individual invasion of individual rights is not the subject-matter of the amendment," at p. 11, and that private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it. Because the virtue of the right to equal protection of the laws could lie only in the breadth of its application, its constitutional assurance was reserved in terms whose imprecision was necessary if the right were to be enjoyed in the variety of individual-state relationships which the Amendment was designed to embrace. For the same reason, to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an "impossible task" which "This Court has never attempted." *Kotch* v. *Pilot Comm'rs,* 330 U. S. 552, 556. Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.

The trial court's disposal of the issues on summary judgment has resulted in a rather incomplete record, but the opinion of the Supreme Court as well as that of the Chancellor presents the facts in sufficient detail for us to determine the degree of state participation in Eagle's refusal to serve petitioner. In this connection the Delaware Supreme Court seems to have placed controlling emphasis on its conclusion, as to the accuracy of which there is doubt, that only some 15% of the total cost of the facility was "advanced" from public funds; that

the cost of the entire facility was allocated three-fifths to the space for commercial leasing and two-fifths to parking space; that anticipated revenue from parking was only some 30.5% of the total income, the balance of which was expected to be earned by the leasing; that the Authority had no original intent to place a restaurant in the building, it being only a happenstance resulting from the bidding; that Eagle expended considerable moneys on furnishings; that the restaurant's main and marked public entrance is on Ninth Street without any public entrance direct from the parking area; and that "the only connection Eagle has with the public facility . . . is the furnishing of the sum of $28,700 annually in the form of rent which is used by the Authority to defray a portion of the operating expense of an otherwise unprofitable enterprise." — Del. —, —, 157 A. 2d 894, 901. While these factual considerations are indeed validly accountable aspects of the enterprise upon which the State has embarked, we cannot say that they lead inescapably to the conclusion that state action is not present. Their persuasiveness is diminished when evaluated in the context of other factors which must be acknowledged.

The land and building were publicly owned. As an entity, the building was dedicated to "public uses" in performance of the Authority's "essential governmental functions." 22 Del. Code, §§ 501, 514. The costs of land acquisition, construction, and maintenance are defrayed entirely from donations by the City of Wilmington, from loans and revenue bonds and from the proceeds of rentals and parking services out of which the loans and bonds were payable. Assuming that the distinction would be significant, cf. *Derrington* v. *Plummer,* 240 F. 2d 922, 925, the commercially leased areas were not surplus state property, but constituted a physically and financially integral and, indeed, indispensable part of the State's

plan to operate its project as a self-sustaining unit. Upkeep and maintenance of the building, including necessary repairs, were responsibilities of the Authority and were payable out of public funds. It cannot be doubted that the peculiar relationship of the restaurant to the parking facility in which it is located confers on each an incidental variety of mutual benefits. Guests of the restaurant are afforded a convenient place to park their automobiles, even if they cannot enter the restaurant directly from the parking area. Similarly, its convenience for diners may well provide additional demand for the Authority's parking facilities. Should any improvements effected in the leasehold by Eagle become part of the realty, there is no possibility of increased taxes being passed on to it since the fee is held by a tax-exempt government agency. Neither can it be ignored, especially in view of Eagle's affirmative allegation that for it to serve Negroes would injure its business, that profits earned by discrimination not only contribute to, but also are indispensable elements in, the financial success of a governmental agency.

Addition of all these activities, obligations and responsibilities of the Authority, the benefits mutually conferred, together with the obvious fact that the restaurant is operated as an integral part of a public building devoted to a public parking service, indicates that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn. It is irony amounting to grave injustice that in one part of a single building, erected and maintained with public funds by an agency of the State to serve a public purpose, all persons have equal rights, while in another portion, also serving the public, a Negro is a second-class citizen, offensive because of his race, without rights and unentitled to service, but at the same time fully enjoys equal access to nearby restaurants in wholly

privately owned buildings. As the Chancellor pointed out, in its lease with Eagle the Authority could have affirmatively required Eagle to discharge the responsibilities under the Fourteenth Amendment imposed upon the private enterprise as a consequence of state participation. But no State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith. Certainly the conclusions drawn in similar cases by the various Courts of Appeals do not depend upon such a distinction.[2] By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination. The State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so "purely private" as to fall without the scope of the Fourteenth Amendment.

Because readily applicable formulae may not be fashioned, the conclusions drawn from the facts and circumstances of this record are by no means declared as universal truths on the basis of which every state leasing agreement is to be tested. Owing to the very "largeness"

[2] See *Aaron* v. *Cooper,* 261 F. 2d 97 (C. A. 8th Cir.); *City of Greensboro* v. *Simkins,* 246 F. 2d 425 (C. A. 4th Cir.), affirming 149 F. Supp. 562 (D. C. M. D. N. C.); *Derrington* v. *Plummer,* 240 F. 2d 922 (C. A. 5th Cir.); *Coke* v. *City of Atlanta,* 184 F. Supp. 579 (D. C. N. D. Ga.); *Jones* v. *Marva Theatres,* 180 F. Supp. 49 (D. C. D. Md.); *Tate* v. *Department of Conservation,* 133 F. Supp. 53 (D. C. E. D. Va.), aff'd, 231 F. 2d 615 (C. A. 4th Cir.); *Nash* v. *Air Terminal Services,* 85 F. Supp. 545 (D. C. E. D. Va.); *Lawrence* v. *Hancock,* 76 F. Supp. 1004, (D. C. S. D. W. Va.); and see *Muir* v. *Louisville Park Theatrical Assn.,* 347 U. S. 971, vacating and remanding 202 F. 2d 275 (C. A. 6th Cir.).

of government, a multitude of relationships might appear to some to fall within the Amendment's embrace, but that, it must be remembered, can be determined only in the framework of the peculiar facts or circumstances present. Therefore respondents' prophecy of nigh universal application of a constitutional precept so peculiarly dependent for its invocation upon appropriate facts fails to take into account "Differences in circumstances [which] beget appropriate differences in law," *Whitney* v. *Tax Comm'n*, 309 U. S. 530, 542. Specifically defining the limits of our inquiry, what we hold today is that when a State leases public property in the manner and for the purpose shown to have been the case here, the proscriptions of the Fourteenth Amendment must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself.

The judgment of the Supreme Court of Delaware is reversed and the cause remanded for further proceedings consistent with this opinion.

Reversed and remanded.

MR. JUSTICE STEWART, concurring.

I agree that the judgment must be reversed, but I reach that conclusion by a route much more direct than the one traveled by the Court. In upholding Eagle's right to deny service to the appellant solely because of his race, the Supreme Court of Delaware relied upon a statute of that State which permits the proprietor of a restaurant to refuse to serve "persons whose reception or entertainment by him would be offensive to the major part of his customers . . . ." * There is no suggestion in the record that the appellant as an individual was such a person. The highest court of Delaware has thus construed this

*24 Del. Code, § 1501. The complete text of the statute is set out in the Court opinion at note 1.

legislative enactment as authorizing discriminatory classification based exclusively on color. Such a law seems to me clearly violative of the Fourteenth Amendment. I think, therefore, that the appeal was properly taken, and that the statute, as authoritatively construed by the Supreme Court of Delaware, is constitutionally invalid.

MR. JUSTICE FRANKFURTER, dissenting.

According to my brother STEWART, the Supreme Court of Delaware has held that one of its statutes, 24 Del. Code, § 1501, sanctions a restaurateur denying service to a person solely because of his color. If my brother is correct in so reading the decision of the Delaware Supreme Court, his conclusion inevitably follows. For a State to place its authority behind discriminatory treatment based solely on color is indubitably a denial by a State of the equal protection of the laws, in violation of the Fourteenth Amendment. My brother HARLAN also would find the claim of invalidity of the statute decisive if he could read the state court's construction of it as our brother STEWART reads it. But for him the state court's view of its statute is so ambiguous that he deems it necessary to secure a clarification from the state court of how in fact it did construe the statute.

I certainly do not find the clarity that my brother STEWART finds in the views expressed by the Supreme Court of Delaware regarding 24 Del. Code, § 1501. If I were forced to construe that court's construction, I should find the balance of considerations leading to the opposite conclusion from his, namely, that it was merely declaratory of the common law and did not give state sanction to refusing service to a person merely because he is colored. The Court takes no position regarding the statutory meaning which divides my brothers HARLAN and STEWART. Clearly it does not take MR. JUSTICE STEWART'S view of what the Supreme Court of Delaware decided.

If it did, it would undoubtedly take his easy route to decision and not reach the same result by its much more circuitous route.

Since the pronouncement of the Supreme Court of Delaware thus lends itself to three views, none of which is patently irrational, why is not my brother HARLAN'S suggestion for solving this conflict the most appropriate solution? Were we to be duly advised by the Supreme Court of Delaware that MR. JUSTICE STEWART is correct in his reading of what it said, there would be an easy end to our problem. There would be no need for resolving the problems in state-federal relations with which the Court's opinion deals. If, on the other hand, the Delaware court did not mean to give such an invalidating construction to its statute, we would be confronted with the problems which the Court now entertains for decision, unembarrassed by disregard of a simpler issue. This would involve some delay in adjudication. But the time would be well spent, because the Court would not be deciding serious questions of constitutional law any earlier than due regard for the appropriate process of constitutional adjudication requires.

Accordingly, I join in MR. JUSTICE HARLAN'S proposed disposition of the case without intimating any view regarding the question, prematurely considered by the Court, as to what constitutes state action.

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

The Court's opinion, by a process of first undiscriminatingly throwing together various factual bits and pieces and then undermining the resulting structure by an equally vague disclaimer, seems to me to leave completely at sea just what it is in this record that satisfies the requirement of "state action."

I find it unnecessary, however, to inquire into the matter at this stage, for it seems to me apparent that before passing on the far-reaching constitutional questions that may, or may not, be lurking in this judgment, the case should first be sent back to the state court for clarification as to the precise basis of its decision. In deciding this case the Delaware Supreme Court, among other things, said:

> "It [Eagle] acts as a restaurant keeper and, as such, is not required to serve any and all persons entering its place of business, any more than the operator of a bookstore, barber shop, or other retail business is required to sell its product to every one. This is the common law, and the law of Delaware as restated in 24 Del. C. § 1501 with respect to restaurant keepers. 10 Am. Jur., Civil Rights, §§ 21, 22; 52 Am. Jur., Theatres, § 9; Williams v. Howard Johnson's Restaurant, 4 cir., 268 F. 2d 845. We, accordingly, hold that the operation of its restaurant by Eagle does not fall within the scope of the prohibitions of the Fourteenth Amendment." * —— Del. ——, ——, 157 A. 2d 894, 902.

If in the context of this record this means, as my Brother STEWART suggests, that the Delaware court construed this state statute "as authorizing discriminatory classification based exclusively on color," I would certainly agree, without more, that the enactment is offensive to the Fourteenth Amendment. It would then be quite

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*24 Del. Code, § 1501, reads as follows:

"No keeper of an inn, tavern, hotel, or restaurant, or other place of public entertainment or refreshment of travelers, guests, or customers shall be obliged, by law, to furnish entertainment or refreshment to persons whose reception or entertainment by him would be offensive to the major part of his customers, and would injure his business."

unnecessary to reach the much broader questions dealt with in the Court's opinion. If, on the other hand, the state court meant no more than that under the statute, as at common law, Eagle was free to serve only those whom it pleased, then, and only then, would the question of "state action" be presented in full-blown form.

I think that sound principles of constitutional adjudication dictate that we should first ascertain the exact basis of this state judgment, and for that purpose I would either remand the case to the Delaware Supreme Court, see *Musser* v. *Utah,* 333 U. S. 95; cf. *Harrison* v. *N. A. A. C. P.,* 360 U. S. 167, or hold the case pending application to the state court for clarification. See *Herb* v. *Pitcairn,* 324 U. S. 117. It seems to me both unnecessary and unwise to reach issues of such broad constitutional significance as those now decided by the Court, before the necessity for deciding them has become apparent.

KOSSICK *v.* UNITED FRUIT CO.

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

No. 96. Argued February 20, 1961.—Decided April 17, 1961.

In a diversity-of-citizenship suit in a Federal District Court in New York by petitioner, a seaman, against respondent, a shipowner, the complaint alleged that: While a member of the crew of respondent's vessel, petitioner suffered an ailment which was not attributable to any fault of respondent but which entitled him to maintenance and cure; he requested private treatment at respondent's expense; this was denied, but respondent promised that, if petitioner would accept treatment at a Public Health Service Hospital, respondent would assume responsibility for all consequences of improper or inadequate treatment; petitioner did so and suffered injury as a result of improper treatment. The District Court dismissed the complaint, because it failed to allege that the agreement was in writing and such a verbal agreement is void under the New York Statute of Frauds. *Held:* It was error to apply the New York Statute of Frauds to bar proof of the agreement alleged in the complaint. Pp. 731–742.

(a) The alleged agreement was sufficiently related to peculiarly maritime concerns as not to be, without more, beyond the pale of admiralty law, which regards oral contracts as valid. Pp. 735–738.

(b) It was not, nevertheless, of such a "local" nature that its validity should be judged by state law. Pp. 738–742.

275 F. 2d 500, reversed.

Jacob Rassner argued the cause and filed a brief for petitioner.

Eugene Underwood argued the cause for respondent. With him on the brief was *Frank I. Fallon.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

This case calls in question the propriety of a dismissal before trial of the first cause of action in a seaman's diversity complaint. Dismissal was on the ground that

the allegations of the complaint are deficient by reason of the New York Statute of Frauds.

The allegations of the complaint, which for present purposes must be taken as true, are in substance as follows: Petitioner, while employed as chief steward on one of the vessels of respondent, United Fruit Company, suffered a thyroid ailment, not attributable to any fault of the respondent, but with respect to which it concededly had a legal duty to provide him with maintenance and cure. (*The Osceola,* 189 U. S. 158.) Respondent insisted that petitioner undergo treatment at a United States Public Health Service Hospital. Petitioner, however, considering on the basis of past experience that such treatment would prove unsatisfactory and inadequate, notified respondent that he wished to be treated by a private physician who had agreed to take care of him for $350, which amount petitioner insisted would be payable by the respondent in fulfillment of its obligation for maintenance and cure.

Respondent, the complaint continues, declined to accede to this course, but agreed that if petitioner would enter a Public Health Service Hospital (where he would receive free care) it would assume responsibility for all consequences of improper or inadequate treatment. Relying on that undertaking, and being unable himself to defray the cost of private treatment, petitioner underwent treatment at a Public Health Service Hospital. The Public Health Service Hospital and private physician alluded to were both located in New York.

Finally, it is alleged that by reason of the improper treatment received at such hospital, petitioner suffered grievous unwonted bodily injury, for which the respondent, because of its undertaking, is liable to the petitioner for damages in the amount of $250,000.[1]

[1] Apparently any cause of action against the United States arising out of the alleged negligence of its agents in treating petitioner was

The District Court dismissed the complaint, considering that the agreement sued on was void under the New York Statute of Frauds, N. Y. Personal Property Law, § 31, par. 2,[2] there being no allegation that such agreement was evidenced by any writing, 166 F. Supp. 571.[3] The Court of Appeals affirmed. 275 F. 2d 500. We brought the case here because it presented novel questions as to the interplay of state and maritime law. 363 U. S. 838.

At the outset, we think it clear that the lower courts were correct in regarding the sufficiency of this complaint as depending entirely upon its averments respecting respondent's alleged agreement with petitioner. Liability here certainly cannot be founded on principles of *respondeat superior*. Nor is there anything in the authorities relating to a shipowner's duty to provide maintenance and cure which suggests that respondent was obliged, as a matter of law, to honor petitioner's preference for private treatment, or that it was responsible for the quality of petitioner's treatment at other hands which, for all that appears, may reasonably have been assumed to be well trained and careful.

With respect to respondent's alleged agreed undertaking, as the case comes to us, petitioner, on the one hand, does not deny the contract's invalidity under the New

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barred by the running of a shorter statute of limitations than is applicable to the contract alleged here. Compare 28 U. S. C. § 2401 (b) with New York Civil Practice Act, § 48.

[2] New York Personal Property Law, § 31, par. 2, provides:
"Every agreement, promise or undertaking is void, unless it or some note or memorandum thereof be in writing, and subscribed by the person to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking;

. . . . . .

"2. Is a special promise to answer for the debt, default or miscarriage of another person."

[3] A second cause of action for maintenance and cure was subsequently discontinued by petitioner, 275 F. 2d, at 502.

York Statute of Frauds, if state law controls, nor, on the other hand, can its validity well be doubted, though the alleged agreement was not reduced to writing, if maritime law controls. For it is an established rule of ancient respectability that oral contracts are generally regarded as valid by maritime law.[4] In this posture of things two

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[4] Although the question has not often been litigated, *Union Fish Co.* v. *Erickson*, 248 U. S. 308; see *United States Fidelity & Guaranty Co.* v. *American-Hawaiian S. S. Co.*, 280 F. 1023; *Hastorf* v. *Long-W. G. Broadhurst Co.*, 239 F. 852; *Quirk* v. *Clinton*, 20 Fed. Cas. No. 11,518; *Northern Star S. S. Co.* v. *Kansas Milling Co.*, 75 F. Supp. 534, it is well accepted that maritime contracts do not as a generality depend on writing for their validity. As Judge Hough, one of the most distinguished of the federal admiralty judges, once said:
". . . [This] failure to stress force of custom, in maritime matters, is found in *Union Fish Co.* v. *Erickson* [*supra*], where with obvious correctness the California statute of frauds was not permitted to defeat a shipmaster's libel for wrongful discharge from an engagement for more than one year. . . . [T]he ground of decision should have been the simple one that such engagements, orally made, were as old as the history of marine customs, had passed into the maritime law of the United States, and would be recognized and enforced by the courts of the nation,—so that what California said on the subject (if anything) was merely immaterial." Hough, Admiralty Jurisdiction—Of Late Years, 37 Harv. L. Rev. 529, at 537.
Writing of a different sort of contract, an equally distinguished British admiralty judge has said that ". . . it is common practice for commercial men to assume very extensive financial obligations on the nod of a head or the initialing of a slip, and many binding chartering engagements are no doubt daily concluded in an informal manner. . . ." *Soc. Portuguesa de Navios Tanques, Ltd.* v. *Hvalfslsk Polaris A/S*, [1952] 1 Lloyd's List Reports 73, 74 (per McNair, J.), in which opinion he is confirmed by Kent, 3 Commentaries 159–160 (1828 ed.), and the French authority, Pothier, Maritime Contracts 10 (Cushing trans.). True, a seaman's contract of hire, his articles, have long been required to be in writing by statutes of the various maritime nations, among them one of the first statutes passed by our Congress, 1 Stat. 131 (1790). Compare 2 Geo. II, c. 36 (1729). But this rule was clearly instituted for the protection of the seaman, Curtis, Merchant Seamen 37, and in no way assumes the invalidity of such con-

questions must be decided: *First,* was this alleged contract a maritime one? *Second,* if so, was it nevertheless of such a "local" nature that its validity should be judged by state law?

I.

The boundaries of admiralty jurisdiction over contracts—as opposed to torts or crimes—being conceptual rather than spatial, have always been difficult to draw. Precedent and usage are helpful insofar as they exclude or include certain common types of contract: a contract to repair, *Endner* v. *Greco,* 3 F. 411, or to insure a ship, *Insurance Co.* v. *Dunham,* 11 Wall. 1, is maritime, but a contract to build a ship is not. *People's Ferry Co.* v. *Beers,* 20 How. 393. Without doubt a contract for hire either of a ship or of the sailors and officers to man her is within the admiralty jurisdiction. 1 Benedict, Admiralty, 366. A suit on a bond covering cargo on general average is governed by admiralty law, *Cie Francaise de Navigation* v. *Bonnasse,* 19 F. 2d 777, while an agreement to pay damages for another's breach of a maritime charter is not, *Pacific Surety Co.* v. *Leatham & Smith T. & W. Co.,* 151 F. 440. The closest analogy we have found to the case at hand is a contract for hospital services rendered an injured seaman in satisfaction of a shipowner's liability for maintenance and cure, which has been held to be a maritime

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tracts in the absence of writing. In our law the seaman who ships without articles can recover the highest wages paid at the port of embarcation, as well as subjecting the master who took him on board to penalties, 46 U. S. C. §§ 564, 578; Norris, The Law of Seamen, §§ 91, 119. An *Ordonnance* of Louis XIV declares that if the seaman's contract is not in writing, the seaman's oath as to its provisions must be credited, Pothier, *supra,* at 100, while Lord Tenterden, Merchant Ships and Seamen 476, expressly states that an oral contract of hire is not invalid but only results in a penalty against the master. The *Union Fish* case, *supra,* no more than exemplifies the enforceability of an oral maritime contract of hire.

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contract. *Methodist Episcopal Hospital* v. *Pacific Transport Co.*, 3 F. 2d 508. The principle by reference to which the cases are supposed to fall on one side of the line or the other is an exceedingly broad one. "The only question is whether the transaction relates to ships and vessels, masters and mariners, as the agents of commerce . . . ." I Benedict, Admiralty, 131.[5]

The Court of Appeals here held:

> "The contract sued on is not a maritime contract, since it was merely a promise to pay money, on land, if the former seaman should suffer injury at the hands of the United States Public Health Service personnel, on land, in the course of medical treatment. . . . For all that appears in the complaint, it may well be that the contract sued on was allegedly made after the maritime contract of employment of the plaintiff had been terminated. It really makes no difference whether this was so or not. All that remained was the performance by the shipowner of its undisputed obligation to supply maintenance and cure. The shipowner supplied plaintiff with a master's certificate, which was used by him to obtain admittance as a patient in the United States Public Health Service Hospital. . . . That took care of the obligation to furnish 'cure.' . . ."

With respect to the learned judges below, we think that is too narrow a view of the matter. It can as well be argued that the alleged contract related to and stood in place of a duty created by and known only in admiralty as a kind of fringe benefit to the maritime contract of hire. See *Cortes* v. *Baltimore Insular Line*, 287 U. S. 367. The

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[5] Benedict goes on to quote from an anonymous commentary on the Mediaeval Statutes of Culm, one of the early sources of maritime law, that anything pertaining to navigation or seamen is to be considered a part of the maritime law.

Court of Appeals and respondent are certainly correct in considering that a shipowner's duty to provide maintenance and cure may ordinarily be discharged by the issuing of a master's certificate carrying admittance to a public hospital, and that a seaman who refuses such a certificate or the free treatment to which it entitles him without just cause, cannot further hold the shipowner to his duty to provide maintenance and cure. *Williams* v. *United States,* 133 F. Supp. 319; *Luth* v. *Palmer Shipping Co.,* 210 F. 2d 224; *The Bouker No. 2,* 241 F. 831; see *Calmar S. S. Corp.* v. *Taylor,* 303 U. S. 525. But without countenancing petitioner's intemperate aspersions against Public Health Service Hospitals, and rejecting as we have the noncontractual grounds upon which he seeks to predicate liability here, we nevertheless are clear that the duty to afford maintenance and cure is not simply and as a matter of law an obligation to provide for entrance to a public hospital. The cases which respondent cites hold no more than that a seaman who can receive adequate and proper care free of charge at a public hospital may not "deliberately refuse the hospital privilege, and then assert a lien upon his vessel for the increased expense which his whim or taste has created." *The Bouker No. 2, supra,* at 835. Presumably if a seaman refuses to enter a public hospital or, having entered, if he leaves to undergo treatment elsewhere, he may recover the cost of such other treatment upon proof that "proper and adequate" cure was not available at such hospital. Cf. *Williams* v. *United States, Luth* v. *Palmer Shipping Co., supra.*

No matter how skeptical one may be that such a burden of proof could be sustained, or that an indigent seaman would be likely to risk losing his rights to free treatment on the chance of sustaining that burden, since we should not exclude that possibility as a matter of law as the Court of Appeals apparently did, it must follow that the con-

tract here alleged should be regarded as an agreement on the part of petitioner to forego a course of treatment which might have involved respondent in some additional expense, in return for respondent's promise to make petitioner whole for any consequences of what appeared to it at the time as the cheaper alternative. In other words, the consideration for respondent's alleged promise was petitioner's good faith forbearance to press what he considered—perhaps erroneously—to be the full extent of his maritime right to maintenance and cure. Compare, American Law Institute, Restatement, Contracts §§ 75, 76. So viewed, we think that the alleged agreement was sufficiently related to peculiarly maritime concerns as not to put it, without more, beyond the pale of admiralty law.

This brings us, then, to the remaining, and what we believe is the controlling, question: whether the alleged contract, though maritime, is "maritime and local," *Western Fuel Co.* v. *Garcia,* 257 U. S. 233, 242, in the sense that the application of state law would not disturb the uniformity of maritime law, *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205.

II.

Although the doctrines of the uniformity and supremacy of the maritime law have been vigorously criticized—see *Southern Pacific Co.* v. *Jensen, supra,* at 218 (dissenting opinion); *Standard Dredging Co.* v. *Murphy,* 319 U. S. 306, 309—the qualifications and exceptions which this Court has built up to that imperative doctrine have not been considered notably more adequate. See Gilmore and Black, Admiralty, *passim;* Currie, Federalism and the Admiralty: "The Devil's Own Mess," 1960, The Supreme Court Review, 158; The Application of State Survival Statutes in Maritime Causes, 60 Col. L. Rev. 534. Perhaps the most often heard criticism of the supremacy doc-

trine is this: the fact that maritime law is—in a special sense at least, *Romero* v. *International Terminal Co.*, 358 U. S. 354—federal law and therefore supreme by virtue of Article VI of the Constitution, carries with it the implication that wherever a maritime interest is involved, no matter how slight or marginal, it must displace a local interest, no matter how pressing and significant. But the process is surely rather one of accommodation, entirely familiar in many areas of overlapping state and federal concern, or a process somewhat analogous to the normal conflict of laws situation where two sovereignties assert divergent interests in a transaction as to which both have some concern. Surely the claim of federal supremacy is adequately served by the availability of a federal forum in the first instance and of review in this Court to provide assurance that the federal interest is correctly assessed and accorded due weight.

Thus, for instance, it blinks at reality to assert that because a longshoreman, living ashore and employed ashore by shoreside employers, performs seaman's work, the State with these contacts must lose all concern for the longshoreman's status and well-being. In allowing state wrongful death statutes, *The Tungus* v. *Skovgaard*, 358 U. S. 588; *The Hamilton*, 207 U. S. 398, and state survival of actions statutes, *Just* v. *Chambers*, 312 U. S. 383, respectively, to grant and to preserve a cause of action based ultimately on a wrong committed within the admiralty jurisdiction and defined by admiralty law, this Court has attempted an accommodation between a liability dependent primarily upon the breach of a maritime duty and state rules governing the extent of recovery for such breach. Since the chance of death foreclosing recovery is necessarily a fortuitous matter, and since the recovery afforded the disabled victim of an accident need be no less than that afforded to his family should he die, the intrusion of these state remedial systems need not

bring with it any undesirable disuniformity in the scheme of maritime law.

Altogether analogous reasoning was used by Mr. Justice Brandeis in *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, where it was held that a New York court could properly compel arbitration under the arbitration clause of a maritime contract. It was there reasoned that since such clauses are valid in admiralty and their breach gives rise to an action for damages, to compel arbitration is really to do no more than substitute a different and more effective remedy for that available in admiralty.

The line of cases descended from the early precedent of *Cooley* v. *Board of Wardens,* 12 How. 299, and most recently added to by *Huron Portland Cement* v. *Detroit,* 362 U. S. 440; see also *Kelly* v. *Washington,* 302 U. S. 1, exemplify but another variation of this process of accommodation. In the *Huron* case we allowed the City of Detroit to impose the requirements of its smoke control regulations on vessels coming to the city, even though they had measured up to federally imposed standards as to ship's boilers and equipment. There the matter was put thus:

> ". . . The thrust of the federal inspection laws [with which petitioner had complied] is clearly limited to affording protection from the perils of maritime navigation. . . .
>
> "By contrast, the sole aim of the Detroit ordinance is the elimination of air pollution to protect the health and enhance the cleanliness of the local community. . . .
>
> . . . . . .
>
> "Congressional recognition that the problem of air pollution is peculiarly a matter of state and local concern is manifest in . . . legislation." 362 U. S., at 445–446.

Turning to the present case, we think that several considerations point to an accommodation favoring the application of maritime law. It must be remembered that we are dealing here with a contract, and therefore with obligations, by hypothesis, voluntarily undertaken, and not, as in the case of tort liability or public regulations, obligations imposed simply by virtue of the authority of the State or Federal Government. This fact in itself creates some presumption in favor of applying that law tending toward the validation of the alleged contract. *Pritchard* v. *Norton,* 106 U. S. 124; Ehrenzweig, Contracts in the Conflict of Laws, Part One: Validity, 59 Col. L. Rev. 973. As we have already said, it is difficult to deny the essentially maritime character of this contract without either indulging in fine-spun distinctions in terms of what the transaction was *really* about, or simply denying the alleged agreement that characterization by reason of its novelty. Considering that sailors of any nationality may join a ship in any port, and that it is the clear duty of the ship to put into the first available port if this be necessary to provide prompt and adequate maintenance and cure to a seaman who falls ill during the voyage, *The Iroquois,* 194 U. S. 240, it seems to us that this is such a contract as may well have been made anywhere in the world, and that the validity of it should be judged by one law wherever it was made. On the other hand we are hard put to perceive how this contract was "peculiarly a matter of state and local concern," *Huron Portland Cement* v. *Detroit, supra,* unless it be New York's interest in not lending her courts to the accomplishment of fraud, something which appears to us insufficient to overcome the countervailing considerations. Finally, since the effect of the application of New York law here would be to invalidate the contract, this case can hardly be analogized to cases such as *Red Cross Line* v. *Atlantic Fruit,* or *Just* v. *Chambers, supra,* where state law had the effect of sup-

plementing the remedies available in admiralty for the vindication of maritime rights. Nor is *Wilburn Boat Co.* v. *Fireman's Ins. Co.*, 348 U. S. 310, apposite. The application of state law in that case was justified by the Court on the basis of a lack of any provision of maritime law governing the matter there presented. A concurring opinion, *id.*, at 321, and some commentators have preferred to refer the decision to the absurdity of applying maritime law to a contract of insurance on a houseboat established in the waters of a small artificial lake between Texas and Oklahoma. See Gilmore and Black, Admiralty 44–45. Needless to say the situation presented here has a more genuinely salty flavor than that.

In sum, were contracts of the kind alleged in this complaint known to be a normal phenomenon in maritime affairs, we think that there would be little room for argument in favor of allowing local law to control their validity. A different conclusion should not be reached either because such a contract may be thought to be a rarity, or because of any suspicion that this complaint may have been contrived to serve ulterior purposes. Cf. 275 F. 2d, at 501; 166 F. Supp., at 573–574, note 1, *supra*. Without remotely intimating any view upon the merits of petitioner's claim, we conclude that it was error to apply the New York Statute of Frauds to bar proof of the agreement alleged in the complaint.

Reversed.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE STEWART joins, dissenting.

Certainly no decision in the Court's history has been the progenitor of more lasting dissatisfaction and disharmony within a particular area of the law than *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205. The mischief it has caused was due to the uncritical application of the loose doctrine of observing "the very uniformity

in respect to maritime matters which the Constitution was designed to establish." *Southern Pacific Co.* v. *Jensen, supra,* at 217. The looser a legal doctrine, like that of the duty to observe "the uniformity of maritime law," the more incumbent it is upon the judiciary to apply it with well-defined concreteness. It can fairly be said that the *Jensen* decision has not been treated as a favored doctrine. Quite the contrary. It has been steadily narrowed in application, as is strikingly illustrated by such a *tour de force* as our decision in *Davis* v. *Department of Labor,* 317 U. S. 249.

The Court today, relying as it does on *Jensen,* reinvigorates that "ill-starred decision." *Davis* v. *Department of Labor, supra,* at 259 (concurring opinion). The notion that if such a limited and essentially local transaction as the contract here in issue were allowed to be governed by a local statute of frauds it would "disturb the uniformity of maritime law" is, I respectfully submit, too abstract and doctrinaire a view of the true demands of maritime law. I would affirm the judgment below.

MR. JUSTICE WHITTAKER, dissenting.

Like the Court of Appeals, 275 F. 2d 500, I think the oral contract here claimed by petitioner was not a maritime but a New York contract and barred by its statute of frauds. New York Personal Property Law, § 31, par. 2. I therefore dissent.

MOSES LAKE HOMES, INC., ET AL. *v.* GRANT COUNTY.

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

No. 212. Argued March 23, 1961.—Decided April 17, 1961.

1. Respondent County attempted to tax the full value of the buildings and improvements on privately owned Wherry Act leaseholds of housing developments on a federally owned Air Force base, although it taxed other leaseholds, including privately owned leaseholds of tax-exempt state lands, at a lower valuation. *Held:* The tax is unconstitutional and void, because it discriminates against the United States and its lessees. *Phillips Co.* v. *Dumas School District,* 361 U. S. 376, followed. *Offutt Housing Co.* v. *Sarpy County,* 351 U. S. 253, distinguished. Pp. 749–751.
2. The Court of Appeals erred in holding that the fact that the taxes were higher did not invalidate them entirely but only required that the amount collectible be reduced to a valid amount and in directing the District Court to decree a valid tax for the invalid one which the State had attempted to exact. Such a discriminatory tax is entirely void, and federal courts have no authority to assess or levy taxes on behalf of States or their counties. Pp. 751–752.
3. An opinion and judgment of the Supreme Court of Washington holding that such leaseholds may lawfully be so valued was not *res judicata* as to the County's tax claims against one of the leaseholds here involved for the years 1955 and 1956, because no tax had been levied or assessed against that leasehold when that decision was rendered, and hence no issue of discrimination was or could have been presented and adjudicated in that case. P. 752.

276 F. 2d 836, reversed.

Lyle L. Iverson argued the cause and filed a brief for petitioners.

Paul A. Klasen, Jr. argued the cause for respondent. With him on the brief was *Jennings P. Felix.*

Solicitor General Rankin, Assistant Attorney General Rice and *I. Henry Kutz* filed a brief for the United States, as *amicus curiae,* urging reversal.

MR. JUSTICE WHITTAKER delivered the opinion of the Court.

Among their various contentions, petitioners sought our writ of certiorari on the ground that, although finding that the State of Washington had discriminatorily, and therefore unconstitutionally, valued and taxed their federal Wherry Act leaseholds, the Court of Appeals for the Ninth Circuit, nevertheless, sustained and enforced those taxes. 276 F. 2d 836. We granted the writ, limited to that question. 364 U. S. 814. Understanding of our decision will require a brief statement of the relevant facts of the case.

Acting pursuant to the provisions of §§ 801 to 809 of Title VIII of the National Housing Act (12 U. S. C. (1958 ed.) §§ 1748, 1748a to 1748h–1), the Secretary of the Air Force, on behalf of the United States, entered into a separate lease, with each of Moses Lake Homes, Inc., Larsonaire Homes, Inc., and Larson Heights, Inc., Washington corporations, demising, in each instance, a particularly described tract of land, within the Larson Air Force Base in Grant County, Washington, for a term of 75 years, unless sooner terminated by the Government, for use as a housing project at a nominal rental of $100 per year.[1]

The leases were on the same form, and each bound the lessee to erect on its leasehold a described housing project, and to maintain and operate it throughout the life of the

[1] The Moses Lake lease was entered into on May 31, 1950, the Larsonaire lease on August 6, 1953, and the Larson Heights lease on August 2, 1954.

lease. Each lease contemplated and provided that the lessee would raise the money necessary to construct the project by an F. H. A. insured mortgage loan on its leasehold and the improvements, to be serviced and amortized by the lessee out of its rents from the housing units, which were to be rented at such rates and to such military and civilian personnel as the Commanding Officer of the air base might designate. The leases further provided that the buildings and improvements, "as completed," would become the property of the United States and so remain, regardless of any termination of the lease, without further compensation to the lessee.

With the proceeds of F. H. A. insured mortgage loans on their respective leaseholds and the improvements, aggregating more than $6,000,000, the lessees erected the respective housing projects and undertook their management and operation as agreed in the leases.

In June 1954, the Grant County assessor placed the Moses Lake leasehold on his assessment list for taxation in the year 1955, but he did not then levy any tax against it. Moses Lake promptly sued for and obtained a decree in the Superior Court of the State enjoining the County from levying *any taxes* on its leasehold for the year 1955 and thereafter. Upon the County's appeal, the Supreme Court of Washington reversed on November 14, 1957, holding that the leasehold was taxable by the County, and further holding, upon its understanding of our opinion in *Offutt Housing Co.* v. *Sarpy County,* 351 U. S. 253, that it would be proper, for such purpose, to value the leasehold at "the full value of the buildings and improvements" thereon. *Moses Lake Homes, Inc.,* v. *Grant County,* 51 Wash. 2d 285, 287, 317 P. 2d 1069, 1070.

Thereafter, in December 1957, the County valued these Wherry Act leaseholds on the basis of the full value of the buildings and improvements, and, acting under § 84.40.080, Revised Code of Washington, retrospectively

assessed its taxes against the Moses Lake leasehold for the years 1955 through 1958, against the Larsonaire leasehold for the years 1956 through 1958, and against the Larson Heights leasehold for the years 1957 and 1958 as "omitted property" as authorized by that section.[2] Later, the County assessed and levied its taxes against the leaseholds, on the same basis, for the year 1959.[3]

On January 21, 1958, the County issued its distraints, and also its notices of sales of these leaseholds and the improvements thereon to be held on March 4, 1958, to satisfy its tax demands. Very soon thereafter, the United States instituted this condemnation action in the United States District Court for the Eastern District of Washington against the lessees and Grant County, and on March 1, 1958, it filed therein its declaration of taking, and took, these leasehold estates—depositing in the registry of the court $253,000 as their estimated value [4]—and thereupon, on motion of the United States, the court

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[2] Section 84.40.080 of the Revised Code of Washington provides, in relevant part, as follows:

"The assessor . . . shall enter in the detail and assessment list of the current year any property shown to have been omitted from the assessment list of any preceding year, at the valuation of that year, or if not then valued, at such valuation as the assessor shall determine from the preceding year . . . . When such an omitted assessment is made, the taxes levied thereon may be paid within one year of the due date of the taxes for the year in which the assessment is made without penalty or interest."

[3] The County's tax claims against petitioners' leaseholds were as follows: Moses Lake, $142,285.73; Larsonaire, $68,838; and Larson Heights, $47,088.

[4] The deposited sum of $253,000 was allocated among the three petitioners as follows: Moses Lake, $126,500; Larsonaire, $65,300; and Larson Heights, $61,200. Thus, the County's claims against the Moses Lake and Larsonaire leaseholders were greater than the amount deposited by the United States as their reasonable value. See note 3. Had the County been successful on all items of its claim, it would have received all but $14,112 of the deposited sum.

enjoined Grant County from proceeding with its tax sales pending final determination of the case.

By its answer, the County claimed, and asked the court to award it, the greater part of the deposit to satisfy its tax demands.[5] The lessees disputed the County's claim, contending, *inter alia,* that the asserted taxes were invalid because discriminatorily assessed in violation of § 511 of the Housing Act of 1956 (70 Stat. 1091, c. 1029, 42 U. S. C. (1958 ed.) § 1594, note) and in violation of the United States Constitution. That issue, among others, was litigated between those parties as adversary codefendants.

Although the District Court found that Washington's "taxes and assessments on Wherry housing [leaseholds] are . . . levied upon a basis different and higher than [other leaseholds]," it, nevertheless, held that, but for the state court injunction, the 1955 and 1956 taxes against the Moses Lake leasehold would have been validly assessed and levied before the effective period of § 511 of the Housing Act of 1956 (June 15, 1956),[6] and it allowed those items of the County's claim; but it denied all other items of the claim. On appeal, the Ninth Circuit "sustained [the District] court's finding that the

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[5] See note 4.

[6] Section 408 of the Housing Amendments of 1955, as amended by § 511 of the Housing Act of 1956 (70 Stat. 1091, c. 1029, 42 U. S. C. (1958 ed.) § 1594, note), contains the following relevant provision:

". . . Nothing contained in the provisions of title VIII of the National Housing Act in effect prior to August 11, 1955, or any related provision of law, shall be construed to exempt from State or local taxes or assessments the interest of a lessee from the Federal Government in or with respect to any property covered by a mortgage insured under such provisions of title VIII: *Provided,* That, no such taxes or assessments (not paid or encumbering such property or interest prior to June 15, 1956) on the interest of such lessee shall exceed the amount of taxes or assessments on other similar property of similar value . . . ."

method used in assessing the Moses Lake leaseholds resulted in a higher tax than would have been true in the case of a non-Wherry Act leasehold," 276 F. 2d, at 847, but it held that "the fact that the taxes are higher does not invalidate the entire tax. It only requires that the amount collectible be reduced to what it would have been if the tax had been levied on a non-Wherry Act leasehold basis," 276 F. 2d, at 847, and—otherwise upholding the County's levies against the Moses Lake leasehold for the years 1955, 1956 and 1957—it remanded the case to the District Court to make the proper reduction in the amount of those taxes, and also for further proceedings respecting the other taxpayers and tax years involved, except it held that the 1959 taxes were invalid because levied on the leaseholds after the United States had acquired them.

In addition to the weight properly to be accorded to the conclusions of the two courts below that Washington imposes a higher tax on Wherry Act leaseholds than on other similar leaseholds, it is eminently clear that this is so. Section 84.40.030 of the Revised Code of Washington provides that all property shall be assessed at 50 percent of its fair value, and that "Taxable leasehold estates shall be valued at such price as they would bring at a fair, voluntary sale for cash." Consonant with that statute, the Washington Supreme Court has consistently held, save as to Wherry Act leaseholds, that all leaseholds, including leaseholds on the State's own tax-exempt lands, are to be valued for tax purposes on the basis of their fair market value, considering their burdens as well as their benefits. *Metropolitan Building Co.* v. *King County,* 72 Wash. 47, 129 P. 883; *Metropolitan Building Co.* v. *King County,* 64 Wash. 615, 117 P. 495; *Metropolitan Building Co.* v. *King County,* 62 Wash. 409, 113 P. 1114. And see *Bellingham Community Hotel Co.* v. *Whatcom County,* 190 Wash. 609, 612–613, 70 P. 2d 301, 303, and

Dexter Horton Bldg. Co. v. *King County,* 10 Wash. 2d 186, 116 P. 2d 507.

Even the facts of the *Metropolitan* cases are remarkably similar to the facts here. There the Metropolitan Company acquired a 50-year lease of land owned by the State. As required by the lease, the lessee erected very substantial improvements upon the land—funding their cost with a large issue of mortgage bonds—which improvements, immediately upon completion, became the property of the State. In the first of those cases, 62 Wash. 409, 113 P. 1114, the Court held that the leasehold should not be assessed at a "speculative" value, but at its "actual . . . value in money . . . ," and that it was error to assess it at the value of the improvements. In the two later *Metropolitan* cases (64 Wash. 615, 117 P. 495; 72 Wash. 47, 129 P. 883), the court emphasized that, in determining the fair market value of the leasehold, consideration must be given to its burdens, including mortgages upon it, as well as to its benefits.

Yet, without overruling or departing those cases with respect to state-created leaseholds, the Washington Supreme Court held in *Moses Lake Homes, Inc.,* v. *Grant County,* 51 Wash. 2d 285, 317 P. 2d 1069, that Wherry Act leaseholds are taxable at "the full value of the buildings and improvements" thereon. It felt bound, as it said, to apply that special valuation rule to Wherry Act leaseholds because of our opinion in *Offutt Housing Co.* v. *Sarpy County,* 351 U. S. 253. In this, the Washington Supreme Court mistakenly read and misapplied the *Offutt* case. Nothing in that case requires the States to assess Wherry Act leaseholds on the basis of the value of the improvements thereon. In this respect, it holds only that such a valuation is not unconstitutional *per se.* That case did not involve any issue or question of discrimination. It involved the law of Nebraska which requires *all leaseholds* in tax-exempt property to be assessed at the

full value of the buildings and improvements thereon, and the *Offutt* case held that such might constitutionally be done. It did not hold, as the Supreme Court of Washington has construed it in the *Moses Lake* case, that a State might constitutionally discriminate against leaseholds on federally owned lands in favor of leaseholds on state-owned lands.

If anything is settled in the law, it is that a State may not discriminate against the Federal Government or its lessees. See, *e. g., Phillips Co.* v. *Dumas School District,* 361 U. S. 376; *United States* v. *City of Detroit,* 355 U. S. 466, 473; *City of Detroit* v. *Murray Corp.,* 355 U. S. 489. In *United States* v. *City of Detroit, supra,* we said:

> "It still remains true, as it has from the beginning, that a tax may be invalid even though it does not fall directly on the United States if it operates so as to discriminate against the Government or those with whom it deals." 355 U. S., at 473.

The *Dumas* case, *supra,* is closely in point and controlling. There the State of Texas taxed the leasehold estate of a government lessee at the "full value of the leased premises" (361 U. S., at 378), while it imposed "a distinctly lesser burden on similarly situated lessees of exempt property owned by the State and its political subdivisions." 361 U. S., at 379. We there said, "[I]t 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," 361 U. S., at 385, and we held the tax to be void because it "discriminates unconstitutionally against the United States and its lessees." 361 U. S., at 379. That case is indistinguishable from this one on the point here.

The Court of Appeals was also in error in holding that "the fact that the taxes are higher does not invalidate the entire tax [but] only requires that the amount collectible

be reduced to what it would have been if the tax had been levied on a non-Wherry Act leasehold basis" (276 F. 2d, at 847), and in remanding the case to the District Court to make the necessary adjustment. We held in the *Dumas* case, *supra,* that a discriminatory tax is void and "may not be exacted." 361 U. S., at 387. The effect of the Court's remand was to direct the District Court to decree a valid tax for the invalid one which the State had attempted to exact. The District Court has no power so to decree. Federal courts may not assess or levy taxes. Only the appropriate taxing officials of Grant County may assess and levy taxes on these leaseholds, and the federal courts may determine, within their jurisdiction, only whether the tax levied by those officials is or is not a valid one. When, as here, the tax is invalid, it "may not be exacted." *Phillips Co.* v. *Dumas School District,* 361 U. S., at 387.

Nor is there any merit in respondent's contention that the opinion and judgment of the Supreme Court of Washington in the *Moses Lake* case, *supra,* is *res judicata* of the County's tax claims against the Moses Lake leasehold for at least the years 1955 and 1956. This is so because no tax whatever had then been assessed and levied against the Moses Lake leasehold, and hence no issue of discrimination was or could have been presented and adjudicated in that case.

Inasmuch as the taxes, presently assessed and levied, discriminate unconstitutionally against the United States and its lessees, they are void, and hence may not be exacted.

Reversed.

BULOVA WATCH CO., INC., *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 241. Argued March 27, 1961.—Decided April 17, 1961.

When the Court of Claims has awarded a judgment against the United States to a taxpayer for an overpayment of excess profits taxes, plus interest thereon "as provided by law," determination of the allowance of interest on so much of the overpayment as was attributable to an unused excess profits credit carry-back is governed by § 3771 (e) of the Internal Revenue Code of 1939, dealing specifically with interest on overpayments resulting from carry-backs, rather than by 28 U. S. C. § 2411 (a), relating to interest on judgments for tax overpayments generally. Pp. 753–761.

Affirmed.

Bernard Weiss argued the cause and filed a brief for petitioner.

Oscar H. Davis argued the cause for the United States. On the briefs were former *Solicitor General Rankin, Solicitor General Cox, Assistant Attorney General Rice, Assistant Attorney General Oberdorfer, Acting Assistant Attorney General Heffron, Meyer Rothwacks* and *A. F. Prescott.*

MR. JUSTICE WHITTAKER delivered the opinion of the Court.

Petitioner recovered a judgment in the Court of Claims against the United States for an overpayment of its excess profits taxes for the fiscal year ended March 31, 1942, in the amount of $211,899.28, plus interest thereon "as provided by law." 143 Ct. Cl. 342, 163 F. Supp. 633. Of the principal sum of the judgment, $150,016.21 was attributable to an unused excess profits credit carry-back from the succeeding year ended March 31, 1943.

Acting in accordance with the provisions of § 3771 (e) of the Internal Revenue Code of 1939, the Commissioner computed and allowed statutory interest on the latter sum from June 14, 1945, the date on which petitioner filed its claim for refund, to April 25, 1959—30 days prior to issuance of the refund check—in the amount of $124,784.72. Thereafter, petitioner moved the Court of Claims for relief from the Commissioner's interpretation of the judgment, contending that interest should be computed, under the provisions of 28 U. S. C. § 2411 (a), from the earliest date the overpayment could have been determined (the end of the fiscal year subsequent to the year involved, *i. e.*, March 31, 1943), rather than from the date it filed its claim for refund (June 14, 1945) as provided in § 3771 (e), and that it was thus entitled to the further sum of $51,252.69. The motion was denied, without opinion.

Because of the importance of the question involved to the proper administration of the internal revenue laws, and to settle a conflict between the lower federal courts upon the question,[1] we granted certiorari. 364 U. S. 861.

The question thus presented is whether the date from which interest accrues on an overpayment of taxes attributable to an unused excess profits credit carry-back is governed by § 3771 (e) [2] of the Internal Revenue Code of 1939, or by 28 U. S. C. § 2411 (a).[3]

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[1] In *Carter* v. *Liquid Carbonic Pacific Corp.*, 97 F. 2d 1, the Court of Appeals for the Ninth Circuit reached a result contrary to that reached by the Court of Claims in this case.

[2] Internal Revenue Code of 1939:

"§ 3771. Interest on Overpayments.

"(a) *Rate.*—Interest shall be allowed and paid upon any overpayment in respect of any internal revenue tax at the rate of 6 per centum per annum.

"(b) *Period.*—Such interest shall be allowed and paid as follows:

"(1) *Credits.*—In the case of a credit . . . .

[*Footnote 2 continued on, and footnote 3 is on, p. 755.*]

Petitioner contends that, because refund of the tax was not awarded administratively but by the "judgment of [a] court," the date from which interest runs is governed by the provisions of § 2411 (a), and that it is thus entitled to interest from "the date of the payment" on the "overpayment" which, it argues, became ascertain-

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"(2) *Refunds.*—In the case of a refund, from the date of the overpayment to a date preceding the date of the refund check by not more than thirty days . . . .

. . . . . .

"(e) [as added by § 153 (d), Revenue Act of 1942, c. 619, 56 Stat. 798, 847] *Claims Based on Carry-Back of Loss or Credit.*—If the Commissioner determines that any part of an overpayment is attributable to the inclusion in computing the net operating loss deduction for the taxable year of any part of the net operating loss for a succeeding taxable year or to the inclusion in computing the unused excess profits credit adjustment for the taxable year of any part of the unused excess profits credit for a succeeding taxable year, no interest shall be allowed or paid with respect to such part of the overpayment for any period before the filing of a claim for credit or refund of such part of the overpayment or the filing of a petition with the Tax Court, whichever is earlier."

[3] 28 U. S. C.:

"§ 2411 [as amended by § 120, Act of May 24, 1949, c. 139, 63 Stat. 89, 106]. *Interest.*

"(a) In any judgment of any court rendered (whether against the United States, a collector or deputy collector of internal revenue, a former collector or deputy collector, or the personal representative in case of death) for any overpayment in respect of any internal-revenue tax, interest shall be allowed at the rate of 6 per centum per annum upon the amount of the overpayment, from the date of the payment or collection thereof to a date preceding the date of the refund check by not more than thirty days, such date to be determined by the Commissioner of Internal Revenue. The Commissioner is authorized to tender by check payment of any such judgment, with interest as herein provided, at any time after such judgment becomes final, whether or not a claim for such payment has been duly filed, and such tender shall stop the running of interest, whether or not such refund check is accepted by the judgment creditor."

able, and hence should be regarded as made, on March 31, 1943.[4] The Government, on the other hand, contends that § 3771 (e) is a special statute relating exclusively to tax refunds attributable to the carry-back provisions of the internal revenue laws, and hence prevails, as respects the special subject of carry-backs, over the general provisions of § 2411 (a). After a careful review of these and other statutes and their legislative history, we have concluded that the Government is right.

Section 3771 (e) of the 1939 Code deals specifically with the subject of interest on tax refunds attributable to the carry-back of a net operating loss or an unused excess profits tax credit, and is "an integral part of the carry-back provision[s]" of the internal revenue laws. *Manning* v. *Seeley Tube & Box Co.*, 338 U. S. 561, 568. It specifically says that "[i]f the Commissioner determines that any part of an overpayment is attributable to . . . [an] unused excess profits credit for a succeeding taxable year, no interest shall be allowed or paid with respect to such part of the overpayment for any period before the filing of a claim for credit or refund of such part of the overpayment or the filing of a petition with the Tax Court, whichever is earlier." The refund awarded here was solely "attributable to [an] unused excess profits credit for [the] succeeding taxable year." How, then, can petitioner be entitled to interest "for any period before the filing of a claim for credit or refund"?

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[4] It will be noted that petitioner stops short of claiming that it is entitled to interest from the date it paid its 1942 excess profits tax. It claims, rather, that interest runs from the end of the succeeding tax year that gave rise to the carry-back (*i. e.*, March 31, 1943). The Government's position, on the other hand, is that the interest runs from June 14, 1945, the date on which the refund claim was first presented.

Petitioner agrees that if its award had been made administratively by the Commissioner or the Tax Court,[5] rather than by the "judgment" of the Court of Claims, interest would not be allowable on the refund for any period prior to the filing of its claim. But it argues that the language of § 2411 (a)—"In any judgment of any court rendered . . . for any overpayment in respect of any internal-revenue tax, interest shall be allowed . . . upon the amount of the overpayment, from the date of the payment or collection thereof" [6]—requires the allowance of interest "from the date of the payment or collection" of the tax when recovery is awarded by a District Court or, as here, by the Court of Claims. The effect of petitioner's contention thus is that Congress has made the starting date of interest in such cases dependent upon the forum selected by the taxpayer. Its argument would mean—in fact, it frankly proceeds on the theory—that a taxpayer, holding a refund claim attributable to an unused excess profits credit, could, by proceeding in a District Court or the Court of Claims, recover interest from the date when a claim for refund *could have been filed,* yet if he proceeded through the Tax Court he could not recover interest for any period prior to the actual filing of his claim, even though the Tax Court's final judgments (or orders) are subject to review by the United States Courts of Appeals and ultimately by this Court. In the light of the provisions of § 3771 (e) and its legislative history, it is almost certain that Congress did not intend such an anomalous, nonuniform and discriminatory result.

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[5] Petitioner points to the fact that in *Lasky* v. *Commissioner,* 352 U. S. 1027, the Tax Court was held to be an administrative agency.

[6] Petitioner does not in fact claim interest from the date it actually paid its excess profits taxes for the year 1942 but, rather, from the end of the succeeding tax year that gave rise to the carryback, *i. e.,* March 31, 1943. See n. 4.

Petitioner further contends that § 2411 (a) is a later enactment than § 3771 (e) and, for that reason, should take precedence over it. We do not believe that § 2411 (a) can fairly be regarded as a later enactment than § 3771 (e), for at the time § 3771 (e) was enacted, in 1942, a predecessor provision of § 2411 (a) had long been on the books. Save for the word "hereby"—of no possible significance—that predecessor provision (§ 177 (b) of the Judicial Code, 28 U. S. C. (1940 ed.) § 284 (b)) was identical with the present § 2411 (a).[7] But even if petitioner were correct in concluding that § 2411 (a) is to be regarded as the later enactment, it would not necessarily take precedence over § 3711 (e), for it is familiar law that a specific statute controls over a general one "without regard to priority of enactment." *Townsend* v. *Little,* 109 U. S. 504, 512. See, *e. g., Ginsberg & Sons* v. *Popkin,* 285 U. S. 204, 208; *MacEvoy Co.* v. *United States,* 322 U. S. 102, 107; *Fourco Glass Co.* v. *Transmirra Corp.,* 353 U. S. 222, 228–229.

Section 3771 (e) specifically fixes the date from which interest shall run on carry-back refunds. It came into the law with the Revenue Act of 1942, which authorized carry-backs. A carry-back is an exceptional relief meas-

[7] The history of 28 U. S. C. § 2411 (a) and its predecessor provisions goes back to 1911. See § 177 (b) of the Judicial Code, enacted in 1911 (c. 231, 36 Stat. 1141), as amended by the Revenue Act of 1921 (c. 136, 42 Stat. 227, § 1324 (b)), as further amended by the Revenue Act of 1926 (c. 27, 44 Stat. 9, § 1117). Further amendments occurred in 1928 (45 Stat. 791, § 615) and in 1936 (49 Stat. 1648, § 808). The 1948 codification omitted from the Judicial Code all reference to interest on tax overpayments, but, by a correction Act in 1949 (c. 139, 63 Stat. 89, § 120), Congress restored the section to the Judicial Code as § 2411 (a). The only difference between § 177 (b) as it stood in 1942, and § 2411 (a) as it stands today, is that the word "hereby" no longer appears. Thus, § 3771 (e) is not only the specific enactment designed to control the subject of interest in carry-back cases, but it is also a later enactment than § 2411 (a).

ure in that it permits a departure from the basic annual accounting rule. The carry-back provisions "were enacted to ameliorate the unduly drastic consequences of taxing income strictly on an annual basis. They were designed to permit a taxpayer to set off its lean years against its lush years, and to strike something like an average taxable income computed over a period longer than one year." *Libson Shops, Inc.,* v. *Koehler,* 353 U. S. 382, 386.

The significant feature of a carry-back is that it permits an adjustment of an earlier liability upon the basis of subsequent events. It contemplates that the initial tax obligation was not incorrectly or mistakenly imposed but was actually due, but that an adjustment may be made upon the basis of the taxpayer's gain or loss in the succeeding year or years, and it is evident from the very terms of § 3771 (e) that Congress thought it would be unfair to the Government to require it to pay interest on a claim brought about by such a retroactive adjustment prior to the time when the taxpayer took affirmative steps to bring home to the Commissioner that he is now in position to claim, and claims, a readjustment of his past admittedly correct tax liability. Section 3771 (e) does not, of course, deny interest on carry-back refunds. It only prohibits the accrual of interest prior to the time the taxpayer's claim therefor is filed with, and thus made known to, the Commissioner.

The report of the Senate Finance Committee on the bill that became § 3771 (e) clearly discloses that these were Congress' purposes in adopting the section. It said:

> "A taxpayer entitled to a carry-back of a net operating loss or an unused excess profits credit (see sec. 204 of the bill) will not be able to determine the deduction on account of such carry-back until the close of the future taxable year in which he sustains the net operating loss or has the unused excess

> profits credit. He must therefore file his return and pay his tax without regard to such deduction, and must file a claim for refund at the close of the succeeding taxable year when he is able to determine the amount of such carry-back. Inasmuch as any overpayment resulting from the deduction of such carry-back does not occur, as a practical matter, until the net operating loss or the unused excess profits credit for the future taxable year is determined, and inasmuch as it is desirable to insure promptness in the filing of claims to inform the Commissioner that such deductions have been determined, this section provides *that no interest will be allowed with respect to any such overpayment for any period before the claim therefor is filed,* or a petition asserting such overpayment is filed with the Board of Tax Appeals, whichever is earlier." [8] (Emphasis added.)

This surely shows Congress' purpose to deny interest on carry-back refunds for any period prior to the time they could be determined, and also to prevent, through delay in the presentation of claims, the accumulation of interest after that date and prior to the filing of the claim.[9]

In providing, in § 6611 (f) of the 1954 Internal Revenue Code, that overpayments resulting from the carry-back of net operating losses "shall be deemed not to have been made prior to the close of the taxable year in which such net operating loss arises," Congress recognized that

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[8] S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 123–124.

[9] That Congress did not propose to allow interest for any period prior to presentment of the claim is further confirmed by the provisions of § 6 of the Tax Adjustment Act of 1945, c. 340, 59 Stat. 517, amending § 3771 (e). Section 4 of that Act added a new section to the Internal Revenue Code, § 3780, providing for tentative carry-back adjustments. The concurrent amendment of § 3771 (e) specifies that interest shall not start to run prior to the date application is made for the tentative carry-back adjustments.

it was making a change from existing law. The relevant Committee Report [10] makes this clear. It said, in pertinent part, that:

> "Existing law denies interest on an overpayment caused by a carry-back for any period prior to the filing of a claim for credit or refund of such amount (or filing a petition with the Tax Court with respect to such amount). Under this [proposed] section, interest is denied only for the period prior to the close of the taxable year in which the net operating loss arises. This is consistent with the rule for interest on underpayments (see the discussion of sec. 6601)." [11]

In the light of the provisions of § 3771 (e) and its clear legislative history, we think it is a special statute relating solely to, and exclusively governing, tax refunds attributable to the carry-back provisions of the internal revenue laws, and hence prevails, as respects the special subject of carry-backs, over the general provisions of § 2411 (a). The judgment of the Court of Claims was therefore correct and must be

Affirmed.

MR. JUSTICE DOUGLAS dissents.

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[10] H. R. Rep. No. 1337, 83d Cong., 2d Sess., p. A418.

[11] Section 6601 (e) provides that if the amount of tax is reduced by a carry-back loss, the reduction shall not affect the interest payable thereon by the taxpayer for the period ending with the close of the year in which the loss arises. Section 292 (c) of the 1939 Code (added by § 6 of the Tax Adjustment Act of 1945, c. 340, 59 Stat. 517) provided: "If any part of a deficiency is determined by the Commissioner to be attributable . . . to a carry-back to which an overpayment described in section 3771 (e) . . . in any other tax is attributable . . . no interest shall be assessed or paid under subsection (a) [providing that interest is payable on a deficiency from the date prescribed for the payment of the tax] with respect to such part of the deficiency for any period during which interest was not allowed with respect to such overpayment . . . ."

COPPOLA *v.* UNITED STATES.

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

No. 153. Argued March 27, 1961.—Decided April 17, 1961.

Certiorari was granted in this case in the belief that it presented a question under *Anderson* v. *United States,* 318 U. S. 350. After hearing oral argument and fully examining the transcript of the proceedings in the trial court, *held:* the particular facts of this case are not ruled by the *Anderson* case, there is no merit in the other argument advanced by petitioner, and the judgments below are affirmed.

281 F. 2d 340, 360, affirmed.

William B. Mahoney argued the cause and filed a brief for petitioner.

Howard A. Heffron argued the cause for the United States. On the briefs were former *Solicitor General Rankin, Solicitor General Cox, Assistant Attorney General Wilkey, Assistant Attorney General Miller* and *Philip R. Monahan.*

PER CURIAM.

We brought this case here, 364 U. S. 813, believing that it presented a question under *Anderson* v. *United States,* 318 U. S. 350. After hearing oral argument and fully examining the transcript of the proceedings in the trial court, we conclude that the particular facts of the case are not ruled by *Anderson.* We find no merit in the other argument advanced by the petitioner.

Affirmed.

MR. JUSTICE DOUGLAS, dissenting.

Petitioner has been convicted of participating in two different bank robberies in violation of 18 U. S. C. § 2113. In each case petitioner's confessions obtained by agents

of the F. B. I. were admitted against him. These confessions were made during an interrogation taking place in the Buffalo police headquarters while petitioner was under detention by local police.

Petitioner was no stranger to the F. B. I. One of the bank robberies charged against petitioner occurred in February 1956, the other in October of that year. The F. B. I. had first come into contact with petitioner when, at their request, he re-enacted the events of the first robbery before an audience of its victims. Apparently nothing came of this investigation. Then—almost a year later—the F. B. I. came into possession of information that petitioner was involved in an unrelated state crime. This information was relayed to the Buffalo police and put into motion the events which led to petitioner's detention, his interrogation, and his being charged with these federal crimes. He was arrested by the local police on a charge of violation of the state law at about 9:30 in the morning. The Buffalo police, who had arrested him, had interrogated him during the day. But they made no attempt to have a prompt commitment hearing that was required by New York law.[1]

The F. B. I. had been informed of petitioner's arrest about noon of the day of his arrest. At nine in the evening of that day they received permission to interrogate petitioner as to his involvement in the two robberies. From nine in the evening until almost one o'clock in the morning of the next day, they carried on their interrogation, while state officials left them alone with petitioner "as a matter of courtesy." It was during this period that petitioner confessed to participation in both crimes. The next day, the federal officers officially "requested custody" of petitioner, so that he could be

[1] N. Y. Code Crim. Proc. § 165. See *People* v. *Lovello*, 1 N. Y. 2d 436, 438, 136 N. E. 2d 483, on whose authority the Government concedes the illegality of the detention under state law.

arraigned on the federal charges. There was some delay before he was given into federal "custody," for the local police had to see to his commitment under the state charges. Shortly after two o'clock in the afternoon he was arraigned on the state charges in the Buffalo City Court. At four in the afternoon, about 19 hours after the federal agents had commenced their interrogation, petitioner was arraigned in the federal court. There has been much attention focused, in the progress of this case, on whether the Buffalo police and the F. B. I. had a "working arrangement" (see *Anderson* v. *United States,* 318 U. S. 350, 356) by which petitioner's detention was effected. In my view, the activity of the federal agents in this case is proscribed without regard to whether there was, or was not, a pre-existing "working arrangement."

The confessions would be inadmissible in the case now before us if the original arrest in this case had been made by federal officers. For the duty of a federal officer making an arrest is to take the arrested person "without unnecessary delay" before a judicial officer for a hearing in compliance with Rule 5 (a), Fed. Rules Crim. Proc. Here the petitioner was detained for 29 hours without seeing a judicial officer of any sort; and for 19 of these hours he was under the visitation of federal officers. There was no effort to arraign the accused during that time. The federal officers took no steps to do it themselves; nor did they insist that the state police make the arraignment before a state judge as required by state law. There was also no showing that magistrates were unavailable.[2] I think it plain therefore that the 19-hour detention was an "unnecessary delay" within the meaning of Rule 5 (a).

[2] There is some suggestion that a state magistrate was not available after five o'clock in the afternoon. Cf. N. Y. Code Crim. Proc. § 165. But there is no suggestion that a federal magistrate was not available.

Arrest, and the resulting detention, serves, under the Federal Rules, the purpose of assuring that a person, accused on probable grounds of a crime, will be amenable to the orders of a competent court, which include by the terms of Rule 5 (b) the right to counsel and to bail. It is not an administrative step preliminary to a secret interrogation. In *Mallory* v. *United States,* 354 U. S. 449, 454, this Court said that an accused "is not to be taken to police headquarters in order to carry out a process of inquiry . . . ." In that case the accused was arrested at 2:30 p. m. and his questioning began about 8 p. m. By 10 p. m. he confessed, at which time the federal agents tried, without success, to reach a federal magistrate. Between 11:30 p. m. and midnight, petitioner dictated his confession to a typist; and he was not arraigned until the next morning.

The only reason put forward for a different result in this case is that the "police headquarters" in which federal agents carried out the wrongful "process of inquiry" belonged to Buffalo police rather than the Federal Government. The Government contends here, as it did in *Anderson* v. *United States, supra,* 356, that it is not "formally guilty of illegal conduct." The device is too transparent. I do not think that federal agents can avoid the impact of federal rules by taking advantage of an illegal detention arranged by state officers. Rule 5 (a) is not a formality; its purpose is to minimize secret police interrogation of persons under detention; its ultimate aim is to avoid those situations out of which grows the whole system of the "third degree." The evil at which the rule aims is in interrogation in secret and in detention before the arraignment. Its means are arraignment "without unnecessary delay." Here, the federal agents carried on the kind of interrogation against which Rule 5 (a) is aimed. The fact that the interrogation took place in the cell of a state police station rather than in the cell of a

federal jail or prison only accentuates the evasion of the Rule. In this case the federal agents used an illegal detention as the occasion to carry on a secret interrogation. What the federal agents cannot do in federal precincts they cannot do in a state jail. What we do today is to permit federal agents to flout the federal law so long as they let the accused stay in a state jail and interrogate him there to their hearts' content.

BOLTON ET AL. *v.* BOROUGH OF SCHUYLKILL HAVEN.

APPEAL FROM THE SUPERIOR COURT OF PENNSYLVANIA.

No. 691. Decided April 17, 1961.

Appeal dismissed and certiorari denied.
Reported below: 190 Pa. Super. 157, 153 A. 2d 504.

George G. Lindsay for appellants.

Calvin J. Friedberg 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.

WALGREEN CO. *v.* COMMISSIONER OF TAXATION.

APPEAL FROM THE SUPREME COURT OF MINNESOTA.

No. 732. Decided April 17, 1961.

Appeal dismissed for want of a substantial federal question.
Reported below: 258 Minn. 522, 104 N. W. 2d 714.

Irving Clark for appellant.

Walter F. Mondale, Attorney General of Minnesota, *Perry Voldness,* Assistant Attorney General, and *Jerome J. Sicora,* Special Assistant Attorney General, for respondent.

PER CURIAM.

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

581322 O-61—53

VERRET ET AL. *v.* OIL TRANSPORT CO., INC., ET AL.

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

No. 388. Decided April 17, 1961.

Consent judgment having been entered by District Court since reversal by Court of Appeals, judgment of Court of Appeals vacated and case remanded with directions to dismiss appeal as moot.

Reported below: 278 F. 2d 464.

James J. Morrison, Arthur A. de la Houssaye and *Raymond H. Kierr* for petitioners.

Eberhard P. Deutsch for respondents.

PER CURIAM.

It appearing from the joint suggestion of mootness that, subsequent to the judgment of reversal by the Court of Appeals of the judgment of the District Court and the filing and granting of the petition for writ of certiorari, a consent judgment was entered by the District Court and that said judgment has been satisfied, 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.

GREAT COVE REALTY CO., INC., ET AL. *v.* BRENNER, DISTRICT ATTORNEY, SUFFOLK COUNTY, ET AL.

APPEAL FROM THE APPELLATE DIVISION, SUPREME COURT OF NEW YORK, SECOND JUDICIAL DEPARTMENT.

No. 675. Decided April 17, 1961.

Appeal dismissed and certiorari denied.

Reported below: 9 App. Div. 2d 948, 195 N. Y. S. 2d 935.

Arthur Karger for appellants.

John P. Cohalan, 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.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that probable jurisdiction should be noted.

ARCO AUTO CARRIERS, INC., ET AL. *v.* ARKANSAS EX REL. BENNETT, ATTORNEY GENERAL.

APPEAL FROM THE SUPREME COURT OF ARKANSAS.

No. 785. Decided April 17, 1961.

Appeal dismissed and certiorari denied.

Reported below: — Ark. —, 341 S. W. 2d 15.

George S. Dixon and *Louis Tarlowski* for appellants.

J. Frank Holt, Attorney General of Arkansas, and *Bruce T. Bullion,* Special Assistant Attorney General, for appellee.

PER CURIAM.

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

REPORTER'S NOTE.

The next page is purposely numbered 801. The numbers between 770 and 801 were purposely omitted, in order to make it possible to publish the orders in the current advance sheets or "preliminary prints" of the United States Reports with *permanent* page numbers, thus making the official citations available immediately.

ORDERS FROM JANUARY 23 THROUGH APRIL 17, 1961.

JANUARY 23, 1961.

Miscellaneous Orders.

No. ——. BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES ET AL. *v.* UNITED STATES ET AL. An application was made to MR. JUSTICE STEWART for an order staying the decree of the three-judge district court in this case insofar as it terminated a temporary restraining order previously entered. The application was referred by MR. JUSTICE STEWART to the Court. In the light of the representations made by Erie-Lackawanna Railroad Company, the application is denied without prejudice to its renewal upon the prompt docketing of the appeal. THE CHIEF JUSTICE, MR. JUSTICE BLACK, and MR. JUSTICE DOUGLAS would grant the stay. *James L. Highsaw, Jr.* and *William G. Mahoney* for applicants. *Solicitor General Rankin* and *Robert W. Ginnane* for the United States and the Interstate Commerce Commission, and *Ralph L. McAfee, John H. Pickering* and *Richard D. Rohr* for Erie-Lackawanna Railroad Co., in opposition. Reported below: 189 F. Supp. 942.

No. 631, Misc. VISCONTI *v.* KENTON, WARDEN; and No. 648, Misc. MONTGOMERY *v.* EYMAN, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

Probable Jurisdiction Noted.

No. 543. WESTERN UNION TELEGRAPH CO. *v.* PENNSYLVANIA. Appeal from the Supreme Court of Pennsylvania. Probable jurisdiction noted. *John G. Buchanan,*

John G. Buchanan, Jr. and *John H. Waters* for appellant. *A. Jere Creskoff* for appellee. Reported below: 400 Pa. 337, 162 A. 2d 617.

Certiorari Granted.

No. 546. ROPER *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari granted. *Sidney H. Kelsey* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General Leonard* and *Alan S. Rosenthal* for the United States. Reported below: 282 F. 2d 413.

No. 480, Misc. LURK *v.* UNITED STATES. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit granted. Case transferred to the appellate docket. *Eugene Gressman* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States.

Certiorari Denied.

No. 577. SMITH, DISTRICT DIRECTOR OF UNITED STEELWORKERS OF AMERICA, ET AL. *v.* SUPERIOR COURT OF CALIFORNIA FOR LOS ANGELES COUNTY ET AL. Supreme Court of California. Certiorari denied. *Jerome Smith* and *Eugene S. Ives* for petitioners. *Theodore G. Lee* for Anthony J. Guzzo, respondent.

No. 579. TRIBORO SCOW CORP. *v.* M. F. HICKEY CO., INC., ET AL. C. A. 2d Cir. Certiorari denied. *Edmund F. Lamb* for petitioner. *Martin J. McHugh* for M. F. Hickey Co., Inc., respondent. Reported below: 280 F. 2d 308.

No. 530, Misc. BETHEA *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. 235, Misc. MERRIMAN *v.* ARIZONA ET AL. Supreme Court of Arizona. Certiorari denied. Petitioner *pro se*. *Wade Church,* Attorney General of Arizona, *Leslie C. Hardy,* Chief Assistant Attorney General, and *Stirley Newell,* Assistant Attorney General, for respondents.

No. 570. EISTRAT *v.* SCHULTHEIS ET AL. District Court of Appeal of California, Second Appellate District. Certiorari denied. Reported below: 181 Cal. App. 2d 57, 5 Cal. Rptr. 77.

No. 348, Misc. VARNER, ALIAS WOODS, *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied. Reported below: 329 S. W. 2d 623.

No. 548, Misc. HILDEBRANDT *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States.

No. 485, Misc. KNISELEY *v.* NEW YORK. Appellate Division, Supreme Court of New York, Fourth Judicial Department. Certiorari denied. Reported below: 10 App. Div. 2d 903, 200 N. Y. S. 2d 236.

No. 564, Misc. SADNESS *v.* NEW YORK. Appellate Division, Supreme Court of New York, Third Judicial Department. Certiorari denied. Reported below: 11 App. Div. 2d 550, 200 N. Y. S. 2d 112.

No. 574, Misc. IN RE POINDEXTER. C. A. 9th Cir. Certiorari denied.

No. 579, Misc. HARRISON *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 223 Md. 228, 163 A. 2d 622.

No. 540, Misc. GREEN ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Edgar Paul Boyko* for petitioners. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 282 F. 2d 388.

No. 565, Misc. MYERS *v.* ISTHMIAN LINES, INC. C. A. 1st Cir. Certiorari denied. *Francis H. Farrell* and *Nathan Greenberg* for petitioner. *Seymour P. Edgerton, Robert J. Hallisey* and *Hiller B. Zobel* for respondent. Reported below: 282 F. 2d 28.

No. 570, Misc. CAPAZZANO *v.* ADAMS, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 572, Misc. JANIEC *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 584, Misc. WEBB *v.* NEW MEXICO. Supreme Court of New Mexico. Certiorari denied. Reported below: 67 N. M. 293, 354 P. 2d 1112.

No. 585, Misc. MITMAN *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. Reported below: See 184 Cal. App. 2d 685, 7 Cal. Rptr. 712.

No. 607, Misc. WATSON *v.* COLORADO. Supreme Court of Colorado. Certiorari denied. Petitioner *pro se. Duke W. Dunbar,* Attorney General of Colorado, *Frank E. Hickey,* Deputy Attorney General, and *J. F. Brauer,* Assistant Attorney General, for respondent. Reported below: 144 Colo. 505, 357 P. 2d 70.

No. 644, Misc. BERMAN *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 19 Ill. 2d 579, 169 N. E. 2d 108.

No. 592, Misc. HARRIS *v.* MCNEILL, STATE HOSPITAL SUPERINTENDENT. Appellate Division, Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 624, Misc. VAN PELT *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 634, Misc. LEWIS *v.* BUCHKOE, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied.

Rehearing Denied.

No. 457. GRIFFITH *v.* CALIFORNIA ET AL., 364 U. S. 476; and

No. 225, Misc. SCHAFFER *v.* CALIFORNIA, 364 U. S. 922. Petitions for rehearing denied.

No. 473. KOTRICH ET AL. *v.* COUNTY OF DU PAGE, ILLINOIS, ET AL., 364 U. S. 475; and

No. 500, Misc. CLINTON *v.* UNITED STATES, 364 U. S. 923. Motions for leave to file petitions for rehearing denied.

JANUARY 27, 1961.

Dismissal Under Rule 60.

No. 542, Misc. BARBONE ET AL. *v.* UNITED STATES. On petition for writ of certiorari to the United States Court of Appeals for the Third Circuit. Petition dismissed pursuant to stipulation under Rule 60 of the Rules of this Court. Petitioners *pro se*. *Solicitor General Cox* was on the stipulation for the United States. *J. Lee Rankin*, then Solicitor General, *Acting Assistant Attorney General Foley, Beatrice Rosenberg* and *Julia P. Cooper* were on the brief for the United States in opposition to the petition. Reported below: 283 F. 2d 628.

FEBRUARY 20, 1961.

Miscellaneous Orders.

No. 4. INTERNATIONAL ASSOCIATION OF MACHINISTS ET AL. *v.* STREET ET AL. Appeal from the Supreme Court of Georgia. (Probable jurisdiction noted, 361 U. S. 807. Argued April 21, 1960. Set for reargument, 363 U. S. 825.) Motion of Kenneth L. Hostetler et al. for leave to file brief, as *amici curiae,* granted. *Herbert M. Brune* for movants. *Milton Kramer* and *Lester P. Schoene* for appellants, and *E. Smyth Gambrell* and *W. Glen Harlan* for appellees, in opposition.

No. 39. MONROE ET AL. *v.* PAPE ET AL. Certiorari, 362 U. S. 926, to the United States Court of Appeals for the Seventh Circuit. (Decided this date and opinion reported, *ante,* p. 167.) Motion of petitioners for leave to file supplemental brief after argument granted. *Morris L. Ernst, Donald Page Moore, Ernst Liebman, Charles Liebman* and *John W. Rogers* for movants.

No. 55. UNITED STATES *v.* E. I. DU PONT DE NEMOURS & Co. ET AL. Appeal from the United States District Court for the Northern District of Illinois. (Probable jurisdiction noted, 362 U. S. 986.) Motion of Clara M. Blum et al. for leave to file brief, as *amici curiae,* granted. MR. JUSTICE CLARK and MR. JUSTICE HARLAN took no part in the consideration or decision of this motion. *Joseph M. Proskauer* and *Harold H. Levin* for movants.

No. 203. ELI LILLY & Co. *v.* SAV-ON-DRUGS, INC. Appeal from the Supreme Court of New Jersey. (Probable jurisdiction noted, 364 U. S. 860.) Motion of the State of New Jersey to be named a party appellee granted. *David D. Furman,* Attorney General of New Jersey, and *David M. Satz,* First Assistant Attorney General, on the motion.

No. 64. LOCAL 357, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA *v.* NATIONAL LABOR RELATIONS BOARD. Certiorari, 363 U. S. 837, to the United States Court of Appeals for the District of Columbia Circuit;

No. 68. LOCAL 60, UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, AFL–CIO, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. Certiorari, 363 U. S. 837, to the United States Court of Appeals for the Seventh Circuit; and

No. 85. NATIONAL LABOR RELATIONS BOARD *v.* LOCAL 357, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA. Certiorari, 363 U. S. 837, to the United States Court of Appeals for the District of Columbia Circuit. Joint motion to redistribute time allotment and to divide subject matter for briefing and argument granted. *Solicitor General Cox* for the National Labor Relations Board. *Herbert S. Thatcher* for petitioner in No. 64 and for respondent in No. 85. *Bernard Dunau* for petitioners in No. 68.

No. 688, Misc. DANDY *v.* BANMILLER, WARDEN. Motion for leave to file petition for writ of certiorari denied.

No. 630, Misc. MOORE *v.* MILLER, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus and/or prohibition denied. *S. Eldridge Sampliner* and *Harry Alan Sherman* for petitioner. Reported below: —— F. 2d ——.

No. 661, Misc. TOMAIOLO *v.* ABRUZZO, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of prohibition and/or mandamus denied. *Solicitor General Cox, Acting Assistant Attorney General Foley, Beatrice Rosenberg* and *Jerome M. Feit* for respondent.

No. 541, Misc. FAULKNER *v.* RAGEN, WARDEN;
No. 604, Misc. IN RE TOTTERDELL;
No. 642, Misc. POUNDS *v.* CALIFORNIA;
No. 643, Misc. MILLER *v.* TAYLOR, WARDEN;
No. 677, Misc. BLACK *v.* BYINGTON, WARDEN;
No. 704, Misc. LEE *v.* WARDEN, MARYLAND PENITENTIARY; and
No. 706, Misc. WRIGHT *v.* CALIFORNIA. Motions for leave to file petitions for writs of habeas corpus denied.

No. 640, Misc. EX PARTE MCMULLEN. Motion for leave to file petition for writ of mandamus denied.

Probable Jurisdiction Noted or Question Postponed.

No. 563. INTERSTATE COMMERCE COMMISSION *v.* J–T TRANSPORT CO., INC., ET AL.; and
No. 564. U. S. A. C. TRANSPORT, INC., ET AL. *v.* J–T TRANSPORT CO., INC., ET AL. Appeals from the United States District Court for the Western District of Missouri. Probable jurisdiction noted. MR. JUSTICE WHITTAKER took no part in the consideration or decision of these cases. *Robert W. Ginnane* and *James Y. Piper* for appellant in No. 563. *Roland Rice* and *James E. Wilson* for appellants in No. 564. *Solicitor General Rankin* filed a memorandum for the United States, suggesting that the Court note probable jurisdiction. *James W. Wrape* and *Clarence D. Todd* for appellees. Reported below: 185 F. Supp. 838.

No. 567. HERTER, SECRETARY OF STATE, *v.* CORT. Appeal from the United States District Court for the District of Columbia. Further consideration of the question of jurisdiction postponed to the hearing of the case on the merits. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Jerome M. Feit* for appellant. Reported below: 187 F. Supp. 683.

No. 566. ROGERS, ATTORNEY GENERAL, *v.* MENDOZA-MARTINEZ. Appeal from the United States District Court for the Southern District of California. Probable jurisdiction noted. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Jerome M. Feit* for appellant. Reported below: 192 F. Supp. 1.

No. 681. BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES ET AL. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Eastern District of Michigan. Probable jurisdiction noted and motions to advance granted. The application for a stay of the decree of the three-judge district court insofar as it terminated a temporary restraining order previously granted presented to MR. JUSTICE STEWART, and by him referred to the Court, is granted. *Clarence M. Mulholland, Edward J. Hickey, Jr., James L. Highsaw, Jr., William G. Mahoney, George E. Brand* and *George E. Brand, Jr.* for appellants. *Solicitor General Rankin, Solicitor General Cox* and *Robert W. Ginnane* for the United States et al. *Ralph L. McAfee, John H. Pickering* and *Richard D. Rohr* for the Erie-Lackawanna Railroad Co., appellee. Reported below: 189 F. Supp. 942.

Certiorari Granted. (*See also No. 382, ante, p. 297.*)

No. 574. DIBELLA *v.* UNITED STATES. C. A. 2d Cir. Certiorari granted. *Jerome Lewis* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Foley* and *Beatrice Rosenberg* for the United States. Reported below: 284 F. 2d 897.

No. 641. CHARLES DOWD BOX CO., INC., *v.* COURTNEY ET AL. Superior Court of Massachusetts, Worcester County. Certiorari granted. *George H. Mason* for petitioner. *David E. Feller* for respondents. Reported below: See 341 Mass. 337, 169 N. E. 2d 885.

No. 141. KILLIAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari granted, limited to Questions 3 and 6 presented by the petition, which read as follows:

"3. Whether instructions to the jury properly defined membership in and affiliation to the Communist Party.

"6. Whether the production of statements which report payments to those witnesses, as informers, is excused after a complete foundation for their production under 18 U. S. Code § 3500 is laid, when all that the government has offered to produce at trial is a list of the amounts and dates of payments and there is no evidence as to what other facts are reported in those statements."

M. Michael Essin and *Basil R. Pollitt* for petitioner. *Solicitor General Rankin, Assistant Attorney General Yeagley* and *George B. Searls* for the United States. Reported below: 275 F. 2d 561.

No. 389, Misc. HODGES *v.* UNITED STATES. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit granted. Case transferred to the appellate docket. *Henry B. Weaver, Jr., Quinn O'Connell* and *Hershel Shanks* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 108 U. S. App. D. C. 375, 282 F. 2d 858.

No. 159, Misc. OYLER *v.* ADAMS, WARDEN; and

No. 280, Misc. CRABTREE *v.* ADAMS, WARDEN. Motions for leave to proceed *in forma pauperis* and petitions for writs of certiorari to the Supreme Court of Appeals of West Virginia granted. Cases transferred to the appellate docket. *Fred H. Caplan* for respondent.

Certiorari Denied. (*See also No. 528, Misc., ante, p. 297, and No. 610, Misc., ante, p. 300.*)

No. 93. HAUG ET UX. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *David Scribner* and *Jack G. Day* for petitioners. *Solicitor General Rankin, Assistant Attorney General Yeagley* and *George D. Searls* for the United States. Reported below: 274 F. 2d 885.

No. 553. ARMOUR RESEARCH FOUNDATION OF ILLINOIS INSTITUTE OF TECHNOLOGY ET AL. *v.* C. K. WILLIAMS & CO., INC., ET AL.; and

No. 606. C. K. WILLIAMS & CO., INC., *v.* ARMOUR RESEARCH FOUNDATION OF ILLINOIS INSTITUTE OF TECHNOLOGY ET AL. C. A. 7th Cir. Certiorari denied. *Carlton Hill* and *Benjamin H. Sherman* for petitioners in No. 553 and, together with *Edward A. Haight* and *William H. Abbott,* for respondents in No. 606. *Albert C. Johnston, Marcus A. Hollabaugh* and *Henry Driemeyer* for C. K. Williams & Co., Inc., in Nos. 553 and 606. Reported below: 280 F. 2d 499.

No. 559. CORAL GABLES FIRST NATIONAL BANK ET AL. *v.* CONSTRUCTORS OF FLORIDA, INC., ET AL. District Court of Appeal of Florida, Third Appellate District. Certiorari denied. *W. G. Ward* and *Leo L. Foster* for petitioners. *William L. Gray, Jr., Fuller Warren, Tom Maxey* and *Egbert Beall* for respondents. Reported below: 119 So. 2d 741.

No. 583. CAUGHORN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *William Earl Badget* for petitioner. *Solicitor General Rankin, Assistant Attorney General Tyler, Harold H. Greene* and *Isabel L. Blair* for the United States. Reported below: 283 F. 2d 868.

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No. 575. KENTUCKY RURAL ELECTRIC COOPERATIVE CORP. *v.* MOLONEY ELECTRIC CO. C. A. 6th Cir. Certiorari denied. *Philip P. Ardery* for petitioner. *Squire R. Ogden* for respondent. Reported below: 282 F. 2d 481.

No. 576. UNION CARBIDE CORP. *v.* GRAVER TANK & MFG. CO., INC., ET AL.; and

No. 604. GRAVER TANK & MFG. CO., INC., ET AL. *v.* UNION CARBIDE CORP. C. A. 7th Cir. Certiorari denied. *John T. Cahill, James A. Fowler, Jr., Richard Russell Wolfe* and *George N. Beamer* for petitioner in No. 576 and respondent in No. 604. *Thomas V. Koykka, James R. Stewart, Casper W. Ooms, Dugald S. McDougall* and *Edward A. Haight* for respondents in No. 576 and petitioners in No. 604. Reported below: 282 F. 2d 653.

No. 585. BLUMENFIELD ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Thomas D. McBride, Michael von Moschzisker* and *Henry H. Bank* for petitioners. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 284 F. 2d 46.

No. 590. FULKS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Daniel G. Marshall* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 283 F. 2d 259.

No. 592. HATTEM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Russell E. Parsons* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 283 F. 2d 339.

No. 573. DURFEE ET AL. *v.* CALIFORNIA. Appellate Department, Superior Court of California, County of Los Angeles. Certiorari denied.

No. 587. UNION CARBIDE & CARBON CORP. *v.* ELLIS-FOSTER CO. ET AL. C. A. 3d Cir. Certiorari denied. *James A. Fowler, Jr., John T. Kelton, William P. Reiss* and *William B. Henry, Jr.* for petitioner. *Albert C. Bickford* for respondents. Reported below: 284 F. 2d 917.

No. 588. RANDALL, ADMINISTRATRIX, *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Hyman Smollar* and *Eugene Gressman* for petitioner. *Solicitor General Rankin, Acting Assistant Attorney General Leonard, Morton Hollander* and *Anthony L. Mondello* for the United States. Reported below: 108 U. S. App. D. C. 317, 282 F. 2d 287.

No. 594. IN RE BROOKS. Supreme Court of Washington. Certiorari denied. *Kenneth A. Cox* for petitioner. *T. M. Royce* for respondent. Reported below: 57 Wash. 2d 66, 355 P. 2d 840.

No. 601. MCKAY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *John Lucius Echeles* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Foley* and *Beatrice Rosenberg* for the United States. Reported below: 283 F. 2d 399.

No. 602. ZUCKERMAN ET AL. *v.* HILL ET AL. Supreme Court of Montana. Certiorari denied. *H. Cleveland Hall* for petitioners. Reported below: 137 Mont. ——, 355 P. 2d 521.

No. 591. COURTIN *v.* SHARP. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *David C. Treen* and *George R. Blue* for respondent. Reported below: 280 F. 2d 345; 283 F. 2d 255.

No. 593. MCDANIEL *v.* THE LISHOLT ET AL. C. A. 2d Cir. Certiorari denied. *Edward J. Malament* for petitioner. *James M. Estabrook* and *Francis X. Byrn* for respondents. Reported below: 282 F. 2d 816.

No. 596. CECERE *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. *Frank A. Palmieri* for petitioner. Reported below: 33 N. J. 454, 165 A. 2d 233.

No. 597. PARK ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Wesley R. Asinof* for petitioners. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 283 F. 2d 253.

No. 598. BAKER *v.* TAYLOR, WARDEN. C. A. 10th Cir. Certiorari denied. *Robert F. Moore* for petitioner. *Solicitor General Rankin, Assistant Attorney General Tyler, Harold H. Greene* and *David Rubin* for respondent. Reported below: 284 F. 2d 43.

No. 600. HOSIE *v.* CHICAGO & NORTH WESTERN RAILWAY CO. C. A. 7th Cir. Certiorari denied. *Charles Dana Snewind* for petitioner. *Carl McGowan* for respondent. Reported below: 282 F. 2d 639.

No. 603. MOUNTAIN STATES SECURITIES CORP. ET AL. *v.* HOOPER, TRUSTEE IN BANKRUPTCY. C. A. 5th Cir. Certiorari denied. *Jack Crenshaw* and *Jos. F. Johnston* for petitioners. *Truman M. Hobbs* for respondent. Reported below: 282 F. 2d 195.

No. 605. MORRIS *v.* CITY OF ST. PAUL. Supreme Court of Minnesota. Certiorari denied. Reported below: 258 Minn. 467, 104 N. W. 2d 902.

No. 610. ACCARDY *v.* CALIFORNIA. District Court of Appeal of California, Fourth Appellate District. Certiorari denied. *Thomas Whelan* for petitioner. Reported below: 184 Cal. App. 2d 1, 7 Cal. Rptr. 167.

No. 615. ROBINSON ET AL. *v.* FRANKE, SECRETARY OF THE NAVY. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Penrose Lucas Albright* for petitioners. *Solicitor General Cox, Acting Assistant Attorney General Leonard* and *Alan S. Rosenthal* for respondent. Reported below: 108 U. S. App. D. C. 368, 282 F. 2d 851; — U. S. App. D. C. —, — F. 2d —.

No. 616. RADOM & NEIDORFF, INC., *v.* UNITED STATES. Court of Claims. Certiorari denied. *Michael Kaminsky* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Sellers, I. Henry Kutz* and *John J. Pajak* for the United States. Reported below: — Ct. Cl. —, 281 F. 2d 461.

No. 620. LUCAS *v.* VIRGINIA. Supreme Court of Appeals of Virginia. Certiorari denied. *Alexander N. Apostolou* for petitioner.

No. 624. KECO INDUSTRIES, INC., *v.* UNITED STATES. Court of Claims. Certiorari denied. *Paul W. Steer* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Leonard* and *John G. Laughlin, Jr.* for the United States. Reported below: — Ct. Cl. —, — F. 2d —.

No. 611. Allen B. DuMont Laboratories, Inc., *v.* Pierce, Executrix. C. A. 3d Cir. Certiorari denied. *Floyd H. Crews* and *Donald J. Overocker* for petitioner. *Thomas Cooch* and *Robert H. Rines* for respondent. Reported below: 278 F. 2d 323.

No. 621. Bertrand *v.* Southern Pacific Co. C. A. 9th Cir. Certiorari denied. *George Olshausen* for petitioner. *Robert A. Seligson* and *Leighton M. Bledsoe* for respondent. Reported below: 282 F. 2d 569.

No. 622. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local Union No. 486, et al. *v.* Haenlein. Supreme Court of Michigan. Certiorari denied. *Leroy G. Vandeveer* for petitioners. *Walter Martin* for respondent. Reported below: 361 Mich. 263, 105 N. W. 2d 166.

No. 625. Pryor *v.* United States. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Acting Assistant Attorney General Foley, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 288 F. 2d 820.

No. 626. McClane *v.* Texas. Court of Criminal Appeals of Texas. Certiorari denied. *L. N. D. Wells, Jr., Oscar H. Mauzy* and *Bernard Dunau* for petitioner. Reported below: — Tex. Cr. R. —, — S. W. 2d —.

No. 595. Presser *v.* United States. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Mr. Justice Black and Mr. Justice Douglas are of the opinion certiorari should be granted. *H. Clifford Allder* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 109 U. S. App. D. C. 99, 284 F. 2d 233.

No. 627. PENNSYLVANIA TURNPIKE COMMISSION *v.* GERR ET AL. C. A. 3d Cir. Certiorari denied. *George H. Hafer* for petitioner. *Solomon Hurwitz* and *Macey E. Klein* for respondents. Reported below: 283 F. 2d 293.

No. 628. SCHULTZ ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *William A. Blank* and *Robert C. Zampano* for petitioners. *Solicitor General Cox, Acting Assistant Attorney General Leonard* and *Morton Hollander* for the United States. Reported below: 282 F. 2d 628.

No. 630. PRICE *v.* FLEMMING, SECRETARY OF HEALTH, EDUCATION AND WELFARE, ET AL. C. A. 3d Cir. Certiorari denied. *Towson Price*, petitioner, *pro se*. *Solicitor General Cox, Acting Assistant Attorney General Leonard* and *John G. Laughlin, Jr.* for Flemming, respondent. Reported below: 280 F. 2d 956.

No. 632. BOSTON & MAINE RAILROAD *v.* HALL, EXECUTRIX. C. A. 1st Cir. Certiorari denied. *James R. DeGiacomo* for petitioner. *William B. Sleigh, Jr.* for respondent. Reported below: 284 F. 2d 474.

No. 636. VON CSEH *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Frances Kahn* for petitioner. *Frank S. Hogan, Richard G. Denzer* and *H. Richard Uviller* for respondent. Reported below: 8 N. Y. 2d 1058, 170 N. E. 2d 408.

No. 637. LOS ANGELES HOTEL-RESTAURANT EMPLOYER-UNION WELFARE FUND *v.* BOWIE, TRUSTEE IN BANKRUPTCY. C. A. 9th Cir. Certiorari denied. *Walter N. Anderson* for petitioner. *Francis F. Quittner* for respondent. Reported below: 283 F. 2d 516.

No. 633. STAUFFER CHEMICAL CO. *v.* BOSTON & MAINE RAILROAD ET AL. C. A. 1st Cir. Certiorari denied. *Samuel P. Sears* for petitioner. Reported below: 284 F. 2d 474.

No. 642. FREDIN *v.* OHIO. Supreme Court of Ohio. Certiorari denied. *N. A. Brinsky* for petitioner. *John T. Corrigan* for respondent. Reported below: 171 Ohio St. 273, 169 N. E. 2d 549.

No. 645. THE MACCABEES ET AL. *v.* SHELLEY. C. A. 2d Cir. Certiorari denied. *John P. Walsh* for petitioners. *Bruce A. Hecker* for respondent.

No. 650. MISSOURI PACIFIC RAILROAD CO. *v.* MENDOZA. Court of Civil Appeals of Texas, Tenth Supreme Judicial District. Certiorari denied. *Howard S. Hoover* for petitioner. *Walter James Kronzer, Jr.* for respondent. Reported below: 337 S. W. 2d 622.

No. 661. ZANNARAS ET AL. *v.* BAGDAD COPPER CORP. C. A. 9th Cir. Certiorari denied. *John Phillip Zannaras,* petitioner, *pro se*. *Joseph L. Alioto* for U. S. Tungsten Corporation and J. P. Robinson, Jr., petitioners. *Mark Wilmer* for respondent. Reported below: 284 F. 2d 147.

No. 668. MACK *v.* LEHIGH VALLEY RAILROAD CO. C. A. 3d Cir. Certiorari denied. *Jacob Rassner* for petitioner. *James J. Langan* and *Raymond J. Lamb* for respondent. Reported below: 283 F. 2d 405.

No. 562. BROWN *v.* PENNSYLVANIA RAILROAD CO. C. A. 3d Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion certiorari should be granted. *Gene K. Lynch* and *James P. McArdle* for petitioner. *Hugh B. Cox* for respondent. Reported below: 282 F. 2d 522.

No. 73, Misc. WEST ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Victor Rabinowitz, Leonard B. Boudin* and *Ann Fagan Ginger* for petitioners. *Solicitor General Rankin, Assistant Attorney General Yeagley* and *George B. Searls* for the United States. Reported below: 274 F. 2d 885.

No. 74, Misc. REINTHALER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Frank J. Donner, Arthur Kinoy* and *Marshall Perlin* for petitioner. *Solicitor General Rankin, Assistant Attorney General Yeagley* and *George B. Searls* for the United States. Reported below: 274 F. 2d 885.

No. 179, Misc. KIRACOFE *v.* SMYTH, PENITENTIARY SUPERINTENDENT. Supreme Court of Appeals of Virginia. Certiorari denied. *William Alfred Hall* for petitioner. *D. Gardiner Tyler,* Assistant Attorney General of Virginia, for respondent.

No. 446, 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* and *Beatrice Rosenberg* for the United States.

No. 457, Misc. RAGAN *v.* MADIGAN, WARDEN. C. A. 9th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General Tyler* and *Harold H. Greene* for the United States.

No. 465, Misc. MORSE *v.* WARDEN, UNITED STATES PENITENTIARY. C. A. 10th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General Tyler, Harold H. Greene* and *David Rubin* for respondent.

No. 138, Misc. RAINEY *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 472, Misc. ELLIS *v.* REID, JAIL SUPERINTENDENT. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Tyler* and *Harold H. Greene* for respondent.

No. 487, Misc. LIPSCOMB *v.* MADIGAN, WARDEN. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Tyler* and *Harold H. Greene* for respondent.

No. 507, Misc. BELL *v.* ROGERS, ATTORNEY GENERAL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Tyler, Harold H. Greene* and *Isabel L. Blair* for respondent.

No. 543, Misc. TYNE *v.* NATIONAL SUPPLY CO. ET AL. C. A. 7th Cir. Certiorari denied. *Benjamin Wham* and *John E. Owens* for petitioner. *Frank D. Mayer, Robert L. Stern* and *Milton L. Fisher* for National Supply Co., respondent. Reported below: 280 F. 2d 878.

No. 558, Misc. EYCHAS *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 566, Misc. ECHOLS *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Acting Assistant Attorney General Foley, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 496, Misc. FISHER *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: —— U. S. App. D. C. ——, —— F. 2d ——.

No. 503, Misc. BROWN *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Reported below: 7 N. Y. 2d 359, 165 N. E. 2d 557.

No. 517, Misc. SEISEK *v.* BLAW-KNOX CO. ET AL. Supreme Court of Pennsylvania. Certiorari denied. Petitioner *pro se*. *H. Reginald Belden* for respondents.

No. 557, Misc. SILAS *v.* ARKANSAS. Supreme Court of Arkansas. Certiorari denied. Reported below: —— Ark. ——, 337 S. W. 2d 644.

No. 577, Misc. LYONS *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: 109 U. S. App. D. C. 103, 284 F. 2d 237.

No. 578, Misc. LEVINE *v.* COLGATE-PALMOLIVE CO. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *James B. Henry, Jr.* for respondent. Reported below: 283 F. 2d 532.

No. 583, Misc. MILLS *v.* WILKINS, WARDEN. Appellate Division, Supreme Court of New York, Fourth Judicial Department. Certiorari denied.

No. 580, Misc. GATEWOOD *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 581, Misc. BULLARD *v.* REEVES, JUDGE, ET AL. Supreme Court of Indiana. Certiorari denied.

No. 582, Misc. BROWN *v.* VERMONT. Supreme Court of Vermont. Certiorari denied. *John S. Burgess* for petitioner. *Thomas M. Debevoise,* Attorney General of Vermont, for respondent. Reported below: 122 Vt. 59, 163 A. 2d 845.

No. 586, Misc. GREEN *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 609, Misc. MORONES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Acting Assistant Attorney General Foley, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: —— F. 2d ——.

No. 639, Misc. DE MOSS *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied. Reported below: 401 Pa. 395, 165 A. 2d 14.

No. 668, Misc. WOLAK *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. Reported below: 33 N. J. 399, 165 A. 2d 174.

No. 684, Misc. AMATO *v.* MURPHY, WARDEN, ET AL. C. A. 2d Cir. Certiorari denied. *Abraham Ziegler* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *Norman Friedman,* Assistant Attorney General, for respondents. Reported below: —— F. 2d ——.

No. 594, Misc. GRIMES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States.

No. 598, Misc. RAMSOUR *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. 611, Misc. CAMPBELL *v.* MURPHY, WARDEN. Appellate Divison, Supreme Court of New York, Fourth Judicial Department. Certiorari denied.

No. 615, Misc. HARRIS *v.* WARDEN, MARYLAND PENITENTIARY. Court of Appeals of Maryland. Certiorari denied.

No. 627, Misc. JACKSON *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 629, Misc. NEAL *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 636, Misc. SHERWOOD *v.* MARION COUNTY CIRCUIT COURT. Supreme Court of Oregon. Certiorari denied.

No. 638, Misc. MAZZELLA *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Frances Kahn* for petitioner.

No. 645, Misc. BROWN *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 222 Md. 514, 161 A. 2d 462.

No. 653, Misc. SMITH *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 656, Misc. DAVIS *v.* CALIFORNIA. Appellate Department, Superior Court of California, County of Los Angeles. Certiorari denied. Petitioner *pro se*. *Roger Arnebergh* and *Philip E. Grey* for respondent.

No. 662, Misc. IVEY *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied.

No. 667, Misc. BRYANT *v.* ADAMS, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 673, Misc. NEAL *v.* OKLAHOMA. Criminal Court of Appeals of Oklahoma. Certiorari denied. Reported below: 355 P. 2d 1071.

No. 726, Misc. LUPINO *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Acting Assistant Attorney General Foley* and *Beatrice Rosenberg* for the United States.

No. 506, Misc. BRUBAKER *v.* DICKSON, WARDEN. Supreme Court of California. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Quentin Ogren* for petitioner. *Stanley Mosk*, Attorney General of California, and *Arlo E. Smith* and *John S. McInerny*, Deputy Attorneys General, for respondent.

No. 549, Misc. MCIVOR *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *John W. Barnum* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 282 F. 2d 587.

Rehearing Denied.

No. 47. CALLANAN *v.* UNITED STATES, 364 U. S. 587;
No. 128. KIMBROUGH *v.* UNITED STATES, 364 U. S. 661;
No. 514. STONE *v.* UNITED STATES, 364 U. S. 928;
No. 530. MENDE *v.* UNITED STATES, 364 U. S. 933;
No. 544. AHEARN ET AL. *v.* UNITED STATES, 364 U. S. 932;
No. 157, Misc. ALLEN *v.* MICHIGAN, 364 U. S. 934;
No. 502, Misc. CAMPBELL *v.* TEXAS, 364 U. S. 927; and
No. 508, Misc. CUMMINS *v.* STROUL, DOING BUSINESS AS STROUL NEWS AGENCY, 364 U. S. 937. Petitions for rehearing denied.

No. 404, Misc. GEORGE *v.* UNITED STATES, 364 U. S. 923; and
No. 441, Misc. FARMER *v.* WILLINGHAM, WARDEN, 364 U. S. 876. Motions for leave to file petitions for rehearing denied.

FEBRUARY 27, 1961.

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 February 27, 1961, and ending June 30, 1961, 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. 65. BROWN SHOE CO., INC., *v.* UNITED STATES. Appeal from the United States District Court for the Eastern District of Missouri. (Probable jurisdiction noted, 363 U. S. 825.) The joint motion to postpone oral argument is granted. *Arthur H. Dean* for appellant. *Solicitor General Cox* for the United States.

No. 551. GINSBURG *v.* GINSBURG ET AL., 364 U. S. 934. The motion to remand is denied. *Paul Ginsburg*, petitioner, *pro se*.

No. 746. OYLER *v.* ADAMS, WARDEN; and

No. 747. CRABTREE *v.* ADAMS, WARDEN. Certiorari, *ante*, p. 810, to the Supreme Court of Appeals of West Virginia. It is ordered that *David Ginsburg, Esquire*, of Washington, District of Columbia, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for petitioners in these cases.

No. 547, Misc. JORDAN *v.* UNITED STATES; and

No. 563, Misc. SPRINGFIELD *v.* UNITED STATES. Motions for leave to file petitions for writs of certiorari denied.

No. 569, Misc. HICKS *v.* WARDEN, MARYLAND 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 denied.

Certiorari Denied. (*See also No. 569, Misc., supra.*)

No. 389. GRIFFITH LABORATORIES, INC., *v.* MINER, U. S. DISTRICT JUDGE. C. A. 7th Cir. Certiorari denied. *Charles J. Merriam* and *Norman M. Shapiro* for petitioner. *M. Hudson Rathburn* and *Richard D. Mason* for respondent.

No. 638. DALLAS GENERAL DRIVERS, WAREHOUSEMEN & HELPERS LOCAL UNION NO. 745 *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. *L. N. D. Wells, Jr., David Previant* and *Herbert S. Thatcher* for petitioner. *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 281 F. 2d 593.

No. 586. Mississippi River Fuel Corp. *v.* Federal Power Commission et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Richmond C. Coburn, Alan C. Kohn* and *Melvin Richter* for petitioner. *Solicitor General Cox, Assistant Attorney General Orrick, John G. Laughlin, Jr., Howard E. Shapiro* and *John C. Mason* for the Federal Power Commission, and *James M. Douglas, Richard D. Shewmaker, Harry A. Poth, Jr.* and *Richard M. Merriman* for other respondents. Reported below: 108 U. S. App. D. C. 284, 281 F. 2d 919.

No. 647. Fisher *v.* North Branch Products, Inc. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Robert G. Mentag* and *Albert W. Rinehart* for petitioner. Reported below: 109 U. S. App. D. C. 182, 284 F. 2d 611.

No. 666. Dailey et al. *v.* United States. C. A. 8th Cir. Certiorari denied. *Harry E. McDermott, Jr.* for petitioners. *Solicitor General Cox, Acting Assistant Attorney General Foley* and *Beatrice Rosenberg* for the United States. Reported below: 286 F. 2d 62.

No. 233, Misc. Greer *v.* Texas. Court of Criminal Appeals of Texas. Certiorari denied. Petitioner *pro se. Will Wilson,* Attorney General of Texas, and *B. H. Timmins, Jr.* and *Houghton Brownlee, Jr.,* Assistant Attorneys General, for respondent. Reported below: See 165 Tex. Cr. R. 300, 306 S. W. 2d 371.

No. 622, Misc. Dawson *v.* United States. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se. Solicitor General Cox* for the United States. Reported below: 109 U. S. App D. C. 22, 283 F. 2d 508.

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No. 612. Lee et ux. *v.* Terminal Transport Co., Inc. C. A. 7th Cir. Certiorari denied. *James A. Dooley* for petitioners. *Harlan L. Hackbert* for respondent. Reported below: 282 F. 2d 805.

No. 644. Padgett *v.* Buxton-Smith Mercantile Co. et al. C. A. 10th Cir. Certiorari denied. *Rolando J. Matteucci* for petitioner. *William A. Sloan* for respondents. Reported below: 283 F. 2d 597.

No. 651. Bailey et al. *v.* United States. C. A. 9th Cir. Certiorari denied. *Howard R. Lonergan* for petitioners. *Solicitor General Cox, Acting Assistant Attorney General Foley, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 282 F. 2d 421.

No. 652. Albert *v.* United States District Court for the Western District of Michigan et al. C. A. 6th Cir. Certiorari denied. *Peter E. Bradt* and *Theodore G. Albert* for petitioner. *Robert J. Danhof* for respondents. Reported below: 283 F. 2d 61.

No. 361, Misc. Justus *v.* New Mexico. Supreme Court of New Mexico. Certiorari denied. Petitioner *pro se*. *Earl E. Hartley,* Attorney General of New Mexico, and *Thomas O. Olson* and *Norman S. Thayer,* Assistant Attorneys General, for respondent. Reported below: See 65 N. M. 195, 334 P. 2d 1104.

No. 428, Misc. Givens *v.* Adams, Warden. Supreme Court of Appeals of West Virginia. Certiorari denied. Petitioner *pro se*. *C. Donald Robertson,* Attorney General of West Virginia, and *George H. Mitchell* and *Fred H. Caplan,* Assistant Attorneys General, for respondent.

No. 510, Misc. CRESWELL ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. Petitioners *pro se*. *Solicitor General Rankin, Assistant Attorney General Rice* and *Meyer Rothwacks* for respondent. Reported below: 278 F. 2d 722.

No. 515, Misc. RINALDI *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 522, Misc. McNAIR *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 523, Misc. IN RE BARNUM. C. A. 9th Cir. Certiorari denied.

No. 536, Misc. McCABE *v.* ELLIS, CORRECTIONS DEPARTMENT GENERAL MANAGER, ET AL. Court of Criminal Appeals of Texas. Certiorari denied. Petitioner *pro se*. *Will Wilson,* Attorney General of Texas, and *Riley Eugene Fletcher* and *Houghton Brownlee, Jr.,* Assistant Attorneys General, for respondents.

No. 626, Misc. WILLIAMS *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Acting Assistant Attorney General Foley* and *Beatrice Rosenberg* for the United States.

No. 669, Misc. STAPLES *v.* WILKINS, WARDEN. Appellate Division, Supreme Court of New York, Fourth Judicial Department. Certiorari denied.

No. 672, Misc. BOLDEN ET AL. *v.* PEGELOW ET AL. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Acting Assistant Attorney General Doar* and *Harold H. Greene* for respondents.

No. 632, Misc. DUKES, ALIAS WELCH, *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. *Charles A. Bellows* for petitioner. Reported below: 19 Ill. 2d 532, 169 N. E. 2d 84.

No. 670, Misc. CASE *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied. Petitioner *pro se*. *T. W. Bruton,* Attorney General of North Carolina, and *H. Horton Rountree,* Assistant Attorney General, for respondent. Reported below: 253 N. C. 130, 116 S. E. 2d 429.

No. 679, Misc. MATSON *v.* NEW YORK. Appellate Division, Supreme Court of New York, Fourth Judicial Department. Certiorari denied.

No. 745, Misc. BERNARD *v.* TINSLEY, WARDEN, ET AL. Supreme Court of Colorado. Certiorari denied. Petitioner *pro se*. *Duke W. Dunbar,* Attorney General of Colorado, *Frank E. Hickey,* Deputy Attorney General, and *J. F. Brauer,* Assistant Attorney General, for respondents. Reported below: 144 Colo. 244, 355 P. 2d 1098.

No. 756, Misc. WILLIAMS *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States. Reported below: 109 U. S. App. D. C. 22, 283 F. 2d 508.

No. 654, Misc. EARLY *v.* TINSLEY, WARDEN. C. A. 10th Cir. Certiorari denied. THE CHIEF JUSTICE is of the opinion that certiorari should be granted. Petitioner *pro se*. *Duke W. Dunbar,* Attorney General of Colorado, *Frank E. Hickey,* Deputy Attorney General, and *J. F. Brauer,* Assistant Attorney General, for respondent. Reported below: 286 F. 2d 1.

No. 680, Misc. AHLET *v.* WILKINS, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 685, Misc. WHITUS *v.* GEORGIA. Supreme Court of Georgia. Certiorari denied. *J. Neely Peacock* for petitioner. *Eugene Cook,* Attorney General of Georgia, *Maston O'Neal,* Solicitor General, and *G. Hughel Harrison* and *Paul Rodgers,* Assistant Attorneys General, for respondent. Reported below: 216 Ga. 284, 116 S. E. 2d 205.

Rehearing Denied.

No. 551. GINSBURG *v.* GINSBURG ET AL., 364 U. S. 934; and

No. 605, Misc. BROWN *v.* UNITED STATES, 364 U. S. 943. Petitions for rehearing denied.

MARCH 6, 1961.

Miscellaneous Orders.

No. 198. MONTANA *v.* ROGERS, ATTORNEY GENERAL. Certiorari, 364 U. S. 861, to the United States Court of Appeals for the Seventh Circuit. The motion to substitute Robert F. Kennedy in place of William P. Rogers as the party respondent is granted. *Solicitor General Cox* on the motion. Reported below: 278 F. 2d 68.

No. 274. MITCHELL, SECRETARY OF LABOR, *v.* WHITAKER HOUSE COOPERATIVE, INC., ET AL. Certiorari, 364 U. S. 861, to the United States Court of Appeals for the First Circuit. The motion to substitute Arthur J. Goldberg in place of James P. Mitchell as the party petitioner is granted. *Solicitor General Cox* on the motion. Reported below: 275 F. 2d 362.

No. 478. HORTON *v.* LIBERTY MUTUAL INSURANCE CO. Certiorari, 364 U. S. 814, to the United States Court of Appeals for the Fifth Circuit. Motion of petitioner to advance denied. *Joe H. Tonahill* for petitioner. Reported below: 275 F. 2d 148.

No. 669. LURK *v.* UNITED STATES. Certiorari, *ante*, p. 802, to the United States Court of Appeals for the District of Columbia Circuit. Motion of petitioner to advance granted. *Eugene Gressman* for petitioner. Reported below: —— U. S. App. D. C. ——, —— F. 2d ——.

No. 761, Misc. HARDING *v.* WARDEN, MARYLAND PENITENTIARY. Motion for leave to file petition for writ of habeas corpus denied.

No. 525, Misc. IN RE POPE. Motion for leave to file petition for writ of certiorari denied. Petitioner *pro se*. *Stanley Mosk*, Attorney General of California, and *Doris H. Maier* and *Raymond M. Momboisse*, Deputy Attorneys General, for respondent.

Certiorari Granted. (*See also No. 121, ante, p. 514.*)

No. 276, Misc. CHEWNING *v.* SMYTH, PENITENTIARY SUPERINTENDENT. Motion to substitute W. K. Cunningham, Jr. in place of W. Frank Smyth, Jr. as the party respondent granted. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the Supreme Court of Appeals of Virginia granted. Case transferred to the appellate docket. Petitioner *pro se*. *Reno S. Harp III*, Assistant Attorney General of Virginia, for respondent.

No. 654. National Labor Relations Board *v.* Ochoa Fertilizer Corp. et al. C. A. 1st Cir. Certiorari granted. *Solicitor General Rankin, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for petitioner. Reported below: 283 F. 2d 26.

No. 8, Misc. Seymour *v.* Schneckloth, Penitentiary Superintendent. 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. Petitioner *pro se*. *John J. O'Connell,* Attorney General of Washington, and *Rembert Ryals,* Assistant Attorney General, for respondent. Reported below: 55 Wash. 2d 109, 346 P. 2d 669.

Certiorari Denied. (*See also No. 373, Misc., ante, p. 516.*)

No. 571. Collier *v.* United States. C. A. 4th Cir. Certiorari denied. *O. John Rogge* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Foley, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 283 F. 2d 780.

No. 658. Union Leader Corp. *v.* Newspapers of New England, Inc., et al. C. A. 1st Cir. Certiorari denied. *James M. Malloy* and *Ralph Warren Sullivan* for petitioner. *Frank Goldman* for respondents. Reported below: 284 F. 2d 582.

No. 664. Cohen et al. *v.* Highway Truck Drivers & Helpers, Local 107, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America. C. A. 3d Cir. Certiorari denied. *Samuel Dash* for petitioners. *Edward B. Bergman* for respondent. Reported below: 284 F. 2d 162.

No. 16. D'Aria et al. *v.* United States;

No. 648. Lo Piccolo *v.* United States;

No. 5, Misc. Santore *v.* United States;

No. 6, Misc. Orlando *v.* United States; and

No. 635, Misc. Santore *v.* United States. C. A. 2d Cir. Certiorari denied. *Menahem Stim* and *Allen S. Stim* for petitioners in No. 16. *Maurice Edelbaum* for petitioner in No. 648. Petitioners *pro se* in Nos. 5, Misc., and 6, Misc. *Edward Q. Carr, Jr.* for petitioner in No. 635, Misc. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States in Nos. 16, 5, Misc., and 6, Misc. *Solicitor General Cox, Acting Assistant Attorney General Foley, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States in Nos. 648 and 635, Misc. Reported below: 290 F. 2d 51.

No. 659. Rose *v.* United States. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *James J. Laughlin* and *Albert J. Ahern, Jr.* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Foley, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 109 U. S. App. D. C. 12, 283 F. 2d 376.

No. 671. Steele et al. *v.* City of Tallahassee. Circuit Court for Leon County, Florida. Certiorari denied. *Alfred I. Hopkins* for petitioners. *James Messer, Jr.* for respondent.

No. 682. Western Auto Supply Co. *v.* McElhenney Co., Inc., et al. C. A. 4th Cir. Certiorari denied. *James C. Wilson* and *Alfred W. Burgess* for petitioner. *Chester D. Ward, Jr.* for respondents. Reported below: 287 F. 2d 524.

No. 662. GROSSO *v.* PENNSYLVANIA; and

No. 663. BRUNO *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied. *Samuel Dash* for petitioners. Reported below: 401 Pa. 549, 165 A. 2d 73.

No. 670. BACON *v.* JEFFERSON CONSTRUCTION CO. ET AL. C. A. 1st Cir. Certiorari denied. *William H. K. Donaldson* for petitioner. *Alexander M. Heron* and *John T. Bowes* for respondents. Reported below: 283 F. 2d 265.

No. 719. MEREDITH *v.* VAN OOSTERHOUT, U. S. CIRCUIT JUDGE. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Orrick, Morton Hollander* and *Anthony L. Mondello* for respondent. Reported below: 286 F. 2d 216.

No. 15. CASELLA *v.* UNITED STATES; and

No. 17. LO PICCOLO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Stanford Shmukler* for petitioner in No. 15. *Maurice Edelbaum* for petitioner in No. 17. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 290 F. 2d 51.

No. 691, Misc. ASHE *v.* TENNESSEE. Supreme Court of Tennessee. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *John Jay Hooker, Jr.* for petitioner. *George F. McCanless,* Attorney General of Tennessee, and *Thomas E. Fox,* Assistant Attorney General, for respondent. Reported below: —— Tenn. ——, —— S. W. 2d ——.

No. 746, Misc. EX PARTE GOSIER. Supreme Court of Ohio. Certiorari denied.

No. 673. CHAVIS *v.* E. I. DU PONT DE NEMOURS & Co. C. A. 4th Cir. Certiorari denied. MR. JUSTICE HARLAN took no part in the consideration or decision of this application. *Henry H. Edens* and *Henry Hammer* for petitioner. *J. Means McFadden* and *David W. Robinson* for respondent. Reported below: 283 F. 2d 929.

No. 335, Misc. ROBLES *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: 279 F. 2d 401.

No. 401, Misc. KINARD *v.* NEW YORK. Appellate Division, Supreme Court of New York, Second Judicial Department. Certiorari denied. Petitioner *pro se*. *William I. Siegel* for respondent.

No. 409, Misc. JORDAN *v.* COCHRAN, CORRECTIONS DIRECTOR. 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. Reported below: 122 So. 2d 410.

No. 436, Misc. VALENTIN *v.* NEW YORK. Appellate Division, Supreme Court of New York, First Judicial Department. Certiorari denied. *Edward Q. Carr, Jr.* for petitioner.

No. 445, Misc. WILLIAMS *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. Reported below: 108 U. S. App. D. C. 384, 282 F. 2d 867.

No. 470, Misc. WARD *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Bernard Koteen* and *Robert S. Green* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 108 U. S. App. D. C. 282, 281 F. 2d 917.

No. 576, Misc. FISHER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Acting Assistant Attorney General Foley* and *Beatrice Rosenberg* for the United States.

No. 709, Misc. PLAYER *v.* WARDEN, MARYLAND HOUSE OF CORRECTION. Criminal Court of Baltimore, Maryland. Certiorari denied.

No. 711, Misc. STALCUP *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Acting Assistant Attorney General Foley, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 284 F. 2d 517.

No. 738, Misc. BURGESS *v.* WARDEN, MARYLAND HOUSE OF CORRECTION. C. A. 4th Cir. Certiorari denied. Reported below: 284 F. 2d 486.

No. 231, Misc. STURDEVANT *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General Tyler* and *Harold H. Greene* for the United States.

No. 538, Misc. PETROLIA *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 747, Misc. PULLITE *v.* RANDOLPH, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 347, Misc. HOLT *v.* UNITED STATES. C. A. 8th Cir. Motion to remand and petition for writ of certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Patricia R. Harris* for the United States. Reported below: 280 F. 2d 273.

No. 397, Misc. GRIFFIN *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied. THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS, and MR. JUSTICE BRENNAN are of the opinion that certiorari should be granted.

No. 505, Misc. HANNA *v.* HOME INSURANCE CO. C. A. 5th Cir. Motion for leave to file supplement to petition for writ of certiorari granted. Certiorari denied. *Curtis E. Hill* for petitioner. Reported below: 281 F. 2d 298.

Rehearing Denied.

No. 565. AMERICAN DREDGING CO. *v.* GULF OIL CORP. ET AL., 364 U. S. 942; and

No. 548, Misc. HILDEBRANDT *v.* UNITED STATES, *ante*, p. 803. Petitions for rehearing denied.

MARCH 20, 1961.

Miscellaneous Orders.

No. 103. BAKER ET AL. *v.* CARR ET AL. Appeal from the United States District Court for the Middle District of Tennessee. (Probable jurisdiction noted, 364 U. S. 898.) Motion of Marvin Fortner et al. for leave to file brief, as *amici curiae*, granted. *Upton Sisson, Clare S. Hornsby, Walter L. Nixon, Jr.* and *John Sekul* for movants.

No. 392. UNITED STATES *v.* SHIMER. Certiorari, 364 U. S. 889, to the United States Court of Appeals for the Third Circuit. Motion of National Association of Mutual Savings Banks et al. for leave to file brief, as *amici curiae*, granted. *William F. McKenna* and *Samuel E. Neel* for movants.

No. 810, Misc. SILVA *v.* UNITED STATES;
No. 817, Misc. ECKMAN *v.* ALASKA; and
No. 818, Misc. CHAPMAN *v.* ALASKA. Motions for leave to file petitions for writs of certiorari denied.

No. 427, Misc. IN RE HICKS;
No. 710, Misc. DEITLE *v.* UNITED STATES;
No. 736, Misc. HARTFORD *v.* WICK, STATE HOSPITAL DIRECTOR, ET AL.;
No. 834, Misc. PARKER *v.* SACKS, WARDEN; and
No. 843, Misc. RICHESON *v.* RANDOLPH, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

Probable Jurisdiction Noted.

No. 608. UNITED STATES ET AL. *v.* DRUM ET AL.; and
No. 609. REGULAR COMMON CARRIER CONFERENCE OF AMERICAN TRUCKING ASSOCIATIONS, INC., *v.* DRUM ET AL. Appeals from the United States District Court for the Western District of Oklahoma. Probable jurisdiction noted. *Solicitor General Rankin, Solicitor General Cox, Assistant Attorney General Bicks, Richard A. Solomon, Robert W. Ginnane* and *B. Franklin Taylor, Jr.* for the United States and the Interstate Commerce Commission in No. 608. *Roland Rice* for appellant in No. 609. *Walter D. Hanson* and *Wm. L. Peterson, Jr.* for Drum et al., appellees. *Charles R. Iden* for Weather-Seal, Inc., appellee in No. 608. Reported below: 193 F. Supp. 275.

Certiorari Granted.

No. 690. POLLER *v.* COLUMBIA BROADCASTING SYSTEM, INC., ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Abraham L. Freedman* for petitioner. *Samuel I. Rosenman, Ambrose Doskow* and *Leon R. Brooks* for respondents. Reported below: 109 U. S. App. D. C. 170, 284 F. 2d 599.

No. 77. ARISTEGUIETA *v.* FIRST NATIONAL CITY BANK OF NEW YORK ET AL. C. A. 5th Cir.; and

No. 688. ARISTEGUIETA *v.* FIRST NATIONAL CITY BANK OF NEW YORK ET AL. C. A. 2d Cir. Certiorari granted. *Dean Acheson, Howard C. Westwood, David C. Acheson, William G. Ward, Sidney S. Sachs, William H. Allen* and *John Logan O'Donnel* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Jerome M. Feit* filed a memorandum for the United States, as *amicus curiae,* in support of the petition in No. 77. *John A. Wilson, Alexis C. Coudert* and *Melber Chambers* for First National City Bank of New York, French American Banking Corp. and Royal Bank of Canada; *Wilson B. Copes, Wellman P. Thayer* and *William L. Kimler* for Napoleon Dupouy; *D. W. Dyer, Otto C. Sommerich, Benjamin Busch* and *Albert M. Herrmann* for Silvio Gutierrez, respondents. Reported below: 274 F. 2d 206; 287 F. 2d 219.

No. 617. GARNER ET AL. *v.* LOUISIANA;

No. 618. BRISCOE ET AL. *v.* LOUISIANA; and

No. 619. HOSTON ET AL. *v.* LOUISIANA. Supreme Court of Louisiana. Certiorari granted. *A. P. Tureaud, Thurgood Marshall, Jack Greenberg, Louis H. Pollak* and *James M. Nabrit III* for petitioners. *Jack P. F. Gremillion,* Attorney General of Louisiana, *N. Cleburn Dalton,* Assistant Attorney General, and *John F. Ward, Jr.* for respondent. Reported below: —— La. ——, —— So. 2d ——.

No. 614. FEDERAL LAND BANK OF WICHITA *v.* BOARD OF COUNTY COMMISSIONERS OF KIOWA COUNTY, KANSAS, ET AL. Supreme Court of Kansas. Certiorari granted. *Wm. G. Plested, Jr.* and *Edw. H. Jamison* for petitioner. *William M. Ferguson,* Attorney General of Kansas, and *A. K. Stavely* and *Robert C. Londerholm,* Assistant Attorneys General, for respondents. *Solicitor General Rankin, Assistant Attorney General Rice* and *I. Henry Kutz* for the United States, as *amicus curiae.* Reported below: 187 Kan. 148, 354 P. 2d 679.

No. 649. PUBLIC AFFAIRS ASSOCIATES, INC., TRADING AS PUBLIC AFFAIRS PRESS, *v.* RICKOVER; and

No. 739. RICKOVER *v.* PUBLIC AFFAIRS ASSOCIATES, INC., TRADING AS PUBLIC AFFAIRS PRESS. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Stanley B. Frosh* and *Harry N. Rosenfield* for petitioner in No. 649 and respondent in No. 739. *Joseph A. McDonald, Edwin S. Nail* and *Harry Buchman* for respondent in No. 649 and petitioner in No. 739. Reported below: 109 U. S. App. D. C. 128, 284 F. 2d 262; — U. S. App. D. C. —, — F. 2d —.

No. 178, Misc. HILL *v.* UNITED STATES. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit granted limited to the question of whether petitioner may raise his claim under Federal Criminal Rule 32 (a) in the proceeding which he has now brought. Case transferred to the appellate docket. It is ordered that *Curtis R. Reitz, Esquire,* of Philadelphia, Pennsylvania, be, and he is hereby, appointed to serve as counsel for the petitioner in this case. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 282 F. 2d 352.

No. 689. NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE *v.* HARRISON, ATTORNEY GENERAL OF VIRGINIA, ET AL. Supreme Court of Appeals of Virginia. Certiorari granted. *Robert L. Carter, Oliver W. Hall* and *Herbert O. Reid* for petitioner. *David J. Mays* and *Henry T. Wickham* for respondents. Reported below: 202 Va. 142, 116 S. E. 2d 55.

No. 250, Misc. MACHIBRODA *v.* UNITED STATES. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit granted. Case transferred to the appellate docket. It is ordered that *Curtis R. Reitz, Esquire,* of Philadelphia, Pennsylvania, be, and he is hereby, appointed to serve as counsel for the petitioner in this case. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 280 F. 2d 379.

Certiorari Denied. (*See also No. 719, Misc., ante, p. 568.*)

No. 558. JONES *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Ellsworth T. Simpson* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Meyer Rothwacks* and *Lawrence K. Bailey* for the United States. Reported below: 282 F. 2d 745.

No. 660. BROWN *v.* LEFKOWITZ, ATTORNEY GENERAL OF NEW YORK. Court of Appeals of New York. Certiorari denied. *Theodore Garris* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, *pro se,* along with *Paxton Blair,* Solicitor General, and *Daniel M. Cohen,* Assistant Attorney General. Reported below: See 283 App. Div. 463, 128 N. Y. S. 2d 738.

No. 653. General Shoe Corp. *v.* United States. C. A. 6th Cir. Certiorari denied. *William Waller* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *I. Henry Kutz* for the United States. Reported below: 282 F. 2d 9.

No. 676. Kameny *v.* Brucker, Secretary of the Army, et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Orrick, John G. Laughlin, Jr.* and *Herbert E. Morris* for respondents. Reported below: 108 U. S. App. D. C. 340, 282 F. 2d 823.

No. 677. Smith et al. *v.* Myers et al. Supreme Court of Ohio. Certiorari denied. *Warren W. Gibson* for petitioners. Reported below: 171 Ohio St. 292, 170 N. E. 2d 71.

No. 684. Theodore Kagen Corp. et al. *v.* Federal Trade Commission. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *B. Paul Noble* for petitioners. *Solicitor General Cox, Acting Assistant Attorney General Kirkpatrick, Richard A. Solomon, PGad B. Morehouse* and *Alan B. Hobbes* for respondent. Reported below: 109 U. S. App. D. C. 7, 283 F. 2d 371.

No. 672. Murphy *v.* Colorado. Supreme Court of Colorado. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. *Mathias F. Correa* and *Eugene F. Sikorovsky* for petitioner. *Duke W. Dunbar,* Attorney General of Colorado, *Frank E. Hickey,* Deputy Attorney General, and *Richard A. Zarlengo,* Assistant Attorney General, for respondent.

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No. 678. STATE-ADAMS CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *H. Gilmer Wells* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Harry Baum* and *Kenneth E. Levin* for respondent. Reported below: 283 F. 2d 395.

No. 685. CONNER *v.* SIMLER. C. A. 10th Cir. Certiorari denied. *Leslie L. Conner, pro se,* along with *Peyton Ford.* Reported below: 282 F. 2d 382.

No. 686. WASHBURN *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. *W. S. Miller, Jr.* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Myron C. Baum* and *Kenneth E. Levin* for respondent. Reported below: 283 F. 2d 839.

No. 692. PEERLESS PRODUCTS, INC., ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. 7th Cir. Certiorari denied. *Simon Herr* for petitioners. *Solicitor General Cox, Acting Assistant Attorney General Kirkpatrick, Richard A. Solomon, PGad B. Morehouse* and *Alan B. Hobbes* for respondent. Reported below: 284 F. 2d 825.

No. 693. ROBERSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *William Earl Badgett* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Foley, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 282 F. 2d 772.

No. 694. BORDA *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *William H. Collins* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Foley, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 285 F. 2d 405.

No. 698. SOUTHWEST PRODUCTS CO. *v.* AETNA STEEL PRODUCTS CORP. C. A. 9th Cir. Certiorari denied. *Leonard S. Lyon* for petitioner. *C. A. Miketta* for respondent. Reported below: 282 F. 2d 323.

No. 699. LANDY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Arthur B. Cunningham* and *Philip T. Weinstein* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Meyer Rothwacks* for the United States. Reported below: 283 F. 2d 303.

No. 700. LOCAL 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 3d Cir. Certiorari denied. *Harold Stern* for petitioners. *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for National Labor Relations Board, respondent. Reported below: 283 F. 2d 54.

No. 768. ADAMS *v.* WEST. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Claude L. Dawson* and *F. Joseph Donohue* for petitioner.

No. 679. HIGHTOWER *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Howard T. Savage* and *William C. Starke* for petitioner. Reported below: 20 Ill. 2d 361, 169 N. E. 2d 787.

No. 325, Misc. HORNBECK *v.* WILKINS, WARDEN. Appellate Division, Supreme Court of New York, Fourth Judicial Department. Certiorari denied. Petitioner *pro se*. *Louis J. Lefkowitz,* Attorney General of New York, and *Paxton Blair,* Solicitor General, for respondent.

No. 703. SMITH ET AL. *v.* FORDHAM UNIVERSITY. Court of Appeals of New York. Certiorari denied.

No. 398, Misc. KIGER *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: 281 F. 2d 551.

No. 415, Misc. KRAVITZ *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied. *Michael F. X. Dolan* for petitioner. Reported below: 400 Pa. 198, 161 A. 2d 861.

No. 416, Misc. COLUCCI *v.* NEW YORK CENTRAL RAILROAD CO. C. A. 6th Cir. Certiorari denied. *Jack G. Day* for petitioner. *John F. Dolan* and *Joseph T. Ryan* for respondent. Reported below: 279 F. 2d 891.

No. 425, Misc. CASEY *v.* TAYLOR, WARDEN. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Tyler, Harold H. Greene* and *Isabel L. Blair* for respondent. Reported below: 281 F. 2d 549.

No. 435, Misc. SANDERS *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. 443, Misc. HARRISON *v.* ADAMS, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied. Petitioner *pro se*. *Philip J. Graziani* and *Fred H. Caplan,* Assistant Attorneys General of West Virginia, for respondent.

No. 448, Misc. SMITH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Robert James Smith pro se. Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 283 F. 2d 16.

No. 449, Misc. WILLIAMS *v.* JONES, WARDEN. Court of Appeals of Kentucky. Certiorari denied. Petitioner *pro se. John B. Breckinridge,* Attorney General of Kentucky, and *Ray Corns,* Assistant Attorney General, for respondent.

No. 460, Misc. HAMLIN *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 499, Misc. KELLEY *v.* RIVERS ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General Tyler* and *Harold H. Greene* for respondents.

No. 511, Misc. SICKLER *v.* MYERS, CORRECTIONAL SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied.

No. 513, Misc. MARKS *v.* NEW YORK. C. A. 2d Cir. Certiorari denied. Petitioner *pro se. Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *George K. Bernstein* and *Frederick E. Weeks, Jr.,* Assistant Attorneys General, for respondent.

No. 520, Misc. GREEN *v.* PEGELOW, REFORMATORY SUPERINTENDENT, ET AL. C. A. 4th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Rankin, Assistant Attorney General Tyler, Harold H. Greene* and *Isabel L. Blair* for respondents.

No. 509, Misc. PROPHET *v.* INDIANA. Supreme Court of Indiana. Certiorari denied. Reported below: —— Ind. ——, 168 N. E. 2d 189.

No. 532, Misc. PRICE *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 282 F. 2d 769.

No. 537, Misc. BURGETT *v.* WILKINS, WARDEN, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 283 F. 2d 306.

No. 596, Misc. MORICONI *v.* BANNAN, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: —— F. 2d ——.

No. 694, Misc. TRINKLE *v.* AMERICAN EMPLOYERS' INSURANCE CO. C. A. 6th Cir. Certiorari denied. Reported below: 286 F. 2d 427.

No. 701, Misc. GAULKE *v.* MINNESOTA. Supreme Court of Minnesota. Certiorari denied. Reported below: 259 Minn. 183, 106 N. W. 2d 560.

No. 714, Misc. BOYE *v.* NEW YORK. Appellate Division, Supreme Court of New York, Fourth Judicial Department. Certiorari denied. Reported below: 11 App. Div. 2d 1084, 208 N. Y. S. 2d 442.

No. 552, Misc. WINN *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *David Carliner* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States.

No. 553, Misc. PRAVATO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 282 F. 2d 587.

No. 562, Misc. MORRIS *v.* JOHNSON, COUNTY JUDGE. Supreme Court of Texas. Certiorari denied. Petitioner *pro se*. *Robert J. Hearon, Jr.* and *Ireland Graves* for respondent. Reported below: See 336 S. W. 2d 817.

No. 575, Misc. HUIZAR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Acting Assistant Attorney General Foley, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 597, Misc. HUNTER *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 608, Misc. McCANTS *v.* WILKINS, WARDEN, ET AL. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *George K. Bernstein* and *Frederick E. Weeks, Jr.,* Assistant Attorneys General, for respondents.

No. 620, Misc. RINEHART *v.* FLORIDA. District Court of Appeal of Florida, Second Appellate District. Certiorari denied. *Hal S. Ives* for petitioner. Reported below: 121 So. 2d 654.

No. 628, Misc. IN RE WARNER. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Acting Assistant Attorney General Doar* and *Harold H. Greene* for the United States in opposition.

No. 613, Misc. FRAZIER *v.* BENNETT, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 633, Misc. MURDAUGH *v.* LAVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 646, Misc. O'NEAL *v.* WILSON. Supreme Court of Florida. Certiorari denied. *Thomas A. Ziebarth, Alex Akerman, Jr.* and *J. B. Hodges* for petitioner.

No. 647, Misc. BARNES *v.* ADAMS, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 651, Misc. HANSON *v.* CHICAGO, BURLINGTON & QUINCY RAILROAD CO. ET AL. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Andrew C. Scott* for Chicago, Burlington & Quincy R. Co., and *Ralph M. Hoyt* for Grand Lodge of the Brotherhood of Locomotive Firemen and Enginemen, respondents. Reported below: 282 F. 2d 758.

No. 652, Misc. SADOWY *v.* FAY, WARDEN. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Louis J. Lefkowitz*, Attorney General of New York, *Paxton Blair*, Solicitor General, and *George K. Bernstein*, Assistant Attorney General, for respondent. Reported below: 284 F. 2d 426.

No. 657, Misc. GODWIN *v.* TAYLOR, WARDEN. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Acting Assistant Attorney General Doar, Harold H. Greene* and *David Rubin* for respondent. Reported below: 284 F. 2d 116.

No. 659, Misc. BIGGS ET AL. *v.* CUMMINS ET AL. Supreme Court of Illinois. Certiorari denied.

No. 678, Misc. LIPSCOMB *v.* UNITED STATES ATTORNEY FOR THE EASTERN DISTRICT OF MISSOURI. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Acting Assistant Attorney General Foley* and *Beatrice Rosenberg* for respondent.

No. 681, Misc. FOWLER *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 686, Misc. ZENGER *v.* EAGER, NEW YORK STATE JUDGE, ET AL. C. A. 2d Cir. Certiorari denied.

No. 689, Misc. GOYNES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Acting Assistant Attorney General Foley, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States.

No. 696, Misc. SMITH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Acting Assistant Attorney General Foley, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 283 F. 2d 760.

No. 697, Misc. ADAMS *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *John H. Pickering* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Foley, Beatrice Rosenberg* and *Julia P. Cooper* for the United States.

No. 703, Misc. JONES *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Acting Assistant Attorney General Foley* and *Beatrice Rosenberg* for the United States.

No. 695, Misc. CABALLERO *v.* WILKINS, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 705, Misc. GIRONDA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Acting Assistant Attorney General Foley* and *Beatrice Rosenberg* for the United States. Reported below: 283 F. 2d 911.

No. 713, Misc. COSTELLO *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Robert P. Whelan* for petitioner. *Edward S. Silver, William I. Siegel* and *David Diamond* for respondent. Reported below: 8 N. Y. 2d 954, 168 N. E. 2d 850.

No. 720, Misc. SANCHEZ *v.* WILKINSON, WARDEN. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Acting Assistant Attorney General Doar, Harold H. Greene* and *Isabel L. Blair* for respondent. Reported below: 283 F. 2d 515.

No. 721, Misc. ARCHIE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Acting Assistant Attorney General Foley* and *Beatrice Rosenberg* for the United States.

No. 724, Misc. LITTERIO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Acting Assistant Attorney General Foley* and *Beatrice Rosenberg* for the United States.

No. 727, Misc. JORDAN *v.* WARDEN, MARYLAND PENITENTIARY. C. A. 4th Cir. Certiorari denied. Reported below: 283 F. 2d 515.

No. 708, Misc. NEGRI *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 723, Misc. MARTIN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Acting Assistant Attorney General Foley, Beatrice Rosenberg* and *Julia P. Cooper* for the United States.

No. 729, Misc. GARDNER *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 223 Md. 405, 164 A. 2d 896.

No. 731, Misc. MIDGETT *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 223 Md. 282, 164 A. 2d 526.

No. 733, Misc. WASHINGTON *v.* DISTRICT OF COLUMBIA GOVERNMENT ET AL. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Acting Assistant Attorney General Doar* and *Harold H. Greene* for respondents.

No. 737, Misc. DE LUCIA *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 743, Misc. IN RE LIPSCOMB. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Acting Assistant Attorney General Foley* and *Beatrice Rosenberg* for the United States.

No. 749, Misc. GERMAN *v.* ADAMS, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 754, Misc. PATRICK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied.

No. 755, Misc. RAYNE *v.* WARDEN, MARYLAND PENITENTIARY. Court of Appeals of Maryland. Certiorari denied. Reported below: 223 Md. 688, 165 A. 2d 474.

No. 759, Misc. VAUGHN *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 763, Misc. LaCLAIR *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Acting Assistant Attorney General Foley, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 285 F. 2d 696.

No. 767, Misc. KING *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Acting Assistant Attorney General Foley* and *Beatrice Rosenberg* for the United States.

No. 768, Misc. RICHARDSON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Acting Assistant Attorney General Foley* and *Beatrice Rosenberg* for the United States. Reported below: 285 F. 2d 751.

No. 770, Misc. MOORE *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 20, Misc. GRAZIANO *v.* NEW YORK. C. A. 2d Cir. Certiorari denied. THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN are of the opinion that certiorari should be granted. *Nathan Kestnbaum* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *George K. Bernstein* and *Jean R. McCoy,* Assistant Attorneys General, for respondent. Reported below: 275 F. 2d 284.

No. 769, Misc. SINKO *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 21 Ill. 2d 23, 171 N. E. 2d 9.

No. 774, Misc. EX PARTE HOWARD. Court of Criminal Appeals of Texas. Certiorari denied.

No. 700, Misc. DAVIS *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Petitioner *pro se*. *T. W. Bruton,* Attorney General of North Carolina, and *Harry W. McGalliard,* Assistant Attorney General, for respondent. Reported below: 253 N. C. 86, 116 S. E. 2d 365.

Rehearing Denied.

No. 26. UNITED STATES *v.* MISSISSIPPI VALLEY GENERATING CO., 364 U. S. 520;

No. 575. KENTUCKY RURAL ELECTRIC COOPERATIVE CORP. *v.* MOLONEY ELECTRIC CO., *ante,* p. 812;

No. 595. PRESSER *v.* UNITED STATES, *ante,* p. 816;

No. 457, Misc. RAGAN *v.* MADIGAN, WARDEN, *ante,* p. 819;

No. 487, Misc. LIPSCOMB *v.* MADIGAN, WARDEN, *ante,* p. 820;

No. 578, Misc. LEVINE *v.* COLGATE-PALMOLIVE CO., *ante,* p. 821; and

No. 640, Misc. EX PARTE MCMULLEN, *ante,* p. 808. Petitions for rehearing denied.

No. 551. GINSBURG *v.* GINSBURG ET AL., *ante,* p. 826. Petition for rehearing from order denying motion to remand denied.

No. 34. TIMES FILM CORP. *v.* CITY OF CHICAGO ET AL., *ante*, p. 43. Motion of Motion Picture Association of America, Inc., for leave to file brief, as *amicus curiae*, in support of petition for rehearing granted. Motion of American Book Publishers Council, Inc., for leave to file brief, as *amicus curiae*, in support of petition for rehearing granted. Motion of Authors League of America, Inc., for leave to file brief, as *amicus curiae*, in support of petition for rehearing granted. Motion of American Society of Magazine Photographers et al. for leave to file brief, as *amici curiae*, in support of petition for rehearing granted. Motion of HMH Publishing Company, Inc., Publishers of Playboy Magazine, for leave to file brief, as *amicus curiae*, in support of petition for rehearing granted. Motion of National Association of Broadcasters for leave to file brief, as *amicus curiae*, in support of petition for rehearing granted. Petition for rehearing denied.

MARCH 27, 1961.

Miscellaneous Orders.

No. 495. COMMUNIST PARTY, U. S. A., ET AL. *v.* CATHERWOOD, INDUSTRIAL COMMISSIONER. Certiorari, 364 U. S. 918, to the Court of Appeals of New York. Pursuant to 28 U. S. C. § 2403, the Court hereby certifies to the Attorney General that there is drawn in question in this case the constitutionality of Section 3 of the Communist Control Act (50 U. S. C. § 842).

No. 789, Misc. FLORES *v.* ELLIS, CORRECTIONS DIRECTOR;

No. 855, Misc. SCHACHEL *v.* UNITED STATES; and

No. 857, Misc. COWAN *v.* PEGELOW ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

No. 739, Misc. BEAMAN *v.* UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF ARKANSAS, ET AL. Motion for leave to file petition for writ of mandamus denied.

Probable Jurisdiction Noted.

No. 635. MARTIN *v.* DAVIS, PROBATE JUDGE OF JOHNSON COUNTY, KANSAS. Appeal from the Supreme Court of Kansas. Probable jurisdiction noted. *F. L. Hagaman* for appellant. Reported below: 187 Kan. 473, 357 P. 2d 782.

Certiorari Granted. (*See also No. 705, ante, p. 609.*)

No. 246. SHELTON *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Joseph L. Rauh, Jr.* and *John Silard* for petitioner. *Solicitor General Rankin, Assistant Attorney General Yeagley* and *Kevin T. Maroney* for the United States. Reported below: 108 U. S. App. D. C. 153, 280 F. 2d 701.

No. 704. ST. REGIS PAPER CO. *v.* UNITED STATES. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit granted limited to Questions 2, 3, 5, and 6 presented by the petition which read as follows:

"2. Does an order and judgment of the District Court under Section 6 (c) of the Administrative Procedure Act, modifying agency investigative process, carry with it liability for forfeitures for noncompliance with the original unmodified agency process?

"3. Did the orders of the Commission, purportedly issued pursuant to Section 6 (b) of the FTC Act, constitute a requirement that petitioner furnish 'answers in writing to specific questions,' and not a requirement of a

'special report,' so that the provisions of the third unnumbered paragraph of Section 10 of the FTC Act, providing for forfeitures in the sum of $100 per day for each day of failure to file a 'report,' have no application?

"5. Are petitioner's retained file copies of confidential reports to the Bureau of Census for the Census of Manufactures subject to the investigative processes of the Commission?

"6. Does the investigative power asserted by the Commission under Section 6 (b) of the FTC Act, if not reviewable except at the risk of paying forfeitures accumulated at the rate of $100 per day throughout the period of noncompliance, including the period of judicial review, deprive petitioner of its property without due process of law?"

Since time will not permit a hearing and determination of these issues until our next Term, petitioner's motion pursuant to § 10 (d) of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. (1958 ed.) § 1009 (d), is granted to the extent of tolling, as of the filing of its petition on February 7, 1961, and pending this Court's disposition of the writ of certiorari, the further running and accumulation of forfeitures under § 10 of the Federal Trade Commission Act, 38 Stat. 723, 15 U. S. C. (1958 ed.) § 50. Petitioner's liability for forfeitures accruing prior to February 7, 1961, is to abide the event of this litigation.

Horace R. Lamb for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Kirkpatrick* and *Richard A. Solomon* for the United States. Reported below: 285 F. 2d 607.

No. 722. UNITED STATES *v.* UNION CENTRAL LIFE INSURANCE CO. Supreme Court of Michigan. Certiorari granted. *Solicitor General Cox, Assistant Attorney General Oberdorfer, I. Henry Kutz* and *Fred E. Young-*

man for the United States. *H. William Butler* for respondent. Reported below: 361 Mich. 283, 105 N. W. 2d 196.

Certiorari Denied. (*See also No. 696, ante, p. 608, and No. 718, Misc., ante, p. 609.*)

No. 702. SCHNEIDER ET AL. *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. *David I. Stepacoff* and *Morris Spritzer* for petitioners. *David M. Satz, Jr.* for respondent. Reported below: 33 N. J. 451, 165 A. 2d 299.

No. 717. WOMACK *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Edward J. Lynch* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: —— U. S. App. D. C. ——, —— F. 2d ——.

No. 728. ZAJICEK ET AL. *v.* KOOLVENT METAL AWNING CORP. OF AMERICA. C. A. 9th Cir. Certiorari denied. *Albert M. Herzig* for petitioners. *Joseph W. Aidlin* for respondent. Reported below: 283 F. 2d 127.

No. 730. STANDARD OIL CO. OF CALIFORNIA *v.* WASHINGTON. Supreme Court of Washington. Certiorari denied. *Thomas Todd* and *DeWitt Williams* for petitioner. *John J. O'Connell,* Attorney General of Washington, and *John W. Riley,* Deputy Attorney General, for respondent. Reported below: 57 Wash. 2d 56, 355 P. 2d 349.

No. 753, Misc. BROWN *v.* DIRECTOR, PATUXENT INSTITUTION. Court of Appeals of Maryland. Certiorari denied. Reported below: 224 Md. 635, 165 A. 2d 895.

No. 709. FLORES ET AL. *v.* PRANN ET AL. C. A. 1st Cir. Certiorari denied. *Max Goldman* for petitioners. *Sydney Krause* for San Juan Dredging Corp., respondent. Reported below: 282 F. 2d 153.

No. 718. JAEGER MOTOR CAR CO. ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. *Edward H. Meldman* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Melva M. Graney* for respondent. Reported below: 284 F. 2d 127.

No. 720. FANDERLIK-LOCKE CO. ET AL. *v.* MORGAN ET AL. C. A. 10th Cir. Certiorari denied. *W. Peter McAtee* for petitioners. *W. A. Sloan* for respondents. Reported below: 285 F. 2d 939.

No. 757. STONE ET AL. *v.* SALT LAKE CITY ET AL. Supreme Court of Utah. Certiorari denied. *Burton W. Musser* and *Elias Hansen* for petitioners. *Franklin Riter* and *Arthur H. Nielsen* for respondents. Reported below: 11 Utah 2d 196, 356 P. 2d 631.

No. 124, Misc. JOHNSON *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. Reported below: 107 U. S. App. D. C. 234, 275 F. 2d 898.

No. 386, Misc. KAM NG, ALIAS JIMMY ENG, *v.* PILLIOD, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 7th Cir. Certiorari denied. *Barratt O'Hara II* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for respondent. Reported below: 279 F. 2d 207.

No. 839. CARBO ET AL. *v.* UNITED STATES. Motion to dispense with printing the petition granted. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. *A. L. Wirin, William B. Beirne, William Strong, Russell E. Parsons, Max Solomon, John J. Bradley* and *Fred Okrand* for petitioners. *Solicitor General Cox* for the United States. Reported below: 288 F. 2d 282.

No. 671, Misc. GOLDSBY *v.* MISSISSIPPI. Supreme Court of Mississippi. Certiorari denied. *George N. Leighton* for petitioner. Reported below: —— Miss. ——, 124 So. 2d 297.

No. 722, Misc. ANDREWS *v.* O'NEAL, SHERIFF, ET AL. Supreme Court of Indiana. Certiorari denied. *William C. Erbecker* for petitioner. Reported below: —— Ind. ——, 169 N. E. 2d 193.

No. 741, Misc. LAVERGNE *v.* FOGLIANI, WARDEN. Supreme Court of Nevada. Certiorari denied. Petitioner *pro se*. *Roger D. Foley,* Attorney General of Nevada, and *Early Monsey* and *Norman H. Samuelson,* Deputy Attorneys General, for respondent. Reported below: 76 Nev. 431, 357 P. 2d 116.

No. 788, Misc. KETCHUM ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioners *pro se*. *Solicitor General Cox, Acting Assistant Attorney General Foley* and *Beatrice Rosenberg* for the United States.

No. 795, Misc. ROBINSON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 21 Ill. 2d 30, 171 N. E. 2d 11.

No. 591, Misc. MOORMAN *v.* WISCONSIN ET AL. Supreme Court of Wisconsin. Certiorari denied. Petitioner *pro se*. *John W. Reynolds,* Attorney General of Wisconsin, and *William A. Platz,* Asssistant Attorney General, for respondents.

No. 650, Misc. COACH *v.* HAND, WARDEN. Supreme Court of Kansas. Certiorari denied.

No. 658, Misc. LOOMIS *v.* PRIEST, TREASURER OF THE UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin* and *Dallas S. Townsend* for respondent. Reported below: 274 F. 2d 513.

No. 687, Misc. LEHMAN *v.* IOWA ET AL. Supreme Court of Iowa. Certiorari denied. Petitioner *pro se*. *Evan Hulton,* Attorney General of Iowa, for respondents.

No. 728, Misc. VANDERSEE *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 742, Misc. MCGEE *v.* RAGEN, WARDEN. Criminal Court of Cook County, Illinois. Certiorari denied.

No. 748, Misc. STEWART *v.* UNITED STATES BOARD OF PAROLE ET AL. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Acting Assistant Attorney General Doar* and *Harold H. Greene* for the United States.

No. 762, Misc. FLANAGAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Acting Assistant Attorney General Foley, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 277 F. 2d 109.

No. 771, Misc. ADAMS *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 772, Misc. COX *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Acting Assistant Attorney General Foley, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 284 F. 2d 704.

No. 776, Misc. KING *v.* O'ROURKE. C. A. 6th Cir. Certiorari denied.

No. 780, Misc. GAMBLE *v.* SMYTH, PENITENTIARY SUPERINTENDENT. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 782, Misc. PINELLI *v.* WARDEN, MARYLAND PENITENTIARY. Court of Appeals of Maryland. Certiorari denied. Reported below: 223 Md. 683, 164 A. 2d 916.

No. 784, Misc. KINDLE *v.* ELLIS, CORRECTIONS DIRECTOR. Court of Criminal Appeals of Texas. Certiorari denied.

No. 787, Misc. MORRIS *v.* ROUSOS. C. A. 10th Cir. Certiorari denied.

No. 790, Misc. EPHRAIM *v.* RAGEN, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 793, Misc. SHIN LEE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Acting Assistant Attorney General Foley, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 491, Misc. ROSANIA *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. MR. JUSTICE BRENNAN took no part in the consideration or decision of this application. Petitioner *pro se*. *Brendan T. Byrne* for respondent. Reported below: 33 N. J. 267, 163 A. 2d 139.

No. 824, Misc. STROUD *v.* UNITED STATES. Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit and for other relief denied. Petitioner *pro se*. *Solicitor General Cox, Acting Assistant Attorney General Foley* and *Beatrice Rosenberg* for the United States. Reported below: 283 F. 2d 137.

Rehearing Denied.

No. 590. FULKS *v.* UNITED STATES, *ante*, p. 812. Petition for rehearing denied.

APRIL 3, 1961.

Miscellaneous Orders.

No. 103. BAKER ET AL. *v.* CARR ET AL. Appeal from the United States District Court for the Middle District of Tennessee. (Probable jurisdiction noted, 364 U. S. 898.) The motion of John F. English et al. for leave to file brief, as *amici curiae*, is granted. The motion of the Solicitor General for leave to participate in oral argument, as *amicus curiae*, is granted. *Eugene H. Nickerson* and *David M. Levitan* for John F. English et al. *Solicitor General Cox* for the United States. Reported below: 179 F. Supp. 824.

No. 820, Misc. SPEARS *v.* ESTES, U. S. DISTRICT JUDGE, ET AL. Motion for leave to file petition for writ of mandamus and/or prohibition denied.

No. 566. ROGERS, ATTORNEY GENERAL, *v.* MENDOZA-MARTINEZ. Appeal from the United States District Court for the Southern District of California. (Probable jurisdiction noted, *ante,* p. 809.) The motion to substitute Robert F. Kennedy in place of William P. Rogers as the party appellant is granted. *Solicitor General Cox* on the motion.

No. 567. HERTER, SECRETARY OF STATE, *v.* CORT. Appeal from the United States District Court for the District of Columbia. (Question of jurisdiction postponed to hearing on the merits, *ante,* p. 808.) The motion to substitute Dean Rusk in place of Christian A. Herter as the party appellant is granted. *Solicitor General Cox* on the motion.

No. 901, Misc. BUCKHANAN *v.* OHIO ET AL. 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.

Probable Jurisdiction Noted or Question Postponed.

No. 667. A. L. MECHLING BARGE LINES, INC., ET AL. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Eastern District of Missouri. Further consideration of the question of jurisdiction postponed to the hearing of the case on the merits. *Edward B. Hayes* for appellants. *Solicitor General Cox, Acting Assistant Attorney General Kirkpatrick, Richard A. Solomon, Robert W. Ginnane* and *H. Neil Garson* for the United States and the Interstate Commerce Commission, appellees. *Robert H. Bierma, James M. Souby, Jr.* and *James E. Steffarud* for the Pennsylvania Railroad Co. et al., intervening appellees. Reported below: 188 F. Supp. 386.

No. 687. CAMPBELL, COMMISSIONER OF AGRICULTURE OF GEORGIA, ET AL. *v.* HUSSEY ET AL. Appeal from the United States District Court for the Southern District of Georgia. Probable jurisdiction noted. The Solicitor General is invited to file a brief setting forth the views of the United States. *Eugene Cook,* Attorney General of Georgia, *G. Hughel Harrison,* Assistant Attorney General, and *Gordon Knox, Frank S. Twitty* and *Chris B. Conyers,* Deputy Assistant Attorneys General, for Commissioner of Agriculture, and *Denmark Groover, Jr.* for Georgia Farm Bureau Federation, appellants. Reported below: 189 F. Supp. 54.

Certiorari Granted.

No. 701. HUTCHESON *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Charles H. Tuttle, Joseph P. Tumulty, Jr.* and *M. Joseph Matan* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States.

No. 219, Misc. TOWNSEND *v.* SAIN, SHERIFF, ET AL. 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 appellate docket. *George N. Leighton* for petitioner. *Benjamin S. Adamowski* for respondents. Reported below: 276 F. 2d 324.

No. 665. BECK *v.* WASHINGTON. Petition for writ of certiorari to the Supreme Court of Washington granted limited to questions 1, 2, and 3 presented by the petition, which read as follows:

"1. Where accusation is by a grand jury indictment, does a person (in this case a member and officer of a labor

union who at the time of the grand jury proceedings was the subject of continuous, extensive, and intensely prejudicial publicity) have a right under the due process and equal protection clauses of the Fourteenth Amendment to have the charges and evidence considered by a grand jury which was fair and impartial or, at least, which was instructed and directed to act fairly and impartially?

"(a) Where petitioner was a member and officer of a labor union, and where prejudicial and inflammatory charges against him were being widely and intensively disseminated by all news media, did he have a right under the due process and equal protection clauses of the Fourteenth Amendment to have the grand jury impaneled in a manner which would prevent or at least tend to prevent the selection of biased and prejudiced grand jurors?

"(b) Was it a denial of due process and equal protection as guaranteed by the Fourteenth Amendment for the Court, in the course of instructing the grand jury, to make statements of an inflammatory nature, prejudicial to petitioner, including a statement that testimony before a United States Senate Committee had disclosed that officers of the Teamsters Union (including petitioner) '. . . had, through trick and device, embezzled or stolen hundreds of thousands of dollars of the funds of that union—money which had come to the union from the dues of its members . . . ?'

"(c) Were petitioner's rights under the due process and equal protection clauses of the Fourteenth Amendment violated by inflammatory statements of the prosecutors made in secret session of the grand jury, including statements of disbelief of testimony favorable to petitioner, threats of perjury charges against a witness who gave testimony favorable to petitioner, and other statements of an inflammatory nature prejudicial to petitioner?

"2. Was the petitioner's right to a fair trial, as guaranteed by the due process and equal protection clauses of

the Fourteenth Amendment, violated where a timely motion for a continuance was denied, although inflammatory and prejudicial statements concerning petitioner had been widely and intensively disseminated in the press and in national magazines, and through the media of radio and television, commencing prior to the indictment of petitioner and continuing until the date of trial?

"3. Was the petitioner's right to a fair trial, as guaranteed by the due process clause of the Fourteenth Amendment, violated where a seasonable application for a change of venue was denied, although inflammatory and prejudicial statements concerning petitioner had been widely and intensively disseminated in the press and in national magazines, and through the media of radio and television, commencing prior to the indictment of petitioner and continuing until the date of trial?"

Charles S. Burdell and *Donald McL. Davidson* for petitioner. *William L. Paul, Jr.* for respondent. Reported below: 56 Wash. 2d 474, 349 P. 2d 387, 353 P. 2d 429.

No. 716. Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America *v.* Lucas Flour Co. Supreme Court of Washington. Certiorari granted. *Francis Hoague* for petitioner. *Stuart G. Oles* and *Seth W. Morrison* for respondent. Reported below: 57 Wash. 2d 95, 356 P. 2d 1.

Certiorari Denied. (*See also No. 344, Misc., ante, p. 650, and No. 901, Misc., supra.*)

No. 735. Mosheim *v.* United States. C. A. 5th Cir. Certiorari denied. *Percy D. Williams* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 285 F. 2d 949.

No. 707. KOHLER CO. *v.* LOCAL 833, UAW–AFL–CIO INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Jerome Powell, William F. Howe, E. Riley Casey* and *Lyman C. Conger* for petitioner. *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for the National Labor Relations Board, and *Joseph L. Rauh, Jr., John Silard, Harold A. Cranefield* and *Louis H. Pollak* for Local 833, respondents.

No. 727. SEVEN-UP CO. *v.* O-SO GRAPE CO. ET AL. C. A. 7th Cir. Certiorari denied. *Beverly W. Pattishall* for petitioner. *Charles F. Meroni* for respondents. Reported below: 283 F. 2d 103.

No. 733. SOUTHERN CROSS STEAMSHIP CO., INC., *v.* FIRIPIS. C. A. 4th Cir. Certiorari denied. *Hugh S. Meredith* for petitioner. *Sidney H. Kelsey* for respondent. Reported below: 285 F. 2d 651.

No. 736. SARKES TARZIAN, INC., *v.* AUDIO DEVICES, INC., ET AL. C. A. 9th Cir. Certiorari denied. *C. B. Dutton* for petitioner. *Thomas F. Reddy, Jr.* for respondents. Reported below: 283 F. 2d 695.

No. 737. WESTCHESTER FIRE INSURANCE CO. *v.* HANLEY ET AL. C. A. 6th Cir. Certiorari denied. *Samuel Levin* for petitioner. *Harold S. Sawyer* for respondents. Reported below: 284 F. 2d 409.

No. 749. ROMERO *v.* GARCIA & DIAZ, INC. C. A. 2d Cir. Certiorari denied. *Philip F. Di Costanzo* and *Narciso Puente, Jr.* for petitioner. *John L. Quinlan* for respondent. Reported below: 286 F. 2d 347.

No. 738. DECKER ET AL. *v.* KENTUCKY. Court of Appeals of Kentucky. Certiorari denied. *Walter B. Smith* for petitioners. *John B. Breckinridge,* Attorney General of Kentucky, and *Troy D. Savage,* Assistant Attorney General, for respondent. Reported below: See 331 S. W. 2d 886.

No. 740. MATHESON *v.* ARMBRUST. C. A. 9th Cir. Certiorari denied. *Justin N. Reinhardt* for petitioner. *William F. White* for respondent. *Solicitor General Cox, Walter P. North* and *David Ferber* filed a brief for the Securities and Exchange Commission, as *amicus curiae,* in opposition to the petition. Reported below: 284 F. 2d 670.

No. 742. DEERE & Co. *v.* ENGLAND. C. A. 7th Cir. Certiorari denied. *Arthur H. Boettcher, Cameron A. Whitsett* and *Edward C. Grelle* for petitioner. *John M. Mason* and *Penrose Lucas Albright* for respondent. Reported below: 284 F. 2d 460.

No. 743. RENDON *v.* GOLDNER. C. A. 2d Cir. Certiorari denied. *Benjamin H. Siff* for petitioner. *Harry Seidell* for respondent. Reported below: 283 F. 2d 881.

No. 745. JENSEN *v.* NEBRASKA STATE BAR ASSOCIATION. Supreme Court of Nebraska. Certiorari denied. *Joseph T. Votava* for petitioner. *Clarence A. H. Meyer,* Attorney General of Nebraska, and *Gerald S. Vitamvas,* Deputy Attorney General, for respondent. Reported below: 171 Neb. 1, 105 N. W. 2d 459.

No. 755. BENSON *v.* BRATTLEBORO RETREAT. Supreme Court of New Hampshire. Certiorari denied. *Dort S. Bigg* for petitioner. *Stanley M. Brown* for respondent. Reported below: 103 N. H. 28, 164 A. 2d 560.

No. 744. STIRONE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Vincent M. Casey* and *V. J. Rich* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: —— F. 2d ——.

No. 711. GASTELUM-QUINONES *v.* ROGERS, ATTORNEY GENERAL. Motion to substitute Robert F. Kennedy in the place of William P. Rogers as the party respondent granted. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *David Rein* and *Joseph Forer* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for respondent. Reported below: 109 U. S. App. D. C. 267, 286 F. 2d 824.

No. 758. MILE BRANCH COAL CO. *v.* UNITED MINE WORKERS OF AMERICA. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE STEWART took no part in the consideration or decision of this application. *Samuel L. Goldstein* and *Thurman Hill* for petitioner. *John J. Wilson, Welly K. Hopkins, Harrison Combs* and *Willard P. Owens* for respondent. Reported below: 109 U. S. App. D. C. 265, 286 F. 2d 822.

No. 63, Misc. ALVAREZ *v.* MURPHY, WARDEN. C. A. 2d Cir. Certiorari denied. *Nathan Kestnbaum* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, *Joseph Rose,* Assistant Attorney General, *Isidore Dollinger* and *Irving Anolik* for respondent. Reported below: 277 F. 2d 304.

No. 752. RIBEIRO *v.* UNITED FRUIT CO. ET AL. C. A. 2d Cir. Certiorari denied. *Jacob Rassner* and *Louis J. Opal* for petitioner. *Walter X. Connor* and *James P. O'Neill* for Esso Standard Oil Co., respondent. Reported below: 284 F. 2d 317.

No. 809. MEROLLA *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Frank Serri* for petitioner. *Edward S. Silver* for respondent. Reported below: 9 N. Y. 2d 62, 172 N. E. 2d 541.

No. 170, Misc. WHITE *v.* SACKS, WARDEN. Supreme Court of Ohio. Certiorari denied. Petitioner *pro se.* *Mark McElroy,* Attorney General of Ohio, and *Aubrey A. Wendt,* Assistant Attorney General, for respondent.

No. 715, Misc. CARABELLESE *v.* NAVIERA AZNAR, S. A., ET AL. C. A. 2d Cir. Certiorari denied. *Philip F. Di Costanzo* for petitioner. *Walter X. Connor* and *John P. Smith* for respondents. Reported below: 285 F. 2d 355.

No. 808, Misc. PARKER *v.* WARDEN, MARYLAND PENITENTIARY. Court of Appeals of Maryland. Certiorari denied. Reported below: 224 Md. 641, 166 A. 2d 916.

No. 815, Misc. RAMSEY *v.* HAND, WARDEN. Supreme Court of Kansas. Certiorari denied. Reported below: 187 Kan. 502, 357 P. 2d 810.

No. 838, Misc. MACHIN *v.* FEDERAL BUREAU OF INVESTIGATION. C. A. 9th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Cox* for respondent. Reported below: —— F. 2d ——.

No. 521, Misc. MUHLENBROICH *v.* HEINZE, WARDEN. C. A. 9th Cir. Certiorari denied. *James F. Thacher* for petitioner. *Stanley Mosk,* Attorney General of California, and *Doris H. Maier,* Deputy Attorney General, for respondent. Reported below: 281 F. 2d 881.

No. 599, Misc. DUNCAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Acting Assistant Attorney General Foley* and *Beatrice Rosenberg* for the United States.

No. 664, Misc. NEAR *v.* VIRGINIA. Supreme Court of Appeals of Virginia. Certiorari denied. *Robert Randolph Jones* and *W. Griffith Purcell* for petitioner. *Reno S. Harp III,* Assistant Attorney General of Virginia, for respondent. Reported below: 202 Va. 20, 116 S. E. 2d 85.

No. 777, Misc. NUNEMAKER *v.* WILKINS, WARDEN. C. A. 2d Cir. Certiorari denied. Petitioner *pro se. Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *Irving Galt* and *Norman Friedman,* Assistant Attorneys General, for respondent.

No. 778, Misc. SCOTT *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 20 Ill. 2d 324, 169 N. E. 2d 763.

No. 792, Misc. HILL *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 284 F. 2d 754.

No. 796, Misc. LANGSTON *v.* HERITAGE, WARDEN. C. A. 5th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Acting Assistant Attorney General Doar* and *Harold H. Greene* for respondent.

No. 812, Misc. SIMMONS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States.

No. 813, Misc. ELLEDGE *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 822, Misc. MILLER *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 223 Md. 354, 164 A. 2d 715.

No. 826, Misc. HILL *v.* MYERS, CORRECTIONAL SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied.

No. 831, Misc. OWENS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: See 271 F. 2d 425.

No. 848, Misc. DUNCAN *v.* WILKINS, WARDEN. Court of Appeals of New York. Certiorari denied.

No. 873, Misc. CATALANO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

Rehearing Denied.

No. 155. MICHIGAN NATIONAL BANK ET AL. *v.* MICHIGAN ET AL., *ante*, p. 467. Petition for rehearing denied. MR. JUSTICE STEWART took no part in the consideration or decision of this application.

No. 50. EASTERN RAILROAD PRESIDENTS CONFERENCE ET AL. *v.* NOERR MOTOR FREIGHT, INC., ET AL., *ante*, p. 127;

No. 91. UNITED STATES *v.* FRUEHAUF ET AL., *ante*, p. 146;

No. 93. HAUG ET UX. *v.* UNITED STATES, *ante*, p. 811;

No. 73, Misc. WEST ET AL. *v.* UNITED STATES, *ante*, p. 819; and

No. 74, Misc. REINTHALER *v.* UNITED STATES, *ante*, p. 819. Petitions for rehearing denied.

APRIL 17, 1961.

Miscellaneous Orders.

No. 103. BAKER ET AL. *v.* CARR ET AL. Appeal from the United States District Court for the Middle District of Tennessee. (Probable jurisdiction noted, 364 U. S. 898.) Motion of *Upton Sisson* for leave to participate in oral argument, as *amicus curiae*, denied.

No. 181. RECK *v.* RAGEN, WARDEN. Certiorari, 363 U. S. 838, to the United States Court of Appeals for the Seventh Circuit. Motion to substitute Frank J. Pate in the place of Joseph E. Ragen as the party respondent granted. *Donald Page Moore* on the motion.

No. 783. CHEWNING *v.* CUNNINGHAM, PENITENTIARY SUPERINTENDENT. Certiorari, *ante*, p. 832, to the Supreme Court of Appeals of Virginia. The motion for appointment of counsel is granted, and it is ordered that *Daniel J. Meador, Esquire*, of Charlottesville, Virginia, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for the petitioner in this case.

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No. 80. PAN AMERICAN PETROLEUM CORP. *v.* SUPERIOR COURT OF DELAWARE FOR NEW CASTLE COUNTY ET AL.; and

No. 81. TEXACO, INC., *v.* SUPERIOR COURT OF DELAWARE FOR NEW CASTLE COUNTY ET AL. Certiorari, 363 U. S. 818, to the Supreme Court of Delaware. The motion of Colorado Interstate Gas Company for leave to file brief, as *amicus curiae,* is granted. *James Lawrence White, John Fleming Kelly* and *Lewis M. Poe* for movant. *John J. Wilson, Frank H. Strickler, Paul F. Schlicher, W. W. Heard, Byron M. Gray* and *William J. Grove* for petitioners in opposition to the motion.

No. 566. KENNEDY, ATTORNEY GENERAL, *v.* MENDOZA-MARTINEZ. Appeal from the United States District Court for the Southern District of California. (Probable jurisdiction noted, *ante,* p. 809.) Motion for leave to use record in No. 29, October Term, 1959, granted. *Solicitor General Cox* on the motion.

No. 717, Misc. DYSON *v.* UNITED STATES;

No. 892, Misc. IN RE SMITH;

No. 914, Misc. JENKINS *v.* WILLINGHAM, WARDEN; and

No. 917, Misc. SMITH *v.* OHIO PARDON AND PAROLE COMMISSION ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

No. 44, Misc. LOLLIS *v.* WILSON, PRISON SUPERINTENDENT; and

No. 907, Misc. HOBBS *v.* PEPERSACK, 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. 863, Misc. SIMS *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari denied.

Probable Jurisdiction Noted.

No. 714. ATCHISON, TOPEKA & SANTA FE RAILWAY CO. ET AL. *v.* REDDISH ET AL.;

No. 723. INTERSTATE COMMERCE COMMISSION *v.* REDDISH ET AL.; and

No. 725. ARKANSAS-BEST FREIGHT SYSTEM, INC., ET AL. *v.* REDDISH ET AL. Appeals from the United States District Court for the Western District of Arkansas. Probable jurisdiction noted. *Amos M. Mathews* for appellants in No. 714. *Robert W. Ginnane* and *Arthur J. Cerra* for appellant in No. 723. *Roland Rice* and *Rollo E. Kidwell* for appellants in No. 725. *Solicitor General Cox* filed a memorandum for the United States suggesting that the Court note probable jurisdiction. *Clarence D. Todd* for Contract Carrier Conference of American Trucking Assns., Inc., appellee in No. 714. Reported below: 188 F. Supp. 160.

Certiorari Granted. (*See also No. 164, ante, p. 715.*)

No. 713. STILL *v.* NORFOLK & WESTERN RAILWAY CO. Supreme Court of Appeals of West Virginia. Certiorari granted. *Lewis Jacobs* and *Sidney S. Sachs* for petitioner. *Robert B. Claytor* and *Joseph M. Sanders* for respondent. Reported below: —— W. Va. ——, —— S. E. 2d ——.

Certiorari Denied. (*See also Misc. Nos. 44, 863 and 907, supra; No. 675, ante, p. 769; No. 691, ante, p. 767; and No. 785, ante, p. 770.*)

No. 741. HUNT FOODS & INDUSTRIES, INC., *v.* FEDERAL TRADE COMMISSION. C. A. 9th Cir. Certiorari denied. *Bert W. Levit* for petitioner. *Solicitor General Cox, Assistant Attorney General Loevinger, Richard A. Solomon, PGad B. Morehouse* and *Alan B. Hobbes* for respondent. Reported below: 286 F. 2d 803.

No. 756. Gonzales *v.* United States. C. A. 10th Cir. Certiorari denied. *Henry A. Kiker, Jr.* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 286 F. 2d 118.

No. 759. Allis-Chalmers Manufacturing Co. *v.* Local 248, United Automobile, Aircraft & Agricultural Implement Workers of America, AFL–CIO;

No. 760. Wisconsin Employment Relations Board *v.* Local 248, United Automobile, Aircraft & Agricultural Implement Workers of America, AFL–CIO; and

No. 761. Carey et al. *v.* Lodge 78, International Association of Machinists, AFL–CIO. Supreme Court of Wisconsin. Certiorari denied. *John G. Kamps, James Urdan* and *John L. Waddleton* for petitioner in No. 759. *John W. Reynolds,* Attorney General of Wisconsin, and *Beatrice Lampert,* Assistant Attorney General, for petitioner in No. 760. *John H. Wessel* for petitioners in No. 761. *Max Raskin, Harold A. Cranefield* and *Philip L. Padden* for respondent in No. 760. *Robert E. Gratz* for respondent in No. 761. Reported below: 11 Wis. 2d 277, 105 N. W. 2d 271; 11 Wis. 2d 292, 105 N. W. 2d 278.

No. 763. Chandler *v.* Brown et al. C. A. 5th Cir. Certiorari denied. *Alfred Petsch* for petitioner. *Davis Scarborough* for Brown, respondent. Reported below: 282 F. 2d 186.

No. 772. Pinkstaff *v.* Pennsylvania Railroad Co. Supreme Court of Illinois. Certiorari denied. *James A. Dooley* and *William C. Wines* for petitioner. *Howard Ellis* and *Robert H. Bierma* for respondent. Reported below: 20 Ill. 2d 193, 170 N. E. 2d 139.

No. 764. MAKAH INDIAN TRIBE *v.* UNITED STATES. Court of Claims. Certiorari denied. *J. Duane Vance* for petitioner. *Solicitor General Cox* and *Roger P. Marquis* for the United States.

No. 766. ROGERS *v.* NORFOLK & WESTERN RAILWAY Co. Supreme Court of Appeals of Virginia. Certiorari denied. *Louis B. Fine* and *Howard I. Legum* for petitioner. *Thomas R. McNamara* for respondent.

No. 771. LOWREY ET AL. *v.* MALKOWSKI ET AL. Supreme Court of Illinois. Certiorari denied. *Irving Eisenberg* and *Paul I. Baikoff* for petitioners. Reported below: 20 Ill. 2d 280, 170 N. E. 2d 147.

No. 779. CIRCLE LINE SIGHTSEEING YACHTS, INC., *v.* CITY OF NEW YORK. C. A. 2d Cir. Certiorari denied. *Warner Pyne* and *William A. Wilson* for petitioner. *Seymour B. Quel* for respondent. Reported below: 283 F. 2d 811.

No. 780. SUPERIOR OIL CO. *v.* UNITED GAS IMPROVEMENT CO. ET AL. C. A. 9th Cir. Certiorari denied. *R. B. Voight* and *H. W. Varner* for petitioner. *J. David Mann, Jr., William W. Ross* and *John E. Holtzinger, Jr.* for United Gas Improvement Company, and *Kent H. Brown* for Public Service Commission of New York, respondents. *David Berger* and *Robert M. Beckman* filed a brief for the City of Philadelphia, as *amicus curiae,* in opposition to the petition. Reported below: 283 F. 2d 817.

No. 784. GARFINKEL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Maurice J. Walsh* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 285 F. 2d 548.

No. 751. HOHENSEE *v.* FERGUSON ET AL. C. A. 3d Cir. Certiorari denied. *James C. Newton* for petitioner. *W. S. Moorhead, Jr.* for respondents. Reported below: 281 F. 2d 952.

No. 762. CONN ET AL. *v.* UNITED STATES. Court of Claims. Certiorari denied. Petitioners *pro se*. *Solicitor General Cox, Assistant Attorney General Orrick* and *Alan S. Rosenthal* for the United States. Reported below: —— Ct. Cl. ——, —— F. 2d ——.

No. 767. ALEXANDER ET AL. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Carl L. Shipley* and *Samuel Resnicoff* for petitioners. *Solicitor General Cox, Assistant Attorney General Orrick, Alan S. Rosenthal* and *Kathryn H. Baldwin* for the United States. Reported below: —— Ct. Cl. ——, —— F. 2d ——.

No. 781. PANICA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Osmond K. Fraenkel* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 290 F. 2d 97.

No. 787. JONES *v.* UNITED STATES. Court of Claims. Certiorari denied. *Fred W. Shields* for petitioner. *Solicitor General Cox, Assistant Attorney General Orrick, John G. Laughlin, Jr.* and *Donald H. Green* for the United States. Reported below: —— Ct. Cl. ——, 282 F. 2d 906.

No. 793. HOPE NATURAL GAS CO. ET AL. *v.* PUBLIC SERVICE COMMISSION OF NEW YORK. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *C. William Cooper, Christopher T. Boland, Thomas F. Brosnan* and *Martin L. Friedman* for petitioners. *Kent H. Brown* for respondent. Reported below: 109 U. S. App. D. C. 292, 287 F. 2d 146.

No. 796. AMERICAN-LAFRANCE-FOAMITE CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Lawrence A. Baker* and *William W. Karatz* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, I. Henry Kutz* and *Morton K. Rothschild* for respondent. Reported below: 284 F. 2d 723.

No. 726. CODUTO *v.* UNITED STATES. Motion to strike portions of respondent's brief denied. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied. *Charles A. Bellows* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 284 F. 2d 464.

No. 770. Goss *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. *Edwin R. Armstrong* for petitioner. Reported below: 20 Ill. 2d 224, 170 N. E. 2d 113.

No. 776. CALIFORNIA COMPANY *v.* UNITED GAS IMPROVEMENT CO. ET AL. The motion to substitute California Oil Co. in the place of California Company as the party petitioner is granted. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied. *Justin R. Wolf, Charles A. Case, Jr., Melvin Richter* and *Woollen H. Walshe* for petitioner. *J. David Mann, Jr., William W. Ross* and *John E. Holtzinger, Jr.* for United Gas Improvement Co., and *Kent H. Brown* for Public Service Commission of New York, respondents. *David Berger* and *Robert M. Beckman* filed a brief for the City of Philadelphia, as *amicus curiae,* in opposition to the petition. Reported below: 283 F. 2d 817.

No. 774. Shell Oil Co. et al. *v.* Public Service Commission of New York. The motion to substitute California Oil Co. in the place of California Company as a party petitioner is granted. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit denied. *Oliver L. Stone, William F. Kenney, Thomas F. Ryan, Jr., Eugene F. Sikorovsky, Robert E. May, H. Y. Rowe, William J. Merrill, William H. Holloway, Jack T. Conn, Wm. Amory Underhill, William S. Richardson, Roy L. Merrill, William P. McClure, Rayburn L. Foster, Kenneth Heady, Charles E. McGee, George D. Horning, Jr., Robert O. Koch, Bruce R. Merrill, Robert C. Hawley, W. W. Heard, William J. Grove, Woollen H. Walshe* and *Justin R. Wolf* for petitioners. *Kent H. Brown* for respondent. Reported below: 109 U. S. App. D. C. 292, 287 F. 2d 146.

No. 590, Misc. Smallwood *v.* Warden, Maryland Penitentiary. Court of Appeals of Maryland. Certiorari denied. Petitioner *pro se*. *Thomas B. Finan*, Attorney General of Maryland, and *Clayton A. Dietrich*, Assistant Attorney General, for respondent. Reported below: 223 Md. 671, 164 A. 2d 288.

No. 665, Misc. Johnson *v.* United States. Court of Claims. Certiorari denied. *Thomas H. King, Paul R. Harmel* and *Clifford A. Sheldon* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Leonard* and *Alan S. Rosenthal* for the United States. Reported below: —— Ct. Cl. ——, 280 F. 2d 856.

No. 811, Misc. Libbey *v.* Oregon. Supreme Court of Oregon. Certiorari denied. *Howard R. Lonergan* for petitioner. *Charles E. Raymond* for respondent. Reported below: 224 Ore. 431, 356 P. 2d 161.

No. 467, Misc. HILL *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: 281 F. 2d 443.

No. 476, Misc. ZIZZO *v.* FAY, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 490, Misc. SHERWOOD *v.* GLADDEN, WARDEN. Supreme Court of Oregon. Certiorari denied. Petitioner *pro se*. *Harold W. Adams,* Attorney General of Oregon, for respondent.

No. 600, Misc. JOHN *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied. Petitioner *pro se*. *Stanley Mosk,* Attorney General of California, and *Doris H. Maier* and *Edsel W. Haws,* Deputy Attorneys General, for respondents.

No. 616, Misc. WILLIAMS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 618, Misc. CAMPBELL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 282 F. 2d 871.

No. 619, Misc. RIVERA-ESCUTE *v.* DELGADO, WARDEN. C. A. 1st Cir. Certiorari denied. *Santos P. Amadeo* for petitioner. *J. B. Fernandez-Badillo,* Solicitor General of Puerto Rico, for respondent. Reported below: 282 F. 2d 335.

No. 637, Misc. EGITTO *v.* NEW YORK. Appellate Division, Supreme Court of New York, Second Judicial Department. Certiorari denied. Petitioner *pro se*. *William I. Siegel* for respondent.

No. 663, Misc. KERNS *v.* ADAMS, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied. Petitioner *pro se*. *C. Donald Robertson,* Attorney General of West Virginia, and *Andrew J. Goodwin* and *Fred H. Caplan,* Assistant Attorneys General, for respondent.

No. 702, Misc. TEDFORD *v.* HEINZE, WARDEN, ET AL. Supreme Court of California. Certiorari denied. Petitioner *pro se*. *Stanley Mosk,* Attorney General of California, and *Doris H. Maier* and *Edsel W. Haws,* Deputy Attorneys General, for respondents.

No. 712, Misc. PHILLIPS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Acting Assistant Attorney General Foley* and *Beatrice Rosenberg* for the United States. Reported below: 286 F. 2d 428.

No. 725, Misc. MEYER *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 758, Misc. JONES *v.* MARONEY, WARDEN. C. A. 3d Cir. Certiorari denied.

No. 766, Misc. RODGERS *v.* BENNETT, WARDEN. Supreme Court of Iowa. Certiorari denied. Reported below: 252 Iowa 191, 105 N. W. 2d 507.

No. 775, Misc. SIMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 781, Misc. WILLIAMS *v.* HEINZE, WARDEN, ET AL. Supreme Court of California. Certiorari denied.

No. 791, Misc. WHITE *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Acting Assistant Attorney General Foley, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States.

No. 797, Misc. TASCO *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 223 Md. 503, 165 A. 2d 456.

No. 799, Misc. ADRIANO *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 800, Misc. NEAL *v.* CALIFORNIA ADULT AUTHORITY ET AL. Supreme Court of California. Certiorari denied.

No. 802, Misc. HANDY *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 805, Misc. RAGAN *v.* SECRETARY OF THE AIR FORCE ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Acting Assistant Attorney General Doar, Harold H. Greene* and *David Rubin* for respondents.

No. 819, Misc. ELLISON *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 283 F. 2d 489.

No. 750, Misc. IN RE STRAIGHT. Supreme Court of Alaska. Certiorari denied. Reported below: —— Alaska ——, —— P. 2d ——.

No. 785, Misc. IN RE TOMICH. Supreme Court of Montana. Certiorari denied. Reported below: 137 Mont. ——, 358 P. 2d 78.

No. 835, Misc. PIORKOWSKI ET AL. *v.* COUNTY ET AL. Supreme Court of Ohio. Certiorari denied. Reported below: 171 Ohio St. 401, 171 N. E. 2d 336.

No. 844, Misc. WRIGHT *v.* WARDEN, MARYLAND PENITENTIARY. Court of Appeals of Maryland. Certiorari denied. Reported below: 223 Md. 684, 165 A. 2d 144.

No. 852, Misc. BRITT *v.* SOUTH CAROLINA. Supreme Court of South Carolina. Certiorari denied. *Aaron Kravitch* for petitioner. *Daniel R. McLeod,* Attorney General of South Carolina, *Everett N. Brandon,* Assistant Attorney General, and *Julian S. Wolfe* for respondent. Reported below: 237 S. C. 293, 117 S. E. 2d 379.

No. 884, Misc. WESTBURY *v.* SOUTH CAROLINA. Supreme Court of South Carolina. Certiorari denied. *Henry R. Sims II* for petitioner. *Daniel R. McLeod,* Attorney General of South Carolina, for respondent. Reported below: 237 S. C. 293, 117 S. E. 2d 379.

No. 908, Misc. ROBILLARD *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. *Vincent Hallinan* for petitioner. *Stanley Mosk,* Attorney General of California, and *Arlo E. Smith* and *John S. McInerny,* Deputy Attorneys General, for respondent. Reported below: 55 Cal. 2d 88, 358 P. 2d 295.

No. 827, Misc. TAYLOR *v.* CUNNINGHAM, PENITENTIARY SUPERINTENDENT. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 828, Misc. PARLER *v.* NEW YORK. Appellate Division, Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 829, Misc. GILMER *v.* SMYTH, PENITENTIARY SUPERINTENDENT. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 833, Misc. WILSON *v.* WARDEN, MARYLAND PENITENTIARY. Court of Appeals of Maryland. Certiorari denied. Reported below: 223 Md. 680, 164 A. 2d 911.

No. 837, Misc. THOMAS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 20 Ill. 2d 603, 170 N. E. 2d 543.

No. 839, Misc. WATSON *v.* LAVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 840, Misc. BARKAN *v.* FEDERAL DISTRICT COURT, SOUTHERN DIVISION OF ILLINOIS, ET AL. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for respondents.

No. 845, Misc. BEAR *v.* GLADDEN, WARDEN. Supreme Court of Oregon. Certiorari denied.

No. 851, Misc. VASQUEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 849, Misc. SEYMOUR *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied.

No. 853, Misc. CAINS *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 854, Misc. ZERBA *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. *Ernst Liebman, Donald Page Moore* and *Charles Liebman* for petitioner. Reported below: 20 Ill. 2d 269, 170 N. E. 2d 97.

No. 858, Misc. WOLF *v.* BOYD, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, ET AL. C. A. 9th Cir. Certiorari denied. *John Caughlan* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for respondents.

No. 860, Misc. RHALL *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 862, Misc. TRUMBLAY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 286 F. 2d 918.

No. 864, Misc. STICKNEY *v.* ELLIS, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. *O. John Rogge* for petitioner. *Frank Brisco* and *Carl E. F. Dally* for respondent. Reported below: 286 F. 2d 755.

No. 867, Misc. LEIGHTON *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Walter P. North* and *David Ferber* for respondent.

No. 872, Misc. DOTSON *v.* KANSAS. Supreme Court of Kansas. Certiorari denied.

No. 876, Misc. LEGG *v.* BRODY ET AL. Supreme Court of California. Certiorari denied.

No. 877, Misc. CARTER *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 730, Misc. TRENT *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN are of the opinion that certiorari should be granted. *Arthur J. Lambert* and *Richard A. Fitzgerald* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Foley, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 109 U. S. App. D. C. 152, 284 F. 2d 286.

No. 798, Misc. OUGHTON *v.* UNITED STATES. Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit and for other relief denied. Petitioner *pro se*. *Solicitor General Cox, Acting Assistant Attorney General Doar* and *Harold H. Greene* for the United States. Reported below: 287 F. 2d 882.

No. 865, Misc. RODELLA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 286 F. 2d 306.

No. 803, Misc. CUTLIP *v.* ADAMS, WARDEN. The motion to substitute Otto C. Boles in the place of D. E. Adams as the party respondent is granted. Petition for writ of certiorari to the Supreme Court of Appeals of West Virginia denied.

Rehearing Denied.

No. 37. WILKINSON *v.* UNITED STATES, *ante*, p. 399;

No. 54. BRADEN *v.* UNITED STATES, *ante*, p. 431;

No. 182. WILSON *v.* SCHNETTLER ET AL., *ante*, p. 381;

No. 631. JERROLD ELECTRONICS CORP. ET AL. *v.* UNITED STATES, *ante*, p. 567;

No. 658. UNION LEADER CORP. *v.* NEWSPAPERS OF NEW ENGLAND, INC., ET AL., *ante*, p. 833;

No. 335, Misc. ROBLES *v.* UNITED STATES, *ante*, p. 836;

No. 654, Misc. EARLY *v.* TINSLEY, WARDEN, *ante*, p. 830; and

No. 720, Misc. SANCHEZ *v.* WILKINSON, WARDEN, *ante*, p. 852. Petitions for rehearing denied.

No. 21. ARO MANUFACTURING CO., INC., ET AL. *v.* CONVERTIBLE TOP REPLACEMENT CO., INC., *ante*, p. 336. Petition for rehearing or alternative motion for amendment or clarification of opinion denied.

No. 70. GREEN *v.* UNITED STATES, *ante*, p. 301. Petition for rehearing or to remand denied.

No. 551. GINSBURG *v.* GINSBURG ET AL., 364 U. S. 934. Motion for leave to file a second petition for rehearing denied.

ORDERS AMENDING FEDERAL RULES OF CIVIL PROCEDURE

AND

RULES OF PRACTICE IN ADMIRALTY AND MARITIME CASES

On April 17, 1961, the Court entered an order amending the Federal Rules of Civil Procedure and certain forms used in connection therewith and an order amending the Rules of Practice in Admiralty and Maritime Cases. These amendments became effective on July 19, 1961, and they will be reported in 368 U. S.

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ADMINISTRATIVE PROCEDURE. See **Labor**, 1–5; **Natural Gas Act.**

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2. *Amendments of Rules.*—Order entered April 17, 1961, amending Rules of Practice in Admiralty and Maritime Cases, effective July 19, 1961, to be reported later, p. 891.

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ANTITRUST ACTS.

1. *Sherman Act—Drug manufacturer—Resale price maintenance—Remedy.*—When this Court had ruled that the Government's proofs were sufficient to show violation of Sherman Act and, on remand, defendant only showed that it had abandoned illegal practices and injunction was not needed, district court should have entered judgment on merits and retained case on docket for further relief, if defendant should resume illegal activity. United States v. Parke, Davis & Co., p. 125.

2. *Sherman Act—Efforts to influence legislation and law enforcement against competitors—Railroads against truckers.*—Organized efforts of railroads to influence legislation and law enforcement adverse to long-distance trucking did not violate Sherman Act, even when purpose was to destroy truckers as competitors for long-distance freight business. Eastern Railroads Conf. v. Noerr Motor Freight, p. 127.

3. *Clayton Act—Sherman Act—Exclusive-dealing agreement—Substantial lessening of competition—Relevant market.*—Agreement to buy all coal needed for fuel at one plant for 20 years did not violate § 3 of Clayton Act or § 1 or 2 of Sherman Act when amount involved

ANTITRUST ACTS—Continued.

exceeded entire consumption in State but was less than 1% of capacity of all producers in seller's competitive area. Tampa Electric Co. v. Nashville Coal Co., p. 320.

APPEALS. See **Constitutional Law,** III, 2; **Procedure,** 1.

ARREST. See **Civil Rights,** 1; **Evidence,** 1.

BANKS. See **Taxation,** 3.

CALIFORNIA. See **Procedure,** 2.

CARRIERS. See **Antitrust Acts,** 2; **Employers' Liability Act.**

CARRY-BACK. See **Taxation,** 1.

CENSORSHIP. See **Constitutional Law,** I, 1.

CERTIORARI. See **Procedure,** 3–5.

CITIZENSHIP. See also **Procedure,** 6.

Denaturalization—Fraudulent procurement—Willful misrepresentation of occupation—Lapse of time.—Evidence was sufficient to support finding that applicant for citizenship swore that his occupation was "real estate" when actually it was bootlegging; denaturalization sustained notwithstanding lapse of 27 years between naturalization and filing of denaturalization complaint. Costello v. United States, p. 265.

CIVIL RIGHTS.

1. *Unlawful search—Civil action for damages—Sufficiency of complaint.*—In civil action by Negroes for damages under R. S. § 1979, allegations that, without warrant or probable cause, city policemen invaded and searched home and arrested and detained one of the plaintiffs stated a cause of action against policemen; but city was not liable. Monroe v. Pape, p. 167.

2. *Deprivation—Civil action for damages—Right to maintain.*—Under 42 U. S. C. §§ 1983 and 1985, petitioner could not maintain civil action against municipality for damages for deprivation of rights of freedom of speech and asssembly; but such action could be maintained against individuals. Egan v. City of Aurora, p. 514.

CLAYTON ACT. See **Antitrust Acts,** 2–3.

CLOSED SHOPS. See **Labor,** 1–3.

COAL. See **Antitrust Acts,** 3.

COMMUNICATIONS ACT.

1. *Wiretapping—Electronic listening device—Admissibility of evidence.*—Eavesdropping by police using electronic listening device

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which penetrated wall of house occupied by defendants did not violate § 605 of Communications Act of 1934; but it violated their rights under Fourth Amendment, and evidence so obtained was not admissible at their trial for gambling offenses. Silverman v. United States, p. 505.

2. *Wiretapping—Use in state court—Injunction by federal court.*—A federal court may not enjoin use in a criminal trial in a state court of evidence obtained by wiretapping in violation of Federal Communications Act. Pugach v. Dollinger, p. 458.

COMMUNISM. See **Constitutional Law**, I, 2.

CONFESSIONS. See **Constitutional Law**, IV.

CONGRESSIONAL INVESTIGATIONS. See **Constitutional Law**, I, 2.

CONNECTICUT. See **Constitutional Law**, IV.

CONSTITUTIONAL LAW. See also **Civil Rights**, 1–2; **Eminent Domain; Procedure**, 3–5; **Taxation**, 2–4.

I. Freedom of Speech and Press.

1. *Motion pictures—Requirement of submission for examination or censorship.*—City ordinance requiring that all motion pictures be submitted for examination or censorship prior to their public exhibition not void on its face as violative of First and Fourteenth Amendments. Times Film Corp. v. Chicago, p. 43.

2. *Congressional investigations—Contempt convictions for refusal to answer—Communistic propaganda.*—Conviction under 2 U. S. C. § 192 for refusal to answer questions regarding membership in Communist Party and communistic propaganda activities did not violate rights of witnesses under First Amendment. Wilkinson v. United States, p. 399; Braden v. United States, p. 431.

II. Due Process.

1. *State criminal trial—Right to counsel—Habeas corpus.*—Petition for habeas corpus alleging that, in state criminal trial for noncapital offense, defendant was indigent, ignorant and mentally ill Negro who requested but was denied counsel, together with record showing that legal issues were very complex and he obviously was incapable of conducting his own defense, indicated denial of due process and entitled petitioner to hearing to determine whether his allegations were true. McNeal v. Culver, p. 109.

2. *Due process—State criminal trial—Right to counsel.*—When state law made person charged with crime incompetent to testify under oath in his own behalf but permitted him to make unsworn

CONSTITUTIONAL LAW—Continued.

statement to jury, court's refusal to permit his counsel to question him on stand violated Due Process Clause of Fourteenth Amendment. Ferguson v. Georgia, p. 570.

3. *Due process—State criminal trial—Right to counsel.*—On petition for habeas corpus, petitioner was entitled to opportunity to prove that he had been deprived of due process in criminal trial by court's refusal to grant continuance until arrival of counsel he had retained. Reynolds v. Cochran, p. 525.

III. Equal Protection of Laws.

1. *Racial discrimination—Restaurant in public parking building.*—When restaurant was located in, and operated as integral part of, public parking building built with public funds and owned and operated by State, its refusal to serve Negro violated Equal Protection Clause of Fourteenth Amendment. Burton v. Wilmington Parking Authority, p. 715.

2. *State criminal cases — Habeas corpus — Appeals — Indigents.*—Iowa statute that requires indigent prisoner to pay filing fee before his application for writ of habeas corpus or appeal from conviction will be docketed denies him equal protection of laws in violation of Fourteenth Amendment. Smith v. Bennett, p. 708.

IV. Self-incrimination.

Confessions—Reliability as bearing on voluntariness.—In admitting confessions in evidence in murder trial, it was error for state court to consider whether or not they were reliable in determining whether they were "voluntary," and this violated Due Process Clause of Fourteenth Amendment. Rogers v. Richmond, p. 534.

V. Search and Seizure.

1. *Rented premises—Consent of landlord.*—Consent of landlord did not validate search of rented premises without warrant, and articles seized not admissible in evidence in criminal trial in federal court. Chapman v. United States, p. 610.

2. *Electronic listening devices—Admissibility of evidence.*—Eavesdropping by police using electronic listening device which penetrated wall of house occupied by defendants did not violate § 605 of Communications Act of 1934; but it did violate their rights under Fourth Amendment, and evidence so obtained was not admissible at their trial for gambling offenses. Silverman v. United States, p. 505.

CONTEMPT. See **Constitutional Law,** I, 2.

COUNSEL. See **Constitutional Law,** II, 1–3.

COURT OF CLAIMS. See **Supreme Court; Taxation,** 1.

COURTS OF APPEALS. See **Labor**, 5.

CRIMINAL LAW. See also **Constitutional Law**, I, 2; II, 1–3; III, 2; IV; V; **Evidence**, 1–3; **Procedure**, 1, 3–5, 7–8; **Trial**, 1–2.

Multiple convictions and sentences—Stealing government property—Receiving same property.—Under 18 U. S. C. § 641, person may not be convicted and sentenced both for stealing government property and for receiving and concealing same property. Milanovich v. United States, p. 551.

DAMAGES. See **Civil Rights**, 1–2; **Employers' Liability Act**; **Eminent Domain.**

DELAWARE. See **Constitutional Law**, III, 1.

DENATURALIZATION. See **Citizenship**; **Procedure**, 6.

DISCOVERY. See **Trial.**

DISCRIMINATION. See **Constitutional Law**, III; **Labor**, 1–3, 5; **Taxation**, 2–3.

DISMISSAL. See **Procedure**, 1, 3–4, 6.

DRUGS. See **Antitrust Acts**, 1.

DUE PROCESS. See **Civil Rights**, 1; **Constitutional Law**, II; IV; **Procedure**, 7–8.

EASEMENTS. See **Eminent Domain.**

EAVESDROPPING. See **Communications Act**; **Constitutional Law**, V, 2; **Evidence**, 2–3.

ELECTIONS. See **Labor**, 4.

ELECTRIC POWER. See **Antitrust Acts**, 3.

EMINENT DOMAIN.

Just compensation—Navigable waters—Destruction of privately owned flowage easement.—When construction of dam and reservoir on navigable river by Government destroyed privately owned flowage easement over adjacent land, owner of easement was entitled to compensation; measure of damages. United States v. Virginia Electric & Power Co., p. 624.

EMPLOYERS' LIABILITY ACT.

Release—Consideration—Federal question.—When suit in state court under Federal Employers' Liability Act turned on validity of release, that presented federal question, and factual issue concerning presence of consideration for release should have been submitted to jury. Maynard v. Durham & S. R. Co., p. 160.

EQUAL PROTECTION OF LAWS. See **Constitutional Law**, III.

EVIDENCE. See also **Citizenship; Communications Act,** 1–2; **Constitutional Law,** IV; V.

1. *Unlawful seizure by federal agents—Use in state court—Suit in federal court to enjoin.*—In suit in federal court to enjoin use in state court of narcotics seized by federal agents during search without warrant, complaint was properly dismissed for failure to state claim upon which relief could be granted. Wilson v. Schnettler, p. 381.

2. *Admissibility—Wiretapping—Use in state court—Injunction by federal court.*—A federal court may not enjoin use in a criminal trial in a state court of evidence obtained by wiretapping in violation of Federal Communications Act. Pugach v. Dollinger, p. 458.

3. *Admissibility—Eavesdropping—Electronic listening device.*—Eavesdropping by police using electronic listening device which penetrated wall of house occupied by defendants did not violate § 605 of Communications Act of 1934; but it violated their rights under Fourth Amendment, and evidence so obtained was not admissible in evidence at their trial for gambling offenses. Silverman v. United States, p. 505.

EXCESS PROFITS TAX. See **Taxation,** 1.

FEDERAL COMMUNICATIONS ACT. See **Communications Act.**

FEDERAL EMPLOYERS' LIABILITY ACT. See **Employers' Liability Act.**

FEDERAL HOME LOAN BANK ACT. See **Taxation,** 4.

FEDERAL POWER COMMISSION. See **Natural Gas Act.**

FEDERAL RULES OF CIVIL PROCEDURE. See also **Procedure,** 6.

Amendments of Rules and Forms.—Order entered April 17, 1961, amending Federal Rules of Civil Procedure and certain forms used in connection therewith, effective July 19, 1961, to be reported later, p. 891.

FEDERAL RULES OF CRIMINAL PROCEDURE. See **Procedure,** 7.

FEDERAL SAVINGS AND LOAN ASSOCIATIONS. See **Taxation,** 3–4.

FEDERAL-STATE RELATIONS. See **Admiralty; Civil Rights,** 1–2; **Constitutional Law,** I, 1; II; III; IV; **Evidence,** 1–2; **Taxation,** 2–4.

FILING FEES. See **Constitutional Law,** III, 2.

FIRST AMENDMENT. See **Constitutional Law,** I.

FLORIDA. See **Constitutional Law**, II, 1, 3.

FOREMEN. See **Labor**, 2.

FOURTEENTH AMENDMENT. See **Civil Rights**, 1–2; **Constitutional Law**, I, 1–2; II, 1–3; III, 1–2; IV; **Procedure**, 4.

FOURTH AMENDMENT. See **Civil Rights**, 1; **Communications Act**; **Constitutional Law**, V; **Evidence**, 1, 3.

FRAUD. See **Citizenship.**

FREEDOM OF SPEECH, PRESS AND ASSEMBLY. See **Civil Rights**, 2; **Constitutional Law**, I, 1–2.

GAS. See **Natural Gas Act.**

GEORGIA. See **Constitutional Law**, II, 2.

HABEAS CORPUS. See **Constitutional Law**, II, 1, 3; III, 2.

HIRING HALLS. See **Labor**, 3.

HOME OWNERS' LOAN ACT. See **Taxation**, 4.

HOSPITALS. See **Admiralty**, 1.

ILLINOIS. See **Civil Rights**, 1–2; **Patents**, 2.

IMMIGRATION AND NATIONALITY ACT. See **Citizenship.**

INDIANA. See **Patents**, 2.

INDICTMENTS. See **Procedure**, 1.

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INJUNCTIONS. See **Antitrust Acts**, 1; **Evidence**, 1.

INSPECTION. See **Trial**, 1–2.

INTEREST. See **Taxation**, 1.

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JENCKS ACT. See **Trial**, 1–2.

JUDGMENTS. See **Antitrust Acts**, 1; **Taxation**, 1.

JURISDICTION. See **Labor**, 5; **Patents**, 2; **Procedure**, 1.

KU KLUX ACT. See **Civil Rights**, 1.

LABOR. See also **Admiralty**, 1; **Employers' Liability Act**; **Procedure**, 1.

1. *National Labor Relations Act—Closed-shop agreement—Refund of dues.*—When Board found that unions had violated § 8 (b) (1) (A) and § 8 (b) (2) by establishing and maintaining closed-shop preferential hiring conditions and causing employer to refuse to hire certain applicants, Board was not authorized by § 10 (c) to require unions

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to refund dues and fees paid by their members. Carpenters Local v. Labor Board, p. 651; Teamsters Local v. Labor Board, p. 667; Labor Board v. News Syndicate Co., p. 695.

2. *National Labor Relations Act—Closed-shop agreement—Requirement that union foremen do hiring.*—Requirement of collective bargaining agreement that hiring be done by union foremen and that employer comply with union rules "not in conflict with" federal law, not unlawful *per se*. Labor Board v. News Syndicate Co., p. 695; Typographical Union v. Labor Board, p. 705.

3. *National Labor Relations Act—Closed-shop agreement—Hiring hall.*—Hiring hall arrangements not unlawful unless they actually result in discriminations prohibited by the Act. Teamsters Local v. Labor Board, p. 667.

4. *National Labor Relations Act — Representative elections—Refusal to enforce Board's order—Inconsequential error in corporate name of employer.*—Court of Appeals erred in refusing to enforce order of Board in representative election solely because notices of election contained minor and unconfusing mistake in employer's corporate name. Labor Board v. Mattison Machine Works, p. 123.

5. *National Labor Relations Act—Board findings—Scope of review by Court of Appeals.*—Court of Appeals did not go beyond proper scope of review in holding that record did not support Board's finding that, in practice, employer maintained and enforced closed-shop and preferential hiring conditions which violated Act. Labor Board v. News Syndicate Co., p. 695.

LABOR MANAGEMENT RELATIONS ACT, 1947. See **Procedure**, 1.

LACHES. See **Citizenship.**

LANDLORD AND TENANT. See **Constitutional Law**, V; **Taxation**, 2.

LARCENY. See **Criminal Law.**

LIMITATIONS. See **Citizenship.**

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LOBBYING. See **Antitrust Acts**, 2.

MAINTENANCE AND CURE. See **Admiralty**, 1.

MICHIGAN. See **Taxation**, 3.

MISREPRESENTATION. See **Citizenship.**

MONOPOLY. See **Antitrust Acts**, 1–3.

MOTION PICTURES. See **Constitutional Law,** I, 1.

MOTOR CARRIERS. See **Antitrust Acts,** 2; **Labor,** 3.

MULTIPLE CONVICTIONS. See **Criminal Law.**

MUNICIPALITIES. See **Civil Rights,** 1–2; **Constitutional Law,** I, 1.

NARCOTICS. See **Evidence,** 1.

NATIONAL BANKS. See **Taxation,** 3.

NATIONAL HOUSING ACT. See **Taxation,** 2.

NATIONAL LABOR RELATIONS ACT. See **Labor,** 1–5.

NATURAL GAS ACT.

Application under § 7—Sale for consumption by industrial user—Matters considered by Commission.—On application by pipeline company for certification under § 7 (e) of transportation of gas for public utility company which had purchased it directly from producers for consumption under its own boilers, Commission did not exceed authority or abuse discretion by denying application after considering desirability of such use, possibility of pre-emption of pipeline capacity and gas reserves by industrial users, and effect of high price agreed upon. Federal Power Comm'n v. Transcontinental Pipe Line Co., p. 1.

NATURALIZATION. See **Citizenship.**

NAVIGABLE WATERS. See **Eminent Domain.**

NEGROES. See **Civil Rights,** 1; **Constitutional Law,** II, 1; III, 1.

NEW YORK. See **Admiralty,** 1.

PATENTS.

1. *Infringements—Combinations—Manufacture and sale of unpatented component.*—When a patent covered only the combination of certain unpatented components into flexible convertible automobile tops, manufacture and sale of flexible top fabric for use in replacing original fabric did not constitute either direct or contributory infringement. Aro Mfg. Co. v. Convertible Top Co., p. 336.

2. *Infringement suits—Venue—Waiver.*—In patent infringement suit in federal district court in Indiana, an Illinois manufacturer which openly assumed and controlled defense of its Indiana customer did not thereby as matter of law subject itself to jurisdiction of court in Indiana or waive venue requirements of 28 U. S. C. § 1400. Schnell v. Peter Eckrich & Sons, p. 260.

PAUPERS. See **Constitutional Law,** III, 2.

PERSONAL INJURIES. See **Admiralty; Employers' Liability Act.**

PIPELINES. See **Natural Gas Act.**

PLEADINGS. See **Civil Rights,** 1.

POLICE. See **Civil Rights,** 1.

PRICE MAINTENANCE. See **Antitrust Acts,** 1.

PROCEDURE. See also **Admiralty,** 2; **Antitrust Acts,** 1; **Constitutional Law,** II; III, 2; IV; **Employers' Liability Act; Evidence,** 1–3; **Federal Rules of Civil Procedure; Labor,** 4, 5; **Taxation,** 1; **Trial.**

1. *Supreme Court—Direct appeal from district court—Dismissal of indictment—Abstract question.*—On direct appeal from order of district court dismissing indictment under § 302 of Labor Management Relations Act, 1947, on ground it did not apply to loans, order set aside and case remanded for trial on indictment when record presented only abstract question. United States v. Fruehauf, p. 146.

2. *Supreme Court — Diversity of citizenship case — Subsequent change in state decisional law.*—When judgment below in diversity of citizenship case was based on what appeared to be applicable state law but recent dictum of state supreme court cast doubt on it, judgment vacated and cause remanded. Nolan v. Transocean Air Lines, p. 293.

3. *Supreme Court — Certiorari — Dismissal when improvidently granted.*—Where certiorari was granted but record revealed that circumstances did not warrant it, writ dismissed. Bullock v. South Carolina, p. 292.

4. *Supreme Court — Certiorari — Dismissal when improvidently granted.*—When certiorari was granted in belief that decision of state supreme court presented question under Fourteenth Amendment, but record did not adequately establish that such a question was presented to it, certiorari was dismissed as improvidently granted. Newsom v. Smyth, p. 604.

5. *Supreme Court—Certiorari—Affirmance of judgment below.*—When certiorari was granted in federal criminal case on misapprehension as to issues and there was no merit to petitioner's arguments, judgment of Court of Appeals was affirmed. Coppola v. United States, p. 762.

6. *District courts—Dismissal of denaturalization proceeding—Failure to specify it was "without prejudice."*—Dismissal of denaturalization proceeding for failure to file affidavit of good cause was "for lack of jurisdiction" within meaning of Rule 41 (b) of Federal

PROCEDURE—Continued.

Rules of Civil Procedure; failure to specify that it was "without prejudice" did not bar second denaturalization proceeding. Costello v. United States, p. 265; United States v. Lucchese, p. 290.

7. *District courts—Criminal cases—Right of defendant to speak before sentencing—Technical defect in sentence.*—On motions under Rule 35 of Federal Rules of Criminal Procedure to vacate sentence for aggravated bank robbery, record did not support claim that defendant was not given opportunity to speak before sentencing, as required by Rule 32 (a), and technical defect in sentence did not invalidate it. Green v. United States, p. 301.

8. *District courts—Criminal trials—Fair administration of justice.*—When defendant was convicted on four counts of five-count indictment under narcotics laws, and Solicitor General suggested to this Court that the combination of circumstances, beginning with one judge's clearly expressed intention to impose a five-year sentence and ending with another judge's imposition of a twenty-year sentence, was not consistent with the orderly administration of criminal justice, this Court set aside all but a five-year sentence on which defendant had originally pleaded guilty. Saldana v. United States, p. 646.

PRODUCTION OF DOCUMENTS. See **Trial**, 1–2.

PROPAGANDA. See **Antitrust Acts**, 2; **Constitutional Law**, I, 2.

PUBLIC UTILITIES. See **Natural Gas Act.**

RACIAL DISCRIMINATION. See **Constitutional Law**, III, 1.

RAILROADS. See **Antitrust Acts**, 2; **Employers' Liability Act.**

RECEIVING STOLEN PROPERTY. See **Criminal Law.**

REFUNDS. See **Labor**, 1.

RELEASES. See **Employers' Liability Act.**

REMEDIES. See **Antitrust Acts**, 1; **Civil Rights**; **Labor**, 1, 4.

RESTAURANTS. See **Constitutional Law**, III, 1.

RESTRAINT OF TRADE. See **Antitrust Acts**, 1–3.

RIGHT TO COUNSEL. See **Constitutional Law**, II, 1–3.

RULES OF CIVIL PROCEDURE. See **Federal Rules of Civil Procedure**; **Procedure**, 6.

RULES OF CRIMINAL PROCEDURE. See **Procedure**, 7.

SAVINGS AND LOAN ASSOCIATIONS. See **Taxation**, 3–4.

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SEARCH AND SEIZURE. See **Civil Rights**, 1; **Constitutional Law**, V, 1–2; **Evidence**, 1, 4.

SELF-INCRIMINATION. See **Constitutional Law**, IV.

SENTENCE. See **Criminal Law; Procedure**, 7–8.

SHERMAN ACT. See **Antitrust Acts**, 1–3.

SHIPOWNERS. See **Admiralty**, 1.

SOUTH CAROLINA. See **Procedure**, 3; **Taxation**, 4.

STAMP TAXES. See **Taxation**, 4.

STATUTE OF FRAUDS. See **Admiralty**, 1.

SUPREME COURT. See also **Procedure**, 1–5.

Mr. Justice Reed (retired) designated to perform judicial duties on Court of Claims, p. 825.

TAXATION.

1. *Excess profits tax — Judgment for overpayment — Interest.*— When Court of Claims has awarded judgment against United States to taxpayer for overpayment of excess profits taxes, interest on part of judgment attributable to unused excess profits credit carry-back is governed by § 3771 (e) of Internal Revenue Code of 1939, rather than by 28 U. S. C. § 2411 (a). Bulova Watch Co. v. United States, p. 753.

2. *State taxes—Discrimination against United States—Private leaseholds on Air Force base.*—State taxation of privately owned Wherry Act leaseholds of housing developments on federally owned Air Force base entirely unconstitutional when it taxed such leaseholds on higher valuation than leaseholds on state-owned lands; federal court could not levy lower taxes for State. Moses Lake Homes v. Grant County, p. 744.

3. *State taxes—National banks—Discrimination.*—Michigan tax on shares of national banks at higher rate than tax on shares of federal and state savings and loan associations *held* not so discriminatory as to violate R. S. § 5219. Michigan Nat. Bank v. Michigan, p. 467.

4. *State taxes—Federal home loan banks—"Advances" to federal savings and loan associations.*—State may not require tax stamps on notes of federal savings and loan association covering loans from federal home loan bank. Laurens Fed. Sav. & Loan Assn. v. South Carolina Tax Comm'n, p. 517.

TRADE ASSOCIATIONS. See **Antitrust Acts**, 2; **Labor**, 3.

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TRANSPORTATION. See **Antitrust Acts**, 2; **Employers' Liability Act**; **Labor**, 3; **Natural Gas Act.**

TRIAL. See also **Constitutional Law**, II; IV; V; **Evidence**, 1–3.

1. *Criminal cases—Jencks Act—Duty of trial judge in determining whether document in question is "statement" which defense is entitled to inspect.*—When defense moved to inspect statement made and signed by witness and Government denied possession of it but admitted possession of F. B. I. summary of interview with him, it was error for trial judge to rely on witness' denial that summary was his statement and to deny motion without calling F. B. I. agent who had prepared summary. Campbell v. United States, p. 85.

2. *Criminal cases—Jencks Act—"Statement"—Failure to produce.*—When government witnesses testified to conversations with defendants and admitted that they had prepared memoranda of such conversations, such memoranda were "statements" within meaning of 28 U. S. C. § 3500, and failure to produce some of them was reversible error. Clancy v. United States, p. 312.

TRUCKERS. See **Antitrust Acts**, 2; **Labor**, 3.

UNIONS. See **Labor**, 1–5; **Procedure**, 1.

VENUE. See **Patents**, 2.

WASHINGTON. See **Taxation**, 2.

WATER POWER. See **Eminent Domain.**

WHERRY ACT. See **Taxation**, 2.

WIRETAPPING. See **Communications Act**; **Evidence**, 2–3.

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WORDS.

1. *"Advances."*—Federal Home Loan Bank Act, § 13. Laurens Fed. Sav. & Loan Assn. v. South Carolina Tax Comm'n, p. 517.

2. *"At a greater rate than . . . other moneyed capital . . . coming into competition with the business of national banks."*—R. S. § 5219. Michigan National Bank v. Michigan, p. 467.

3. *"For lack of jurisdiction."*—Federal Rules of Civil Procedure, 41 (b). Costello v. United States, p. 265; United States v. Lucchese, p. 290.

4. *"Occupation."*—Petition for naturalization under Immigration and Nationality Act of 1952. Costello v. United States, p. 265.

5. *"Statement."*—18 U. S. C. § 3500. Campbell v. United States, p. 85; Clancy v. United States, p. 312.

6. *"Under color of" state law.*—R. S. § 1979. Monroe v. Pape, p. 167.