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UNITED STATES REPORTS

VOLUME 381

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1964

MAY 3 THROUGH JUNE 7, 1965
END OF TERM

HENRY PUTZEL, jr.
REPORTER OF DECISIONS

UNITED STATES
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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

EARL WARREN, Chief Justice.
HUGO L. BLACK, Associate Justice.
WILLIAM O. DOUGLAS, Associate Justice.
TOM C. CLARK, Associate Justice.
JOHN M. HARLAN, Associate Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
ARTHUR J. GOLDBERG, Associate Justice.

RETIRED

STANLEY REED, Associate Justice.
CHARLES E. WHITTAKER, Associate Justice.

NICHOLAS deB. KATZENBACH, Attorney General.
ARCHIBALD COX, Solicitor General.
JOHN F. DAVIS, Clerk.
HENRY PUTZEL, jr., Reporter of Decisions.
T. PERRY LIPPITT, Marshal.
HELEN NEWMAN, Librarian.

SUPREME COURT OF THE UNITED STATES.

ALLOTMENT OF JUSTICES.

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, viz.:

For the District of Columbia Circuit, EARL WARREN, Chief Justice.

For the First Circuit, ARTHUR J. GOLDBERG, 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, BYRON R. WHITE, Associate Justice.

For the Ninth Circuit, WILLIAM O. DOUGLAS, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

October 15, 1962.

(For next previous allotment, see 370 U. S., p. IV.)

PROCEEDINGS IN THE SUPREME COURT OF THE UNITED STATES IN MEMORY OF MR. JUSTICE BURTON.*

MONDAY, MAY 24, 1965.

Present: MR. CHIEF JUSTICE WARREN, MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE CLARK, MR. JUSTICE HARLAN, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE WHITE, and MR. JUSTICE GOLDBERG.

Mr. Solicitor General Cox addressed the Court as follows:

May it please the Court:

At a meeting of the Members of the Bar of the Supreme Court held at 11: 00 o'clock this morning, resolutions expressing their profound sorrow at the death of Justice Harold Hitz Burton were offered by a Committee, of which Dean Erwin N. Griswold was Chairman. Addresses on the resolutions were made by the Honorable Kingsley A. Taft, Chief Justice of the Supreme Court of Ohio; Raymond S. Troubh, Esquire, of New York, New York; and the Honorable Robert Hale, formerly U. S. Representative from the State of Maine.

The resolutions unanimously adopted are as follows:

"RESOLUTIONS

"On behalf of the Bar of the Supreme Court, we have met to record our regard for Harold Hitz Burton, Justice

*Mr. Justice Burton, who retired from active service on October 13, 1958 (358 U. S., VII), died in Washington, D. C., on October 28, 1964. Services were held at All Souls Unitarian Church, Washington, D. C., on October 31, 1964, and at the First Unitarian Church, Cleveland, Ohio, November 2, 1964. Interment was in Highland View Cemetery in Cleveland, Ohio, on November 2, 1964. See 379 U. S., IV, IX.

of the Supreme Court of the United States for thirteen active years from 1945 to 1958. He died October 28, 1964, and is mourned by members of the profession, his many friends, and citizens everywhere.

"Harold Hitz Burton was born in Jamaica Plain, Massachusetts, on June 22, 1888. His great-grandfather, John Hitz, was the first Swiss Consul General to the United States, and his home was within what is now the Capitol Plaza diagonally across the street from the present Supreme Court building.

"Harold Burton's early education was in Switzerland where his mother had returned for her health. As a result, he was bilingual in English and in French and this undoubtedly contributed to his broad outlook. His mother died when he was seven years old, and he returned to the United States. He attended the Newton High School, and then went on to Bowdoin College, where he received the A.B. degree in 1909. His roommate at Bowdoin was Owen Brewster, later Senator of the United States from the State of Maine. Both Brewster and Burton proceeded to the Harvard Law School, and received their LL.B. degrees in the class of 1912. Other members of that class included John G. Buchanan of the Pittsburgh bar, Charles Evans Hughes, Jr., formerly Solicitor General of the United States, and later of the New York bar, and Ivan Cleveland Rand, who became a Justice of the Supreme Court of Canada.

"Justice Burton was married on June 15, 1912, immediately after his graduation from Law School to Selma Florence Smith, of West Newton, Massachusetts, then a recent graduate of Wellesley College. This was a happy union, and Mrs. Burton was a constant support and a source of strength to the Justice. They had four children, two daughters and two sons. Both of the sons are graduates of the Harvard Law School, and members of the bar of this Court.

"After leaving Law School, Harold Burton headed west, and was in practice in Cleveland for two years. Then he

went still farther west, and worked as a lawyer in Salt Lake City, and Boise, Idaho, from 1914 to 1917. With the outbreak of war, in 1917, he entered officers' training. He was commissioned a First Lieutenant, and eventually a Captain. From June 1918, he served in France, participating in the St. Mihiel offensive in September, in the Meuse-Argonne, and later in Belgium as operations officer of his regiment. His Colonel recorded that 'much of the success of the operations of the regiment was due to his careful analysis of all situations as they arose, and thorough preparation of the command for whatever emergency was to be met.' He was awarded the Belgian Croix de Guerre, and the United States Army Meritorious Service citation. When the order of the Purple Heart was established in 1932, he received its medal.

"With the close of the war, he returned to Cleveland, and spent the next ten years in private practice. During this period, however, he carried on many other activities. He taught Corporation Law at the Western Reserve University Law School. He was President of the First Unitarian Church of Cleveland, and Chairman of the Research Committee of the Citizens Committee on Regional Government. He was also active in important posts in the American Legion.

"At the close of this period, his character, outlook, and standing are clearly shown by a perceptive passage in a letter written to him by a leading citizen of Cleveland, Newton D. Baker. Some members of the bar had advanced Harold Burton for appointment to the United States District Court. As things worked out, it was perhaps fortunate that this did not succeed. At any rate, when the appointment went elsewhere, Mr. Baker wrote to him: 'My own mind leaned to you because you are young, studious, educated and have a desire to serve your day and generation measured by other standards than the mere monetary reward. There is a long career of fine usefulness ahead of you and I shall watch with delight the successful steps you take in accomplishing it.'

"In 1928, Harold Burton became a member of the Board of Education of East Cleveland. In November of that year, he was elected a member of the Ohio House of Representatives. On October 15, 1929, he was appointed Director of Law of the City of Cleveland, an office which he held until November 9, 1931. For a part of this time, he was Acting City Manager of Cleveland. On November 9, 1931, he became Acting Mayor of Cleveland, a post which he held until February 20 of the following year. For the next three years, he resumed private practice specializing in municipal law, but continued his active interest in public affairs. He was Associate Counsel for the City of Cleveland in its gas rate litigation. He was Chairman of the Intercity Committee of Lake Erie Ports. He was Chairman of the Cleveland Board of Education Committee on Citizenship Training, a member of the Governor's Commission on County Government, and Chairman of the County Charter Commission of Cuyahoga County.

"In 1935, Harold Burton was elected Mayor of Cleveland. He was reelected in 1937 and 1939. Thus, he was Mayor of this great and complex city during one of its most difficult periods in history, a service which he performed with devotion and skill, and with the acclaim of all elements in the community.

"In November 1940, Harold Burton was elected United States Senator from Ohio, and he resigned as Mayor in December 1940. On his last day as Mayor, the Cleveland News wrote:

" 'We consider this to be the most unusual man in American politics, and the most unusual Mayor any city has had in these times. Other cities can take their LaGuardias, Kelleys, Hoans. We'll take you; the outstanding exponent of a city government that is honest, high minded, and right in step with all its people, common and uncommon.'

"He took office as Senator on January 3, 1941. As a Senator, he quickly made himself known as a quiet and

effective worker for the public interest. He was a member of the Senate's Committee on the Conduct of the War, of which then Senator Truman was Chairman. During the same time, he was Moderator of the American Unitarian Association.

"In September 1945, President Truman appointed him as Associate Justice of the Supreme Court of the United States, and he took his seat on the bench on October 1, 1945.

"When Justice Burton was appointed to the Court, the Minister of his church in Cleveland, the Reverend Dilworth Lupton, summed up his qualities in a way which future events fulfilled. He said: 'He will bring to the office a sportsmanship that will win him the respect of both adherents and opponents; a plodding intellectual penetration that will search out the heart of great issues; a faculty for creative listening that is a prime requisite of a judicial mind; and a sense of quiet humor that marks a matured man.

" 'And he will bring to the office a spirit of dedication to eternal principles—a dedication that few men possess.'

"In his work on the Court, he continued to show the qualities which had distinguished him in his earlier career. Few men, even among our greatest judges, have achieved the quality of disinterestedness so completely and effectively as Harold Burton did. He was quiet and thorough in his work, devoted to the Court and to the law, and wholly dispassionate in his reasoning and in his conclusions. He always had the warm respect of his colleagues, and the high regard of the members of the bar.

"His first opinion was a concurring opinion in the case of *Markham* v. *Cabell,* 326 U. S. 404, 413, involving the Trading with the Enemy Act. His final opinion was in *Ashdown* v. *Utah,* 357 U. S. 426, a first degree murder case. In between, were many notable opinions, including his opinion for the Court in *Henderson* v. *United States,* 339 U. S. 816 (1950), where in his characteristic logical and dispassionate way he reached the conclusion that all

persons are entitled to be free of discrimination on racial or other grounds in the operation of a carrier regulated by Federal statute. Other opinions which may be mentioned are his concurring opinion in the Steel Seizure case (*Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S. 579, 655), where he decided against the validity of President Truman's action, and his powerful dissenting opinion in *United States* v. *E. I. du Pont de Nemours & Co.,* 353 U. S. 586, 608. All of his opinions show great craftsmanship and thoroughness. They are simple, direct and unassuming, without verbal adornment or glittering phrase. They do not proceed by the broad sweep, or in generalities, but deal specifically with the case at hand. They are the work of a careful man whose mind penetrated deeply, step by step, and who reached his conclusions through painstaking effort. They reflect clearly the deep interest of Justice Burton in the viable administration of government in the interest of all the people. In this way, as well as in their professional skill, they are important contributions to our law.

"While on the Court, Harold Burton wrote a number of articles which expressed his point of view. He wrote about leading cases in the Court's history,[1] about John Marshall,[2] and about the Supreme Court and its independence.[3]

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[1] The Cornerstone of Constitutional Law: The Extraordinary Case of *Marbury* v. *Madison,* 36 A. B. A. J. 805 (1950); The Dartmouth College Case: A Dramatization, 38 A. B. A. J. 991 (1952); Two Significant Decisions: *Ex parte Milligan* and *Ex parte McCardle,* 41 A. B. A. J. 121 (1955); and The Legal Tender Cases: A Celebrated Supreme Court Reversal, 42 A. B. A. J. 231 (1956).

[2] "Justice the Guardian of Liberty": John Marshall at the Trial of Aaron Burr, 37 A. B. A. J. 735 (1951); John Marshall—The Man, 104 U. Pa. L. Rev. 3 (1955).

[3] The Supreme Court: Mr. Justice Burton Gives Interesting Comparisons, 33 A. B. A. J. 645 (1947); An Independent Judiciary: The Keystone of Our Freedom, 39 A. B. A. J. 1067 (1953); The Independence and Continuity of the Supreme Court of the United States, speech delivered in the National Convention of the Phi Alpha Delta Law Fraternity on June 22, 1956, at Cleveland, Ohio.

"In his work on the Court, as in his previous public career, Harold Burton could not be catalogued. He was never cynical, acid or vitriolic. He was always mild and unassuming. He was always hard-working and self-effacing. He proceeded through the force of his ideas, and not the strength of his words. As a commentator in the New York Times said at the time of his retirement: 'He has never been found among those public figures who automatically seem to give off sparks. It has been a long time since the Justice created headlines; he has been too busy and too earnest for that.'

"Just before his retirement in 1958, Justice Burton received the Bowdoin Prize, the highest award of his alma mater, made in recognition 'of his distinctive contribution through his outstanding service to his nation and his fellow man.' At that time, his eight colleagues on the Court wrote: 'Justice Burton has regarded his position on the Court as a trusteeship, and has dedicated himself to it wholly and without stint. His indefatigable energies for keen analysis have earned the respect of those who served with him, as his gentle, understanding, and undemanding nature has earned their deep affection and esteem.' And in the letter which the members of the Court wrote to Justice Burton at the time of his retirement, they said: 'Without exception, we believe that of all the Justices who have sat on this Bench, not one has adhered more closely than you to the ideal for which we all strive—"Equal Justice Under Law." ' 358 U. S. x, xi.

"With these words, which take on the character of res judicata, we close these remarks about the career of Justice Burton. Much of his contribution during his service on the Court was made in ways which will be fully appreciated only by those who are professionally the officers of the Court. His was a life of service, through which he made important contributions to the nation and to the law. It is accordingly fitting that we members of the bar of the Court should submit the following Resolutions.

" 'We do

" '*Resolve* that we, the bar of the Supreme Court of the United States, express our profound sorrow at the death of Justice Harold Hitz Burton, and our deep appreciation for his contributions of public service, where he served with equal distinction and effectiveness in the Executive, Legislative and Judicial branches of the government, in the armed forces, and in civil life at all levels of our governmental system as an officer of his city, state, and nation, and as a Justice of the Supreme Court who was in all places unexcelled in his dispassionate search for light and truth:

" '*It is further Resolved*

" 'That the Attorney General be asked to present these Resolutions to the Court, and to request that they be inscribed upon its permanent records, and that copies of these Resolutions be forwarded to the widow and children of Justice Burton.' "

Mr. Attorney General Katzenbach addressed the Court as follows:

Mr. Chief Justice, May It Please the Court:

The Bar of this Court met today to honor the memory of Harold Hitz Burton and to recall for posterity, as vividly as dry words permit, the many admirable qualities of the man, the distinguished capacities in which he served his community and his country, and, of particular importance to those assembled here, the contribution he made to the rule of law during his thirteen years as an Associate Justice of this Court.

Those who knew him most intimately have already paid fitting tribute to the traits of mind and character which transformed Harold Burton's acquaintances to friends and his friends to admirers. They have, in a sense, reaffirmed what was known by all who were ever affected by his public or private endeavors—that the private citi-

zen, like the public servant, embodied qualities of courage, dedication and fairness which placed him in the front rank of men.

As an infantry captain, Ohio state legislator, Mayor of Cleveland and Senator from Ohio, he was well served by these powerful personal attributes. On many different battlefields, his quiet fortitude enabled him to face hostile forces with equanimity.

Coming to this Court from the rough-and-tumble of politics and legislative compromise, Harold Burton succeeded, swiftly and with remarkable ease, in channeling the talents which had contributed to his earlier success into the more contemplative cast required of members of this Court. During each of his many eventful terms on this Court, Mr. Justice Burton demonstrated anew the qualities of fairness, tenacity and devotion to principle which had marked his earlier career.

His appointment to this Court was itself a tribute to his judicious and dispassionate temper. For his political affiliation was different from that of President Truman, who nominated Harold Burton for the first opening on the Court during his tenure in office. The President's choice was particularly striking in the light of his own commitment to vigorous rivalry between our major political parties; it must have been influenced by the qualities of fairness and openmindedness which he saw demonstrated by Harold Burton during their association in the Senate of the United States and in their joint service upon its committees. Justice Burton's nomination was, in every sense, a nonpartisan one because it placed upon this Court a man who was singularly free of preconceptions, prejudices, or predilections.

President Truman's judgment of his fairness was by no means the first. From the outset men had appreciated in him a disarming simplicity, objectivity of judgment and directness of expression. In politics, as later on this Court, these qualities stood him in good stead. He was first elected Mayor of Cleveland in 1935 as an Inde-

pendent-Republican candidate when the city was overwhelmingly Democratic. In the major battle of his administration four years later, Mayor Burton—then an avowed Republican—did not hesitate to take on the Republican governor of Ohio on the urgent question of relief.

Again, repeatedly, as a Senator, Mr. Burton's independent convictions led him against the current of his party's leadership and what others read as popular opinion—most particularly in the Senate debate over Lend-Lease and, in 1943 in a bipartisan resolution which he drafted calling for American leadership in forming a United Nations organization.

From the inception of his judicial career, Justice Burton devoted to the business of deciding cases and writing opinions the same care and energy that had made him an outstanding legislator and administrator. His first opinion for the Court concerned the application of the Fair Labor Standards Act to a corporation engaged in electrical contracting and in the sale of motors and generators. In determining that the Act applied to the corporation's employees, Justice Burton wove his way, in great detail, through the relevant history of the statute—including the debates on the floor of the Congress—and meticulously defining ambiguous statutory terms by reference to authorities ranging from the unabridged dictionary and the Encyclopedia of Social Sciences to industrial manuals issued by the Bureau of the Budget and the Social Security Board.

The precision manifested by this maiden effort emerged time and again in his opinions on questions of statutory construction. As a former legislator, he knew that legislative intent is a restless and shifting creature which almost never stands still long enough to be identified; but he persisted in the dominant concern of searching out the real wish of Congress by placing the statute in historical perspective and determining how Congress resolved the problem before it. He would then reconcile and align

statutory provisions in a manner calculated to carry out that wish as applied to the facts of the case before him without intruding his own view of policy.

Justice Burton left behind him in the legislative chambers all *a priori* notions of what statutes should say or what proper legislative policy might be. His judgment invariably rested upon an exhaustive examination of all available material casting light upon the meaning of legislation at hand. "He would not," as the poet said, "make his judgment blind." And yet, Justice Burton was wary lest finely drawn lines frustrate the purpose for which legislation was enacted. In his first Term on the Court, he alone dissented from the holding in *Commissioner* v. *Wilcox* that embezzled money did not constitute income within the meaning of the Internal Revenue Code; in his next-to-last Term, he wrote a majority opinion rejecting the argument that a certain federal criminal statute should be limited in its application to persons committing acts which would have been crimes under the common law. In each instance, it was his view that the very fine line sought to be drawn could not be harmonized with the will of Congress. And his dissent in *Wilcox* was, of course, vindicated by subsequent decisions.

When, in his view, fine lines were warranted, Justice Burton could draw them with the adeptness of the most skillful attorney. His carefully limited opinion in *Joint Anti-Fascist Refugee Committee* v. *McGrath,* in which his vote was the necessary one for reversal, is proof enough of that. And the hallmark of his opinions for the Court—an introductory sentence beginning: "This case presents two questions . . ." or "The issue here is whether . . ." or "The question before us is . . ."—epitomized his careful lawyerlike attitude towards the decision-making responsibility which resides with this Court. In Justice Burton's view, cases heard by this Court invariably narrowed themselves down to precise issues, and it was on the merits of those issues of law alone that they were to be decided. To him, who the parties were was irrelevant.

Justice Burton enriched our law with opinions ranging over a wide range of subject matter. He was the author of seminal opinions in the field of labor law, as well as cases defining the scope of the pre-emption doctrine. He also wrote opinions for the Court in several major anti-trust cases, and manifested his independent spirit in numerous forceful dissents.

At the conclusion of the 1957 Term, a crippling illness which had struck Justice Burton became too severe to permit him to carry on the heavy day-to-day labors required of members of this Court. Upon his retirement, however, he offered and was assigned by the Chief Justice to serve on the Court of Appeals for the District of Columbia Circuit; he did so for the following five years to the extent that his health and energy permitted.

His interest in the business of this Court never flagged. Despite the obvious incapacitating effect of his illness, Justice Burton would regularly attend sessions of the Court on Monday mornings to hear decisions rendered and would appear for the argument of important cases. His conduct on these occasions made observers of the Court marvel at his courage and dedication to the Court as an institution.

May it please this Honorable Court: In the name of the lawyers of this Nation, and particularly of the Bar of this Court, I respectfully request that the resolution presented to you in memory of the late Justice Harold H. Burton be accepted by you, and that it, together with the chronicle of these proceedings, be ordered kept for all time in the records of this Court.

THE CHIEF JUSTICE said:

Mr. Attorney General:

Your statement concerning our Brother Burton is music to our ears. In honoring him, you honor the Court. We agree with everything you have said, and need only add

to it a few remarks from our hearts to indicate what he meant to us as individuals and to the Court as an institution through the years of intimate association we had with him.

I think it is not beyond the spirit of our democratic institutions to say that Harold Burton was a nobleman, not in a patriarchal sense but in the sense that he was essentially a man of noble character, stamped by both integrity and humility. He was in all respects a friend of man, not of some men, but of all men. He was as free from animosity, prejudice and all other fetishes, which are common faults of human nature, as anyone we in our varied experiences have come in contact with. Because of these rare qualities, he was able to engage in the judging process with an equanimity that has been given to few men. Our feeling concerning him may be epitomized in our joint statement on the occasion of his retirement from the Court.

In our letter of farewell to him, we said:

> "We believe that of all the Justices who have sat on this Bench, not one has adhered more closely than you to the ideal for which we all strive—'Equal Justice Under Law.' "

No higher praise could be given to any Justice by his colleagues, and I am sure that none of the ninety-four Justices of this Court could have been more worthy of it. In addition, I think it might as properly be said that no one who has ever sat on the Court was a more leavening influence than was he—gentle, kindly, self-effacing, but with complete dedication to the principles of justice, he strove diligently and understandingly always for that which he believed to be right. His one overwhelming desire was to be helpful to everyone, on and off the Court.

He was the good Samaritan in every phase of his life—in public office, in his home, and on the streets. He made no show of this lovable trait of character, but occasionally his acts of kindness, which were so well known by his

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friends, came to the attention of the public through the press. I will read one article concerning an incident which never would have been told by him, but which was brought to public attention by the beneficiary of his good deed. It was thus reported:

> "A crippled beggar was pushing his wheel chair along a rainy Washington street. The pavement was wet. Crossing the street, the rubber tires of the wheel chair slipped, finally stalled at the curb. The chair wouldn't budge.
>
> "A stranger hurrying through the drizzle, stepped over to the wheel chair and gave it a push.
>
> "The cripple wiped his face with a soiled service cap and thanked the stranger, who asked where he was going. 'To the Union Station,' was the reply, 'to get out of the rain.'
>
> "The well-dressed stranger offered to push the wheel chair to the station. 'We'll go there together,' said the stranger pushing the wheel chair ahead of him.
>
> " 'Work for the Government?' asked the cripple as they proceeded. 'Yes.'
>
> " 'Veterans Administration?' 'No.'
>
> " 'Where do you work?' persisted the wheel chair passenger. 'Over in the court.'
>
> " 'Which Court?' 'The Supreme Court.'
>
> "The beggar twisted his head around for a good look at the man who was pushing him through the rain.
>
> " 'Which one are you?' he asked. The man who had rescued him was Justice Harold Burton."

Such acts of kindness were a way of life with Justice Burton. I am sure this way of life was natural to him, but it was also accentuated and made more meaningful by Selma, his wife of 52 years, whose benefactions and service in behalf of good causes have been well known to the people of Washington throughout the 25 years of their

residence here. Those facets of the lives of these two generous souls permeated their community, their church, and their family lives. With their four children, ten grandchildren and two great grandchildren, they made the ideal family.

As a man of God, Justice Burton found the time to serve as National Moderator of his church.

Justice Burton was one of the few Justices of the Supreme Court who served in all three Branches of the Government, thus bringing to the Court a profound understanding of the prerogatives of each of them and the relationships between them.

As Mayor of the great City of Cleveland, as United States Senator from the State of Ohio, and as a Justice of this Court, he brought his rare qualities and broad experience to all the complex and emotion-packed issues which were presented to the Court in his time. In all of these important offices which he held, his acts were marked with the label of simple honesty.

I shall never forget the statement of one of our colleagues who was endeavoring to give the strongest recommendation he was capable of for a man some of us did not know. He ended by saying he would trust this man as he would Harold Burton. We all realized what a recommendation that was.

This common honesty was made more meaningful throughout his life by the calm courage which brought him distinction both as a soldier in France and Belgium during World War I, as a reform Mayor of his city, and as a member of the Senatorial Committee on the prosecution of the War.

But, of course, he is best known to us by that same quiet, dignified courage as a Justice of this Court and during the long illness which necessitated his retirement. For this, he will always be remembered.

About two weeks before our Brother Frankfurter passed away, he came to my chambers and told me he would like to have a few moments at this ceremony to express his

feeling toward Justice Burton. He said he could best do this by merely reading a letter he had written to Justice Burton in 1964. I told him I was sure that all present would be happy to hear it. Unfortunately, Justice Frankfurter also went to his reward before these services could be held, but I now read his letter with the assurance that it expresses the sentiment we all have for Harold Burton:

> "To you and to Selma and to many others I have often expressed my admiration to you as a member of the Supreme Court, for no member of the Supreme Court deserves admiration more than you for exercising with exquisite and unqualified fidelity the judicial power entrusted to members of the Court.
>
> "What I have just said I would be writing if I were writing a formal history of the Court, namely, that no one who knows the history and behavior of individual Justices during the whole history of the Court as well as I do could single out any Justice who has been more conscientious in his duties while on the Court than you. You were a Judge in all that the term implies for you have never allowed any considerations except those relevant to a conscientious decision of issues before the Court to determine how litigations that came before you should be determined. May all your remaining days give you the satisfaction of having been so conspicuously good a Justice of our highest tribunal and may you not merely live in the past but also may you find comfort and strength from all your past as well as from the happy blessings that the good Lord has showered upon you in your family life.
>
> "This brings you the best wishes and the most respectful admiration of your old friend and colleague."

I will not discuss at this time the important decisions which Justice Burton wrote or participated in during his

13 years of service on the Court, but they are recorded in Volumes 326 through 357 of the United States Reports, and will always be a living part of our jurisprudence.

Mr. Attorney General, on behalf of the Court, I desire to thank you for your generous words concerning our Brother, and we accept with pleasure the Resolutions of the Bar which you have presented to us. In return, may I ask you to communicate our appreciation to the Bar of this Court and express our thanks for the interest which prompts them to have their sentiments preserved in our records for all time.

Let the Resolutions and your statement be spread upon the Minutes of this Court.

DEATH OF MR. JUSTICE MINTON.

SUPREME COURT OF THE UNITED STATES.

MONDAY, JUNE 7, 1965.

Present: MR. CHIEF JUSTICE WARREN, MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE CLARK, MR. JUSTICE HARLAN, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE WHITE, and MR. JUSTICE GOLDBERG.

THE CHIEF JUSTICE said:

Before rising for the Term, the Court records with sadness the passing of Retired Justice Sherman Minton. He is the third of our Retired Justices to have gone to his reward during this 1964 Term of Court. The deaths of Mr. Justice Burton and Mr. Justice Frankfurter have already been recorded in our proceedings.

Justice Minton died peacefully at his home in New Albany, Indiana, at the age of 74 on April 9, 1965, after a long debilitating illness that had caused his retirement from this Court on October 15, 1956. Prior to that date, he had devoted most of his adult life to the service of his native State and Nation.

As a gallant combat officer in World War I, as public counselor for the Public Service Commission of Indiana, as United States Senator from that State, as Presidential Assistant, as Judge of the United States Court of Appeals for the Seventh Circuit, and for seven years before his retirement as an Associate Justice of this Court, he made important contributions in each of the offices he held to the history of our time. For this devoted public service, he will be long remembered.

Those of us who had the privilege of serving with him on the Supreme Court mourn his loss as we would a brother.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1964.

ZEMEL *v.* RUSK, SECRETARY OF STATE, ET AL.

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

No. 86. Argued March 1, 1965.—Decided May 3, 1965.

After this country had broken diplomatic relations with Cuba and the Department of State had eliminated Cuba from the area for which passports were not required, appellant applied to have his passport validated for travel to Cuba "to satisfy [his] curiosity . . . and to make [him] a better informed citizen." His request was denied, and he filed suit in federal district court seeking a judgment declaring that he was entitled under the Constitution and laws of the United States to travel to Cuba and to have his passport validated for that purpose, that the Secretary of State's travel restrictions were invalid, and that the Passport Act of 1926 and § 215 of the Immigration and Nationality Act of 1952 were unconstitutional. In addition, he prayed that the Secretary and the Attorney General be enjoined from interfering with such travel. A three-judge court granted the Secretary's motion for summary judgment and dismissed the action against the Attorney General. *Held:*

1. Since the complaint launched a substantial constitutional attack upon two federal statutes and prayed that their operation be enjoined, the three-judge court was properly convened. Pp. 5–7.

2. The Passport Act of 1926 grants authority to the Executive to refuse validation of passports for Cuban travel. Pp. 7–13.

(a) The consistent interpretation by the Department of State of its authority to impose area restrictions, both before and after

the 1926 enactment, must be given weight by the courts in construing the statute. Pp. 8–11.

(b) In 1952 Congress enacted legislation relating to passports, but despite the many executive impositions of area restrictions it left untouched the broad rule-making authority granted in the Passport Act of 1926. P. 12.

(c) This case, where the Secretary's refusal is based on foreign policy considerations affecting all citizens, is distinguished from *Kent* v. *Dulles*, 357 U. S. 116, where the passport denial was based on the applicant's political beliefs or associations. Pp. 12–13.

3. The restriction on travel to Cuba does not abridge appellant's constitutional rights. Pp. 13–18.

(a) The fact that a liberty cannot be inhibited without due process of law does not mean that it can under no circumstances be inhibited. P. 14.

(b) The restriction here is justified by the weightiest considerations of national security. Pp. 14–15.

(c) The failure to validate appellant's passport results in an inhibition of action and not a restriction of a First Amendment right. The right to speak and publish does not carry with it an unrestrained right to gather information. Pp. 16–17.

(d) The Passport Act of 1926 contains sufficiently definite standards for action, especially since the area is that of foreign affairs where the Executive has broad authority. P. 17.

(e) The Passport Act of 1926 does not grant the Executive completely unrestricted freedom of action, as it authorizes only those passport restrictions which it could fairly be argued were adopted by Congress in light of prior administrative practice. Pp. 17–18.

4. Adjudication of the reach and constitutionality of § 215 (b) of the Immigration and Nationality Act of 1952 as applied to travel in violation of an area restriction must await a concrete factual situation. Pp. 18–20.

228 F. Supp. 65, affirmed.

Leonard B. Boudin argued the cause for appellant. With him on the briefs were *Victor Rabinowitz* and *Samuel Gruber*.

Solicitor General Cox argued the cause for appellees. With him on the brief were *Assistant Attorney General*

Yeagley, Daniel M. Friedman, Bruce J. Terris, Kevin T. Maroney and *Lee B. Anderson.*

Edward J. Ennis and *Melvin L. Wulf* filed a brief for the American Civil Liberties Union, as *amicus curiae,* urging reversal.

Isidore Englander and *Joseph Forer* filed a brief for Anatol Schlosser, as *amicus curiae.*

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

The questions for decision are whether the Secretary of State is statutorily authorized to refuse to validate the passports of United States citizens for travel to Cuba, and, if he is, whether the exercise of that authority is constitutionally permissible. We answer both questions in the affirmative.

Prior to 1961 no passport was required for travel anywhere in the Western Hemisphere. On January 3 of that year, the United States broke diplomatic and consular relations with Cuba. On January 16 the Department of State eliminated Cuba from the area for which passports were not required, and declared all outstanding United States passports (except those held by persons already in Cuba) to be invalid for travel to or in Cuba "unless specifically endorsed for such travel under the authority of the Secretary of State." A companion press release stated that the Department contemplated granting exceptions to "persons whose travel may be regarded as being in the best interests of the United States, such as newsmen or businessmen with previously established business interests."

Through an exchange of letters in early 1962, appellant, a citizen of the United States and holder of an otherwise valid passport, applied to the State Department to have his passport validated for travel to Cuba as a tourist. His

request was denied. On October 30, 1962, he renewed the request, stating that the purpose of the proposed trip was "to satisfy my curiosity about the state of affairs in Cuba and to make me a better informed citizen." The request again was denied, on the ground that the purpose of the trip did not meet the previously prescribed standards for such travel.

On December 7, 1962, appellant instituted this suit against the Secretary of State and the Attorney General in the United States District Court for the District of Connecticut, seeking a judgment declaring: (1) that he was entitled under the Constitution and laws of the United States to travel to Cuba and to have his passport validated for that purpose; (2) that his travel to Cuba and the use of his passport for that purpose would not violate any statute, regulation, or passport restriction; (3) that the Secretary's restrictions upon travel to Cuba were invalid; (4) that the Passport Act of 1926 and § 215 of the Immigration and Nationality Act of 1952 were unconstitutional; (5) that the Secretary's refusal to grant him a passport valid for Cuba violated rights guaranteed him by the Constitution and the United Nations Declaration of Human Rights; and (6) that denial of the passport endorsement without a formal hearing violated his rights under the Fifth Amendment.[1] The complaint also requested that the Secretary be directed to validate appellant's passport for travel to Cuba and that the Secretary and the Attorney General be enjoined from interfering with such travel. In his amended complaint, appellant added to his constitutional attack on the 1926 and 1952 Acts a prayer that the Secretary and the Attorney General be enjoined from enforcing them.

On appellant's motion, and over the objection of appellees, a three-judge court was convened. On cross-

[1] This procedural claim was abandoned in the District Court and has not been urged here.

motions for summary judgment, the court, by a divided vote, granted the Secretary of State's motion for summary judgment and dismissed the action against the Attorney General, 228 F. Supp. 65 (D. C. D. Conn. 1964). We postponed consideration of the jurisdictional question to the hearing of the case on the merits, 379 U. S. 809.

I.

A direct appeal to this Court from a district court lies under 28 U. S. C. § 1253 (1958 ed.) only "from an order granting or denying . . . an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." Thus we must deal first with the Government's contention that a three-judge court was improperly convened, for if the contention is correct, this Court lacks jurisdiction over the appeal. *Phillips* v. *United States,* 312 U. S. 246, 248.

Section 2282 of Title 28 of the United States Code requires the impanelling of a three-judge court in any case where the relief sought is "[a]n interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States . . . ." On its face, appellant's amended complaint, by calling upon the court below to enjoin the enforcement of the Passport Act of 1926 and § 215 of the Immigration and Nationality Act of 1952, on the ground that those statutes are unconstitutional, meets the requirements of § 2282. The Solicitor General notes that appellant would be accorded full relief by the voiding of the Secretary's order. It is true that appellant's argument—that either the Secretary's order is not supported by the authority granted him by Congress, or the statutes granting that authority are unconstitutional—is two-pronged. But we have often held that a

litigant need not abandon his nonconstitutional arguments in order to obtain a three-judge court: "the joining in the complaint of a nonconstitutional attack along with the constitutional one does not dispense with the necessity to convene such a court." [2]

The Solicitor General, apparently conceding—as all three judges below agreed—that appellant's Fifth Amendment attack is substantial, cf. *Kent* v. *Dulles,* 357 U. S. 116, 125; *Aptheker* v. *Secretary of State,* 378 U. S. 500, 505–506, argues that it is in reality an attack upon an administrative, as opposed to a legislative, policy, and therefore, under cases like *Phillips* v. *United States,* 312 U. S. 246, and *Ex parte Bransford,* 310 U. S. 354, a three-judge court need not have been convened. We need not evaluate this contention, for appellant's complaint also attacks the 1926 and 1952 Acts on the ground that "they contain no standards and are therefore an invalid delegation of legislative power." This allegation cannot be brushed aside as an attack upon the actions of the Secretary; in arguing invalid delegation, appellant has quite clearly assailed the statutes themselves. The Solicitor General therefore meets the delegation argument on another ground: by labeling it "frivolous." Although we do not accept appellant's delegation argument, *infra,* pp. 17–18, we cannot agree that it is so insubstantial as to compel a district court to read it out of the complaint and refuse to convene a three-judge court. Compare *William Jameson & Co.* v. *Morgenthau,* 307 U. S. 171; *Schneider* v. *Rusk,* 372 U. S. 224. Indeed, we explicitly noted in *Kent* v. *Dulles, supra,* at 129, that if we had held that the Secretary's refusal to issue a passport to petitioner in that case was supported by the 1926 and 1952 Acts, we would

[2] *Florida Lime Growers* v. *Jacobsen,* 362 U. S. 73, 80; see also *Allen* v. *Grand Central Aircraft Co.,* 347 U. S. 535; *Lee* v. *Bickell,* 292 U. S. 415; *Sterling* v. *Constantin,* 287 U. S. 378.

then have been obliged to consider whether those Acts were void for invalid delegation.[3]

The complaint therefore launches a substantial constitutional attack upon two federal statutes, and prays that their operation be enjoined. Cf. *Idlewild Liquor Corp.* v. *Epstein*, 370 U. S. 713, 715. We hold that the three-judge court was properly convened, and that we therefore have jurisdiction over the appeal.[4]

II.

We think that the Passport Act of 1926, 44 Stat. 887, 22 U. S. C. § 211a (1958 ed.), embodies a grant of authority to the Executive to refuse to validate the passports of United States citizens for travel to Cuba. That Act provides, in pertinent part:

> "The Secretary of State may grant and issue passports . . . under such rules as the President shall

[3] See also *Douglas* v. *Noble*, 261 U. S. 165.

[4] The convening of a three-judge court in this case surely coincides with the legislative policy underlying the passage of § 2282:

"The legislative history of § 2282 and of its complement, § 2281 . . . indicates that these sections were enacted to prevent a single federal judge from being able to paralyze totally the operation of an entire regulatory scheme, either state or federal, by issuance of a broad injunctive order. . . . Repeatedly emphasized during the congressional debates on § 2282 were the heavy pecuniary costs of the unforeseen and debilitating interruptions in the administration of federal law which could be wrought by a single judge's order, and the great burdens entailed in coping with harassing actions brought one after another to challenge the operation of an entire statutory scheme, wherever jurisdiction over government officials could be acquired, until a judge was ultimately found who would grant the desired injunction." *Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144, 154–155.

Appellant in this case does not challenge merely a "single, unique exercise" of the Secretary's authority, cf. *Phillips* v. *United States*, *supra*, at 253. On the contrary, this suit seeks to "paralyze totally the operation of an entire regulatory scheme," indeed, a regulatory scheme designed and administered to promote the security of the Nation.

designate and prescribe for and on behalf of the United States . . . ." [5]

This provision is derived from § 23 of the Act of August 18, 1856, 11 Stat. 52, 60–61, which had, prior to 1926, been re-enacted several times without substantial change. The legislative history of the 1926 Act and its predecessors does not, it is true, affirmatively indicate an intention to authorize area restrictions. However, its language is surely broad enough to authorize area restrictions, and there is no legislative history indicating an intent to exclude such restrictions from the grant of authority; these factors take on added significance when viewed in light of the fact that during the decade preceding the passage of the Act, the Executive had imposed both peacetime and wartime area restrictions. As a result of a famine in Belgium in 1915, the State Department stopped issuing passports for use in that country except to "applicants obliged to go thither by special exigency or authorized by Red Cross or Belgian Relief Commission." III Hackworth, Digest of International Law, p. 526 (1942). Beginning December 9, 1914, and continuing through World War I, passports were validated only for specific purposes and specific countries. No passports were issued for travel in Germany and Austria until July 18, 1922, and none for the Soviet Union until approximately September 1923.

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[5] The Secretary of State, rather than the President, imposed the restriction on travel to Cuba. However, Congress has provided that "[t]he Secretary of State shall perform such duties as shall from time to time be enjoined on or intrusted to him by the President relative to . . . such . . . matters respecting foreign affairs as the President of the United States shall assign to the department . . . ." R. S. § 202, 5 U. S. C. § 156 (1958 ed.). The President, in turn, has authorized the Secretary in his discretion "to restrict a passport for use only in certain countries [or] to restrict it against use in certain countries . . . ." Exec. Order No. 7856, 3 Fed. Reg. 681, 687, 22 CFR § 51.75.

Hearings before the Senate Committee on Foreign Relations on Department of State Passport Policies, 85th Cong., 1st Sess., pp. 63–64. The use in the 1926 Act of language broad enough to permit executive imposition of area restrictions, after the Executive had several times in the recent past openly asserted the power to impose such restrictions under predecessor statutes containing substantially the same language, supports the conclusion that Congress intended in 1926 to maintain in the Executive the authority to make such restrictions.[6]

This construction of the Act is reinforced by the State Department's continued imposition of area restrictions during both times of war and periods of peace since 1926. For a period of about seven months following the outbreak of war between Italy and Ethiopia in 1935, the Department declined to issue passports for travel in Ethiopia, except to journalists, Red Cross representatives, and others able to show a "compelling exigency" necessitating such travel. In cases where persons did not include Ethiopia in their applications, but were—by reason of the mention in their applications of adjacent countries—suspected of intending to travel therein, their passports were stamped "not valid for use in Ethiopia." III Hackworth, *supra,* pp. 531–532. Following the outbreak of the Spanish Civil War in 1936, passports were stamped "not valid for travel in Spain," with exceptions for newspapermen and persons furnishing medical assistance. *Id.,* at 533–534. A similar restriction was placed on travel to China in August 1937, in view of "the disturbed situation in the Far East." Passports were validated for travel to China only "in exceptional circumstances," and in no case for women or children. *Id.,* at 532–533.

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[6] *United States* v. *Cerecedo Hermanos y Compania,* 209 U. S. 337; *Service* v. *Dulles,* 354 U. S. 363, 380; *Labor Board* v. *Gullett Gin Co.,* 340 U. S. 361, 366.

On March 31, 1938, the President, purporting to act pursuant to the 1926 Act, specifically authorized the Secretary to impose area restrictions in the issuance of passports, Exec. Order No. 7856, 3 Fed. Reg. 681, 687:

> "The Secretary of State is authorized in his discretion to refuse to issue a passport, to restrict a passport for use only in certain countries, to restrict it against use in certain countries, to withdraw or cancel a passport already issued, and to withdraw a passport for the purpose of restricting its validity or use in certain countries."

This Executive Order is still in force. 22 CFR § 51.75. In September 1939, travel to Europe was prohibited except with a passport specially validated for such travel; passports were so validated only upon a showing of the "imperativeness" of the travel. Departmental Order No. 811, 4 Fed. Reg. 3892.

Area restrictions have also been imposed on numerous occasions since World War II. Travel to Yugoslavia was restricted in the late 1940's as a result of a series of incidents involving American citizens. Dept. State Press Conf., May 9, 1947. Travel to Hungary was restricted between December 1949 and May 1951, and after December 1951.[7] In June 1951, the State Department began to stamp passports "not valid for travel in Czechoslovakia," and declared that all passports outstanding at that time were not valid for such travel. 24 Dept. State Bull. 932. In May 1952, the Department issued a general order that all new passports would be stamped not valid for travel to Albania, Bulgaria, Communist China, Czechoslovakia, Hungary, Poland, Rumania and the Soviet Union. 26 *id.*, at 736. In October 1955, the Secretary announced that passports would no longer require special validation

[7] 22 Dept. State Bull. 399; 26 *id.*, at 7.

for travel to Czechoslovakia, Hungary, Poland, Rumania and the Soviet Union, but would be stamped invalid for travel "to the following areas under control of authorities with which the United States does not have diplomatic relations: Albania, Bulgaria, and those portions of China, Korea and Viet-Nam under communist control." 33 *id.*, at 777. In February 1956, the restriction on travel to Hungary was reimposed. 34 *id.*, at 246–248. And in late 1956, passports were for a brief period stamped invalid for travel to or in Egypt, Israel, Jordan and Syria. 35 *id.*, at 756.

Even if there had been no passport legislation enacted since the 1926 Act, the post-1926 history of executive imposition of area restrictions, as well as the pre-1926 history, would be of relevance to our construction of the Act. The interpretation expressly placed on a statute by those charged with its administration must be given weight by courts faced with the task of construing the statute. *Udall* v. *Tallman*, 380 U. S. 1, 16–18; *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315. Under some circumstances, Congress' failure to repeal or revise in the face of such administrative interpretation has been held to constitute persuasive evidence that that interpretation is the one intended by Congress.[8] In this case, however, the inference is supported by more than mere congressional inaction. For in 1952 Congress, substantially re-enacting laws which had been passed during the First and Second World Wars,[9] provided that after the issuance of a presidential proclamation of war or national emergency, it would be unlawful to leave or enter the

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[8] *Norwegian Nitrogen Co.* v. *United States*, *supra*, at 313; *Costanzo* v. *Tillinghast*, 287 U. S. 341, 345; *United States* v. *Midwest Oil Co.*, 236 U. S. 459, 472–473.

[9] Act of May 22, 1918, 40 Stat. 559; Act of June 21, 1941, 55 Stat. 252.

United States without a valid passport. Section 215 of the Immigration and Nationality Act of 1952, 66 Stat. 190, 8 U. S. C. § 1185 (1958 ed.). The Solicitor General urges that in view of the issuance in 1953 of a presidential proclamation of national emergency which is still outstanding,[10] travel in violation of an area restriction imposed on an otherwise valid passport is unlawful under the 1952 Act. The correctness of this interpretation is a question we do not reach on this appeal, see *infra*, pp. 18–20. But whether or not the new legislation was intended to attach criminal penalties to the violation of area restrictions, it certainly was not meant to cut back upon the power to impose such restrictions. Despite 26 years of executive interpretation of the 1926 Act as authorizing the imposition of area restrictions, Congress in 1952, though it once again enacted legislation relating to passports, left completely untouched the broad rule-making authority granted in the earlier Act. Cf. *Norwegian Nitrogen Co.* v. *United States*, *supra*, at 313.[11]

This case is therefore not like *Kent* v. *Dulles*, *supra*, where we were unable to find, with regard to the sort of passport refusal involved there, an administrative practice sufficiently substantial and consistent to warrant the conclusion that Congress had implicitly approved it.

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[10] Pres. Proc. No. 3004, 67 Stat. c31; cf. Exec. Order No. 11037, 3 CFR 621 (1959–1963 Comp.).

[11] Pres. Proc. No. 3004, 67 Stat. c31, which was issued in 1953 pursuant to § 215, stated that the departure and entry of citizens would be governed by "sections 53.1 to 53.9, inclusive, of title 22 of the Code of Federal Regulations." 22 CFR § 53.8 (1949 ed.) provided:

"Nothing in this part shall be construed to prevent the Secretary of State from exercising the discretion resting in him to refuse to issue a passport, to restrict its use to certain countries, to withdraw or cancel a passport already issued, or to withdraw a passport for the purpose of restricting its validity or use in certain countries."

Appellant reminds us that in summarizing the Secretary's practice in *Kent,* we observed:

> "So far as material here, the cases of refusal of passports generally fell into two categories. First, questions pertinent to the citizenship of the applicant and his allegiance to the United States had to be resolved by the Secretary . . . . Second, was the question whether the applicant was participating in illegal conduct, trying to escape the toils of the law, promoting passport frauds, or otherwise engaging in conduct which would violate the laws of the United States." 357 U. S., at 127.

It must be remembered, in reading this passage, that the issue involved in *Kent* was whether a citizen could be denied a passport because of his political beliefs or associations. In finding that history did not support the position of the Secretary in that case, we summarized that history "so far as material here"—that is, so far as material to passport refusals based on the character of the particular applicant. In this case, however, the Secretary has refused to validate appellant's passport not because of any characteristic peculiar to appellant, but rather because of foreign policy considerations affecting all citizens.

III.

Having concluded that the Secretary of State's refusal to validate appellant's passport for travel to Cuba is supported by the authority granted by Congress in the Passport Act of 1926, we must next consider whether that refusal abridges any constitutional right of appellant. Although we do not in this case reach the question of whether the 1952 Act should be read to attach criminal penalties to travel to an area for which one's passport is not validated, we must, if we are to approach the constitutional issues presented by this appeal candidly, pro-

ceed on the assumption that the Secretary's refusal to validate a passport for a given area acts as a deterrent to travel to that area. In *Kent* v. *Dulles, supra,* at 125, we held that "[t]he right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment." See also *Aptheker* v. *Secretary of State, supra,* at 505–506. However, the fact that a liberty cannot be inhibited without due process of law does not mean that it can under no circumstances be inhibited.[12]

The requirements of due process are a function not only of the extent of the governmental restriction imposed,[13] but also of the extent of the necessity for the restriction. Cuba is the only area in the Western Hemisphere controlled by a Communist government. It is, moreover, the judgment of the State Department that a major goal of the Castro regime is to export its Communist revolution to the rest of Latin America.[14] The United States and other members of the Organization of American States have determined that travel between Cuba and the other countries of the Western Hemisphere is an important element in the spreading of subversion, and many have there-

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[12] *Aptheker* v. *Secretary of State, supra,* at 505–514; *Shachtman* v. *Dulles,* 96 U. S. App. D. C. 287, 290 (opinion of the court), 293 (Edgerton, J., concurring), 225 F. 2d 938, 941, 944 (1955); cf. *Bolling* v. *Sharpe,* 347 U. S. 497, 499–500; Freedom to Travel (Report of Special Committee to Study Passport Procedures, Ass'n of the Bar of the City of New York), pp. 53, 55 (1958); Chafee, Three Human Rights in the Constitution of 1787, p. 192 (1956).

[13] Compare *Kent* v. *Dulles, supra; Aptheker* v. *Secretary of State, supra;* Universal Declaration of Human Rights, Art. 13 (quoted, S. Doc. No. 123, 81st Cong., 1st Sess., p. 1157); *Korematsu* v. *United States,* 323 U. S. 214, 218.

[14] Cuba, Dept. State Pub. No. 7171, pp. 25–36 (1961); see also Ball, U. S. Policy Toward Cuba, Dept. State Pub. No. 7690, p. 3 (1964); 47 Dept. State Bull. 598–600.

fore undertaken measures to discourage such travel.[15] It also cannot be forgotten that in the early days of the Castro regime, United States citizens were arrested and imprisoned without charges. We think, particularly in view of the President's statutory obligation to "use such means, not amounting to acts of war, as he may think necessary and proper" to secure the release of an American citizen unjustly deprived of his liberty by a foreign government,[16] that the Secretary has justifiably concluded that travel to Cuba by American citizens might involve the Nation in dangerous international incidents, and that the Constitution does not require him to validate passports for such travel.

The right to travel *within* the United States is of course also constitutionally protected, cf. *Edwards* v. *California*, 314 U. S. 160. But that freedom does not mean that areas ravaged by flood, fire or pestilence cannot be quarantined when it can be demonstrated that unlimited travel to the area would directly and materially interfere with

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[15] See Report of the Special Committee to Study Resolutions II.1 and VIII of the Eighth Meeting of Consultation of Ministers of Foreign Affairs, OEA/Ser. G/IV, pp. 14–16 (1963); 48 Dept. State Bull. 517, 719; Resolution I, Final Act, Ninth Meeting of Consultation of Ministers of Foreign Affairs, OEA/Ser. F/II.9 (1964).

[16] R. S. § 2001, 22 U. S. C. § 1732 (1958 ed.), provides :

"Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress."

the safety and welfare of the area or the Nation as a whole. So it is with international travel. That the restriction which is challenged in this case is supported by the weightiest considerations of national security is perhaps best pointed up by recalling that the Cuban missile crisis of October 1962 preceded the filing of appellant's complaint by less than two months.

Appellant also asserts that the Secretary's refusal to validate his passport for travel to Cuba denies him rights guaranteed by the First Amendment. His claim is different from that which was raised in *Kent* v. *Dulles, supra,* and *Aptheker* v. *Secretary of State, supra,* for the refusal to validate appellant's passport does not result from any expression or association on his part; appellant is not being forced to choose between membership in an organization and freedom to travel. Appellant's allegation is, rather, that the "travel ban is a direct interference with the First Amendment rights of citizens to travel abroad so that they might acquaint themselves at first hand with the effects abroad of our Government's policies, foreign and domestic, and with conditions abroad which might affect such policies." We must agree that the Secretary's refusal to validate passports for Cuba renders less than wholly free the flow of information concerning that country. While we further agree that this is a factor to be considered in determining whether appellant has been denied due process of law,[17] we cannot accept the contention of appellant that it is a First Amendment right which is involved. For to the extent that the Secretary's refusal to validate passports for Cuba acts as an inhibition (and it would be unrealistic to assume that it does not), it is an inhibition of action. There are few restrictions

[17] Indeed, it was precisely this sort of consideration which led us to hold in *Kent* v. *Dulles, supra,* at 126–127, that the right to travel is protected by the Fifth Amendment. See also *Aptheker* v. *Secretary of State, supra,* at 520 (DOUGLAS, J., concurring).

on action which could not be clothed by ingenious argument in the garb of decreased data flow. For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right. The right to speak and publish does not carry with it the unrestrained right to gather information.

Finally, appellant challenges the 1926 Act on the ground that it does not contain sufficiently definite standards for the formulation of travel controls by the Executive. It is important to bear in mind, in appraising this argument, that because of the changeable and explosive nature of contemporary international relations, and the fact that the Executive is immediately privy to information which cannot be swiftly presented to, evaluated by, and acted upon by the legislature, Congress—in giving the Executive authority over matters of foreign affairs—must of necessity paint with a brush broader than that it customarily wields in domestic areas.

> "Practically every volume of the United States Statutes contains one or more acts or joint resolutions of Congress authorizing action by the President in respect of subjects affecting foreign relations, which either leave the exercise of the power to his unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs." *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 324.

This does not mean that simply because a statute deals with foreign relations, it can grant the Executive totally unrestricted freedom of choice. However, the 1926 Act contains no such grant. We have held, *Kent* v. *Dulles*, *supra*, and reaffirm today, that the 1926 Act must take its

content from history: it authorizes only those passport refusals and restrictions "which it could fairly be argued were adopted by Congress in light of prior administrative practice." *Kent* v. *Dulles, supra*, at 128. So limited, the Act does not constitute an invalid delegation.

IV.

Appellant's complaint sought not only an order compelling the Secretary of State to validate his passport for travel to Cuba, but also a declaration that appellant "is entitled under the Constitution and laws of the United States to travel to Cuba," and an order enjoining the Secretary and the Attorney General from interfering with such travel. Read in the context of the arguments appellant makes here, it appears that the intent of the complaint was that these latter prayers should be considered only in the event that the court decided that the Secretary lacks authority to refuse to validate appellant's passport for Cuba. However, the complaint can also be read to incorporate a request that, even if the court should find that the Secretary does have such authority, it go on to decide whether appellant can be criminally prosecuted, under § 215 (b) of the Immigration and Nationality Act of 1952, 66 Stat. 190, 8 U. S. C. § 1185 (b) (1958 ed.), for travel in violation of an area restriction. That section provides:

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

A proclamation of the sort referred to was issued in 1953 and remains on the books. Pres. Proc. No. 3004, 67 Stat. c31; cf. Exec. Order No. 11037, 3 CFR 621 (1959–1963 Comp.). We hold that on either interpretation of the complaint, the court below was correct in refusing to reach the issue of criminal liability.

There are circumstances under which courts properly make exceptions to the general rule that equity will not interfere with the criminal processes, by entertaining actions for injunction or declaratory relief in advance of criminal prosecution. See *Evers* v. *Dwyer,* 358 U. S. 202; *Terrace* v. *Thompson,* 263 U. S. 197. However, the Declaratory Judgment Act, 28 U. S. C. § 2201 (1958 ed.), "is an enabling Act, which confers a discretion on the courts rather than an absolute right upon the litigant." *Public Serv. Comm'n* v. *Wycoff Co.,* 344 U. S. 237, 241. The complaint filed in this case does not specify the sort of travel to Cuba appellant has in mind—*e. g.,* whether he plans to proceed to Cuba directly or travel there via one or more other countries. Nor can we tell from the papers filed whether the Government will, in the event appellant journeys to Cuba, charge him under § 215 (b) with leaving the United States on a carrier bound for Cuba with a passport not validated for Cuba; leaving the United States with such a passport with the intent of traveling to Cuba before he returns home; leaving the United States with such a passport on a journey which in fact takes him to Cuba; re-entering the United States with such a passport after having visited Cuba; some other act—or whether it will charge him at all.[18] Whether

[18] The Solicitor General does not state with particularity the Government's position as to the reach of § 215 (b) with regard to area restrictions; he simply asserts that § 215 (b) "confirms the authority of the Secretary to impose area restrictions in the issuance of passports and prohibits travel in violation thereof." Brief for Appellees, p. 56; see also *id.,* at 10–11, 60–61.

each or any of these gradations of fact or charge would make a difference as to criminal liability is an issue on which the District Court wisely took no position. Nor do we. For if we are to avoid rendering a series of advisory opinions, adjudication of the reach and constitutionality of § 215 (b) must await a concrete fact situation. Compare *Federation of Labor* v. *McAdory,* 325 U. S. 450.

The District Court therefore correctly dismissed the complaint, and its judgment is

Affirmed.

MR. JUSTICE BLACK, dissenting.

Article I of the Constitution provides that "*All* legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." (Emphasis supplied.) I have no doubt that this provision grants Congress ample power to enact legislation regulating the issuance and use of passports for travel abroad, unless the particular legislation is forbidden by some specific constitutional prohibition such as, for example, the First Amendment. See *Aptheker* v. *Secretary of State,* 378 U. S. 500, 517 (concurring opinion); cf. *Kent* v. *Dulles,* 357 U. S. 116. Since Article I, however, vests "All legislative Powers" in the Congress, and no language in the Constitution purports to vest any such power in the President, it necessarily follows, if the Constitution is to control, that the President is completely devoid of power to make laws regulating passports or anything else. And he has no more power to make laws by labeling them regulations than to do so by calling them laws. Like my Brother GOLDBERG, I cannot accept the Government's argument that the President has "inherent" power to make regulations governing the issuance and use of passports. *Post,* pp. 28–30. We emphatically and I think properly rejected a similar argument advanced to support a seizure of the Nation's steel com-

panies by the President. *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S. 579. And regulation of passports, just like regulation of steel companies, is a law-making—not an executive, law-enforcing—function.

Nor can I accept the Government's contention that the passport regulations here involved are valid "because the Passport Act of 1926 in unequivocal words delegates to the President and Secretary a general discretionary power over passports . . . ." That Act does provide that "the Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries . . . under such rules as the President shall designate and prescribe . . . ." [1] Quite obviously, the Government does not exaggerate in saying that this Act "does not provide any specific standards for the Secretary" and "delegates to the President and Secretary a general discretionary power over passports"—a power so broad, in fact, as to be marked by no bounds except an unlimited discretion. It is plain therefore that Congress has not itself passed a law regulating passports; it has merely referred the matter to the Secretary of State and the President in words that say in effect, "We delegate to you our constitutional power to make such laws regulating passports as you see fit." The Secretary of State has proceeded to exercise the power to make laws regulating the issuance of passports by declaring that he will issue them for Cuba only to "persons whose travel may be regarded as being in the best interests of the United States," as he views those interests. For Congress to attempt to delegate such an undefined law-making power to the Secretary, the President, or both, makes applicable to this 1926 Act what Mr. Justice Cardozo said about the National Industrial Recovery Act: [2] "This is delegation running riot. No such plenitude of power is susceptible of transfer."

[1] 44 Stat. 887, 22 U. S. C. § 211a (1958 ed.).

[2] Act of June 16, 1933, 48 Stat. 195.

A. L. A. Schechter Poultry Corp. v. *United States*, 295 U. S. 495, 553 (concurring opinion). See also *Panama Ref. Co.* v. *Ryan*, 293 U. S. 388; cf. *Kent* v. *Dulles*, 357 U. S. 116, 129.

Our Constitution has ordained that laws restricting the liberty of our people can be enacted by the Congress and by the Congress only. I do not think our Constitution intended that this vital legislative function could be farmed out in large blocks to any governmental official, whoever he might be, or to any governmental department or bureau, whatever administrative expertise it might be thought to have. The Congress was created on the assumption that enactment of this free country's laws could be safely entrusted to the representatives of the people in Congress, and to no other official or government agency. The people who are called on to obey laws have a constitutional right to have them passed only in this constitutional way. This right becomes all the more essential when as here the person called on to obey may be punishable by five years' imprisonment and a $5,000 fine if he dares to travel without the consent of the Secretary or one of his subordinates.[3] It is irksome enough for one who wishes to travel to be told by the Congress, the constitutional lawmaker with power to legislate in this field, that he cannot go where he wishes. It is bound to be far more irritating—and I do not think the authors of our Constitution, who gave "All" legislative power to Congress, intended—for a citizen of this country to be told that he cannot get a passport because Congress has given an unlimited discretion to an executive official (or viewed practically, to his subordinates) to decide when and where he may go. I repeat my belief that Congress has ample power to regulate foreign travel. And of course, the fact that there may be good and adequate reasons for Congress

[3] 66 Stat. 190, 8 U. S. C. § 1185 (1964 ed.).

to pass such a law is no argument whatever for holding valid a law written not by the Congress but by executive officials. See *Panama Ref. Co.* v. *Ryan, supra,* 293 U. S., at 420. I think the 1926 Act gives the lawmaking power of Congress to the Secretary and the President and that it therefore violates the constitutional command that "All" legislative power be vested in the Congress. I would therefore reverse the judgment.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE GOLDBERG concurs, dissenting.

Appellant, the holder of a valid United States passport, requested that his passport be validated for travel to Cuba: he wished to make the trip "to satisfy my curiosity about the state of affairs in Cuba and to make me a better informed citizen." The need for validation arose from the Department of State's prior elimination of Cuba from the area for which passports were not required, 22 CFR § 53.3 (b), and from its issuance of a public notice declaring all outstanding passports invalid for travel to Cuba unless specifically endorsed for such travel under the authority of the Secretary of State, 26 Fed. Reg. 492. A companion press release of January 16, 1961, stated that such travel would be permitted by "persons whose travel may be regarded as being in the best interests of the United States, such as newsmen or businessmen with previously established business interests." The Passport Office denied appellant's request for validation. Referring to the press release, the Deputy Director of the Passport Office informed appellant that it was "obvious that your present purpose of visiting Cuba does not meet the standards for validation of your passport."

We held in *Kent* v. *Dulles,* 357 U. S. 116, that the right to travel overseas, as well as at home, was part of the citizen's liberty under the Fifth Amendment. That conclusion was not an esoteric one drawn from the blue. It

reflected a judgment as to the peripheral rights of the citizen under the First Amendment. The right to know, to converse with others, to consult with them, to observe social, physical, political and other phenomena abroad as well as at home gives meaning and substance to freedom of expression and freedom of the press. Without those contacts First Amendment rights suffer. That is why in *Kent* v. *Dulles, supra,* we said that freedom of movement has "large social values." *Id.,* at 126.

The ability to understand this pluralistic world, filled with clashing ideologies, is a prerequisite of citizenship if we and the other peoples of the world are to avoid the nuclear holocaust. The late Pope John XXIII in his famous encyclical *Pacem in Terris* stated the idea eloquently:

> "Men are becoming more and more convinced that disputes which arise between States should not be resolved by recourse to arms, but rather by negotiation.
>
> "It is true that on historical grounds this conviction is based chiefly on the terrible destructive force of modern arms; and it is nourished by the horror aroused in the mind by the very thought of the cruel destruction and the immense suffering which the use of those armaments would bring to the human family; and for this reason it is hardly possible to imagine that in the atomic era war could be used as an instrument of justice.
>
> "Nevertheless, unfortunately, the law of fear still reigns among peoples, and it forces them to spend fabulous sums for armaments: not for aggression, they affirm—and there is no reason for not believing them—but to dissuade others from aggression.
>
> "There is reason to hope, however, that by meeting and negotiating, men may come to discover better the bonds that unite them together, deriving from

> the human nature which they have in common; and that they may also come to discover that one of the most profound requirements of their common nature is this: that between them and their respective peoples it is not fear which should reign but love, a love which tends to express itself in a collaboration that is loyal, manifold in form and productive of many benefits."

He also said:

> "From the fact that human beings are by nature social, there arises the right of assembly and association."

Since we deal with rights peripheral to the enjoyment of First Amendment guarantees, restrictive legislation must be "narrowly drawn" (*Cantwell* v. *Connecticut,* 310 U. S. 296, 307) to meet a precise evil. Only last Term, in *Aptheker* v. *Secretary of State,* 378 U. S. 500, we reaffirmed that when we struck down a provision of the Subversive Activities Control Act of 1950 (64 Stat. 987) because it "too broadly and indiscriminately" restricted the right to travel. *Id.,* at 505. We should do the same here.

I agree that there are areas to which Congress can restrict or ban travel. Pestilences may rage in a region making it necessary to protect not only the traveler but those he might infect on his return. A theatre of war may be too dangerous for travel. Other like situations can be put. But the only so-called danger present here is the Communist regime in Cuba. The world, however, is filled with Communist thought; and Communist regimes are on more than one continent. They are part of the world spectrum; and if we are to know them and understand them, we must mingle with them, as Pope John said. Keeping alive intellectual intercourse between opposing groups has always been important and perhaps was never more important than now.

The First Amendment presupposes a mature people, not afraid of ideas. The First Amendment leaves no room for the official, whether truculent or benign, to say nay or yea because the ideas offend or please him or because he believes some political objective is served by keeping the citizen at home or letting him go. Yet that is just what the Court's decision today allows to happen. We have here no congressional determination that Cuba is an area from which our national security demands that Americans be excluded. Nor do we have a congressional authorization of the Executive to make such a determination according to standards fixed by Congress. Rather we have only the claim that Congress has painted with such a "broad brush" that the State Department can ban travel to Cuba simply because it is pleased to do so. By permitting this, the Court ignores the "familiar and basic principle," *Aptheker* v. *Secretary of State, supra,* at 508, that "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *NAACP* v. *Alabama,* 377 U. S. 288, 307.

As I have said, the right to travel is at the periphery of the First Amendment, rather than at its core, largely because travel is, of course, more than speech: it is speech brigaded with conduct. "Conduct remains subject to regulation for the protection of society. . . . [But i]n every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." *Cantwell* v. *Connecticut, supra,* at 304. Restrictions on the right to travel in times of peace should be so particularized that a First Amendment right is not precluded unless some clear countervailing national interest stands in the way of its assertion.*

*Time after time this Court has been alert to protect First Amendment rights which are exercised in a context of overt action which

MR. JUSTICE GOLDBERG, dissenting.

Last year approximately 2,750,000 Americans traveled abroad. More than 1,100,000 passports were issued or renewed, nearly 4,000 of which were obtained by journalists.[1] This phenomenal amount of travel not only demonstrates our curiosity about things foreign, and the increasing importance of, and indeed often necessity for, travel, but it also reflects the long history of freedom of movement which Americans have enjoyed. Since the founding of the Republic our Government has encouraged such travel.[2] For example, in 1820, when John Quincy Adams issued a passport to one Luther Bradish he certified that Bradish was about to visit foreign countries "with the view of gratifying a commendable curiosity." [3] In 1962, however, when appellant requested that his passport be validated so that he might travel to Cuba "to satisfy my curiosity about the state of affairs in Cuba and to make me a better informed citizen," his request was

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is subject to governmental regulation. "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." *Shelton* v. *Tucker*, 364 U. S. 479, 488. See, *e. g.*, *Lovell* v. *Griffin*, 303 U. S. 444; *Schneider* v. *State*, 308 U. S. 147; *Cantwell* v. *Connecticut, supra; Martin* v. *Struthers*, 319 U. S. 141; *Saia* v. *New York*, 334 U. S. 558; *Kunz* v. *New York*, 340 U. S. 290; *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 239; *Louisiana ex rel. Gremillion* v. *NAACP*, 366 U. S. 293; *NAACP* v. *Button*, 371 U. S. 415; *Aptheker* v. *Secretary of State, supra.*

[1] U. S. Dept. of State, Summary of Passport Statistics Jan. 1965.

[2] Very recently the President has requested citizens voluntarily and temporarily to limit their travel abroad because of balance of payments difficulties.

[3] See U. S. Dept. of State, The American Passport 10 (1898).

denied upon the basis of Department of State regulations, issued under the alleged authority of an Executive Order, restricting travel to Cuba.

Appellant attacks the limitation imposed upon the validity of his passport as beyond the inherent power of the Executive, unauthorized by Congress, and beyond the constitutional authority of either the Executive or Congress. I agree with the Court that Congress has the constitutional power to impose area restrictions on travel, consistent with constitutional guarantees, and I reject appellant's arguments to the contrary. With all deference, however, I do not agree with the Court's holding that Congress has exercised this power. Moreover, I do not believe that the Executive has inherent authority to impose area restrictions in time of peace. I would hold, under the principles established by prior decisions of this Court that inasmuch as Congress has not authorized the Secretary to impose area restrictions, appellant was entitled to a passport valid for travel to Cuba.

I. INHERENT AUTHORITY OF THE EXECUTIVE.

This Court has recognized that the right to travel abroad is "an important aspect of the citizen's 'liberty' " guaranteed by the Due Process Clause of the Fifth Amendment. *Kent* v. *Dulles*, 357 U. S. 116, 127. In *Aptheker* v. *Secretary of State*, 378 U. S. 500, 517, we reaffirmed that "freedom of travel is a constitutional liberty closely related to rights of free speech and association." As nations have become politically and commercially more dependent upon one another and foreign policy decisions have come to have greater impact upon the lives of our citizens, the right to travel has become correspondingly more important. Through travel, by private citizens as well as by journalists and governmental officials, information necessary to the making of informed decisions can be obtained. And, under our constitutional system,

ultimate responsibility for the making of informed decisions rests in the hands of the people. As Professor Chafee has pointed out, "An American who has crossed the ocean is not obliged to form his opinions about our foreign policy merely from what he is told by officials of our government or by a few correspondents of American newspapers. Moreover, his views on domestic questions are enriched by seeing how foreigners are trying to solve similar problems. In many different ways direct contact with other countries contributes to sounder decisions at home." Chafee, Three Human Rights in the Constitution of 1787, 195–196 (1956).

The constitutional basis of the right to travel and its importance to decision-making in our democratic society led this Court in *Kent* v. *Dulles, supra,* to conclude that "[i]f that 'liberty' is to be regulated, it must be pursuant to the law-making functions of the Congress." 357 U. S., at 129. Implicit in this statement, and at the very core of the holding in *Kent* v. *Dulles,* is a rejection of the argument there advanced and also made here by the Government that the Executive possesses an inherent power to prohibit or impede travel by restricting the issuance of passports. The Court in *Kent* expressly recognized that a passport is not only of great value, but also is necessary [4] to leave this country and to travel to most parts of the world. *Kent* v. *Dulles, supra,* at 121. The Court demonstrates in *Kent* v. *Dulles,* and I shall show in detail below, that there is no long-standing and consistent history of the

[4] Except for the years 1918 to 1921 and since 1941 American law did not require a passport for travel abroad. Currently, however, § 215 (b) of the Immigration and Nationality Act of 1952, 66 Stat. 190, 8 U. S. C. § 1185 (b) (1958 ed.), makes it unlawful, after the proclamation of a national emergency "to depart from or enter, or attempt to depart from or enter, the United States . . . [without] a valid passport." The Court expresses no views nor do I upon the validity or proper interpretation of this provision, which is currently involved in other litigation not now before us.

exercise of an alleged inherent Executive power to limit travel or restrict the validity of passports. In view of the constitutional basis of the right to travel, the legal and practical necessity for passports, and the absence of a long-standing Executive practice of imposing area restrictions, I would rule here, as this Court did in *Kent* v. *Dulles*, that passport restrictions may be imposed only when Congress makes provision therefor "in explicit terms," *Kent* v. *Dulles, supra,* at 130, consistent with constitutional guarantees. Cf. *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S. 579. I would hold expressly that the Executive has no inherent authority to impose area restrictions in time of peace.

II. STATUTORY AUTHORITY.

I cannot accept the Court's view that authority to impose area restrictions was granted to the Executive by Congress in the Passport Act of 1926, 44 Stat. 887, 22 U. S. C. § 211a (1958 ed.), which provides, "The Secretary of State may grant and issue passports . . . under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports." I do not believe that the legislative history of this provision, or administrative practice prior to its most recent re-enactment in 1926 will support the Court's interpretation of the statute. Moreover, the nature of the problem presented by area restrictions makes it unlikely that authority to impose such restrictions was granted by Congress in the course of enacting such a broad general statute. In my view, as the history I shall relate establishes, this statute was designed solely to centralize authority to issue passports in the hands of the Secretary of State in order to overcome the abuses and chaos caused by the fact that prior to the passage of the statute numerous unauthorized persons issued passports and travel documents.

A. *The Legislative History.*

The 1926 provision has its origin in the Act of August 18, 1856, 11 Stat. 52, 60–61. Prior to 1856 the issuance of passports was not regulated by law. Governors of States, local mayors, and even notaries public issued documents which served as passports. This produced confusion abroad. In 1835 Secretary of State Forsyth wrote:

> "It is within the knowledge of the Department that the diplomatic agents of foreign governments in the United States have declined authenticating acts of governors or other State or local authorities; and foreign officers abroad usually require that passports granted by such authorities shall be authenticated by the ministers or consuls of the United States. Those functionaries, being thus called upon, find themselves embarrassed between their desire to accommodate their fellow-citizens and their unwillingness to certify what they do not officially know; and the necessity of some uniform practice, which may remove the difficulties on all sides, has been strongly urged upon the Department." III Moore, International Law Digest 862–863 (1906).

Despite administrative efforts to curb the flow of state and local passports, Secretary of State Marcy wrote in 1854:

> "To preserve proper respect for our passports it will be necessary to guard against frauds as far as possible in procuring them. I regret to say that local magistrates or persons pretending to have authority to issue passports have imposed upon persons who go abroad with these spurious papers. Others, again, who know that they are not entitled to passports—not being citizens of the United States—seek to get these fraudulent passports, thinking that they will protect them while abroad." III Moore, *op. cit. supra,* at 863.

As is noted in an official history of the State Department, "The lack of legal provision on the subject [of passports] led to gross abuses, and 'the impositions practiced upon the illiterate and unwary by the fabrication of worthless passports' [IX Op. Atty. Gen. 350] led finally to the passage of the Act of August 18, 1856." The Department of State of the United States: Its History and Functions 178 (1893). This Act provided that "the Secretary of State shall be authorized to grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by such diplomatic or consular officers of the United States, and under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify any such passport." 11 Stat. 60. That Act made it a crime for a person to issue a passport who was not authorized to do so. This provision was re-enacted on July 3, 1926, 44 Stat. 887, in substantially identical form.[5] There is no indication in the legislative history either at the time the Act was originally passed in 1856 or when it was re-enacted, that it was meant to serve any purpose other than that of centralizing the authority to issue passports in the hands of the Secretary of State so as to eliminate abuses in their issuance. Thus, in my view, the authority to make rules, granted by the statute to the Executive, extends only to the promulgation of rules designed to carry out this statutory purpose.

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[5] The following changes have been made in the wording of this provision of the statute between 1856 and the present: When the statute was placed in the Revised Statutes of 1874, the words "shall be authorized to" were replaced by "may." R. S. § 4075. On June 14, 1902, the provision was amended to increase the list of those whom the Secretary could cause to grant, issue and verify passports in foreign countries by adding the words "and by such chief or other executive officer of the insular possessions of the United States." 32 Stat. 386. When the provision was re-enacted in 1926, the list of those whom the Secretary could cause to grant, issue and verify pass-

B. *The Administrative Practice.*

The administrative practice of the State Department prior to 1926 does not support the Court's view that when Congress re-enacted the 1856 provision in 1926 it intended to grant the Executive authority to impose area restrictions. Prior to the First World War the State Department had never limited the validity of passports for travel to any particular area. In fact, limitations upon travel had been imposed only twice. During the War of 1812 Congress specifically provided by statute that persons could not cross enemy lines without a passport, and in 1861 at the beginning of the Civil War the Secretary of State ruled that passports would not be issued to persons whose loyalty was in doubt. These restrictions were imposed in time of war. The first, restricting the area of travel, evidently was thought to require a specific statutory enactment by Congress, and the second did not limit the area of travel, but, rather, limited the persons to whom passports would be issued.[6] Until 50 years ago peacetime limitations upon the right of a citizen to travel were virtually unknown, see Chafee, *op. cit. supra,* at 193; Jaffe, The Right to Travel: The Passport Problem, 35 Foreign Affairs 17, and it was in this atmosphere that the Act of 1856 was passed and its re-enactment prior to 1926 took place.

The only area restrictions imposed between 1856 and 1926 arose out of the First World War. Although Amer-

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ports in foreign countries was modified by substituting for the words "by such diplomatic or consular officers of the United States," the words "by diplomatic representatives of the United States, and by such consul generals, consuls, or vice consuls when in charge, as the Secretary of State may designate," and the words "such passports" were substituted for the words "any such passport." 44 Stat. 887.

[6] See *Kent* v. *Dulles, supra,* at 128, where the Court implies that regulation of travel based upon disloyalty to the country during wartime presents quite a different question from such regulation in time of peace.

icans were not required by law to carry passports in 1915, certain foreign countries insisted that Americans have them. American Consulates and Embassies abroad were therefore authorized to issue *emergency* passports after the outbreak of the war, and in 1915 the Secretary of State telegraphed American Ambassadors and Ministers in France, Germany, Great Britain, Italy, the Netherlands, and Denmark: "Do not issue emergency passports for use in Belgium [then occupied by German armed forces] unless applicants obliged to go thither by special exigency or authorized by Red Cross or Belgian Relief Commission." See III Hackworth, Digest of International Law 525–526 (1942). After the United States entered World War I travel to areas of belligerency and to enemy countries was restricted. Passports were marked not valid for travel to these areas, and Congress provided by statute that passports were necessary in order to leave or enter the United States. The congressional Act requiring passports for travel expired in 1921, and soon after the official end of the war passports were marked valid for travel to all countries. See III Hackworth, *supra*, at 527; Hearings before the Senate Committee on Foreign Relations on Department of State Passport Policies, 85th Cong., 1st Sess., 64 (hereafter Senate Hearings). Thus in 1926 freedom of travel was as complete as prior to World War I. In this atmosphere Congress re-enacted, in virtually identical terms, the 1856 statute, the sole purpose of which, as I have already noted, was to centralize passport issuance. Congress in doing so did not indicate the slightest intent or desire to enlarge the authority of the Executive to regulate the issuance of passports. Surely travel restrictions imposed while the United States was at war and a single telegram instructing ministers to deny emergency passports for a brief time in 1915 for travel to a theatre of war, do not show that Congress, by re-enacting the 1856 Act in 1926, intended to authorize the Execu-

tive to impose area restrictions upon travel in peacetime whenever the Executive believed such restrictions might advance American foreign policy. The long tradition of freedom of movement, the fact that no passport area restrictions existed prior to World War I, the complete absence of any indication in the legislative history that Congress intended to delegate such sweeping authority to the Executive all point in precisely the opposite direction.[7]

In *Kent* v. *Dulles, supra,* the Court held that the 1926 Act did not authorize the Secretary of State to withhold passports from persons because of their political beliefs or associations. Although it was argued that prior to

[7] The Court also argues that State Department imposition of area restrictions after 1926 shows that the Act granted power to impose such restrictions, for a consistent administrative interpretation must be given weight by the courts. *Ante,* at 11. See *Norwegian Nitrogen Co.* v. *United States,* 288 U. S. 294. With all deference, I do not find a consistent administrative interpretation of the 1926 Act. While area restrictions have been imposed by the Executive from time to time since 1926, see Senate Hearings 64–65, the Executive has also indicated doubts as to its authority to restrict passports. In 1958 the President formally asked Congress for "clear statutory authority to prevent Americans from using passports for travel to areas where there is no means of protecting them, or where their presence would conflict with our foreign policy objectives." H. R. Doc. No. 417, 85th Cong., 2d Sess. In 1957 the Report of the Commission on Government Security expressly recommended that it be made unlawful "for any citizen of the United States to travel to any country in which his passport is declared to be invalid." S. Doc. No. 64, 85th Cong., 1st Sess., 475. Moreover, when the Department of State announced limitations on the use of passports for travel to Red China, the accompanying press release stated that the restrictions did not forbid American travel to the areas restricted. See Senate Hearings 40; Report of the Association of the Bar of the City of New York, Freedom to Travel 70 (1958). In any event I believe that the evidence set out above that Congress did not mean the 1926 Act to authorize the imposition of area restrictions is sufficiently strong so that it is not overcome by the fact that after 1926 the Department on occasion asserted that it had an inherent power to impose such restrictions.

1926 the Secretary had withheld passports from Communists and other suspected subversives and that such an administrative practice had been adopted by Congress, the Court found that the evidence of such a practice was insufficient to warrant the conclusion that it had congressional authorization.

Yet in *Kent* v. *Dulles* the Government pointed to scattered Executive interpretations showing that upon occasion the State Department believed that it had the authority in peacetime to withhold passports from persons deemed by the Department to hold subversive beliefs. In 1901 Attorney General Knox advised the Secretary of State that a passport might be withheld from "an avowed anarchist." 23 Op. Atty. Gen. 509, 511. Orders promulgated by the Passport Office periodically have required denial of passports to "revolutionary radicals." See Passport Office Instructions of May 4, 1921. A State Department memorandum of May 29, 1956, in summarizing the Department's passport policy, states that after the Russian Revolution "passports were refused to American Communists who desired to go abroad for indoctrination, instruction, etc. This policy was continued until 1931 . . . ." [8]

These isolated instances of the assumption of authority to refuse passports to persons thought subversive were held insufficient to show that Congress in 1926 intended to grant the Secretary of State discretionary authority to deny passports to persons because of their political beliefs, *Kent* v. *Dulles, supra,* at 128. This case presents an even more attenuated showing of administrative practice, for there is revealed only one isolated instance of a peacetime area restriction and this closely connected with World War I. Clearly this single instance is insufficient to show

[8] See the Report of the Commission on Government Security 470, 471 (1957).

that Congress intended to authorize the Secretary to impose peacetime area restrictions.

Moreover, just as the more numerous instances of restriction on travel because of political beliefs and associations in wartime were insufficient to show that Congress intended to grant the Secretary authority to curtail such travel in time of peace, see *Kent* v. *Dulles, supra,* at 128, so here the fact that area restrictions were imposed during World War I does not show that Congress intended to grant the Secretary authority to impose such restrictions in time of peace. In time of war and in the exercise of the war power, restrictions may be imposed that are neither permissible nor tolerable in time of peace. See *Kent* v. *Dulles, supra,* at 128; cf. *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S. 579. But see *Kennedy* v. *Mendoza-Martinez,* 372 U. S. 144. Thus even if the State Department's wartime practice should lead to the conclusion that area restrictions in time of war were sanctioned, it surely does not show that Congress wished to authorize similar curtailment of the right to travel in time of peace.[9]

While the Court intimates that *Kent* v. *Dulles* is distinguishable from the present case because in *Kent* v. *Dulles* passports were denied on the basis of the applicants' political beliefs, *ante,* at 13, I find little in the logic of that opinion to support such a distinction. The Court in *Kent* v. *Dulles* based its conclusions that the Executive does not have an inherent power to impose peacetime passport restrictions and that Congress did not delegate such authority to the Executive on the history of

[9] Although the United States has severed its diplomatic ties with the Castro government, and, as the Court correctly points out, *ante,* at 14–15, justifiably regards the Castro regime as hostile to this country, the United States is not in a state of war with Cuba. See *Banco Nacional de Cuba* v. *Sabbatino,* 376 U. S. 398, 410.

passport restrictions and the constitutional basis of the right to travel. While the Court there mentions that it is dealing "with beliefs, with associations, with ideological matters," 357 U. S., at 130, a reading of the opinion clearly reveals that its holding does not turn upon such factors. Moreover, the importance of travel to the gathering of information, an activity closely connected with the First Amendment and a right asserted here, seems to be a major reason for the Court's holding in *Aptheker* and *Kent* that the right to travel is afforded constitutional protection. *Kent* v. *Dulles* thus seems not only relevant, but controlling, in the case presented here.

C. *The Statute's Inapplicability to the Problem of Area Restrictions.*

The Court's interpretation of the 1926 Passport Act not only overlooks the legislative history of the Act and departs from the letter and spirit of this Court's decisions in *Kent* v. *Dulles, supra,* and *Aptheker* v. *Secretary of State, supra,* but it also implies that Congress resolved, through a sweeping grant of authority, the many substantial problems involved in curtailing a citizen's right to travel because of considerations of national policy. People travel abroad for numerous reasons of varying importance. Some travel for pleasure, others for business, still others for education. Foreign correspondents and lecturers must equip themselves with firsthand information. Scientists and scholars gain considerably from interchanges with colleagues in other nations. See Chafee, *op. cit. supra,* at 195.

Just as there are different reasons for people wanting to travel, so there are different reasons advanced by the Government for its need to impose area restrictions. These reasons vary. The Government says restrictions are imposed sometimes because of political differences with countries, sometimes because of unsettled conditions, and sometimes, as in this case, as part of a program, under-

taken together with other nations, to isolate a hostile foreign country such as Cuba because of its attempts to promote the subversion of democratic nations. See Senate Hearings 63–69. The Department of State also has imposed different types of travel restrictions in different circumstances. All newsmen, for example, were prohibited from traveling to China, see Senate Hearings 67, but they have been allowed to visit Cuba. See Public Notice 179 (Jan. 16, 1961), 26 Fed. Reg. 492; Press Release No. 24, issued by the Secretary of State, Jan. 16, 1961. In view of the different types of need for travel restrictions, the various reasons for traveling abroad, the importance and constitutional underpinnings of the right to travel and the right of a citizen and a free press to gather information about foreign countries, it cannot be presumed that Congress, without focusing upon the complex problems involved, resolved them by adopting a broad and sweeping statute which, in the Court's view, confers unlimited discretion upon the Executive, and which makes no distinctions reconciling the rights of the citizen to travel with the Government's legitimate needs. I do not know how Congress would deal with this complex area were it to focus on the problems involved, or whether, for example, in light of our commitment to freedom of the press, Congress would consent under any circumstances to prohibiting newsmen from traveling to foreign countries. But, faced with a complete absence of legislative consideration of these complex issues, I would not presume that Congress, in 1926, issued a blanket authorization to the Executive to impose area restrictions and define their scope and duration, for the nature of the problem seems plainly to call for a more discriminately fashioned statute.

III. CONCLUSION.

In my view it is clear that Congress did not mean the 1926 Act to authorize the Executive to impose area re-

strictions in time of peace, and, with all deference, I disagree with the Court's holding that it did. I agree with the Court that Congress may authorize the imposition of travel restrictions consistent with constitutional guarantees, but I find it plain and evident that Congress has never considered and resolved the problem. After consideration Congress might determine that broad general authority should be delegated to the Secretary of State, or it might frame a narrower statute. I believe that here, as in other areas, appropriate delegation is constitutionally permissible where some standard for the application of delegated power is provided. See, *e. g., Lichter* v. *United States,* 334 U. S. 742, 785. However, in light of my conclusion that the 1926 Act did not deal with area restrictions I do not find it necessary to consider the question of whether the language of the 1926 Act might constitute an unconstitutionally broad delegation of power.

In view of the different types of need for area restrictions asserted by the Government, the various reasons for travel abroad, the importance and constitutional underpinnings of the right of citizens and a free press to gather information about foreign countries—considerations which Congress did not focus upon—I would not infer, as the Court does, that Congress resolved the complex problem of area restrictions, which necessarily involves reconciling the rights of the citizen to travel with the Government's legitimate needs, by the re-enactment of a statute that history shows was designed to centralize authority to issue passports in the Secretary of State so as to prevent abuses arising from their issuance by unauthorized persons. Since I conclude that the Executive does not possess inherent power to impose area restrictions in peacetime, and that Congress has not considered the issue and granted such authority to the Executive, I would reverse the judgment of the District Court.

MARYLAND, FOR THE USE OF LEVIN, ET AL. *v.* UNITED STATES.

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

No. 345. Argued March 15, 1965.—Decided May 3, 1965.

Petitioners' decedents were passengers on an airliner which collided with a jet trainer assigned to the Maryland Air National Guard. The only survivor was the jet trainer pilot, whose negligence is not disputed. The pilot held a commission from the Governor of Maryland as an officer in the Maryland Air National Guard where he served on alternate Saturdays as a fighter pilot and Squadron Maintenance Officer. He was otherwise employed by the Guard as a civilian Aircraft Maintenance Chief under 32 U. S. C. § 709, as a so-called "caretaker" of Guard property. This suit was brought against the United States under the Federal Tort Claims Act. The principal issue below was whether the pilot was in his military or civilian capacity at the time of the accident. The District Court found he was in a civilian status and awarded judgment for petitioners, but the Court of Appeals reversed. *Held:* In both his civilian and military capacities the pilot was an employee of the State of Maryland and thus the United States is not liable under the Federal Tort Claims Act for his negligence in either capacity. Pp. 46–53.

(a) Except when called into federal service, the Guard is in charge of the Governor of the State and its military members are state employees. Pp. 47–48.

(b) Civilian caretakers, while meeting federal requirements and receiving payment from the United States, are under the jurisdiction of the State Adjutant General and are performing a state function. Pp. 48–49.

(c) *United States* v. *Holly*, 192 F. 2d 221, which held that civilian caretakers were employees of the United States, was decided on an incorrect construction of the National Defense Act. P. 50.

(d) Congressional enactments, despite the *Holly* line of cases, treat both military and civilian employees of the National Guard as state employees. Pp. 51–52.

329 F. 2d 722, affirmed.

Theodore E. Wolcott argued the cause and filed briefs for petitioners.

David L. Rose argued the cause for the United States. With him on the brief were *Solicitor General Cox, Assistant Attorney General Douglas, Nathan Lewin* and *Morton Hollander.*

Louis G. Davidson, Richard W. Galiher, William E. Stewart, Jr., and *Peter J. McBreen* filed a brief as *amici curiae,* urging reversal.

MR. JUSTICE HARLAN delivered the opinion of the Court.

The question we decide here is whether a civilian employee and military member of the National Guard is an "employee" of the United States for purposes of the Federal Tort Claims Act when his National Guard unit is not in active federal service.[1]

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[1] The Federal Tort Claims Act provides in pertinent part:

28 U. S. C. § 1346 (1958 ed.):

"(b) Subject to the provisions of chapter 171 of this title, the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

28 U. S. C. § 2671:

"As used in this chapter and sections 1346 (b) and 2401 (b) of this title, the term—

" 'Federal agency' includes the executive departments and independent establishment of the United States, and corporations primarily acting as, instrumentalities or agencies of the United States but does not include any contractor with the United States.

" 'Employee of the government' includes officers or employees of any federal agency, members of the military or naval forces of the

Petitioners' decedents were passengers on a Capital Airlines plane that collided over Maryland with a jet trainer assigned to the Maryland Air National Guard. The only survivor of the accident was the pilot of the trainer, Captain McCoy, and it is not disputed that the collision was caused by his negligence. The estates of the pilot and co-pilot of the Capital plane, and Capital Airlines itself, filed suit against the United States under the Federal Tort Claims Act in the District Court for the District of Columbia, and recovered judgments. The Court of Appeals for the District of Columbia Circuit affirmed, *United States* v. *Maryland for the use of Meyer,* 116 U. S. App. D. C. 259, 322 F. 2d 1009, cert. denied, 375 U. S. 954, motion for leave to file petition for rehearing pending, No. 543, 1963 Term. Meanwhile, petitioners filed a similar suit in the Western District of Pennsylvania, and all parties agreed to proceed solely on the record made in the *Meyer* case. The District Court rendered judgment for petitioners, but the Court of Appeals for the Third Circuit reversed. 329 F. 2d 722. We granted certiorari, 379 U. S. 877, to resolve the conflict between the two Circuits on this single record, and, more broadly, to settle authoritatively the basic question stated at the outset of this opinion which is at the core of other litigation arising out of this same disaster, now pending in a number of courts in different parts of the country.[2]

United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation."

28 U. S. C. § 2674:

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

[2] We are informed that such litigation is pending in Illinois, Ohio, and New York.

Captain McCoy held a commission from the Governor of Maryland as an officer in the Maryland Air National Guard, and he served on alternate Saturdays as a fighter pilot and Squadron Maintenance Officer with the 104th Fighter Interceptor Squadron. During the rest of the month Captain McCoy was employed by the Guard in a civilian capacity as Aircraft Maintenance Chief under 32 U. S. C. § 709 (1958 ed.), the so-called federal "caretaker" statute.[3] In his civilian capacity Captain McCoy

[3] National Defense Act of 1916, § 90, 39 Stat. 166, as amended, now 32 U. S. C. § 709 (1958 ed.):

"(a) Under such regulations as the Secretary of the Army may prescribe, funds allotted by him for the Army National Guard may be spent for the compensation of competent persons to care for material, armament, and equipment of the Army National Guard. Under such regulations as the Secretary of the Air Force may prescribe, funds allotted by him for the Air National Guard may be spent for the compensation of competent persons to care for material, armament, and equipment of the Air National Guard. A caretaker employed under this subsection may also perform clerical duties incidental to his employment and other duties that do not interfere with the performance of his duties as caretaker.

"(b) Enlisted members of the National Guard and civilians may be employed as caretakers under this section. However, if a unit has more than one caretaker, one of them must be an enlisted member. Compensation under this section is in addition to compensation otherwise provided for a member of the National Guard.

"(c) Under regulations to be prescribed by the Secretary concerned, material, armament, and equipment of the Army National Guard or Air National Guard of a State or Territory, Puerto Rico, the Canal Zone, or the District of Columbia may be placed in a common pool for care, maintenance, and storage. Not more than 15 caretakers may be employed for each of those pools.

"(d) Under regulations to be prescribed by the Secretary concerned, one commissioned officer of the National Guard in a grade below major may be employed for each pool set up under subsection (c) and for each squadron of the Air National Guard. Commissioned officers may not be otherwise employed under this section.

"(e) Funds appropriated by Congress for the National Guard are in addition to funds appropriated by the several States and Terri-

supervised the maintenance of the squadron aircraft assigned to the Air National Guard but owned by the United States. On the day of the accident, Captain McCoy had obtained permission from his superior to take a passenger on a flight in order to interest the passenger in joining the Air National Guard. The principal factual dispute below was whether at the time of the accident Captain McCoy was performing his duties with the Guard in a military or civilian capacity. A line of cases in the courts of appeals beginning with *United States* v. *Holly,* 192 F. 2d 221 (C. A. 10th Cir., 1951), has held that civilian "caretakers" are employees of the United States for purposes of suit under the Federal Tort Claims Act.[4] Another line of cases has been equally consistent in treating military members of the Guard as employees of the States, not the Federal Government.[5] We do not deal with the factual question, on which the decision below turned,[6] since, in agreement with the views

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tories, Puerto Rico, the Canal Zone, and the District of Columbia for the National Guard, and are available for the hire of caretakers and clerks.

"(f) The Secretary concerned shall fix the salaries of clerks and caretakers authorized to be employed under this section, and shall designate the person to employ them."

[4] *Elmo* v. *United States,* 197 F. 2d 230 (C. A. 5th Cir.); *United States* v. *Duncan,* 197 F. 2d 233 (C. A. 5th Cir.); *Courtney* v. *United States,* 230 F. 2d 112 (C. A. 2d Cir.); *United States* v. *Wendt,* 242 F. 2d 854 (C. A. 9th Cir.).

[5] *Williams* v. *United States,* 189 F. 2d 607 (C. A. 10th Cir.); *Dover* v. *United States,* 192 F. 2d 431 (C. A. 5th Cir.); *McCranie* v. *United States,* 199 F. 2d 581 (C. A. 5th Cir.); *Storer Broadcasting Co.* v. *United States,* 251 F. 2d 268 (C. A. 5th Cir.); *Bristow* v. *United States,* 309 F. 2d 465 (C. A. 6th Cir.); *Pattno* v. *United States,* 311 F. 2d 604 (C. A. 10th Cir.); *Blackwell* v. *United States,* 321 F. 2d 96 (C. A. 5th Cir.).

[6] A majority of the Court of Appeals held, contrary to the District Court, that McCoy was acting in his military capacity at the time of the accident.

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of Judge Smith [7] and in disagreement with the Court of Appeals in the *Meyer* case, we hold that in both capacities Captain McCoy was an employee of the State of Maryland, and not of the United States. Hence the United States cannot be held liable under the Tort Claims Act for his negligence in either capacity.

I.

The National Guard is the modern Militia reserved to the States by Art. I, § 8, cl. 15, 16, of the Constitution.[8] It has only been in recent years that the National Guard has been an organized force, capable of being assimilated with ease into the regular military establishment of the United States. From the days of the Minutemen of Lexington and Concord until just before World War I, the various militias embodied the concept of a citizen army, but lacked the equipment and training necessary for their use as an integral part of the reserve force of the United States Armed Forces.[9] The passage of the National Defense Act of 1916 [10] materially altered the status of the militias by constituting them as the National Guard. Pursuant to power vested in Congress by the Constitution (see n. 8), the Guard was to be

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[7] Of the other two members of the panel, Judge Hastie did not reach the question whether civilian Guard employees were embraced within the Tort Claims Act, and Judge Staley was in accord with the views of the District of Columbia Circuit in *Meyer*.

[8] "The Congress shall have Power . . .

"To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

"To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress."

[9] See generally, Wiener, The Militia Clause of the Constitution, 54 Harv. L. Rev. 181 (1940).

[10] 39 Stat. 166 (1916).

uniformed, equipped, and trained in much the same way as the regular army, subject to federal standards and capable of being "federalized" by units, rather than by drafting individual soldiers.[11] In return, Congress authorized the allocation of federal equipment to the Guard, and provided federal compensation for members of the Guard, supplementing any state emoluments. The Governor, however, remained in charge of the National Guard in each State except when the Guard was called into active federal service; in most instances the Governor administered the Guard through the State Adjutant General,[12] who was required by the Act to report periodically to the National Guard Bureau, a federal organization, on the Guard's reserve status.[13] The basic structure of the 1916 Act has been preserved to the present day.

Section 90 of the National Defense Act authorized the payment of federal funds for the employment by the Guard of civilian "caretakers" to be responsible for the upkeep of federal equipment allocated to the National Guard.[14] This section was later amended to make explicit that employment as a caretaker could be held by officers in the Guard, who would receive a full-time salary

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[11] National Defense Act, § 111, now 10 U. S. C. § 672 (1964 ed.). See Wiener, *supra*, n. 9.

[12] See 32 U. S. C. § 314 (1958 ed.).

[13] National Defense Act, § 66, as amended, now 32 U. S. C. § 314 (d) (1958 ed.).

[14] "Funds allotted by the Secretary of War for the support of the National Guard shall be available . . . for the compensation of competent help for the care of the material, animals, and equipment thereof, under such regulations as the Secretary of War may prescribe: *Provided*, That the men to be compensated, not to exceed five for each battery or troop, shall be duly enlisted therein and shall be detailed by the battery or troop commander, under such regulations as the Secretary of War may prescribe, and shall be paid by the United States disbursing officer in each State, Territory, and the District of Columbia." 39 Stat. 205.

as civilian caretakers, and in addition would receive compensation for service as military members of the Guard.[15] The legislative history of these amendments makes clear that the State Adjutant General could appoint officers of the Guard to serve as civilian caretakers, provided only that the appointees met the requirements established by the federal authorities.[16]

II.

It is not argued here that military members of the Guard are federal employees, even though they are paid with federal funds and must conform to strict federal requirements in order to satisfy training and promotion standards. Their appointment by state authorities and the immediate control exercised over them by the States make it apparent that military members of the Guard are employees of the States, and so the courts of appeals have uniformly held. See n. 5, *supra*. Civilian caretakers should not be considered as occupying a different status. Caretakers, like military members of the Guard, are also paid with federal funds and must observe federal requirements in order to maintain their positions.[17] Although they are employed to maintain federal property, it is property for which the States are responsible, and its maintenance is for the purpose of keeping the state militia in a ready status. The National Defense Act of 1916 authorized the allocation of federal property to the National Guard, but provided

> "That as a condition precedent to the issue of any property as provided for by this Act, the State, Terri-

[15] Act of June 19, 1935, 49 Stat. 391.

[16] See S. Rep. No. 635, 74th Cong., 1st Sess., pp. 2–3, quoted *infra*, p. 51.

[17] Detailed requirements for civilian caretakers are set out in Air National Guard Regulation No. 40–01, dated December 20, 1954 (hereinafter ANGR 40–01), and Air National Guard Manual No. 40–01, dated March 1, 1958.

> tory, or the District of Columbia desiring such issue shall make adequate provision, to the satisfaction of the Secretary of War, for the protection and care of such property . . . ." [18]

The Act also provided that damage or loss of federal property would be charged to the States, unless the Secretary of War determined that the damage or loss was unavoidable.[19] Caretakers appointed under § 90 of the Act were thus to perform a state function, the maintenance of federal equipment allocated to the Guard.[20] The caretakers have been termed the "backbone" of the Guard,[21] and are the only personnel on duty with Guard units during the greater part of the year. Like their military counterpart, caretakers are appointed by the State Adjutant General,[22] and are responsible to him in the performance of their daily duties. They can be discharged and promoted only by him.[23] Civilian caretakers are treated as state employees for purposes of the Social Security Act,[24] for state retirement funds,[25] and under the regula-

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[18] National Defense Act, § 83, 39 Stat. 203, 204, now 32 U. S. C. § 702 (d) (1958 ed.).

[19] *Id.*, § 87, now 32 U. S. C. § 710 (1958 ed.).

[20] In 1926 Congress authorized the employment of National Guard officers as caretakers, limited to one per squadron, in order to provide "an officer constantly on duty at the flying field for the supervision of flying training." H. R. Rep. No. 1031, 69th Cong., 1st Sess., p. 3, explaining the amendment to § 90 of the National Defense Act, enacted as Act of May 28, 1926, 44 Stat. 673, now 32 U. S. C. § 709 (d) (1958 ed.). See also S. Rep. No. 785, 69th Cong., 1st Sess. Training, of course, was a duty reserved to the States by § 91 of the National Defense Act and by Art. I, § 8, cl. 16, of the Constitution.

[21] Hearings before the Subcommittee of the House Appropriations Committee, 84th Cong., 2d Sess., p. 1303.

[22] ANGR 40–01, ¶¶ 3 (b), 7 (a).

[23] *Id.*, ¶ 3.

[24] Act of Aug. 14, 1935, c. 531, 49 Stat. 620, as amended, 42 U. S. C. § 418 (b)(5) (1958 ed.).

[25] Act of June 15, 1956, c. 390, 70 Stat. 283, as amended, 5 U. S. C. § 84d (1964 ed.).

tions issued by the Department of the Air Force.[26] As early as 1920 the Comptroller of the Treasury ruled that a civilian caretaker was not a federal employee entitled to the annual leave provisions applicable to the War Department,[27] an opinion that was reiterated in 1941 by the Comptroller General [28] and that reflects the consistent position of the Department of Defense.[29]

United States v. *Holly, supra,* decided in 1951, held that civilian caretakers were employees of the United States, and has since been followed in other courts of appeals (n. 4, *supra*). *Holly* rested on a construction of the National Defense Act which, in our view, is not supported by the legislative history. Although the original section provided that caretakers were to "be detailed by the battery or troop commander" (who was a state employee), n. 14, *supra,* in 1935 Congress amended the statute to provide that the Secretary of the military establishment concerned (here the Secretary of the Air Force) "shall *designate* the person to employ" the caretaker.[30] The court in *Holly* read this amendment to mean that caretakers could be employed directly by federal authorities or by the State Adjutant General acting as a federal agent. However, the purpose of the amendment was simply to permit a State to pool its caretakers, and not to restrict the employment of such personnel only to those on the military roster of the unit where the equipment was allotted. The Senate report indicates that

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[26] ANGR 40–01, ¶ 4, provides:

"Air National Guard civilian personnel are considered to be employees of the State, Territory, Puerto Rico, or the District of Columbia (21 Comp Gen Dec. 305)."

[27] 27 Comp. Dec. 344 (1920).

[28] 21 Comp. Gen. 305 (1941).

[29] See S. Rep. No. 1502, 86th Cong., 2d Sess., p. 6; H. R. Rep. No. 1928, 86th Cong., 2d Sess., p. 6.

[30] *Supra,* n. 15, now 32 U. S. C. § 709 (f) (1958 ed.) (emphasis supplied).

Congress envisaged that caretakers would continue to be employed only by the state authorities. It stated:

> "Section 6 of S. 2710 will authorize the pooling of National Guard caretakers. Under present law States are required to select the caretakers from the units that have the material. Section 6 will permit the handling under the adjutant general or other proper State official of the caretakers as a pool." [31]

It seems clear, then, that no significant distinction was intended between the method of employing military and civilian personnel of the National Guard.

Congress again in 1954 accepted the Defense Department understanding that civilian caretakers were employees of the States. In amending the Social Security Act (68 Stat. 1059, 42 U. S. C. § 418 (b)(5) (1958 ed.)) to provide coverage for civilian caretakers as state employees, the committee reports stated:

> "This provision would establish as a separate coverage group civilian employees of State National Guard units who are employed pursuant to section 90 of the National Defense Act . . . and paid from funds allotted to such units by the Department of Defense. These employees would also be deemed to be employees of the State. The Department of Defense does not regard these employees as Federal employees . . . ." [32]

In 1956 Congress authorized federal disbursing officers to withhold from the salaries of civilian caretakers amounts needed by the States for their retirement systems. Although Congress was aware of the *Holly* line of cases,[33] the Senate report stated that authority was

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[31] S. Rep. No. 635, 74th Cong., 1st Sess., pp. 2–3.

[32] S. Rep. No. 1987, 83d Cong., 2d Sess., pp. 45–46; H. R. Rep. No. 1698, 83d Cong., 2d Sess., p. 50.

[33] S. Rep. No. 2045, 84th Cong., 2d Sess., p. 4.

necessary since "[t]hese employees, although paid from Federal funds, are considered to be State rather than Federal employees. Accordingly, State authorities have been unable to make the usual deduction of the employee's contribution into the retirement system." S. Rep. No. 2045, 84th Cong., 2d Sess. (1956).

In 1960 it was proposed to extend the coverage of the Federal Tort Claims Act to include civilian and military personnel of the National Guard.[34] This proposal was rejected, and the bill that finally passed provides an administrative procedure whereby the proper Secretary can pay claims up to $5,000 for damage to persons or property caused by National Guard personnel.[35] The Act includes liability for personal injury caused by civilian caretakers, even though the Justice Department called to the attention of Congress the line of cases indicating that acts of civilian caretakers were already covered under the Federal Tort Claims Act.[36] The committee reports of both the House and Senate reflect acceptance of the position advocated by the Department of the Army that civilian caretakers should be included in the bill along with their military counterparts.[37]

In sum, we conclude that the congressional purpose in authorizing the employment by state authorities of civilian caretakers, the administrative practice of the Defense Department in treating caretakers as state employees, the consistent congressional recognition of that

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[34] S. 1764 and H. R. 5435, 86th Cong., 2d Sess.

[35] Act of September 13, 1960, 74 Stat. 878, 32 U. S. C. § 715 (1958 ed., Supp. IV). If the claim is for more than $5,000 and the Secretary deems it meritorious he may award up to $5,000 and certify the balance to Congress for appropriate action.

[36] See S. Rep. No. 1502, 86th Cong., 2d Sess., p. 11; Hearings before Subcommittee No. 2 of the House Committee on the Judiciary on H. R. 5435 and H. R. 9315, 86th Cong., 2d Sess., pp. 6–7.

[37] See S. Rep. No. 1502, *supra;* H. R. Rep. No. 1928, *supra.* The 1960 Act does not cover the accident involved in these cases, since the collision occurred in 1958.

status, and the like supervision exercised by the States over both military and civilian personnel of the National Guard, unmistakably lead in combination to the view that civilian as well as military personnel of the Guard are to be treated for the purposes of the Tort Claims Act as employees of the States and not of the Federal Government. This requires a decision that the United States is not liable to petitioners for the negligent conduct of McCoy.[38]

In so holding we are not unmindful that this doubtless leaves those who suffered from this accident without effective legal redress for their losses.[39] It is nevertheless our duty to take the law as we find it, remitting those aggrieved to whatever requitement may be deemed appropriate by Congress, which in affording the administrative remedies, unfortunately not available here (see n. 37), has shown itself not impervious to the moral demands of such distressing situations.

Affirmed.

MR. JUSTICE DOUGLAS dissents.

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[38] Petitioners contend that the judgments of the District of Columbia Circuit in *Meyer* should be given collateral estoppel effect here, even though petitioners were not parties in *Meyer*. See Restatement, Judgments § 93, comment *b;* Developments in the Law—*Res Judicata,* 65 Harv. L. Rev. 818, 865, 870–871 (1952); but see *United States* v. *United Air Lines, Inc.,* 216 F. Supp. 709, aff'd on other grounds *sub nom. United Air Lines, Inc.* v. *Wiener,* 335 F. 2d 379, writ of cert. dismissed under Rule 60, 379 U. S. 951. We reject the Government's contention that the point was not preserved below. Having regard to the fact that the decision in *Meyer* came down during the interval between the argument and decision of *Levin,* we think that the estoppel challenge was properly and timely raised in the petition for rehearing in *Levin.* However, we need not reach the merits of the challenge since the judgment in *Meyer,* also pending in this Court (see p. 43, *supra*), must, in any event, now fall in consequence of our decision in the cases before us.

[39] The State of Maryland has not, so far as we know, waived its sovereign immunity, and petitioners are not eligible for benefits under 32 U. S. C. § 715, *supra,* n. 35.

UNITED STATES *v.* MIDLAND-ROSS CORP.

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

No. 628. Argued March 31, 1965.—Decided May 3, 1965.

Respondent taxpayer in 1952–1954 bought noninterest-bearing promissory notes at prices discounted below the face amounts and held them over six months. Before maturity and in the year of purchase it sold each below the face amount but for more than the issue price. The gains, concededly the economic equivalent of interest, were reported as capital gains. The Commissioner of Internal Revenue determined that the gains attributable to original issue discount were but interest in another form and therefore taxable as ordinary income. After paying the deficiencies respondent brought this refund action which both the District Court and the Court of Appeals decided in its favor. *Held:* Earned original issue discount is not entitled to capital gains treatment under the 1939 Internal Revenue Code. Pp. 56–67.

(a) Although capital gains treatment is to be accorded to the sale of a "capital asset," defined in § 117 (a) (1) of the Internal Revenue Code of 1939 as "property" held by the taxpayer, the term "capital asset" is to be construed narrowly so as to apply only where there has been realization of appreciation in value accrued over a substantial period of time. Pp. 56–57.

(b) "Capital asset" does not include an item like earned original issue discount, which serves the same function as stated interest, the earning of which is predictable and does not represent market appreciation. Pp. 57–58.

(c) In specifying ordinary income treatment for original issue discount in § 1232 (a) (2) of the Internal Revenue Code of 1954 and in special provisions of the 1939 Code Congress did not indicate any understanding that such discount would be entitled to capital gains treatment in the absence of such provisions. Pp. 58–63.

(d) A case in which the Tax Court allowed capital gains treatment of the full amount the taxpayer received upon retirement of an "Accumulative Installment Certificate"—*Caulkins* v. *Commissioner*, 1 T. C. 656, acq. 1944 Cum. Bull. 5, aff'd, 144 F. 2d 482 (C. A. 6th Cir.), acq. withdrawn, 1955–1 Cum. Bull. 7—did not

unambiguously establish that original issue discount was itself a "capital asset" entitled to capital gains treatment, and what little other administrative practice dealt with the question appears contrary to its holding. Pp. 63–66.

(e) This Court has often recognized the economic function of discount as interest. Pp. 66–67.

335 F. 2d 561, reversed.

Frank I. Goodman argued the cause for the United States. With him on the brief were *Solicitor General Cox, Assistant Attorney General Oberdorfer, Wayne G. Barnett* and *Joseph Kovner.*

Theodore R. Colborn argued the cause for respondent. With him on the brief was *Theodore M. Garver.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question for decision is whether, under the Internal Revenue Code of 1939, certain gains realized by the taxpayer are taxable as capital gains or as ordinary income. The taxpayer bought noninterest-bearing promissory notes from the issuers at prices discounted below the face amounts. With one exception, each of the notes was held for more than six months, and, before maturity and in the year of purchase, was sold for less than its face amount but more than its issue price.[1] It is conceded that the

[1] The original plaintiff, Industrial Rayon Corporation, was merged into respondent Midland-Ross Corporation in 1961. During 1952, 1953, and 1954, Industrial's idle funds were used to purchase 13 noninterest-bearing notes, varying in face amount from $500,000 to $2,000,000, from General Motors Acceptance Corporation, Commercial Investment Trust Company and Commercial Credit Company. The original issue discount in most instances was calculated to yield the equivalent of 2% to 2½% on an annual basis if the note were held to maturity, and the gains on sale approximated the discount earned to date. It is not contended that any part of the gain was attributable to market fluctuations as opposed to the passage of time.

gain in each case was the economic equivalent of interest for the use of the money to the date of sale but the taxpayer reported the gains as capital gains. The Commissioner of Internal Revenue determined that the gains attributable to original issue discount were but interest in another form and therefore were taxable as ordinary income. Respondent paid the resulting deficiencies and in this suit for refund prevailed in the District Court for the Northern District of Ohio, 214 F. Supp. 631, and in the Court of Appeals for the Sixth Circuit, 335 F. 2d 561. Because this treatment as capital gains conflicts with the result reached by other courts of appeals,[2] we granted certiorari. 379 U. S. 944. We reverse.

The more favorable capital gains treatment applied only to gain on "the sale or exchange of a capital asset." § 117 (a)(4). Although original issue discount becomes property when the obligation falls due or is liquidated prior to maturity and § 117 (a)(1) defined a capital asset as "property held by the taxpayer," [3] we have held that

> "not everything which can be called property in the ordinary sense and which is outside the statutory exclusions qualifies as a capital asset. This Court has long held that the term 'capital asset' is to be construed narrowly in accordance with the purpose

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[2] *Real Estate Investment Trust of America* v. *Commissioner,* 334 F. 2d 986 (C. A. 1st Cir.), petition for writ of certiorari pending, No. 620; *Dixon* v. *United States,* 333 F. 2d 1016 (C. A. 2d Cir.), affirmed, *post,* p. 68; *Rosen* v. *United States,* 288 F. 2d 658 (C. A. 3d Cir.); *United States* v. *Harrison,* 304 F. 2d 835 (C. A. 5th Cir.); *Commissioner* v. *Morgan,* 272 F. 2d 936 (C. A. 9th Cir.). See also *Pattiz* v. *United States,* 160 Ct. Cl. 121, 311 F. 2d 947; *Schwartz* v. *Commissioner,* 40 T. C. 191; *Leavin* v. *Commissioner,* 37 T. C. 766; *Gibbons* v. *Commissioner,* 37 T. C. 569.

[3] "Sec. 117. *Capital Gains and Losses.*

"(a) *Definitions.*—As used in this chapter—

"(1) *Capital Assets.*—The term 'capital assets' means property held by the taxpayer . . . ."

> of Congress to afford capital-gains treatment only in situations typically involving the realization of appreciation in value accrued over a substantial period of time, and thus to ameliorate the hardship of taxation of the entire gain in one year." *Commissioner* v. *Gillette Motor Co.*, 364 U. S. 130, 134.

See also *Corn Products Co.* v. *Commissioner*, 350 U. S. 46, 52. In applying this principle, this Court has consistently construed "capital asset" to exclude property representing income items or accretions to the value of a capital asset themselves properly attributable to income. Thus the Court has held that "capital asset" does not include compensation awarded a taxpayer as representing the fair rental value of its facilities during the period of their operation under government control, *Commissioner* v. *Gillette Motor Co., supra;* the amount of the proceeds of the sale of an orange grove attributable to the value of an unmatured annual crop, *Watson* v. *Commissioner*, 345 U. S. 544; an unexpired lease, *Hort* v. *Commissioner*, 313 U. S. 28; and oil payment rights, *Commissioner* v. *P. G. Lake, Inc.*, 356 U. S. 260. Similarly, earned original issue discount cannot be regarded as "typically involving the realization of appreciation in value accrued over a substantial period of time . . . [given capital gains treatment] to ameliorate the hardship of taxation of the entire gain in one year."

Earned original issue discount serves the same function as stated interest, concededly ordinary income and not a capital asset; it is simply "compensation for the use or forbearance of money." *Deputy* v. *du Pont*, 308 U. S. 488, 498; cf. *Lubin* v. *Commissioner*, 335 F. 2d 209 (C. A. 2d Cir.). Unlike the typical case of capital appreciation, the earning of discount to maturity is predictable and measurable, and is "essentially a substitute for . . . payments which § 22 (a) expressly characterizes as gross income[; thus] it must be regarded as ordinary income, and

it is immaterial that for some purposes the contract creating the right to such payments may be treated as 'property' or 'capital.'" *Hort* v. *Commissioner, supra,* at 31. The $6 earned on a one-year note for $106 issued for $100 is precisely like the $6 earned on a one-year loan of $100 at 6% stated interest. The application of general principles would indicate, therefore, that earned original issue discount, like stated interest, should be taxed under § 22 (a) as ordinary income.[4]

The taxpayer argues, however, that administrative practice and congressional treatment of original issue discount under the 1939 Code establish that such discount is to be accounted for as capital gain when realized. Section 1232 (a)(2)(A) of the Internal Revenue Code of 1954 [5] provides that "upon sale or exchange of . . . evi-

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[4] Our disposition makes it unnecessary to decide certain questions raised at argument, as to which we intimate no view:

(1) Since each note was sold in the year of purchase, we do not reach the question whether an accrual-basis taxpayer is required to report discount earned before the final disposition of an obligation;

(2) Since no argument is made that the gain on the sale of each note varied significantly from the portion of the original issue discount earned during the holding period, we do not reach the question of the tax treatment under the 1939 Code of "market discount" arising from post-issue purchases at prices varying from issue price plus a ratable portion of the original issue discount, or of the tax treatment of gains properly attributable to fluctuations in the interest rate and market price of obligations as distinguished from the anticipated increase resulting from mere passage of time.

[5] "*Sale or exchange.*—

"(A) [As amended by § 50 (a), Technical Amendments Act of 1958, Pub. L. 85–866, 72 Stat. 1606] *General rule.*—Except as provided in subparagraph (B), upon sale or exchange of bonds or other evidences of indebtedness issued after December 31, 1954, held by the taxpayer more than 6 months, any gain realized which does not exceed—

. . . . . .

"(ii) . . . an amount which bears the same ratio to the original issue discount (as defined in subsection (b)) as the number of com-

dences of indebtedness issued after December 31, 1954, held by the taxpayer more than 6 months, any gain realized . . . [up to the prorated amount of original issue discount] shall be considered as gain from the sale or exchange of property which is not a capital asset," that is, it is to be taxed at ordinary income rates. From this the taxpayer would infer that Congress understood prior administrative and legislative history as extending capital gains treatment to realized original issue discount. If administrative practice and legislative history before 1954 did in fact ignore economic reality and treat stated interest and original issue discount differently for tax purposes, the taxpayer should prevail. See *Hanover Bank* v. *Commissioner*, 369 U. S. 672; *Deputy* v. *du Pont, supra;* cf. *Helvering* v. *R. J. Reynolds Tobacco Co.*, 306 U. S. 110. But the taxpayer must persuade us that this was clearly the case, see *Watson* v. *Commissioner, supra,* at 551, and has not done so.

The taxpayer refers us to various statutory provisions treating original issue discount as ordinary income in specific situations, arguing that these establish a congressional understanding that in situations not covered by such provisions, original issue discount is entitled to capi-

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plete months that the bond or other evidence of indebtedness was held by the taxpayer bears to the number of complete months from the date of original issue to the date of maturity,

"shall be considered as gain from the sale or exchange of property which is not a capital asset. Gain in excess of such amount shall be considered gain from the sale or exchange of a capital asset held more than 6 months."

Section 1232 (b) defines "original issue discount" as "the difference between the issue price and the stated redemption price at maturity. . . ."

We intimate no view on the construction of this statute. In particular, we imply no view upon the Commissioner's implicit contention that accrual-basis taxpayers are required to report discount as earned prior to final disposition of obligations acquired after December 31, 1954. Cf. *Lubin* v. *Commissioner, supra.*

tal gains treatment. Even if these provisions were merely limited applications of the principle of § 1232 (a)(2), they may demonstrate, not that the general rule was to the contrary, but that the general rule was unclear, see Brandis, Effect of Discount or Premium on Bondholder's North Carolina Income Tax, 19 N. C. L. Rev. 1, 7 (1940), and that Congress wished to avoid any doubt as to its treatment of particular situations. Cf. S. Rep. No. 1622, 83d Cong., 2d Sess., p. 112 (1954).

First we are referred to §§ 42 (b) and 42 (c) of the 1939 Code.[6] Section 42 (b) applied, *inter alia,* to discounted noninterest-bearing obligations periodically redeemable for specified increasing amounts, and permitted

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[6] "Sec. 42. Period in Which Items of Gross Income Included.

. . . . . .

"(b) Noninterest-bearing Obligations Issued at Discount.—If, in the case of a taxpayer owning any noninterest-bearing obligation issued at a discount and redeemable for fixed amounts increasing at stated intervals or owning an obligation described in paragraph (2) of subsection (d), the increase in the redemption price of such obligation occurring in the taxable year does not (under the method of accounting used in computing his net income) constitute income to him in such year, such taxpayer may, at his election made in his return for any taxable year beginning after December 31, 1940, treat such increase as income received in such taxable year. . . . In the case of any such obligations owned by the taxpayer at the beginning of the first taxable year to which his election applies, the increase in the redemption price of such obligations occurring between the date of acquisition . . . and the first day of such taxable year shall also be treated as income received in such taxable year.

"(c) Short-Term Obligations Issued on Discount Basis.—In the case of any obligation of the United States or any of its possessions, or of a State or Territory, or any political subdivision thereof, or of the District of Columbia, issued on or after March 1, 1941, on a discount basis and payable without interest at a fixed maturity date not exceeding one year from the date of issue, the amount of discount at which such obligation is originally sold shall not be considered to accrue until the date on which such obligation is paid at maturity, sold, or otherwise disposed of."

cash-basis taxpayers an election to accrue the annual increase. If anything, the statutory language supports the Government's position, for it implies that an accrual-basis taxpayer has no election, but must accrue the increases; this seems to indicate a congressional understanding that such increases were ordinary income. Section 42 (c) postpones recognition of discount on short-term government obligations until maturity or sale. That provision, however, has its own history. Earlier law, requiring the proration of original issue discount according to the time the obligation was held, was considered to "impose on taxpayers the duty of making burdensome computations." See S. Rep. No. 673, Part 1, 77th Cong., 1st Sess., p. 30 (1941). The proration provisions had in turn succeeded a statute enacted, not to make an exception to a general rule of capital gains treatment for issue discount, but to insure that the then-existing exemption for discount as representing interest could be claimed by taxpayers other than the original holder. H. R. Conf. Rep. No. 17, 71st Cong., 1st Sess., p. 2 (1929). Since the tax exemption for Treasury paper was eliminated in 1941, there was no longer any important reason to distinguish exempt original issue discount from nonexempt market discount, and § 42 (c) was enacted expressly to simplify administration by eliminating the necessity for allocation between interest and capital gain or loss, and treating all discount as income, but taxable only on realization.[7] If

[7] Since the statute applied only to paper with maturity of a year or less, the simplification resulting from recognizing income only on realization outweighed the possible shifting of income between tax years by accrual-basis taxpayers. At the same time, short-term government paper was excluded from the definition of "capital asset" in § 117 (a)(1)(D) of the 1939 Code, avoiding the necessity of separating out the amount of proceeds attributable to market fluctuations rather than earned discount. This exclusion is carried forward as § 1221 (5) of the 1954 Code.

the inferences drawn by respondent were correct, these provisions would be rendered superfluous by the enactment of § 1232 (a)(2), but they have been carried forward as §§ 454 (a) and (b) of the 1954 Code.

It is also argued that §§ 201 (e) and 207 (d) of the 1939 Code [8] manifested a congressional view opposed to ordinary income treatment. These sections required annual accrual of bond premium and discount by life and mutual casualty insurance companies. But again, somewhat like § 42 (b), these provisions provided for accrual by cash-basis taxpayers. See *Massachusetts Mutual Life Ins. Co.* v. *United States*, 288 U. S. 269. Moreover, the Com-

[8] "Sec. 201. Life Insurance Companies.

. . . . . .

"(e) Amortization of Premium and Accrual of Discount.—The gross income, the deduction provided in section 201 (c)(7)(A) and the credit allowed against net income in section 26 (a) shall each be decreased by the appropriate amortization of premium and increased by the appropriate accrual of discount attributable to the taxable year on bonds, notes, debentures or other evidences of indebtedness held by a life insurance company. Such amortization and accrual shall be determined (1) in accordance with the method regularly employed by such company, if such method is reasonable, and (2) in all other cases, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary.

. . . . . .

"Sec. 207. Mutual Insurance Companies other than Life or Marine.

. . . . . .

"(d) Amortization of Premium and Accrual of Discount.—The gross amount of income during the taxable year from interest, the deduction provided in subsection (b)(4)(A), and the credit allowed against net income in section 26 (a) shall each be decreased by the appropriate amortization of premium and increased by the appropriate accrual of discount attributable to the taxable year on bonds, notes, debentures or other evidences of indebtedness held by a mutual insurance company subject to the tax imposed by this section. Such amortization and accrual shall be determined (1) in accordance with the method regularly employed by such company, if such method is reasonable, and (2) in all other cases, in accordance with regulations prescribed by the Commissioner with the approval of the Secretary."

missioner had interpreted these provisions as requiring him to treat market discounts or premiums, as well as interest agreed upon by the borrower in the guise of original issue discount, as ordinary income items.[9]

Thus, the taxpayer has not demonstrated that, in specifying ordinary income treatment for original issue discount in particular situations, Congress evinced its understanding that such discount would otherwise be entitled to capital gains treatment. Therefore we turn to the question whether Treasury practice and decisional law preclude ordinary income treatment.

The taxpayer premises this part of his argument primarily upon the case of *Caulkins* v. *Commissioner,* 1 T. C. 656, acq., 1944 Cum. Bull. 5, aff'd, 144 F. 2d 482 (C. A. 6th Cir.), acq. withdrawn, 1955–1 Cum. Bull. 7.[10] The taxpayer there purchased an "Accumulative Installment Certificate" providing for 10 annual payments of $1,500 in return for $20,000 at the end of 10 years. The certificate provided for gradually increasing cash surrender and loan values. In 1939 the taxpayer received $20,000 as agreed and, relying on the long-term capital gains provisions of the Revenue Act of 1938, c. 289, 52 Stat. 447, reported only half the profit as taxable income. Acting primarily on the theory that the certificate was not in registered form as required by § 117 (f), the Commissioner sought to treat the increment as interest or as income arising out of a transaction entered into for profit. The Tax Court upheld the taxpayer, finding that the certificate was in

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[9] This provision was eliminated and the life insurance provision amended by the Revenue Act of 1964, § 228, 78 Stat. 19, 98–99, amending §§ 818 (b), 822 (d)(2) of the 1954 Code. See S. Rep. No. 830, 88th Cong., 2d Sess., pp. 122–124, for a detailed explanation.

[10] We consider the decisions and acquiescence only as evidence of the earlier understanding of the tax law. With respect to the claim of a particular taxpayer that he relied to his detriment on the acquiescence, see *Dixon* v. *United States, post,* p. 68.

registered form within the meaning of § 117 (f) of the Revenue Act of 1938, a provision identical to § 117 (f) of the 1939 Code,[11] but its discussion of the capital gains question is at best opaque.[12] The Court of Appeals acknowledged that "the transaction presents no true aspect of capital gain" and that "Congress might well have made the differentiation urged by the Commissioner, since it is difficult to perceive any practical reason for taxing increment of the type involved here differently from ordinary income . . . [as] consideration paid for the use

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[11] "*Retirement of Bonds, Etc.*—For the purposes of this chapter, amounts received by the holder upon the retirement of bonds, debentures, notes, or certificates or other evidences of indebtedness issued by any corporation (including those issued by a government or political subdivision thereof), with interest coupons or in registered form, shall be considered as amounts received in exchange therefor."

[12] The entire discussion of the capital gains question is as follows:

"Prior to the enactment of the Revenue Act of 1934, the payment of a bond by the corporation issuing it was held to be but the fulfillment of a contractual obligation to repay money in accordance with the fixed terms of the obligation and not a sale or exchange of a capital asset. *Fairbanks* v. *United States,* 306 U. S. 436; *Felin* v. *Kyle,* 102 Fed. (2d) 349; *John H. Watson, Jr.,* 27 B. T. A. 463; *Arthur E. Braun, Trustee,* 29 B. T. A. 1161; *Frank J. Cobbs,* 39 B. T. A. 642; petition to review dismissed, 111 Fed. (2d) 644. Section 117 (f), *supra,* appeared for the first time in the Revenue Act of 1934. In *McClain* v. *Commissioner,* 311 U. S. 527, the Supreme Court said: 'It is plain that Congress intended by the new sub-section (f) to take out of the bad debt provision certain transactions and to place them in the category of capital gains and losses.' This tribunal has held that by a parity of reasoning Congress also intended to take out of the ordinary income provisions of the revenue act gains realized by a taxpayer in connection with the retirement of the specified obligations. *William H. Noll,* 43 B. T. A. 496." 1 T. C., at 660–661.

It thus seems unclear whether the acquiescence related to the essentially uncontested capital gains question, and whether the decision was meant to apply beyond the narrow confines of § 117 (f). See *Dixon* v. *United States, post,* at 76–79.

of the amounts paid in. . . ." 144 F. 2d, at 484. Nevertheless it construed the words "amounts received by the holder upon . . . retirement" in § 117 (f) as unsusceptible of partition, and therefore as including the increment attributable to interest, which, with the principal amount, was thus taxable only as capital gain.

Caulkins did not unambiguously establish that original issue discount was itself a "capital asset" entitled to capital gains treatment. It held only that under § 117(f) Congress had not provided that the "amount" received on retirement might be broken down into its component parts. This was inconsistent with the view expressed in *Williams* v. *McGowan,* 152 F. 2d 570 (C. A. 2d Cir.), and approved by this Court in *Watson* v. *Commissioner, supra,* at 552, that "Congress plainly did mean to comminute the elements of a business; plainly it did not regard the whole as 'capital assets.' " 152 F. 2d, at 572. The Tax Court has consistently regarded *Caulkins* as having erroneously read § 117 (f) to preclude differentiation of the sources of proceeds on redemption. *Paine* v. *Commissioner,* 23 T. C. 391, 401, reversed on other grounds, 236 F. 2d 398 (C. A. 8th Cir.); *Stanton* v. *Commissioner,* 34 T. C. 1; see 3B Mertens, The Law of Federal Income Taxation 184–186, 378–381 (Zimet rev.). The Commissioner, in addition to withdrawing his acquiescence in *Caulkins,* has also rejected the interpretation of "amount" under § 117 (f) as not subject to apportionment under general principles. Rev. Rul. 119, 1953–2 Cum. Bull. 95; Rev. Rul. 55–136, 1955–1 Cum. Bull. 213; Rev. Rul. 56–299, 1956–1 Cum. Bull. 603. To the extent the Tax Court's decision in *Caulkins* rested, as its opinion indicates, on a reading of § 117 (f) to require more favorable treatment on redemption than on sale, it is clearly at odds with the legislative purpose, which was merely to treat alike redemptions and sales or exchanges of securities in registered form or with coupons attached,

and not to extend the class of capital assets. Rev. Rul. 56–299, *supra*. Such an interpretation, which would not benefit the taxpayer in the sale transactions here involved, may underlie the Tax Court's decision but it has no justification in logic or in the legislative history, and even the taxpayer would reject such a meaning, however well supported by the *Caulkins* acquiescence. Finally, notwithstanding the acquiescence, what little other administrative practice we are referred to seems contrary to *Caulkins*. See I. T. 1684, II–1 Cum. Bull. 60 (1923).

The concept of discount or premium as altering the effective rate of interest is not to be rejected as an "esoteric concept derived from subtle and theoretic analysis." *Old Colony R. Co* v. *Commissioner,* 284 U. S. 552, 561. For, despite some expressions indicating a contrary view,[13] this Court has often recognized the economic function of discount as interest. In *Old Mission Co.* v. *Helvering,* 293 U. S. 289, 290, for example, the Court regarded it as "no longer open to question that amortized bond discount may be deducted in the separate return of a single taxpayer." [14] The radical changes since *Caulkins* in the concept of treatment of accumulated interest under the 1939 Code are consistent with this. For example, accrued bond interest on stated interest bonds sold between interest dates has long been taxable to the seller of the bonds. See I. T. 3175, 1938–1 Cum. Bull. 200. But on "flat" sales of defaulted notes at prices in excess of face

[13] See, *e. g., New York Life Ins. Co.* v. *Edwards,* 271 U. S. 109, 116; *Old Colony R. Co.* v. *Commissioner, supra.* Though these bond premium cases are said to be inconsistent with the view taken here, they are equally inconsistent with the treatment of discount to the borrower.

[14] See also *Helvering* v. *Union Pacific R. Co.,* 293 U. S. 282, 285, 288; *Western Maryland R. Co.* v. *Commissioner,* 33 F. 2d 695, 696 (C. A. 4th Cir.); *Longview Hilton Hotel Co.* v. *Commissioner,* 9 T. C. 180, 182.

amount, with no attribution of interest arrearages in the sale price, the requirement of allocation to treat a portion of the proceeds as ordinary income dates only from 1954. *Fisher* v. *Commissioner,* 209 F. 2d 513 (C. A. 6th Cir.); see *Jaglom* v. *Commissioner,* 303 F. 2d 847 (C. A. 2d Cir.). The propriety of such allocation in the present case is even more evident; unlike defaulted bond interest, there is no suggestion that full payment of the original issue discount will not be made at maturity.

For these reasons we hold that earned original issue discount is not entitled to capital gains treatment under the 1939 Code.

Reversed.

DIXON ET AL. *v.* UNITED STATES.

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

No. 486. Argued March 30–31, 1965.—Decided May 3, 1965.

A partnership to which petitioners belong, in 1952 bought short-term noninterest-bearing notes at discounts. The purchases were assertedly made in reliance on the published acquiescence of the Commissioner of Internal Revenue in *Caulkins* v. *Commissioner*, 1 T. C. 656, aff'd 144 F. 2d 482, where the Tax Court had allowed capital gains treatment of the full amount a taxpayer had received on an "Accumulative Installment Certificate." After holding the notes six months they disposed of some at a gain before the end of the tax year and the balance in the next tax year. The partnership reported the gain as a long-term capital gain and, although on an accrual basis, did not accrue any income for the notes unsold that year. Petitioners' individual returns reflected the same treatment for their distributive shares of the partnership income. The Commissioner subsequently withdrew his acquiescence in *Caulkins* except with respect to debt securities that were (a) of the specific type involved in *Caulkins*, and (b) issued by the particular issuer involved in that case. The Commissioner determined that petitioners' gain was taxable as ordinary income and that a portion of the original issue discount on the unsold notes was reportable as earned in the tax year. Petitioners paid the deficiencies and sued for refund. Respondent prevailed in the District Court and the Court of Appeals. *Held:*

1. Original issue discount is not entitled to capital gains treatment under the 1939 Internal Revenue Code. *United States* v. *Midland-Ross Corp.*, *ante*, p. 54, followed. P. 70.

2. The Commissioner's acquiescence in an erroneous decision of the Tax Court cannot by itself bar collection of a tax otherwise lawfully due; the Commissioner has discretion under § 7805 (b) of the Internal Revenue Code of 1954 retroactively to withdraw an acquiescence, and he may do so even where a taxpayer may have detrimentally relied on the Commissioner's mistake. Pp. 70–75.

3. The Commissioner did not abuse his discretion in this case by giving retroactive effect to the withdrawal of his acquiescence. Pp. 75–80.

(a) No notice that he was about to correct his mistake of law was required in the relevant tax year since the petitioners were not justified in relying on the acquiescence as precluding correction. P. 76.

(b) Since the Commissioner's acquiescence in *Caulkins* should not have been read as constituting acceptance of the general proposition that earned original issue discount was entitled to capital gains treatment, the revocation of his acquiescence was not a repudiation of his earlier acceptance of a decision that prescribed capital gains treatment for the original issue discount here involved; consequently, his exception of specific certificates of the type involved in *Caulkins* from the retroactive application of his nonacquiescence could not constitute an abuse of discretion of which petitioners may complain. Pp. 76–79.

(c) In any event petitioners did not satisfy their burden of showing that those securities could not rationally be distinguished from other discounted securities. Pp. 79–80.

333 F. 2d 1016, affirmed.

Bernard E. Brandes argued the cause for petitioners. With him on the briefs was *Sanford Saideman.*

Frank I. Goodman argued the cause for the United States. With him on the brief were *Solicitor General Cox, Assistant Attorney General Oberdorfer, Wayne G. Barnett* and *Joseph Kovner.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

This case involves the issue decided today in *United States* v. *Midland-Ross Corp.,* No. 628, *ante,* p. 54. Petitioners are members of a partnership which, during the tax year 1952, bought 33 short-term noninterest-bearing notes from issuers at discounts between 2⅜% and 3¾% of face value. The notes had maturities ranging from 190 to 272 days. Their total face value was $43,050,000, and the total issue price was $42,222,357. The partnership sold 20 of the 33 notes before the end of the tax year but after having held them for more than

six months, realizing a gain of $494,528. The remaining 13 notes were disposed of in the next tax year. In its 1952 return the partnership reported the $494,528 gain as a long-term capital gain, and, although on the accrual basis, did not accrue any income on account of the 13 unsold notes. Petitioners' individual income tax returns reflected the same treatment for their respective distributive shares of the partnership income derived from the sale of the notes.

The Commissioner of Internal Revenue determined that the gain realized was taxable as ordinary income, and also that a portion of the original issue discount on the 13 unsold notes was earned and reportable as ordinary income for 1952.[1] Petitioners paid the resulting deficiencies, and in this suit for refund the United States prevailed in the District Court for the Southern District of New York, 224 F. Supp. 358, and in the Court of Appeals for the Second Circuit, 333 F. 2d 1016. We brought the case here on certiorari, 379 U. S. 943, to resolve a conflict with *United States* v. *Midland-Ross Corp., supra.* We affirm.

Our holding today in *Midland-Ross* that original issue discount is not entitled to capital gains treatment under the 1939 Internal Revenue Code requires that we affirm the result below unless an affirmance is precluded by an argument made here and not in *Midland-Ross.* The petitioners contend that in purchasing the notes they relied upon the Commissioner's published acquiescence in the Tax Court's decision in *Caulkins* v. *Commissioner,* 1 T. C.

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[1] The petitioners concede the correctness of this treatment of the earned discount on the 13 unsold notes if original issue discount is reportable as ordinary income. Again, as in *Midland-Ross,* we do not reach or intimate any view upon the question whether an accrual-basis taxpayer is required to report discount earned before the final disposition of an obligation. See *United States* v. *Midland-Ross, ante,* p. 54, at 58, note 4.

656, aff'd 144 F. 2d 482, not withdrawn until the transaction was closed,[2] which acquiescence would require treating the gain realized as gain on the sale or exchange of a capital asset. Although petitioners concede that under § 7805 (b) of the Internal Revenue Code of 1954 the Commissioner has discretion to apply the withdrawal of the acquiescence retroactively, cf. *Automobile Club of Michigan* v. *Commissioner,* 353 U. S. 180, they contend that he abused his discretion in this case.

Section 7805 (b) provides:

> "Retroactivity of Regulations or Rulings.—The Secretary [of the Treasury] or his delegate may prescribe the extent, if any, to which any ruling or regulation, relating to the internal revenue laws, shall be applied without retroactive effect." [3]

In *Caulkins* the Tax Court allowed capital gains treatment of the full amount received by the taxpayer upon the retirement of an "Accumulative Installment Certificate," a debt security under which the lender made 10

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[2] The Commissioner initially published a notification of nonacquiescence. See Rev. Rul. 11581, 1943 Cum. Bull. 1, 28. He published his acquiescence after the Court of Appeals affirmed the Tax Court. See Rev. Rul. 11907, 1944 Cum. Bull. 1, 5. The withdrawal of his acquiescence and the reinstatement of his initial nonacquiescence came in 1955, in 1955–1 Cum. Bull. 7, and Rev. Rul. 55–136, 1955–1 Cum. Bull. 213.

[3] Section 3791 (b) of the 1939 Code, 53 Stat. 467, was similarly worded except that the 1954 Act substituted "The Secretary or his delegate" for "The Secretary, or the Commissioner with the approval of the Secretary . . . ."

Whether the discount element of the gain from the notes here involved is a capital or an income item is governed by the relevant provisions of the 1939 Code, but the statute governing the retroactive application of the withdrawal of the acquiescence in 1955 is § 7805 (b) of the 1954 Code, and not § 3791 (b) of the 1939 Code. This makes no practical difference since the two provisions are identical apart from the variance mentioned above.

annual remittances to the borrower in the amount of $1,500 each in return for a payment of $20,000 in the tenth year. See *United States* v. *Midland-Ross Corp., supra,* at 63. This result gave capital gains treatment to an amount corresponding to but not in the form of original issue discount. The basis for this result was an interpretation of § 117 (f) of the Revenue Act of 1938, c. 289, 52 Stat. 447, which was re-enacted as § 117 (f) of the 1939 Code, and which provided that "amounts received by the holder upon the retirement of bonds, debentures, notes, or certificates or other evidences of indebtedness . . . with interest coupons or in registered form, shall be considered as amounts received in exchange therefor." The Commissioner's 1955 withdrawal of his acquiescence in the Tax Court's decision in *Caulkins* was made retroactive as a general matter, but an exception was made for "amounts received upon redemption of Accumulative Installment Certificates issued by Investors Syndicate which were purchased during the period beginning December 25, 1944, the date acquiescence in the Caulkins case was announced and March 14, 1955, the date this Revenue Ruling is published . . . ." [4] The exception thus covered only the debt securities of the specific type involved in *Caulkins,* and issued by the particular issuer there involved.

In *Automobile Club of Michigan* v. *Commissioner, supra,* at 183–184, we held that the Commissioner is empowered retroactively to correct mistakes of law in the application of the tax laws to particular transactions.[5]

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[4] The withdrawal was published March 14, 1955. However, the exception was later limited to certificates acquired before December 31, 1954, Rev. Rul. 56–299, 1956–1 Cum. Bull. 603, apparently because § 1232 of the 1954 Code applies to obligations issued after that date.

[5] See also *Helvering* v. *Reynolds,* 313 U. S. 428; *Manhattan General Equipment Co.* v. *Commissioner,* 297 U. S. 129, 134–135.

He may do so even where a taxpayer may have relied to his detriment on the Commissioner's mistake. See *Manhattan General Equipment Co.* v. *Commissioner*, 297 U. S. 129. This principle is no more than a reflection of the fact that Congress, not the Commissioner, prescribes the tax laws. The Commissioner's rulings have only such force as Congress chooses to give them, and Congress has not given them the force of law. Consequently it would appear that the Commissioner's acquiescence in an erroneous decision, published as a ruling, cannot in and of itself bar the United States from collecting a tax otherwise lawfully due.

But petitioners point to prefatory statements in the Internal Revenue Bulletins for 1952 and other years stating that Tax Court decisions acquiesced in "should be relied upon by officers and employees of the Bureau of Internal Revenue as precedents in the disposition of other cases." See, *e. g.*, 1952–1 Cum. Bull. IV. These are merely guidelines for Bureau personnel, however, and hardly help the petitioners here. The title pages of the same Revenue Bulletins give taxpayers explicit warning that rulings

> ". . . are for the information of taxpayers and their counsel as showing the trend of official opinion in . . . the Bureau of Internal Revenue; the rulings other than Treasury Decisions have none of the force or effect of Treasury Decisions and *do not commit the Department to any interpretation of the law which has not been formally approved and promulgated by the Secretary of the Treasury.*" [6] (Emphasis added.)

[6] Compare the current Internal Revenue Bulletins, wherein, with specific regard to acquiescences, it is stated:

"Actions of acquiescences in adverse decisions shall be relied on by Revenue officers and others concerned as conclusions of the Service only to the application of the law to the facts in the particular case. Caution should be exercised in extending the application of the

This admonition, together with the language of § 7805 (b)'s predecessor, § 3791 (b) of the 1939 Code, gave ample notice that the Commissioner's acquiescence in *Caulkins* was not immune from subsequent retroactive correction to eliminate a mistake of law.

Indeed, long before the tax year here in question this Court had made it clear that "The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law . . . but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity." *Manhattan General Equipment Co.* v. *Commissioner, supra,* at 134.[7] There we held that the Commissioner could make retroactive a new regulation increasing tax liability beyond that provided for by the prior regulation where the superseding regulation corrected an erroneous interpretation of the statute.

> "The statute defines the rights of the taxpayer and fixes a standard by which such rights are to be measured. The regulation constitutes only a step in the administrative process. It does not, and could not,

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decision to a similar case unless the facts and circumstances are substantially the same . . . ." *E. g.,* 1964–1 Cum. Bull. 3.

And the introduction to Revenue Rulings now expressly warns that "Except where otherwise indicated, published rulings and procedures apply retroactively." *Id.,* at 1. See also Rev. Proc. 62–28, 1962–2 Cum. Bull. 496, which states at 504:

"A ruling . . . may be revoked or modified at any time in the wise administration of the taxing statutes. . . . If a ruling is revoked or modified, the revocation or modification applies to all open years under the statutes, unless the Commissioner exercises the discretionary powers given to him under section 7805 (b) of the Code to limit the retroactive effect of the ruling."

[7] See also *Miller* v. *United States,* 294 U. S. 435, 439–440; *Lynch* v. *Tilden Produce Co.,* 265 U. S. 315, 320–322.

> alter the statute. It is no more retroactive in its operation than is a judicial determination construing and applying a statute to a case in hand." *Id.*, at 135.

This reasoning applies with even greater force to the Commissioner's rulings and acquiescences.[8] Therefore the acquiescence in *Caulkins,* even assuming for the moment that it embodied the Commissioner's acceptance of the treatment petitioners urge upon us here, does not preclude the Commissioner from collecting the tax lawfully due under the statute.

We cannot agree with petitioners that *Automobile Club of Michigan* v. *Commissioner, supra,* supports a finding that the Commissioner abused his discretion in giving retroactive effect to the withdrawal of the acquiescence. In that case the Commissioner had issued general pronouncements according exempt status to all automobile clubs similarly situated, following letter rulings to that effect in favor of the taxpayer. The Commissioner then corrected his erroneous view and, in 1945, specifically revoked the taxpayer's exemption for 1943 and subsequent years. We rejected the taxpayer's claim that the Commissioner had abused the discretion given him by § 7805 (b)'s predecessor. The Commissioner's action had been forecast in a General Counsel Memorandum in 1943, and the corrected ruling had been applied to all automobile clubs for tax years back to 1943. 353 U. S., at 185–186.

Petitioners make two arguments based on *Automobile Club of Michigan.* First, they contend that the Commissioner's decision to apply his change of position retroactively to them is an abuse of discretion because, unlike

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[8] The Commissioner's acquiescence in *Caulkins* and his withdrawal and reinstatement of nonacquiescence were stated in Revenue Rulings. Present practice appears to be to publish acquiescences and nonacquiescences without incorporating them in rulings. See, *e. g.*, 1964–1 Cum. Bull. 3.

the taxpayer in *Automobile Club*, they had no notice in the relevant tax year that the Commissioner was about to correct his mistake of law, and thus had purchased the discounted notes in express reliance upon the Commissioner's published acquiescence in *Caulkins*. Second, they argue that the Commissioner abused his discretion because the retroactive withdrawal of his acquiescence in *Caulkins* excepted certificates of the type involved in *Caulkins* if issued by the issuer there involved and purchased while the acquiescence was in effect; this is said to be an unreasonable and arbitrary classification since, petitioners assert, there is no significant difference between the excepted certificates and the notes that they had purchased.

Although we mentioned certain facts in support of our conclusion in *Automobile Club* that there had not been an abuse of discretion in that case, it does not follow that the absence of one or more of these facts in another case wherein a ruling or regulation is applied retroactively establishes an abuse of discretion. *Automobile Club* merely examined all the circumstances of the particular case to determine whether the Commissioner had there abused his discretion. 353 U. S., at 185. In the present case it cannot be said that the Commissioner abused his discretion in either of the respects urged by petitioners. The absence of notice does not prove an abuse, since, for the reasons we have stated, the petitioners were not justified in relying on the acquiescence as precluding correction of the underlying mistake of law and the retroactive application of the correct law to their case. Since no reliance was warranted, no notice was required.

Nor is there merit in the argument that the Commissioner abused his discretion in distinguishing Investors Syndicate Accumulative Installment Certificates from other debt securities, for we do not think the Commissioner's acquiescence in *Caulkins* was to be interpreted as his acceptance of the proposition that earned original

issue discount was entitled to capital gains treatment.[9] That interpretation might be properly put upon his acquiescence only if, *first,* the Tax Court in *Caulkins* squarely decided that any discount element in the amount realized by the taxpayer on the retirement of the certificate was not to be taxed as ordinary income but as capital gain, and, *second,* the decision of the Tax Court should be read as holding that the tax treatment of gain attributable to discount is the same on sales and retirements. But *Caulkins* embodies neither of these holdings. Therefore, when the Commissioner revoked his acquiescence in 1955 he was not repudiating his earlier acceptance of a decision that prescribed capital gains treatment for the earned original issue discount here involved. Consequently, his decision to except Accumulative Installment Certificates from the retroactive application of his nonacquiescence in *Caulkins* could not constitute an abuse of discretion of which the petitioners may complain.

As to item *first:* that the Tax Court in *Caulkins* did not squarely decide that the discount element in the amount realized by the taxpayer on the retirement of a debt security is to be taxed as a capital gain is apparent from its opinion. The Tax Court seemed to regard the only significant issue before it as whether the taxpayer's certificate of indebtedness was a "registered" certificate within

[9] Petitioners invoke the principle that "The Commissioner cannot tax one and not tax another without some rational basis for the difference. And so, assuming the correctness of the principle of 'equality,' it can be an independent ground of decision that the Commissioner has been inconsistent, without much concern for whether we should hold as an original matter that the position the Commissioner now seeks to sustain is wrong." *United States* v. *Kaiser,* 363 U. S. 299, 308 (concurring opinion). See also *Schuster* v. *Commissioner,* 312 F. 2d 311 (C. A. 9th Cir.); *Exchange Parts Co. of Fort Worth* v. *United States,* 150 Ct. Cl. 538, 279 F. 2d 251; *City Loan & Savings Co.* v. *United States,* 177 F. Supp. 843, aff'd 287 F. 2d 612 (C. A. 6th Cir.); *Brecklein* v. *Bookwalter,* 231 F. Supp. 404; *Connecticut Railway & Lighting Co.* v. *United States,* 142 F. Supp. 907.

the meaning of § 117 (f). There was no explicit consideration of whether any discount element in the amount realized by the taxpayer on the certificate was to be taxed as ordinary income or as capital gain. It is at best highly questionable, therefore, that by acquiescing in this decision the Commissioner conceded that § 117 (f) extended capital gains treatment to the discount element in the certificate of indebtedness.[10]

As to item *second:* the petitioners were not warranted in reading *Caulkins* as holding that the gain realized on a sale that is attributable to original issue discount is to be given the same tax treatment as gain so attributable realized on a retirement. The opinion deals only with, and rests squarely upon, § 117 (f), which is concerned with *retirements.* It is true that, in the case of securities in registered form or with coupons attached, that section was added by the Revenue Act of 1934, 48 Stat. 680, 714–715, to eliminate a difference in treatment between sales and retirements. See, *e. g., Fairbanks* v. *United States,* 306 U. S. 436; *Watson* v. *Commissioner,* 27 B. T. A. 463. But the opinion in *Caulkins* appears erroneously to carry forward a distinction and to give more favorable treatment to retirements. See *United States* v. *Midland-Ross Corp., supra,* at 63–66. Thus petitioners should not have read *Caulkins* as they did. Indeed the Tax Court has since distinguished *Caulkins* on the ground that it rested on the § 117 (f) language of

[10] The opinion of the Court of Appeals stated that § 117 (f) required that all gain realized upon retirement of an obligation to which the section applied be given capital gains treatment; that court's primary concern, however, was also with the question whether the section applied to the *Caulkins* certificates. Technically, the Commissioner's acquiescence in *Caulkins* was in the Tax Court decision and not in the decision of the Court of Appeals. As a general matter, the Commissioner still follows the practice of noting his acquiescence or nonacquiescence only in Tax Court decisions.

retirement and consequently was inapplicable to a sale. See *Paine* v. *Commissioner,* 23 T. C. 391, 401, rev'd on other grounds, 236 F. 2d 398 (C. A. 8th Cir.); *United States* v. *Midland-Ross Corp., supra,* at 65.

Furthermore, even on the assumption that *Caulkins* may be read as petitioners contend, petitioners had the burden of demonstrating that Accumulative Installment Certificates could not rationally be distinguished from other discounted securities. Cf. *American State Bank* v. *United States,* 279 F. 2d 585, 589–590 (C. A. 7th Cir.); *Schwartz* v. *Commissioner,* 40 T. C. 191, 193. But the record is devoid of any evidence of effort by petitioners to discharge this burden by showing the absence of any significant difference between the holders of Accumulative Installment Certificates and themselves. Indeed, the Commissioner might well have believed that however mistaken the view that his acquiescence in *Caulkins* was tantamount to an acceptance of capital gains treatment for original issue discount, the assumption that such treatment would be given the discount element of their debt securities was more understandable in the case of holders of Accumulative Installment Certificates—the same obligations as were involved in *Caulkins*—than in the case of other taxpayers. So thinking, the Commissioner might further have concluded that equitable considerations pointed to making an exception to the retroactive application of the nonacquiescence for the holders of these Certificates. It is not for us to pass upon the wisdom of any such distinction. It suffices that on this record we cannot say that the distinction was so devoid of rational basis that we must now overturn the Commissioner's judgment.

Insofar as petitioners' arguments question the policy of empowering the Commissioner to correct mistakes of law retroactively when a taxpayer acts to his detriment in reliance upon the Commissioner's acquiescence in an

erroneous Tax Court decision,[11] their arguments are more appropriately addressed to Congress. Congress has seen fit to allow the Commissioner to correct mistakes of law, and in § 7805 (b) has given him a large measure of discretion in determining when to apply his corrections retroactively. In the circumstances of this case we cannot say that this discretion was abused.

Affirmed.

[11] Cf. Griswold, A Summary of the Regulations Problem, 54 Harv. L. Rev. 398, 411–419 (1941).

SIMONS *v.* MIAMI BEACH FIRST NATIONAL BANK, EXECUTOR.

CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT.

No. 363. Argued March 10, 1965.—Decided May 3, 1965.

Petitioner and her husband, Simons, were legally separated in New York, where they were domiciled, and he was ordered by the separation decree to make monthly alimony payments. He ultimately moved to Florida, where a year later he secured a divorce. Petitioner had valid constructive notice of the divorce action but entered no appearance. Simons made the monthly payments under the New York decree up to his death about eight years after the divorce. Petitioner claimed dower under Florida law when respondent, executor, offered Simons' will for probate. Respondent opposed the claim on the ground that because of the divorce petitioner was not Simons' wife when he died. Petitioner then brought this action in a Florida court seeking a declaration that the divorce had not destroyed her dower claim. The trial court's dismissal of the action was affirmed on appeal and the state supreme court declined review. *Held:*

1. The denial of petitioner's dower by the Florida courts did not violate the Full Faith and Credit Clause of the Constitution, since the New York decree, which was fully complied with by Simons, preserved no dower rights in his property. P. 84.

2. Any dower rights petitioner may have had in Simons' estate under Florida law did not survive the divorce decree, since under Florida law dower rights in Florida property are inchoate, and are extinguished by a divorce decree predicated upon constructive service. P. 85.

157 So. 2d 199, affirmed.

Robert C. Ward argued the cause for petitioner. On the brief was *William Gresham Ward.*

Marion E. Sibley argued the cause for respondent. With him on the brief was *Irving B. Levenson.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The question to be decided in this case is whether a husband's valid Florida divorce, obtained in a proceeding wherein his nonresident wife was served by publication only and did not make a personal appearance, unconstitutionally extinguished her dower right in his Florida estate.

The petitioner and Sol Simons were domiciled in New York when, in 1946, she obtained a New York separation decree that included an award of monthly alimony. Sol Simons moved to Florida in 1951 and, a year later, obtained there a divorce in an action of which petitioner had valid constructive notice but in which she did not enter a personal appearance.[1] After Sol Simons' death in Florida in 1960, respondent, the executor of his estate, offered his will for probate in the Probate Court of Dade County, Florida. Petitioner appeared in the proceeding and filed an election to take dower under Florida law, rather than have her rights in the estate governed by the terms of the will, which made no provision for her.[2] The respondent opposed the dower claim, asserting that since Sol Simons

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[1] Petitioner was served by publication while still living in New York and received copies of the order for publication and the divorce complaint. She did not enter an appearance in the Florida proceeding on advice of counsel.

[2] 21 Fla. Stat. Ann. 1964, § 731.34 provides as follows:

"Whenever the widow of any decedent shall not be satisfied with the portion of the estate of her husband to which she is entitled under the law of descent and distribution or under the will of her husband, or both, she may elect in the manner provided by law to take dower, which dower shall be one third in fee simple of the real property which was owned by her husband at the time of his death or which he had before conveyed, whereof she had not relinquished her right of dower as provided by law, and one third part absolutely of the personal property owned by her husband at the time of his death . . . ."

had divorced petitioner she had not been his wife at his death, and consequently was not entitled to dower under Florida law. Petitioner thereupon brought the instant action in the Circuit Court for Dade County in order to set aside the divorce decree and to obtain a declaration that the divorce, even if valid to alter her marital status, did not destroy or impair her claim to dower. The action was dismissed after trial, and the Florida District Court of Appeal for the Third District affirmed. 157 So. 2d 199.[3] The Supreme Court of Florida declined to review the case, 166 So. 2d 151. We granted certiorari, 379 U. S. 877. We affirm.

Petitioner's counsel advised us during oral argument that he no longer challenged the judgment below insofar as it embodied a holding that the 1952 Florida divorce was valid and terminated the marital status of the parties. We therefore proceed to the decision of the question whether the Florida courts unconstitutionally denied petitioner's dower claim.[4]

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[3] Petitioner attacked the validity of the divorce on the grounds: (1) that Sol Simons had defrauded the Florida courts by falsely claiming residence, (2) that the New York decree was a bar to the divorce suit and that Sol Simons had defrauded the court by failing to disclose the prior New York decree, (3) that the divorce decree on its face showed want of jurisdiction and (4) that after petitioner received notice of the divorce suit Sol Simons lulled her into inaction. The trial court made findings of fact adverse to petitioner on all points and dismissed the suit with prejudice. In affirming, the Florida District Court of Appeal held that "[t]he prior New York separate maintenance decree was not a bar to a divorce suit by the husband, and his failure to disclose it in his complaint was not a fraud on the court. . . . Any affirmative defense the prior suit may have afforded should have been presented in the divorce suit." 157 So. 2d 199, at 200.

[4] Neither the Florida trial court nor the District Court of Appeal expressly discussed the merits of petitioner's claim that the divorce, even if valid, did not destroy or impair her dower rights. But since Florida law allows dower only to a decedent's wife, see note 6, *infra*,

Petitioner argues that since she had not appeared in the Florida divorce action the Florida divorce court had no power to extinguish any right which she had acquired under the New York decree. She invokes the principle of *Estin* v. *Estin,* 334 U. S. 541, where this Court decided that a Nevada divorce court, which had no personal jurisdiction over the wife, had no power to terminate a husband's obligation to provide the wife support as required by a pre-existing New York separation decree. As this was so, we there ruled that New York, in giving continued effect to the maintenance provisions of its separation decree, did not deny full faith and credit to the Nevada decree. See U. S. Const., Art. IV, § 1.[5] The application of the *Estin* principle to the instant case, petitioner contends, dictates that we hold the Florida courts to their constitutional duty to give effect to the New York decree, inherent in which is a preservation of her dower right.

The short answer to this contention is that the only obligation imposed on Sol Simons by the New York decree, and the only rights granted petitioner under it, concerned monthly alimony for petitioner's support. Unlike the ex-husband in *Estin,* Sol Simons made the support payments called for by the separate maintenance decree notwithstanding his *ex parte* divorce. In making these payments until his death he complied with the full measure of the New York decree; when he died there was consequently nothing left of the New York decree for Florida to dishonor.

This conclusion embodies our judgment that there is nothing in the New York decree itself that can be construed as creating or preserving any interest in the nature

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we interpret the Florida courts' decisions sustaining the validity of the divorce as also holding that the divorce extinguished petitioner's dower rights.

[5] "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. . . ."

of or in lieu of dower in any property of the decedent, wherever located. Petitioner refers us to no New York law that treats such a decree as having that effect, or, for that matter, to any New York law that has such an effect irrespective of the existence of the decree. We think it clear that the burden of showing this rested upon petitioner. Cf. *State Farm Ins. Co.* v. *Duel,* 324 U. S. 154, 160; *Alaska Packers Assn.* v. *Industrial Accident Comm'n,* 294 U. S. 532, 547–548. It follows that insofar as petitioner's argument rests on rights created by the New York decree or by New York law, the denial of her dower by the Florida courts was not a violation of the Full Faith and Credit Clause. Cf. *Armstrong* v. *Armstrong,* 350 U. S. 568.

Insofar as petitioner argues that since she was not subject to the jurisdiction of the Florida divorce court its decree could not extinguish any dower right existing under Florida law, *Vanderbilt* v. *Vanderbilt,* 354 U. S. 416, 418, the answer is that under Florida law no dower right survived the decree. The Supreme Court of Florida has said that dower rights in Florida property, being inchoate, are extinguished by a divorce decree predicated upon substituted or constructive service. *Pawley* v. *Pawley,* 46 So. 2d 464.[6]

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[6] In *Pawley* the Supreme Court of Florida distinguished the dower right from the right to support, saying at 46 So. 2d 464, 472–473, n. 2:

"In this, if not in every jurisdiction, right of dower can never be made the subject of a wholly independent issue in any divorce suit. It stands or falls as a result of the decree which denies or grants divorce. It arises upon marriage, as an institution of the law. The inchoate right of dower has some of the incidents of property. It partakes of the nature of a lien or encumbrance. It is not a right which is originated by or is derived from the husband; nor is it a personal obligation to be met or fulfilled by him, but it is a creature of the law, is born at the marriage altar, cradled in the bosom of the marital status as an integral and component part thereof, survives

It follows that the Florida courts transgressed no constitutional bounds in denying petitioner dower in her ex-husband's Florida estate.

Affirmed.

MR. JUSTICE HARLAN, concurring.

I am happy to join the opinion of the Court because it makes a partial retreat from *Vanderbilt* v. *Vanderbilt*, 354 U. S. 416, a decision which I believe must eventually be rerationalized, if not entirely overruled.

The *Vanderbilt* case was this. The Vanderbilt couple was domiciled in California. Mr. Vanderbilt went to Nevada, established a new domicile, and obtained an *ex parte* [1] divorce decree which did not provide for alimony payments to Mrs. Vanderbilt. In the meantime Mrs. Vanderbilt went to New York. After the Nevada decree had become final, she sued in New York for support under New York law, sequestering Mr. Vanderbilt's property located there. New York ordered support payments, rejecting full-faith-and-credit arguments based on

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during the life of the wife as such and finds its sepulcher in divorce. Alimony too is an institution of the law but it is a personal obligation of the husband which is based upon the duty imposed upon him by the common law to support his wife and gives rise to a personal right of the wife to insist upon, if she be entitled to, it. It has none of the incidents of, and is in no sense a lien upon or interest in, property. Consequently, the right of the wife to be heard on the question of alimony should not, indeed lawfully it cannot, be destroyed by a divorce decree sought and secured by the husband in an action wherein only constructive service of process was effected."

A petition for writ of certiorari to this Court alleged, "Petitioner is thus permitted to file another suit for alimony, but her contract of marriage is annulled and her inchoate dower rights destroyed without due process of law." Brief for petitioner, p. 9, *Pawley* v. *Pawley*, No. 325, October Term, 1950. The petition was denied, 340 U. S. 866.

[1] *"Ex parte"* throughout this opinion is used to denote a situation in which the divorce court has not obtained personal jurisdiction over the defendant spouse.

the Nevada decree. Over dissents by Mr. Justice Frankfurter and myself (354 U. S., at 419, 428) the Court affirmed the New York award, holding that because the Nevada court had no personal jurisdiction over Mrs. Vanderbilt, "the Nevada decree, to the extent it purported to affect the wife's right to support, was void . . . ." 354 U. S., at 419.

Two rules emerged from the case, neither of which, I suggest with deference, commends itself: (1) an *ex parte* divorce can have no effect on property rights; (2) a State in which a wife subsequently establishes domicile can award support to her regardless of her connection with that State at the time of the *ex parte* divorce and regardless of the law in her former State of domicile.[2]

The first rule slips unobtrusively into oblivion in today's decision, for Florida is allowed to turn property rights on its *ex parte* decree. A concurrence disputes this, but I do not understand how the Court's language in this case can be read as anything less. If I may paraphrase only slightly, the Court says, "Insofar as petitioner argues that since she was not subject to the jurisdiction of the Florida divorce court, its decree could not

[2] The *Vanderbilt* result might have been proper on any of three grounds. (1) If New York was Mrs. Vanderbilt's State of domicile at the time of the *ex parte* Nevada divorce, New York law investing a wife with support rights should not be overborne by an *ex parte* decree in another State. (2) If California was Mrs. Vanderbilt's domicile at the time of the Nevada divorce and under California law support could have been awarded, New York should also be free (though not bound) to award support. (3) If Mr. Vanderbilt owned property in New York at the time of the *ex parte* divorce, New York might arguably be free to hold that ownership of New York property carries with it the obligation to support one's wife, at least to the extent of the value of that property.

The Court did not concern itself with the location of Mrs. Vanderbilt's domicile or Mr. Vanderbilt's property at the time of the Nevada divorce.

extinguish any dower right existing under Florida law, *Vanderbilt* v. *Vanderbilt,* 354 U. S. 416, 418, the answer is that the Florida decree extinguished petitioner's dower rights." *Ante,* p. 85. The Court goes on to state and accept the Florida law that an *ex parte* divorce extinguishes dower rights. I do not see how a withdrawal from the due process phase of *Vanderbilt* could be clearer.

Because New York was petitioner's State of domicile at all times relevant to this case and did not purport to invest her with any rights to property beyond those she received from her husband, the second rule is not involved here. My hope is that its time will come too. I continue to believe that the views expressed in my *Vanderbilt* dissent embody a more satisfactory and workable approach to the law of "divisible divorce" (*Estin* v. *Estin,* 334 U. S. 541) than can be distilled from existing Court opinions.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, concurring.

I agree completely with the Court's judgment and opinion, and add these few words only in reply to the suggestion of my Brother HARLAN that the Court here is making "a partial retreat from *Vanderbilt* v. *Vanderbilt,* 354 U. S. 416." I do not think that today's decision marks any "retreat" at all from the opinion or holding in *Vanderbilt,* and I do not understand the Court so to regard it. *Vanderbilt* held that a wife's right to support could not be cut off by an *ex parte* divorce. In the case before us, Mrs. Simons' Florida dower was not terminated by the *ex parte* divorce. It simply never came into existence. No one disputes that the *ex parte* divorce was effective to end the marriage, so that after it Mrs. Simons was no longer Mr. Simons' wife. Florida law, as the Court's opinion shows, grants dower only to a woman who

is the legal wife of the husband when he dies. Mrs. Simons therefore had no property rights cut off by the divorce. She simply had her marriage ended by it, and for that reason was not a "widow" within the meaning of the Florida law. Unless this Court were to make the novel declaration that Florida cannot limit dower rights to widows, I see no possible way in which the *Vanderbilt* case, which dealt with rights which a State did give to divorced wives, could be thought to apply.

MR. JUSTICE STEWART and MR. JUSTICE GOLDBERG, dissenting.

We would dismiss the writ of certiorari in this case as improvidently granted, believing that, as the Court's opinion clearly demonstrates, no federal question is presented. There exists no question under the Full Faith and Credit Clause, because Sol Simons, even after his Florida divorce, "complied with the full measure of the New York decree," *ante,* at 84.

No other federal question is even remotely suggested in the present posture of this case. Petitioner asserted in her petition for a writ of certiorari that "[t]he Courts of Florida have denied to the widow, Lucy C. Simons, her constitutional property rights to which she was entitled . . . by the mere subterfuge of an ex parte divorce case in the Courts of Florida, where the Florida Court did not have jurisdiction because of the lack of proper residence." We were advised at oral argument by petitioner's counsel, however, that petitioner no longer challenged the judgment below insofar as it embodied a holding that the 1952 Florida divorce decree was valid and terminated the marital status of the parties.

The only possible questions which remain in this case, therefore, are questions of state law which are of no proper concern to this Court.

FEDERAL POWER COMMISSION *v.* UNION ELECTRIC CO.

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

No. 123. Argued March 2, 1965.—
Decided May 3, 1965.

Respondent filed a declaration of intention with the Federal Power Commission (FPC) pursuant to § 23 (b) of the Federal Power Act to construct a pumped storage plant on a nonnavigable tributary of a navigable stream. A pumped storage plant uses power during periods of nonpeak demands to pump water to an upper pool to be used to generate peak-period energy by water falling into a lower pool. The FPC found that the nonnavigable tributary is a stream over which Congress has jurisdiction as it is a headwater of a navigable river system. The FPC held that the project would require a license under § 23 (b) because it would use water power for the interstate transmission of electricity and because it would affect downstream navigability. The Court of Appeals reversed, finding that the only relevant "commerce" under § 23 (b) is that on the downstream navigable waterway and that the project would have no significant impact on water commerce. *Held:*

1. The commerce power of Congress clearly encompasses the interstate transmission of electric energy, and the project here is within the purview of that power, without regard to federal control of tributary streams and navigation. P. 94.

2. The language of the licensing requirement of § 23 (b) invokes the full congressional authority over commerce and not merely the regulation of navigation or water commerce. Pp. 95–98.

3. The purposes of the predecessor statute, the Federal Water Power Act, which included the comprehensive development of water power and hydroelectric energy, are more fully served by considering the impact of the project on the full range of commerce interests. Pp. 98–109.

4. Since the original Federal Water Power Act was concerned with the utilization of water resources and particularly the power potential in water, there is no anomaly in the FPC's position that steam plants generating energy for interstate transmission are not within the scope of § 23 (b), although located on a stream over

which Congress has jurisdiction, while similar hydroelectric facilities are covered by § 23 (b). Pp. 109–110.

326 F. 2d 535, reversed.

Ralph S. Spritzer argued the cause for petitioner. With him on the brief were *Solicitor General Cox, Frank Goodman, Richard A. Solomon* and *Howard E. Wahrenbrock.*

Robert J. Keefe argued the cause for respondent. With him on the brief was *Robert F. Schlafly.*

MR. JUSTICE WHITE delivered the opinion of the Court.

Section 23 (b) [1] of the Federal Power Act [2] requires any person desiring to construct a dam or other project on a nonnavigable stream, but one over which Congress has jurisdiction under its authority to regulate commerce, to file a declaration of intention with the Federal Power Commission. If the Commission finds that "the interests of interstate or foreign commerce would be affected by such proposed construction," the declarant may not construct or operate the project without a license. The issue here is whether the construction of a pumped storage hydroelectric project generating energy for interstate transmission is one which would affect the "interests of interstate or foreign commerce" within the intendment of the Act.

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[1] 49 Stat. 838, 846, 16 U. S. C. § 817 (1958 ed.).

[2] The Federal Power Act was originally enacted in 1920 as the Federal Water Power Act, 41 Stat. 1063. The original Act was amended by Title II of the Public Utility Act of 1935, 49 Stat. 838, 16 U. S. C. §§ 791–823 (1958 ed.), and made Part I of the Federal Power Act. Parts II and III, dealing with regulation of electric utility companies, were added. To distinguish the original Federal Water Power Act, which was kept largely intact, from Parts II and III, Part I will be referred to in this opinion under its original title.

I.

Respondent Union Electric Co. (Union), operating generating plants and an interconnected transmission and distribution system in Missouri, Illinois, and Iowa, filed a declaration of intention pursuant to § 23 (b) to construct a pumped storage hydroelectric facility, the Taum Sauk installation, as a part of Union's interstate system. The pumped storage plant, an engineering innovation of growing use, is to supplement the energy produced by other plants during periods of peak demands. During such periods it generates energy through use of hydroelectric units driven by water falling from an elevated reservoir into a lower pool.[3] During off-peak periods it uses energy from other sources to pump water from the lower pool back to the headwater pool.[4] The project is capable

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[3] A pumped storage facility may be likened to a large storage battery, taking electric energy from other sources, usually steam-electric plants, during some hours of the day, and supplying energy to an integrated system during other hours. The water in the upper pool may thus be regarded as the equivalent of stored electric energy. Pumped storage installations fall into two categories, those in which pumped storage facilities are added to a conventional hydro installation, and those which are exclusively pumped storage, generating power solely by circulating water between a lower and higher reservoir. Within these categories pumped storage installations vary widely in design and mode of operation. F. P. C., 1964 National Power Survey, Part I, 120–124. Existing combined pumped storage hydroelectric projects include Rocky River, Conn. (1929); Buchanan, Tex. (1950); Flatiron, Colo. (1954); Hiwassee, N. C. (1956); and Lewiston, N. Y. (1961). The pure pumped storage installations are of more recent vintage, with the following projects planned or recently constructed: Yards Creek, N. J.; Cabin Creek, Colo.; Muddy Run, Pa.; Ludington, Mich.; Cornwall, N. Y.; and the Taum Sauk project. See *id.*, at 122–123.

[4] At Taum Sauk the upper reservoir is a 32-acre pool constructed atop a mountain, at about 1,500 feet above sea level, and the lower reservoir, impounded by a 60-foot dam, covers about 370 acres and has a usable storage capacity of 4,350 acre-feet of water. The two

of creating up to 350 megawatts and the energy created will be utilized in Missouri, Illinois, and possibly Iowa. Taum Sauk is to be located on the East Fork of the Black River, about four miles above the confluence of these waters.[5] The East Fork is a nonnavigable tributary of the Black River, itself a navigable stream along with the White River into which it flows.

The FPC found the East Fork was a stream "over which Congress has jurisdiction under its authority to regulate commerce," since it is a headwater of a navigable river system. The project would affect the interests of commerce and would require a license, the FPC also held, both because it contemplated the utilization of water power for the interstate transmission of electricity and because it would affect downstream navigability, 27 F. P. C. 801. The Court of Appeals reversed, 326 F. 2d 535 (C. A. 8th Cir.) holding that the only "commerce" which is relevant to the FPC's determination under § 23 (b) is commerce on the downstream navigable waterway and that the project in question would have no significant impact on water commerce.[6] Absent an

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are connected by a pressure tunnel and conduit, with a pumping and generating station on an open channel running to the lower pool.

[5] During normal stream flows and normal operations of the project, there would be no increase or decrease of the natural stage or flow of waters below the dam. In the event of malfunction or abnormal flows, the project might affect the level of both the East Fork and Black River.

[6] The trial examiner found that the Taum Sauk project would affect the navigable capacity of the Black River. Although the Commission directed most of its opinion to the issue of whether the project affected the interests of commerce because a substantial part of its power is transmitted in interstate commerce, it concurred in the examiner's finding that the project may, under certain conditions, affect the navigability of the Black River. The Court of Appeals reversed the latter holding on the ground that the finding was not supported by substantial evidence. The question presented in the petition for certiorari was whether the generation of energy for inter-

effect on downstream navigability, or on irrigation development, flood control projects or planned utilization of water resources, matters which might affect the interests of water commerce, a water power project located on the headwaters of a navigable river is a "local" activity beyond the licensing power and consequent regulatory controls of the FPC. Because the question is an unresolved one of jurisdiction over an important class of hydroelectric projects, we granted certiorari, 379 U. S. 812, and now reverse the judgment of the Court of Appeals. We have determined that its limitation of the FPC's licensing power to projects affecting commerce on navigable waters is founded upon an erroneous reading of the language of § 23 (b) and the design and purposes of the Federal Water Power Act.

II.

To focus the inquiry, it is well to state what is not involved in this case. There is no question that the interstate transmission of electric energy is fully subject to the commerce powers of Congress. *Public Utilities Comm'n* v. *Attleboro Steam & Elec. Co.*, 273 U. S. 83, 86; *Electric Bond & Share Co.* v. *Securities & Exchange Comm'n*, 303 U. S. 419, 432–433. Nor is there any doubt today that projects generating energy for such transmission, such as Taum Sauk, affect commerce among the States and therefore are within the purview of the commerce power, quite without regard to the federal control of tributary streams and navigation. See *Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 40–41; *Labor Board* v. *Fruehauf*

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state transmission was a sufficient basis for requiring a license, although the Commission reserved in a footnote the right to argue the correctness of the alternative holding. We do not determine whether this issue is properly here or decide whether there is substantial evidence to support a finding of effect on navigability; our discussion proceeds on the assumption that the Court of Appeals was correct in determining that there was not.

Trailer Co., 301 U. S. 49; *Consolidated Edison* v. *Labor Board*, 305 U. S. 197; *Katzenbach* v. *McClung*, 379 U. S. 294, 301–304. But see *United States* v. *Appalachian Power Co.*, 107 F. 2d 769, rev'd on other grounds, 311 U. S. 377.[7] Thus, there are no constitutional doubts or barriers to the FPC's interpretation. The only question is whether Congress has required a license for a water power project utilizing the headwaters of a navigable river to generate energy for an interstate power system. We think an affirmative answer is required by both the language and purposes of the Act.

The language of the Act, in our view, plainly requires a license in the circumstances of this case. Section 23 (b)[8]

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[7] *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165, cited by the Court of Appeals, is not opposed. The Court there held that a State had power to impose a tax on a company generating electric energy for distribution in interstate commerce. This, of course, does not control the commerce powers of Congress. Cf. *Edison Co.* v. *Labor Board*, 305 U. S. 197; *Polish Alliance* v. *Labor Board*, 322 U. S. 643, 649: "[F]ederal regulation does not preclude state taxation and state taxation does not preclude federal regulation."

[8] Section 23 (b) reads:

"It shall be unlawful for any person . . . for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with . . . a license granted pursuant to this Act. Any person . . . intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined herein as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed

prohibits construction of nonlicensed hydroelectric projects on navigable streams, regardless of any effect, detrimental or beneficial, on navigation or commerce by water and requires those proposing a project on a nonnavigable stream to file a declaration of intention and to come before the Commission for a determination of whether the "interests of interstate or foreign commerce would be affected," a determination which obviously does not speak in terms of the interests of navigation or water commerce. Plainly the provision does not require a license only where "the interests of interstate or foreign commerce *on navigable waters* would be affected." Although transportation on interstate waterways is interstate commerce, the phrase "affect the interests of commerce" on its face hardly supports any claim that Congress sought to regulate only such transportation. Rather, it strongly implies that Congress drew upon its full authority under the Commerce Clause, including but not limited to its power over water commerce. "[H]alf a dozen enactments, other than the National Labor Relations Act, are sufficient to illustrate that when [Congress] wants to bring aspects of commerce within the full sweep of its constitutional authority, it manifests its purpose by regulating not only 'commerce' but also matters which 'affect,' 'interrupt,' or 'promote' interstate commerce. . . . In so describing the range of its control, Congress is not indulging stylistic preferences." *Polish National Alliance* v. *Labor Board*, 322 U. S. 643, 647.

The scope of this language is not restricted by the earlier clause in § 23 (b) limiting the filing requirements

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construction, such person . . . shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this Act. If the Commission shall not so find, and if no public lands or reservations are affected, permission is hereby granted to construct such dam or other project works in such stream upon compliance with State laws."

to projects on nonnavigable streams "over which Congress has jurisdiction under its authority to regulate commerce" that is, tributaries of river systems necessitating supervisory power to preserve or improve downstream navigability or water commerce generally. See *United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U. S. 690; *Phillips* v. *Guy F. Atkinson Co.*, 313 U. S. 508. This language merely designates those who must file a declaration of intention—all those who would locate a water power project on a nonnavigable stream within the jurisdiction of Congress are required to declare their intention so that the Commission may determine the necessity for a license. Congress then proceeds to invoke its full authority over commerce, without qualification, to define what projects on nonnavigable streams are required to be licensed. Respondent asserts that commerce must mean the same thing in both the filing and licensing requirements of § 23 (b); because of the allusion to water commerce in the filing provision, the Commission's inquiry into the effect of the project on commerce must be limited to the source of Congress' power over the stream. Nothing in the structure or syntax of § 23 (b) compels this conclusion. Indeed, in describing in distinct terms the standard for who must file and what must be licensed,[9] the more compelling inference is that Congress in-

[9] To be sure the requirement that the project be on a stream over which Congress has jurisdiction delimits the cases in which the Commission need inquire into the project's effect on commerce, leaving the theoretical possibility that some projects affecting commerce need not be licensed because they are located on waters beyond cognizance under the Commerce Clause. But it has not been shown that this possibility is anything more than theoretical. To the extent there are such projects, there is nothing inconsistent between a narrow exemption for projects located on intrastate nonnavigable waters which do not flow into any navigable streams and an intent to reach all projects affecting commerce generally when located on the more typical stream.

tended the inquiry into the project's effect on commerce to include, but not be limited to, effect on downstream navigability.[10]

Turning to the purposes of the Federal Water Power Act, enacted in 1920, we find nothing which casts serious doubt upon our reading of § 23 (b) or which indicates that the Commission was to restrict its considerations under § 23 (b) to effect on navigability. There is much to indicate the contrary.

The central purpose of the Federal Water Power Act was to provide for the comprehensive control over those uses of the Nation's water resources in which the Federal Government had a legitimate interest; these uses included navigation, irrigation, flood control, and, very prominently, hydroelectric power—uses which, while unregulated, might well be contradictory rather than harmonious.[11] Prior legislation in 1890 and the Rivers and Har-

[10] Respondent also underscores the statutory directive requiring determination of whether the "proposed *construction*" of the dam or project works would affect commerce and urges that the use of this term indicates the provision refers to effect on navigation. Whether inquiry be limited to such effects or extend to matters affecting the interests of commerce generally, an intelligible determination perforce entails consideration of the nature of the project, its intended use and its mode of operation and not only that of the physical construction. Further, the statute provides that upon finding that the project will have an effect on commerce, the declarant "shall not *construct*, *maintain*, or *operate* such dam or other project works" without a license.

[11] H. R. Rep. No. 61, 66th Cong., 1st Sess.; 58 Cong. Rec. 1932, 1936–1940; 59 Cong. Rec. 241, 1039–1042, 1173–1174. See also 42 Cong. Rec. 6968; S. Doc. No. 325, 60th Cong., 1st Sess., 25.

The movement toward the enactment of the Act in 1920 may be said to have taken its keynote from President Roosevelt's veto of a bill which would have turned over to private interests important power sites on the Rainy River. He said:

"We are now at the beginning of great development in water power. Its use through electrical transmission is entering more and more largely into every element of the daily life of the people. Already

bors Act of 1899,[12] prohibiting the erection of any obstruction to navigation, including those on nonnavigable feeders, *United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U. S. 690, and requiring the consent of Congress and approval of the Secretary of War before constructing a bridge, dam, or dike along or in navigable waters, was thought inadequate, for it accommodated only the federal interest in navigation. As this Court has had occasion to note before, the 1920 Federal Water Power Act "was the outgrowth of a widely supported effort of the conservationists to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, in so far as it was within the reach of the federal power to do so . . . ." *First Iowa Hydro-Electric Coop.* v. *Federal Power Comm'n*, 328 U. S. 152, 180. The principal use to be developed and regulated in the Act, as its title indicates, was that of hydroelectric power to meet the needs of an expanding economy.[13]

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the evils of monopoly are becoming manifest; already the experience of the past shows the necessity of caution in making unrestricted grants of this great power.

. . . . . .

"It should also be the duty of some designated official to see to it that in approving the plans the maximum development of the navigation and power is assured, or at least that in making the plans these may not be so developed as ultimately to interfere with the better utilization of the water or complete development of the power." 42 Cong. Rec. 4698.

The history of the movement and its objectives are well recounted in Kerwin, Federal Water-Power Legislation 105–293 (hereafter Kerwin); Pinchot, The Long Struggle for Effective Federal Water Power Legislation, 14 Geo. Wash. L. Rev. 9 (1945).

[12] 26 Stat. 453, 454; 30 Stat. 1121, 1151; 33 U. S. C. §§ 401, 403 (1958 ed.).

[13] "The increasing need of power, resulting through our participation in the war and growing shortage in certain sections of our coal and oil supply, compelled attention to the urgency of immediate

The provisions of the Act reflect these objectives. The preface states that besides navigation and the creation of the Commission, the Act was "to provide for the . . . development of water power; the use of the public lands in relation thereto . . . and for other purposes." 41 Stat. 1063. Section 10 (a), as amended, requires as a condition for obtaining a license that the proposed project "be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses . . . ." [14] Other provisions regulate the operations, services, charges, and duration of hydroelectric plants,[15] "provisions . . . not essential to or

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and comprehensive water-power legislation. . . . [T]he need for legislation for the development of hydroelectric power at the present time is clearly set forth by Secretary Houston in a recent report." H. R. Rep. No. 61, 66th Cong., 1st Sess., 4.

"If 10 years ago, instead of enacting restrictive laws which have prohibited development of our water powers, Congress had invited their development through fair and reasonable terms, the beginning of the World War would have found the United States with 20,000,000 developed hydroelectric power instead of 5,000,000. . . .

. . . . . .

"The necessity for the development of our water power is of paramount importance to the people of the United States, and Congress should enact a law without further delay . . . ." 59 Cong. Rec. 241, 244 (remarks of Senator Jones in introducing the bill).

See also 59 Cong. Rec. 1222–1224, 1039, 1042, 1048; S. Rep. No. 180, 66th Cong., 1st Sess.

[14] 49 Stat. 842, 16 U. S. C. § 803 (a) (1958 ed.).

[15] These conditions require that the project shall be maintained in good repair and operated in the interests of navigation, amortization reserves shall be maintained after the twentieth year of operation out of any excess return on net investment, annual charges shall be paid to the United States, excessive profits, unregulated by state authority, shall be expropriated to the United States, § 10, 49 Stat. 842, 16 U. S. C. §§ 803 (b), (c), (d), (e) (1958 ed.), and rates and

even concerned with navigation as such," but which "have an obvious relationship to the exercise of the commerce power." *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 424, 427. In order to insure comprehensive control over the utilization of the Nation's waterways, "navigable stream" was broadly defined to include the interrupting falls, shallows, rapids and the waterways authorized by or recommended to Congress for improvement; [16] and other recognized sources of federal authority were invoked, such as jurisdiction over public lands and national forests.[17]

If the comprehensive development of water power, "in so far as it was within the reach of the federal power to do so," *First Iowa Hydro-Electric Coop.* v. *Federal Power Comm'n*, 328 U. S., at 180, was the central thrust of the Act, there is obviously little merit to the argument that § 23 (b) requires a license when the interests of water commerce are affected but dispenses with the license when other commerce interests are vitally involved. The purposes of the Act are more fully served if the Commission must, as it held in this case, consider the impact of the project on the full spectrum of commerce interests.

III.

Union's earnest position, however, is that the legislative history of the Act reveals a more limited purpose and requires a narrower construction of § 23 (b). The core of the argument is that the constitutional basis for the Act generally and for § 23 (b) in particular was the

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services for energy, absent state regulation, shall be reasonable and adequate, § 19, 41 Stat. 1073, 16 U. S. C. § 812 (1958 ed.). Under § 14, 49 Stat. 844, 16 U. S. C. § 807 (1958 ed.), the United States may recapture any project after expiration of the license, upon payment of the net investment in the property.

[16] § 3 (8), 49 Stat. 838, 16 U. S. C. § 796 (8) (1958 ed.).

[17] § 4 (e), 49 Stat. 840, 16 U. S. C. § 797 (e) (1958 ed.).

authority of Congress over navigation, that Congress invoked only this power, and no other, and that § 23 (b) accordingly provides for no greater control over projects on nonnavigable streams than is necessary to protect downstream navigability. On these matters, it is said, both conservationists and opponents of the Act agreed. Moreover, the argument continues, the limited reach of § 23 (b) is confined by the repeated references to navigation and to congressional power over it in the course of committee hearings and reports on the 1935 amendments to the Act.

We cannot distill as much as Union does from the long and intense legislative struggle to enact what was a decided innovation in federal policy. The Act unquestionably involved an invocation of the congressional power over navigation under the Commerce Clause, since it required a license to build any water power project on a navigable stream, broadly defined,[18] regardless of any actual effect on navigation. There was, consequently, considerable debate about the scope and extent of the federal power over river navigation, about the definition of "navigable waters" and about the authority of Congress to impose controls and conditions having little relevance

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[18] § 3 (8), 49 Stat. 838, 16 U. S. C. § 796 (8) (1958 ed.).

Earlier versions of the Act would have defined "navigable waters" to include only such streams or parts thereof which in their ordinary natural condition are used for the transportation of persons and property in interstate commerce or which through improvements shall become usable in such commerce. S. 1419, 65th Cong., 1st Sess.; H. R. 3184, 66th Cong., 1st Sess. The conservationists noted that this definition excluded falls, shallows and rapids, thought to be rather valuable sites for hydroelectric projects. 57 Cong. Rec. 4638. A filibuster in the closing hours of the session in 1919 prevented enactment of S. 1419, Kerwin 253–254, and the definition of navigation in H. R. 3184 was amended by the Senate Commerce Committee to include interrupting falls and shallows and rapids as well as streams cited for improvement. S. Rep. No. 180, 66th Cong., 1st Sess.

to the protection of navigation.[19] Some thought the Commerce Clause did not extend to anything but the navigable mainstream itself, and then only for the purpose of preserving or improving water transportation. This broad objection to the Act found expression in remarks directed at § 23 (b) and in assertions that the power over navigation was not sufficient to require the licensing of projects on nonnavigable streams, save perhaps where downstream navigability was substantially affected.[20]

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[19] See, *e. g.*, 59 Cong. Rec. 1041–1042, 1430–1432, 1472, 6529–6531, 6536, 7723–7729.

These objections may be found in the debates on the earlier versions of water power legislation, notwithstanding that "navigable waters" in these bills was more narrowly defined and permission to construct a project on a nonnavigable stream was granted. Earlier bills include S. 1419, 65th Cong., 1st Sess.; H. R. 3184, 66th Cong., 1st Sess. See 56 Cong. Rec. 8917, 9038; 57 Cong. Rec. 4638; 58 Cong. Rec. 2032.

[20] The following are representative:

"Stripped of its covering, the proposal relates not to commerce between the States or with foreign nations, but it authorizes a commission to issue licenses to corporations and to individuals to build dams and to erect power houses for the generation of electricity for industrial purposes. And in this purpose may be found the explanation of the strained effort to enlarge the definition of 'navigable waters' beyond its proper limits. The proponents of this legislation are not concerned with navigation and so with navigable waters in fact. Theirs is a scheme of power development for the demands and the profits of industry under Federal control. They recognize the impracticability of such developments upon streams navigable in fact and in law, except under unusual and exceptional conditions. . . . Limit this definition of 'navigable waters' as we may and the bill even then will go to the very verge of constitutional inhibition. I know of no authority in our fundamental law for the licensing by Congress of corporations and individuals for the building of dams, the erection of power houses, and the generation of electricity for industrial and commercial purposes. There are those who profess to believe that this may be done upon navigable streams as an incident to the improvement of navigation. Whether this view be sound or not, it is clear in my mind that such powers can not be exercised by

Since the opponents of the Act mounted a major attack on the federal power over navigation, and this was a well-recognized basis of Commerce Clause authority, the proponents defended on this ground. Navigation and federal power over it hence permeated the debates, and statements reflecting the understandings and disagree-

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the Federal Government within the limits of our States upon streams which are not navigable and over which Congress has no jurisdiction. . . ." 59 Cong. Rec. 6531 (remarks of Representative White).

"As a matter of law, aside from purposes of navigation, the use of the water in the different streams of the several States belongs to the people of those States and not to the Federal Government. The argument insisted upon amounts to this: That the Federal Government is to sell and to make a charge for water that does not belong to it, but which belongs to the people of the States." 59 Cong. Rec. 1430 (remarks of Senator Nelson).

"Mr. KING. Obviously, then, under the Senator's contention, the Federal Government would have jurisdiction over the snow line, and, as the Senator from Colorado [Mr. Thomas] sotto voce says, it would have jurisdiction of the clouds which produce the snow which melts and produces the spring which produces the tributary flowing into the river which is navigable. So that the Federal Government may stretch out its powerful and omnipotent hand until it can grasp the snow in the mountains and say, 'We have jurisdiction over that.'

"Mr. NELSON. That is a forced construction.

"Mr. KING. I think that the Senator's position leads to that.

"Mr. NELSON. It does not lead to that, and that is not my position. The Senator a few moments ago referred to the Rio Grande case. The court intimated incidentally in that opinion that the control of Congress extended to the feeders of the stream, but when it comes to applying the principles of law to the facts in each case they must be measured by the facts. The court did not mean to decide that the feeders were navigable. What the court meant to say was that the Federal Government has sufficient jurisdiction over the feeders to see to it that the supply of water shall not be destroyed or so diminished in the feeders as to prevent the main stream from being navigable. . . .

". . . Does the diversion of the water of a certain feeder of a certain stream for irrigation purposes diminish the quantity of the water to such an extent as to destroy the navigability of the main stream? If the diversion of the water did not diminish the navigability of the

ments over these issues understandably constitute a considerable part of the context in which the Act was enacted.

But none of this history can fairly be said to meet, much less determine, the question presented here. That question is not whether Congress exercised its authority over navigation in the Federal Water Power Act, which it most assuredly did, but whether in enacting § 23 (b) it also invoked its full Commerce Clause authority over hydroelectric projects located on waters subject to federal jurisdiction. The fact that there were debates over the extent of federal power over navigation, or over navigable or nonnavigable streams, sheds little light on whether Congress did, or did not, intend to rely on other aspects of its power over commerce when it directed a Commission determination of the effects of a proposed project on the "interests of commerce." It is true that the debates on § 23 (b), taking the course that they did, contain no express references to interstate commerce in electrical energy, perhaps because the authority to regulate the production of goods destined for interstate shipment was far less defined and understood at that time, see *Hammer* v. *Dagenhart,* 247 U. S. 251, decided in 1918, and perhaps because no one was inclined to inject other constitutional issues into the ongoing debates.[21] But the

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main stream, the Government would have no control whatever. Furthermore, it would only have control to the extent of the supply of water needed to subserve the purposes of real navigation.

"We are not seeking to interfere with the present situation, and no matter what we put into this bill, if the Senator from Maine will excuse me a moment longer, we can not change the decisions of the Supreme Court as to their determination of the words 'navigable stream.' We could not undo by this legislation, if we should make the effort, what they have decided. We have made no such attempt." 59 Cong. Rec. 7730.

See also 59 Cong. Rec. 1041–1042, 1472, 7723–7730. Cf. 57 Cong. Rec. 4636–4638, 56 Cong. Rec. 9038.

[21] Especially an issue that was largely theoretical at the time. Prior to the use of the pumped storage technique, hydroelectric

Act which emerged from these debates, and § 23 (b) in particular, was couched in terms which reached beyond the control of navigation and forms no support for the proposition that Congress intended to equate the "interests of commerce" with those of navigation.[22]

Indeed, this history indicates that Congress was differentiating between the two. The House version of § 23 (b) granted permission to construct a dam on a nonnavigable stream and provided for a license if the Commission found the improvement justified for the purpose of improving or developing the waterway "for the use or benefit of navigation in interstate or foreign commerce." [23] The Senate Committee, along with the expansion of the definition of navigable waters, amended this to require the Commission to make an immediate investigation and to prohibit the construction without a license if the Commission found that "the interests of interstate or foreign commerce would be affected." [24] Only if the Commission did not so find was the declarant granted permission to construct upon compliance with state laws. No one offered any explanation for the substitution of the inclusive term "affect the interests of interstate commerce." [25]

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projects sufficiently large to serve interstate markets were on the interrupting falls, shallows, and rapids of the navigable mainstream or utilized enough water to affect the flow or level of navigable portions.

[22] Indeed, Congress not only invoked its powers over commerce in § 23 (b) but also drew upon its powers over public lands and reservations. Only if there is no effect on commerce and "if no public lands or reservations are affected" is permission granted to construct without a license.

[23] H. R. 3184, 66th Cong., 1st Sess. See also S. 1419, 65th Cong., 1st Sess.

[24] S. Rep. No. 180, 66th Cong., 1st Sess., 19.

[25] *Ibid.*, H. R. Rep. No. 910, 66th Cong., 2d Sess. The House managers did state in a separate statement in regard to the Senate amendment:

"This amendment seeks to prescribe how a stream of doubtful navi-

But conservationists and opponents seemed to agree that the Act embodied the full measure of Congress' authority under the Commerce Clause to regulate hydroelectric projects.[26] And there is no evidence that the sponsors of the Act, who prevailed in securing its enactment in the broad terms they drafted, intended a construction of interstate or foreign commerce narrower than their constitutional counterparts. In the face of numerous objections to this exercise of federal authority, we find it of compelling significance that the Congress adopted comprehensive language and refrained from writing any limitation or reference to navigation into § 23 (b).

The materials concerning the 1935 amendments do not alter our conclusion. Here the hearings and reports contained references to navigation and to the federal authority over navigable and nonnavigable streams.[27] The House Report, for example, stated that "every person intending to construct a project which might affect navigation would be required to come to the Commission for a determination of the interests of the United States." H. R. Rep. No. 1318, 74th Cong., 1st Sess., 26. To the same effect, see S. Rep. No. 621, 74th Cong., 1st Sess.,

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gability may be determined as within the provisions of the law, and in substance it provides that the commission shall ascertain whether the interests of commerce are affected; if not, then permission is granted to construct in accordance with the State laws." *Id.*, at 13.

But whatever the scope of § 23 (b), the provision was meant to do more than afford a method for obtaining a determination of the navigability of the stream on which the project was to be located. It applies only if the stream is a nonnavigable stream over which Congress has jurisdiction and the Commission is to determine the effect of the project on commerce, not the nature of the stream.

[26] See, *e. g.*, 58 Cong. Rec. 1935; 59 Cong. Rec. 241–244, 1173–1174, 1472, 6529–6531, 7723–7729.

[27] See Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 5423, 74th Cong., 1st Sess., at 383–391, 471–490; S. Rep. No. 621, 74th Cong., 1st Sess., 46–47; H. R. Rep. No. 1318, 74th Cong., 1st Sess., 25–26.

46–47. Such statements clearly refer to the filing requirement of § 23 (b), which was the subject of the committee amendment. Only persons constructing projects on nonnavigable feeders of navigable waters need file a declaration of intention. The committee statements are thus quite accurate in this respect, but they do not illuminate the licensing provision of § 23 (b), as distinct from its filing requirement, nor do they resolve the issue of which projects among those which might affect navigation are required to be licensed. They do not, explicitly or implicitly, exempt from licensing those projects having no effect on navigation. The reports do not equate the "interests of commerce" with those of water transportation.

It is true that there are no express references in the reports or the debates to other aspects of the commerce power in connection with § 23 (b), but the reports reflect the same broad intent as the earlier deliberations to secure federal control over all water power projects involving the utilization of the Nation's river systems.

> "The act would be greatly strengthened by enabling the Commission to preserve control over all projects with which the Federal Government has any valid concern." S. Rep. No. 621, 74th Cong., 1st Sess., 47.

See also H. R. Rep. No. 1318, 74th Cong., 1st Sess., 26. And on the floor of Congress objections to federal control over projects on nonnavigable streams, similar to those voiced in 1920, were again rejected as inconsistent with effective water power regulation. 79 Cong. Rec. 10568. Moreover, there was promptly eliminated an amendment to § 23 which would have required a license only when the "interests of interstate or foreign commerce would be directly affected or burdened by such proposed construction." [28]

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[28] The amendment was proposed by Senator Pittman and adopted by the Senate without discussion. 79 Cong. Rec. 9053. It was de-

Nor can we ignore the actual effect of the filing requirement added in 1935. The applicable provision prior to this amendment, § 9 of the Rivers and Harbors Act, 30 Stat. 1151, forbidding obstructions to navigation, was adequate to insure that projects with a substantial effect on downstream navigability would be brought before the Commission. Persons intending to construct a project which would likely have no such effect, such as some pure pumped storage installations, could decline to file a declaration of intention with impunity. Thus the 1935 amendment made a difference principally in regard to projects which predictably have little, if any, effect on navigation but a significant effect on interstate commerce. Respondent would have us assume this difference was not intended, although both the Committees stated that the amendment would enable "the Commission to preserve control over all projects with which the Federal Government has any valid concern." S. Rep. No. 621, 74th Cong., 1st Sess., 47; H. R. Rep. No. 1318, 74th Cong., 1st Sess., 26. In light of the necessary purport of this amendment and the breadth of the federal interest in hydroelectric projects expressed in the 1920 Act, the preoccupation of the Commission and the committees with navigation, while not without significance, does not overcome the clear import of the language and the purposes of the Act.

The respondent asserts that an anomalous consequence flows from the Commission's construction of the Act and its view that steam plants generating large amounts of energy for interstate transmission are not within the scope of § 23 (b), although located along a stream over which Congress has jurisdiction. Since the Commission's jurisdiction here rests solely on the interstate transmission of energy, there can be no basis for distinguishing

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leted by the House Committee, also without explanation. H. R. Rep. No. 1318, 74th Cong., 1st Sess., 42. The Senate agreed. 79 Cong. Rec. 14473.

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between a steam plant and a hydroelectric facility both generating energy for interstate use. The Court of Appeals, after noting that the generation of electric energy is a local or intrastate activity, concluded from this argument that "[t]he Commission's jurisdiction . . . must logically rest upon its delegated congressional jurisdiction over the interests of commerce on navigable waters." 326 F. 2d, at 551. On this reasoning either the Act should, but does not, require a license for a steam plant when situated on the navigable mainstream itself, or should not, but does, require a license for a hydroelectric plant, pumped storage or otherwise, situated on the mainstream but which has no demonstrable effect, or a beneficial effect, on navigability. The answer to this conundrum is that unlike Part II of Title II of the Public Utility Act of 1935, under which the Commission regulates various aspects of the sale and transmission of energy in interstate commerce, Part I, the original Federal Water Power Act, is concerned with the utilization of water resources and particularly the power potential in water. In relation to this central concern of the Act,[29] the distinction between a hydroelectric project and a steam plant is obvious, and meaningful, although both produce energy for interstate transmission.[30]

Reversed.

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[29] Respondent notes that if the use of water resources is at the heart of the matter, then it cannot be explained why the Act differentiates between two precisely similar hydroelectric plants on a nonnavigable stream subject to federal jurisdiction solely because one transmits energy in interstate commerce and the other generates for local use. We fail to perceive the difficulty. The project located on a nonnavigable stream, without any effect on navigability and water commerce and without any interstate sales, may well have no effect on commerce among the States and thus be beyond the power of Congress under the Commerce Clause.

[30] The Court of Appeals noted that the Commission's novel construction "represents a decided departure from its administrative construction of [the] statute" and "one not based upon generally

MR. JUSTICE GOLDBERG, with whom MR. JUSTICE HARLAN and MR. JUSTICE STEWART join, dissenting.

I agree with the Court that there "is no question that the interstate transmission of electric energy is fully subject to the commerce powers of Congress," and that proj-

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acknowledged limits of jurisdiction adhered to throughout the years." 326 F. 2d, at 552. Congress must be deemed to have accepted this consistently held administrative view.

It is true that the FPC has not previously required a license for hydroelectric projects generating for interstate markets, but having no effect on navigability, but the existence of such projects in any number may be doubted. The construction of pure pumped storage installations on small streams is a relatively recent development. Thus pure pumped storage projects were not of significance to the federal interest in hydroelectric plants in the early days of the Act.

Further, the FPC's view here is not novel. A Court of Appeals expressly dealt with and rejected this construction of the Act in 1939, *United States* v. *Appalachian Power Co.*, 107 F. 2d 769, 793 (C. A. 4th Cir.). There the Court of Appeals held, in a decision relied on by the court below, that the Commission's construction was untenable "either on the basis of statutory construction or constitutional authority," resting this conclusion in part on a very narrow view of Congress' authority under the Commerce Clause over hydroelectric projects, whether on navigable or nonnavigable waters. This Court, although finding the stream in question navigable, rejected this underpinning of the Court of Appeals' decision and made quite explicit the broad nature of the federal interest in hydroelectric projects. The Court also expressly put aside the issues posed by the intended interstate sales. 311 U. S. 377. Thus the issue herein presented can fairly be said to have been unsettled and unresolved since that decision, as evidenced by an examiner's ruling in 1954 that a project required a license because it would generate energy for interstate transmission. The Commission followed the earlier Court of Appeals' decision and rejected this ruling in a cursory dictum, the project requiring a license on the more traditional ground of effect on navigability. *California Oregon Power Co.*, 13 F. P. C. 1, 3.

The FPC itself has regarded the question as an open one, stating, in reaching the issue in this case, that "an issue of such importance must not be allowed to go unresolved any longer since there can be little doubt that this country in the years ahead will become over-

ects generating energy for such transmission, whether they use water or steam, "are within the purview of the commerce power, quite without regard to the federal control of tributary streams and navigation." *Ante,* at 94. The basic question here presented, however, is one of statutory interpretation: whether Congress exercised fully its commerce power, requiring licenses of those whose projects, built on nonnavigable streams, affect interstate or foreign commerce *in any way,* or whether Congress wished to require licenses only of those whose projects affect interstate or foreign commerce *on navigable waters.* From the time the provision in question was enacted in 1920 until 1962 the Federal Power Commission believed the latter interpretation to be correct and did not attempt to require a license unless commerce on navigable waters was affected. In 1962, however, the Commission "ruled for the first time that [a] hydroelectric project to be constructed in and to utilize nonnavigable waters for the purpose of developing power for interstate use . . . cannot be constructed without an FPC license . . . because it would affect the interests of interstate commerce since the power would be used to supply markets in [other States]." "New Regulatory Policies," Forty-second Annual Report of the Federal Power Commission 23 (1962).[1] I believe that the Commission's earlier interpretation, con-

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whelmingly more dependent upon the maximum development of its water resources in all their uses." 27 F. P. C. 801, 806–807.

We do not find in these circumstances a generally acknowledged jurisdictional limitation or a consistently held administrative interpretation. See *American Trucking Assns.* v. *United States,* 344 U. S. 298.

[1] Moreover, in 1935 Congress re-enacted the relevant statutory provisions. The long-standing administrative interpretation of the licensing provision both before and after its re-enactment is an important factor in construing the statute. See, *e. g., Helvering* v. *Reynolds,* 313 U. S. 428, 432; *Commissioner* v. *Noel,* 380 U. S. 678; 1 Davis, Administrative Law § 5.07 (1958).

sistently followed for many years, correctly reflected congressional intent.

The Court's conclusion, supporting the Commission's new theory that a license is required if a project affects the interests of interstate or foreign commerce in any way seems to be based upon an overly literal reading of the statute. The statute provides that a license is required if the Commission finds that "the interests of interstate or foreign commerce would be affected by such proposed construction." With all deference, I do not believe that the interpretation of the Court and the Commission that this language establishes that Congress intended to exercise the full reach of its commerce power can be maintained, for the legislative history of this provision clearly reveals that the "interests of . . . commerce" to which Congress refers are the interests of commerce on navigable waters. Statements by congressional proponents of the Federal Water Power Act and others, when the Act was first enacted in 1920, make clear an intent that licensing be required only when interests of commerce on navigable waters are affected.[2] Moreover, after a considerable period during which the Commission consistently interpreted the licensing provision in accordance with this congressional intent, the statute was re-enacted in 1935. At that time statements of the drafters of the Act [3] and the Senate and House Reports on the Act [4] again clearly indi-

[2] See Appendix A. See also 56 Cong. Rec. 8917, 9038; 57 Cong. Rec. 4638–4639; 59 Cong. Rec. 6529–6531, 7723, 7725, 7730.

[3] See Appendix B.

[4] Both the Senate and House Reports on the 1935 amendments to the Federal Water Power Act make clear that the licensing provision was to apply where navigable waters are affected. The Senate Report states: "Under this subsection with the two amendments here made every person intending to construct a project which might conceivably affect any navigable waters would be under the duty of coming to the Commission." S. Rep. No. 621, 74th Cong., 1st Sess., 47. The House Report expresses similar views. H. R. Rep. No. 1318, 74th Cong., 1st Sess., 25–26.

cated an intent to have the licensing requirement apply only when a project affects interests of commerce on navigable waters.

It may well be, as the Court intimates, that some of the Act's proponents believed that Congress constitutionally could require licensing only where navigable waters are affected.[5] If the legislative history showed an intent to exercise the commerce power to its full extent, notwithstanding doubts as to the reach of this power, I would accept the reading of the statute given by the Court. However, the history, in my view, reveals an express congressional intent to limit the application of the licensing provision to navigable waters irrespective of the scope of the commerce power. There is no indication that anyone envisaged or desired the application of the licensing provision to the type of project here involved which affects interstate commerce only because the electricity produced crosses state lines.

Moreover, to interpret the provision as the Court does today produces a substantial anomaly, for steam generating plants that affect interstate commerce in a manner identical to that of hydroelectric plants such as the one involved here would not be required to obtain a license from the Commission, yet hydroelectric plants would have to obtain one. The Court attempts to explain away this anomaly, by stating that in view of the original Federal Water Power Act's concern with "the power potential in water," "the distinction between a hydroelectric project and a steam plant is obvious, and meaningful, although both produce energy for interstate transmission." *Ante,* at 110. However, even in terms of the "power potential in water," I fail to find a relevant distinction between a plant which artificially pumps water to an elevated reservoir in off-peak periods allowing it to fall and generate

[5] See n. 2, *supra.*

electricity at peak periods and a plant which heats water to create steam which generates electricity. I see no purpose of the Act that justifies producing this anomaly in the regulatory scheme. Under my view, of course, when interstate or foreign commerce is affected, Congress can constitutionally require licenses of both steam and hydroelectric projects, of either steam or hydroelectric projects, or of neither. The legislative history here, however, establishes to my satisfaction that it has required licenses of neither steam plants nor the type of hydroelectric plant here involved, and in light of this legislative history I agree with the Court of Appeals that Congress intended that a license be required only where the interests of commerce on navigable waters are affected.[6]

APPENDIX A TO OPINION OF MR. JUSTICE GOLDBERG, DISSENTING.

Excerpts from Senate debate on May 27, 1920, 59 Cong. Rec. 7730.

> "Mr. KING. This bill, as I interpret it, would make every stream navigable, even to the headwaters of the smallest stream, or up to the snow line, where the snow melts and finds its way by little trickles and rivulets into some other stream. For instance, this language, if the Senator will pardon me——
>
> "Mr. NELSON. Let me call the attention of the Senator to the first part of the amendment, which reads:
>
> > " 'Navigable waters' means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regu-

[6] In light of the majority decision in this case, I do not feel it necessary to deal with the Court of Appeals determination that the Commission erred in finding that the hydroelectric project here involved affected navigable waters.

late commerce with foreign nations and among the several States——

"Mr. KING. The Senator will see that that does not impose any limitation upon the Federal Government as to what it may regulate. When it confers the power to regulate commerce among the States, et cetera, that is not a definition of what commerce is or the extent to which Congress may control streams. The Supreme Court has held, as I understand, that tributaries of tributaries of other tributaries, if any part of such tributary of the final stream was navigable, would be under the cognizance of the Federal Government. That would carry up to the snow line.

"Mr. NELSON. The court's decision only goes to this extent—and the facts in the case must be considered—that as to the tributaries that supply water to the main stream, which is in fact and in law navigable, Congress of necessity must have sufficient jurisdiction over those feeders to prevent their being dammed up and thereby preventing the supply of water running into the main stream. That is the extent of the decision and the Senator ought to see that that is inevitable, for if all the feeders of our great rivers, such as the Mississippi, the Missouri, and other navigable rivers, could be dammed up so that water would be kept away from them they would cease to be navigable.

"Mr. KING. I am not arguing that question.

"Mr. NELSON. So the Government has jurisdiction to the extent that the supply of water can not be cut off from a navigable stream.

"Mr. KING. Obviously, then, under the Senator's contention, the Federal Government would have jurisdiction over the snow line, and, as the Senator from Colorado (Mr. Thomas) sotto voce says, it

would have jurisdiction of the clouds which produce the snow which melts and produces the spring which produces the tributary flowing into the river which is navigable. So that the Federal Government may stretch out its powerful and omnipotent hand until it can grasp the snow in the mountains and say, 'We have jurisdiction over that.'

"Mr. NELSON. That is a forced construction.

"Mr. KING. I think that the Senator's position leads to that.

"Mr. NELSON. It does not lead to that, and that is not my position. *The Senator a few moments ago referred to the Rio Grande case. The court intimated incidentally in that opinion that the control of Congress extended to the feeders of the stream, but when it comes to applying the principles of law to the facts in each case they must be measured by the facts. The court did not mean to decide that the feeders were navigable. What the court meant to say was that the Federal Government has sufficient jurisdiction over the feeders to see to it that the supply of water shall not be destroyed or so diminished in the feeders as to prevent the main stream from being navigable.* The Senator on reflection ought to see that if the Government had no control whatever of the feeders—if such a thing were possible, although I can not conceive it—if it were possible for the States or individuals to dam up the feeders and prevent a drop of water flowing into the main navigable stream, they could dry up the main stream and destroy navigation on it. Except in those sections where the water is exhausted for irrigation, the erection of dams in feeders, as a matter of fact, for instance, in the East and in the Middle West, does not diminish the supply of water, for the water flows over the dam in one way or another and enters the

feeders and then the main stream. It is only in the arid West where it is possible to divert water entirely for irrigation purposes from the main stream.

"To what extent can that be done? I take it that if a case of that kind should come before the court, the court would consider both the rights of the farmers, who needed the water for irrigation, *and the interests of commerce requiring water for navigation,* and the question would be one of fact in each case. Does the diversion of the water of a certain feeder of a certain stream for irrigation purposes diminish the quantity of the water to such an extent as to destroy the navigability of the main stream? *If the diversion of the water did not diminish the navigability of the main stream, the Government would have no control whatever. Furthermore, it would only have control to the extent of the supply of water needed to subserve the purposes of real navigation.*

"We are not seeking to interfere with the present situation, and no matter what we put into this bill, if the Senator from Maine will excuse me a moment longer, we can not change the decisions of the Supreme Court as to their determination of the words 'navigable stream.' We could not undo by this legislation, if we should make the effort, what they have decided. We have made no such attempt. We have simply said that those parts of streams or bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which in either their natural or improved conditions, and so forth, are navigable, shall be considered to be navigable streams. That is all we have said. We have simply left the matter where the courts have left it; and if we undertook to change the law as it is and to

say that a certain class of streams which are navigable in fact are not navigable the Supreme Court would overrule us." (Emphasis added.)

APPENDIX B TO OPINION OF MR. JUSTICE GOLDBERG, DISSENTING.

A memorandum prepared by the Federal Power Commission and submitted to the House Committee on Interstate and Foreign Commerce explaining the amendments to the Federal Water Power Act states:

> "Section 210 of the bill amends section 23 of the Water Power Act. . . . In subsection (b) the present provision that those intending to undertake projects on a nonnavigable tributary of a navigable stream may in their discretion file declaration of such intention with the Commission is changed so as to make it a duty to file such a declaration before proceeding with the construction, maintenance or operation of any project on such waters. Furthermore, a provision is inserted expressly making it unlawful to construct a project on any navigable waters without a license granted pursuant to the act. This latter provision is in substance the result achieved by the River and Harbor Act of 1899 when read with the Water Power Act. It is thought desirable to bring together the regulations dealing with power projects in a single act. *Under this section as amended, every person intending to construct a project which might conceivably affect any navigable waters would be under the duty of coming to the Commission. The act would be greatly strengthened by enabling the Commission to preserve control over all projects with which the Federal Government has any valid concern.*" Hearings before the House Committee on Interstate and Foreign Commerce, 74th Cong., 1st Sess., 391. (Emphasis added.)

Dozier DeVane, Solicitor for the Federal Power Commission, testified as follows concerning the amendments which the Commission had prepared:

> "Mr. MARTIN. Although it may be rather in the form of repetition, the memorandum impresses me that the contention of Mr. Mapes in section 3 is broader, from the standpoint of commerce in the way of a power, than the language in section 4.
>
> "It occurred to me that you could just leave those words 'navigable waters in the United States' in the section and then add as defined in section 3.
>
> "Mr. DEVANE. No, sir; what we are attempting to do is to make it clear that the Commission has the authority to issue [a] license under section 4 in cases that arise under section 23 of the act.
>
> "Mr. MARTIN. The addition of the words defined in section 3, added to 'navigable waters of the United States,' however, would incorporate the section 3 definition of navigable waters.
>
> "Mr. DEVANE. Of course, we think it exists without that amendment.
>
> "Mr. Ryan calls my attention to the fact that section 3 might be considered to apply only to navigable waters, while section 23 applies to nonnavigable waters as well.
>
> "The jurisdiction of Congress extends beyond the navigable waters. *It extends to nonnavigable waters where anything you do in those rivers or streams might affect navigation and those are the cases which fall under section 23 of the act.*
>
> "Mr. CROSSER. What was that last statement? I did not quite hear it.
>
> "Mr. DEVANE. *Section 23 applies to nonnavigable waters, where anything that is done in those waters might affect interstate or foreign commerce.*

"The CHAIRMAN. I think the committee has your position on that. You may pass on.

. . . . . .

"Mr. MAPES. Does the Commission arrive at its conclusion, reach about the same conclusion, as to whether a plant should obtain the license or not, as Congress and the Board of Engineers do when they determine that a stream is navigable and that, therefore, people who desire to build a bridge across it, must get the consent of Congress to do it?

"Mr. DEVANE. The Commission in the first instance refers these declarations of intention to the War Department, the Engineer Corps of the War Department, and an investigation and recommendation is made by that Department, with reference to the effect upon interstate or foreign commerce, and the Commission, if it is necessary after that investigation and report is made, holds hearings, takes evidence, and makes its findings.

"The Commission attempts to act according to the facts as they are shown. In very few of the cases is there ever any controversy.

"Mr. MAPES. *Are these two expressions synonymous, or not: the effect upon interstate commerce, and the navigability of a stream?*

"Mr. DEVANE. *Mr. Mapes, I think they are. Do you want to hear argument on the other side as to whether they are or not?*

"Mr. MAPES. *No.*

"Mr. DEVANE. I see that you have some knowledge at least of the fact that that question has been debated, but to me it is a question of 'tweedledee and tweedledum.' I cannot take my legal processes to that refinement. There may be a difference; yes, sir. It is conceivable, at least in somebody's mind, that

the construction of a project in a certain stream will not at the time in fact have any effect upon interstate or foreign commerce, but that the construction of the project has a potential possibility of affecting interstate or foreign commerce at some future time which will prevent a man from spending money to put commerce on that stream.

"Now that is the way the argument runs.

. . . . . .

"Mr. DEVANE. We are not seeking by any amendment that we propose to enlarge the jurisdiction of the Commission in the waters of the United States over which Congress has control.

"Mr. HOLMES. I understood you to say you were, so that you could control other than navigable waters.

"Mr. DEVANE. That is the law today.

"Mr. HOLMES. Then I misundertoood you in that regard.

"Mr. DEVANE. Well, I would like to make that perfectly clear.

"We are not extending the power. We are not proposing any amendment that extends the power of the Commission over any waters of the United States that they do not have power over today—not at all.

. . . . . .

"At this point, Mr. Mapes, I think we might clear up the difficulty that I had in answering a question that you asked me on Saturday.

"You will observe that under subsection (b) of section 23, persons desiring to construct projects in waters over which Congress has jurisdiction, but which may not be looked upon as navigable waters, as such, may come to the Commission under a declaration of intention and have determined in advance of the construction whether or not a license is necessary.

"That provision in section 23 is broader than the language in section 3, where the definition of navigable waters is used, the one that you were asking me about, on Saturday.

"The definition of navigable waters in section 3 applies only to those waters that are in fact navigable.

"Section 23 applies to waters that are not in fact navigable, *but where construction may affect interstate or foreign commerce.*

. . . . . .

"Mr. MAPES. Yes. Has the court sustained the Commission in that respect, the jurisdiction of the Commission?

"Mr. DEVANE. Of nonnavigable waters?

"Mr. MAPES. Yes.

"Mr. DEVANE. You are asking about the jurisdiction of Congress over these nonnavigable waters, that affect navigation?

"Mr. MAPES. Yes.

"Mr. DEVANE. Yes; the jurisdiction of Congress over such streams was upheld in the case of the *United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U. S. 690. That was decided under the Rivers and Harbors Act of 1899, *which in effect is the same as section 23 of this act.*"

. . . . . .

Hearings before the House Committee on Interstate and Foreign Commerce, 74th Cong., 1st Sess., 471–472, 474, 476, 489, 490. (Emphasis added.)

CORBETT, GUARDIAN *v.* STERGIOS, AKA STERYIAKIS.

APPEAL FROM THE SUPREME COURT OF IOWA.

No. 179. Argued April 27, 1965.—Decided May 3, 1965.

256 Iowa 12, 126 N. W. 2d 342, reversed.

Robert R. Eidsmoe argued the cause for appellant. With him on the briefs was *George S. Porikos.*

Phillip S. Dandos argued the cause for appellee. With him on the brief was *Harry H. Smith.*

PER CURIAM.

In light of our construction of the Treaty of Friendship, Commerce and Navigation between the United States and the Kingdom of Greece, signed August 3, 1951, effective October 13, 1954,* a construction confirmed by representations of the signatories whose views were not available to the Supreme Court of Iowa, the judgment is reversed. *Clark* v. *Allen,* 331 U. S. 503.

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*5 U. S. Treaties and Other International Agreements 1829; T. I. A. S. No. 3057.

SUSSER ET AL. *v.* CARVEL CORP. ET AL.

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

No. 355. Argued April 29, 1965.—Decided May 3, 1965.

Certiorari dismissed as improvidently granted.

Reported below: 332 F. 2d 505.

Arnold Fleischmann argued the cause for petitioners. With him on the briefs were *Sidney W. Rothstein* and *Robert G. Levy.*

Herman L. Weisman and *John A. Wilson* argued the cause for respondents. With *Mr. Weisman* on the briefs for Carvel Corp. et al. were *Herbert F. Roth* and *Lester G. Renard.* With *Mr. Wilson* on the brief for H. P. Hood & Sons, Inc., was *Willard M. L. Robinson. Albert L. Wigor* filed a brief for Eagle Cone Corp. *William G. Mulligan* and *Doris Carroll* filed a brief for Rakestraw's Dairy Products, Inc.

Jerrold G. Van Cise filed a brief for the International Franchise Association, Inc., as *amicus curiae.*

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

MR. JUSTICE GOLDBERG took no part in the decision of this case.

773-305 O-65-13

WATTS ET AL. *v.* SEWARD SCHOOL BOARD ET AL.

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

No. 923. Decided May 3, 1965.

The cause, involving schoolteachers who claim that their dismissals for activities in attempting to remove a school official and board members violate the First and Fourteenth Amendments to the Constitution, is remanded to the Supreme Court of Alaska to allow that court to consider the effect, if any, of supervening changes in state law upon this case.

Certiorari granted; 395 P. 2d 372, judgment vacated and case remanded.

George Kaufmann for petitioners.

George N. Hayes for respondent Seward School Board.

PER CURIAM.

Petitioners Watts and Blue were dismissed from their positions as schoolteachers in Seward, Alaska, on grounds of "immorality," which under Alaska Statutes 1962, § 14.20.170 was defined as "conduct of the person tending to bring the individual concerned or the teaching profession into public disgrace or disrespect." Petitioners' dismissals were upheld by the Alaska Superior Court (Third Judicial District), and on appeal the Alaska Supreme Court affirmed the Superior Court's decision. 395 P. 2d 372. The Alaska Supreme Court noted that "[t]he immoral conduct complained of as to the appellant Watts was his holding of private conversations with various teachers in which he solicited their support in an attempt to oust the school superintendent from his job. The allegedly immoral conduct of the appellant Blue was his making of a speech to a labor union at Seward in which he stated, 'We have been unable to get rid of the [school]

Superintendent, so we are going to get rid of the Board,' or words to that effect." 395 P. 2d, at 374. The Alaska Supreme Court held that this conduct "had a tendency to bring the [petitioners] . . . and the teaching profession into public disgrace or disrespect," within the terms of the statute, 395 P. 2d, at 375, and it therefore sustained their dismissals. Petitioners contend that their dismissals for engaging in the conduct here described unconstitutionally infringe their rights to political expression guaranteed by the First and Fourteenth Amendments to the United States Constitution.

We need not consider petitioners' contentions at this time, for since their petition for certiorari was filed Alaska has amended its statutes in this area. House Bill 27, adopted by the Alaska Legislature and signed by the Governor on March 31, 1965, now defines "immorality" as grounds for revocation of a teaching certificate, as "the commission of an act which, under the laws of the state, constitutes a crime involving moral turpitude." Moreover, Alaska Statutes, Tit. 14, c. 20, have been amended by the addition of a new section which reads:

> "Sec. 14.20.095. Right to Comment and Criticize Not to be Restricted. No rule or regulation of the commissioner of education, a local school board, or local school administrator may restrict or modify the right of a teacher to engage in comment and criticism outside school hours, relative to school administrators, members of the governing body of any school or school district, any other public official, or any school employee, to the same extent that any private individual may exercise the right."

This Court has held that supervening changes in state law that may be relevant to the disposition of a case may require that the cause be remanded for appropriate action by the state court. See, *e. g., Missouri ex rel. Wabash R.*

Co. v. *Public Service Comm'n,* 273 U. S. 126, 131. Cf. *Trunkline Gas Co.* v. *Hardin County,* 375 U. S. 8. Accordingly, it is appropriate to allow the Alaska court to consider the effect of the new Alaska statutes upon this case. To that end, the petition for certiorari is granted, the judgment of the Supreme Court of Alaska is vacated, and this case is remanded to that court for such further consideration as may be deemed appropriate by that court under Alaska law.

Vacated and remanded.

PARROT ET AL. *v.* CITY OF TALLAHASSEE.

ON PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, LEON COUNTY, FLORIDA.

No. 958. Decided May 3, 1965.

A minor procedural defect which petitioners tried to correct does not constitute an adequate independent state ground for decision barring review by this Court. The petition for writ of certiorari is granted and the judgment is reversed. *Robinson* v. *Florida*, 378 U. S. 153.

Certiorari granted and judgment reversed.

Jack Greenberg and *Derrick A. Bell, Jr.*, for petitioners.

Roy T. Rhodes and *Edw. J. Hill* for respondent.

PER CURIAM.

The petition for writ of certiorari is granted and the judgment of the Florida Circuit Court is reversed. *Robinson* v. *Florida*, 378 U. S. 153.

Respondent asserts that the judgment below rests on an adequate independent state ground in that petitioners, through misunderstanding or oversight, failed to obtain certification of the Circuit Court record submitted with their otherwise timely petition for writ of certiorari in the Florida District Court of Appeal, First District. Petitioners tried to correct this nonjurisdictional defect (see, *e. g.*, *Aris* v. *State*, 162 So. 2d 670 (Fla. Dist. Ct. App.)) when notified of it, but their petition was dismissed nonetheless. We do not find this procedural ground adequate to bar review by this Court. See *Staub* v. *City of Baxley*, 355 U. S. 313; *NAACP* v. *Alabama*, 357 U. S. 449; *NAACP* v. *Alabama*, 377 U. S. 288.

McCLELLAN *v.* CHESAPEAKE & OHIO RAILWAY CO.

APPEAL FROM THE COURT OF APPEALS OF OHIO, CUYAHOGA COUNTY.

No. 994. Decided May 3, 1965.

Appeal dismissed for want of a substantial federal question.

Richard M. Markus for appellant.

John G. Cardinal and *Edwin Knachel* for appellee.

PER CURIAM.

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

HOLT ET AL. *v.* VIRGINIA.

CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 464. Argued April 27–28, 1965.—Decided May 17, 1965.

A state judge denied a motion of petitioner Dawley that the judge disqualify himself for bias from trying Dawley for contempt arising out of his conduct as a lawyer in handling a libel case pending in that judge's court. In arguing a subsequent change of venue motion which Dawley filed, another lawyer, petitioner Holt, read to the judge that motion, which charged the judge with "acting as police officer, chief prosecution witness . . . grand jury, chief prosecutor and judge" with respect to the contempt case against Dawley and with intimidating and harassing Holt in his efforts to defend Dawley. The judge then summarily adjudged both petitioners in contempt for the change of venue plea, which he denied, and for the supporting argument and later fined each $50. The State's highest court affirmed, holding that the language used in the motion violated a state statute authorizing summary contempt punishment for use of "[v]ile, contemptuous or insulting language" concerning a judge's official acts. *Held:* Petitioners were deprived of their rights under the Due Process Clause of the Fourteenth Amendment for doing no more than exercising the constitutional right of an accused and his counsel to defend against the contempt charges made against them. Pp. 136–138.

(a) A defendant charged with contempt such as this has the constitutional right to be heard and to be represented by counsel, who also has a constitutional right to present his client's case. P. 136.

(b) The motion for change of venue to escape a biased tribunal raised a relevant issue. P. 136.

(c) The assertedly "insulting" character of the charges in the motions was inherent in the issue of bias raised. P. 137.

205 Va. 332, 136 S. E. 2d 809, reversed and remanded.

Marvin M. Karpatkin argued the cause for petitioners. With him on the brief were *Melvin L. Wulf, Joseph A. Jordan* and *Leonard W. Holt.*

Francis C. Lee argued the cause for respondent. With him on the brief were *Robert Y. Button,* Attorney General of Virginia, and *D. Gardiner Tyler,* Assistant Attorney General.

MR. JUSTICE BLACK delivered the opinion of the Court.

The petitioners, both of whom are lawyers, were adjudged guilty and each was fined $50 for contempt of court by the Circuit Court of the City of Hopewell, Virginia. The Virginia Supreme Court of Appeals affirmed, rejecting petitioners' contentions that their convictions violated the Due Process Clause of the Fourteenth Amendment. 205 Va. 332, 136 S. E. 2d 809. We granted certiorari. 379 U. S. 957.

The charges against petitioners came about in this way. Petitioner Dawley represented certain defendants in a libel suit pending before Circuit Judge Holladay. The libel case was dismissed by agreement of the parties. After the dismissal Judge Holladay had the court clerk and counsel, including the petitioner Dawley, come into the judge's chambers and there the judge asked Dawley three times if he had had anything to do with making the defendants in the libel case "unavailable to be served with subpoenas." Dawley refused to answer and later, in court, again refused to answer. Judge Holladay then directed the Commonwealth's Attorney to prepare an order directing Dawley to show cause why he should not be punished for contempt. Dawley thereafter filed a motion requesting Judge Holladay to disqualify himself from trying the contempt case. Judge Holladay denied this motion. Dawley then filed a motion for change of venue. Petitioner Holt appeared as counsel representing Dawley and read this motion to the judge as a part of his argument urging a change of venue. It is upon the allega-

tions about Judge Holladay in that motion and the reading of them by Holt that the present convictions for contempt are based.

The motion for change of venue charged, among other things, that because of local prejudice Dawley could not get a fair trial in Hopewell and, crucial to this contempt conviction,

> "3. That the said Judge Carlton E. Holladay, who presided as Judge in said libel suit, and who fails and refuses to disqualify himself as Judge in the pending trial of the Defendant, E. A. Dawley, Jr., has, with respect to said contempt action and is now in effect and/or in fact acting as police officer, chief prosecution witness, adverse witness for the defense, grand jury, chief prosecutor and judge.
>
> "4. That in addition to the foregoing, said Judge Carlton E. Holladay did intimidate and harass and is intimidating and harassing the lawyer representing said E. A. Dawley, Jr., viz, Leonard W. Holt, Esq., the effect of which is to seriously hamper the efforts of said Leonard W. Holt in defending the said E. A. Dawley, Jr.; that said harassment and intimidation arises out of and is connected solely with said Leonard W. Holt's participating in the defense of said E. A. Dawley, Jr. in the contempt action; that part of said harassment and intimidation occurred at a hearing of this contempt action in the Hopewell Circuit Court on January 8, 1962, at which hearing the said Carlton E. Holladay revealed that he had been making an independent investigation and inquiry of Mr. Holt's conduct in this contempt defense, and said Judge at said place and time made the statement that he would 'deal with' said Leonard W. Holt after he, the judge, had dealt with said E. A. Dawley, Jr."

After these charges were read to Judge Holladay by Holt, this colloquy took place:

"The Court: On the motion for change of venue, does that apply whether your client would be tried before a jury or before the Court? Does it apply in both cases?

"Mr. Holt: We say it would apply.

"The Court: Apply in both cases.

"At this time I might say that I do not see how that this Court can pass unnoticed the matters and things that have been presented to the Court by Mr. Dawley in a plea filed in the Court and presented here in Court and by Mr. Holt as his counsel and argued in court. I think that the plea is contemptuous, I think the argument is contemptuous.

"At this time both E. A. Dawley, Jr., and Leonard W. Holt are held and adjudged summarily to be in contempt of this Court.

"I will take under advisement the punishment and advise you of it during the day.

"Court will adjourn for lunch.

"Mr. Holt: Please, before the Court adjourns, may we get the specificity on the part of the Court regarding what is considered in the pleading, if anything, contemptuous? I think under the laws of the Commonwealth and United States we are in this position—that if something has been said which is contemptuous, there be elements of intent that should be present, and if the element of intent be present, and there are certain things which flow under it in terms—

"The Court: I don't think that you need any specification or bill of particulars on that. I think that you can read it, Mr. Dawley can read it, and I think it is plain to the people who are in the court-

> room that the remarks are contemptuous, and you summarily have been held in contempt of Court.
>
> "And Court stands adjourned at this time for lunch."

Thereafter the judge denied the motion for change of venue and fined each petitioner $50.

The Virginia Supreme Court of Appeals, in affirming, held that the language used in the motion violated Va. Code Ann. § 18.1–292 (1960 Repl. Vol.), which authorizes summary punishment of a person who misbehaves in the presence of the court so as to obstruct justice, or who uses "[v]ile, contemptuous or insulting language" to or about a judge in respect of his official acts.[1] Petitioners contend that their convictions through this application of the state law to them in several respects deny due process of law guaranteed by the Due Process Clause of the Fourteenth Amendment. The view we take regarding one of these contentions makes it unnecessary for us to consider the others.[2]

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[1] "The courts and judges may issue attachments for contempt, and punish them summarily, only in the cases following:

"(1) Misbehavior in the presence of the court, or so near thereto as to obstruct or interrupt the administration of justice;

"(2) Violence, or threats of violence, to a judge or officer of the court, or to a juror, witness or party going to, attending or returning from the court, for or in respect of any act or proceeding had or to be had in such court;

"(3) Vile, contemptuous or insulting language addressed to or published of a judge for or in respect of any act or proceeding had, or to be had, in such court, or like language used in his presence and intended for his hearing for or in respect of such act or proceeding;

"(4) Misbehavior of an officer of the court in his official character;

"(5) Disobedience or resistance of an officer of the court, juror, witness or other person to any lawful process, judgment, decree or order of the court." Va. Code Ann. § 18.1–292 (1960 Repl. Vol.).

[2] We neither reach nor consider the questions whether the summary convictions of both Dawley and Holt were invalid because their alleged misconduct did not disturb the court's business or threaten

It is not charged that petitioners here disobeyed any valid court order, talked loudly, acted boisterously, or attempted to prevent the judge or any other officer of the court from carrying on his court duties. Their convictions rest on nothing whatever except allegations made in motions for change of venue and disqualification of Judge Holladay because of alleged bias on his part. It is not claimed, and probably could not seriously be claimed, that petitioners, by filing their motions, violated any duty they owed the court. Dawley had been ordered by the judge to appear to defend himself against a charge of contempt and Holt appeared as his counsel. And it is settled that due process and the Sixth Amendment guarantee a defendant charged with contempt such as this "an opportunity to be heard in his defense—a right to his day in court— . . . and to be represented by counsel." *In re Oliver,* 333 U. S. 257, 273. See also *Gideon* v. *Wainwright,* 372 U. S. 335. The right to be heard must necessarily embody a right to file motions and pleadings essential to present claims and raise relevant issues. See *Willner* v. *Committee on Character and Fitness,* 373 U. S. 96, 105. And since "A fair trial in a fair tribunal is a basic requirement of due process," *In re Murchison,* 349 U. S. 133, 136, it necessarily follows that motions for change of venue to escape a biased tribunal raise constitutional issues both relevant and essential. Cf. *Irvin* v. *Dowd,* 366 U. S. 717, 722; *Tumey* v. *Ohio,* 273 U. S. 510. Consequently, neither Dawley nor his counsel could consistently with due process be convicted for contempt for filing these motions unless it might be thought that there

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demoralization of its authority, cf. *In re Oliver,* 333 U. S. 257, 277–278, whether summary conviction of Dawley was invalid because he committed no act in open court, and whether Judge Holladay was so personally embroiled and interested in the controversy that he should not have decided the contempt issue.

is something about the language used which would justify the conviction.

As previously stated, the words used in the motions were plain English, in no way offensive in themselves, and wholly appropriate to charge bias in the community and bias of the presiding judge. The Supreme Court of Appeals of Virginia considered the motion for change of venue "a vehicle to heap insults upon the court, a studied attempt to smear the judge." 205 Va., at 338, 136 S. E. 2d, at 814. But if the charges were "insulting" it was inherent in the issue of bias raised, an issue which we have seen had to be raised, according to the charges, to escape the probability of a constitutionally unfair trial. Virginia apparently contends here that the right to present a defense is not involved in this case either (1) because the motion for change of venue was not in the proper form and not authorized by state law in such circumstances, or (2) because the charges of bias were false. As to the first argument, assuming it could have any relevance where a defendant asserts a federally guaranteed right to a fair trial, the motion for change of venue was duly filed with the clerk, and the trial court without objection set it down for hearing, specifically invited argument on it, and decided the motion on the merits, without any intimation that a motion for change of venue was not proper in these circumstances. Nor can we accept Virginia's apparent contention that the contempt convictions should be sustained on the ground that petitioners' charges of bias were false. The issue of truth or falsity of these charges was not heard, the trial court choosing instead to convict and sentence petitioners for having done nothing more than make the charges. Even if failure to prove their allegations of bias could under any circumstances ever be made part of the basis of a contempt charge against petitioners, these convictions cannot rest on any such unproven assumption.

Our conclusion is that these petitioners have been punished by Virginia for doing nothing more than exercising the constitutional right of an accused and his counsel in contempt cases such as this to defend against the charges made. The judgment of conviction is reversed and the cause is remanded to the Supreme Court of Appeals of Virginia for further proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE HARLAN, dissenting.

The Virginia Supreme Court of Appeals has in effect held that the manner in which petitioners presented their motion for a change of venue violated professional standards governing members of the Virginia Bar. This Court now sets aside the trivial disciplinary penalty imposed simply because in its view petitioners' conduct was not out of bounds. Believing that any differences over the professional propriety of petitioners' actions involve nothing of constitutional proportions, I would affirm the judgment of the Virginia Supreme Court of Appeals.*

*I do not think that any of the other contentions not reached by this Court can be said, on this record, to present a substantial federal question (*ante*, pp. 135–136, n. 2).

UNITED STATES *v.* CALIFORNIA.

BILL IN EQUITY.

No. 5, Original. Argued December 7–8, 1964.—
Decided May 17, 1965.

The United States brought this suit in 1945 against California to determine dominion over the submerged lands and mineral rights under the three-mile belt of sea off the California coast. In 1947 this Court held (332 U. S. 19) that the United States possessed paramount rights in such lands and minerals underlying the Pacific Ocean seaward of the low-water mark on the California coast and outside of inland waters. Thereafter the Court appointed a Special Master to determine for specific coastal segments the line of ordinary low water and the outer limit of inland waters. In his Report, filed in 1952, the Master based his definition of inland waters on that applied by the United States in its foreign relations as of the date of the 1947 decree. Both parties noted exceptions to the Report, but before any further action, the Submerged Lands Act was enacted in 1953. This Act gave the States ownership of the lands beneath navigable waters within their boundaries, including the seaward boundaries "as they existed at the time such State became a member of the Union," but in no event to be interpreted as extending from the "coast line" more than three geographical miles into the Pacific Ocean. "Coast line" was derivatively defined in terms of the seaward limit of "inland waters," a term not defined by the Act. No action was taken on the Master's Report until 1963, when the United States filed an amended complaint reviving the Report and redescribing the issues as modified by the Submerged Lands Act. The United States contends that the Act simply moved the line out three miles from the line established by the 1947 decree, while California asserts that "inland waters" as used in the Act means not what the United States would claim as such in international relations but what the States historically considered to be inland when they joined the Union. *Held:*

1. The Act's legislative history shows that "inland waters" was to be defined by the courts. Pp. 150–160.

(a) By eliminating the definition of inland waters from the bill Congress intended to leave the meaning of the term to the courts, independently of the Act. Pp. 150–154.

(b) The addition of the three-mile limitation provision to the bill shows that Congress must have intended that some criterion be used by the courts other than one dependent upon a State's subjective concept of its inland waters. Pp. 154–160.

2. The definition of inland waters, as used in the Act, should conform to the Convention on the Territorial Sea and the Contiguous Zone. Pp. 161–167.

(a) While this Court did not define inland waters in the 1947 opinion in this case, it did indicate that it was to have an international content since the outer limits of such waters would determine our international coastline. Pp. 161–162.

(b) Subsequent to the Special Master's Report, this country ratified the Convention, which is now in force and represents the position of the United States. Pp. 163–164.

(c) The Act does not restrict the Court to the time of enactment in determining the best and most workable definition of inland waters, which is found in the Convention. Pp. 164–165.

(d) Adopting the meaning of inland waters in terms of the Convention definition, with a 24-mile maximum closing line for bays and a "semicircle" test for the sufficiency of the water area enclosed, will provide definiteness and stability to the rights granted in the Act. Pp. 165–167.

3. Although the Convention permits the use of the straight-base-line method for ascertaining inland waters claimed against other nations, the choice is one that rests with the United States, which is responsible for the conduct of foreign affairs, and not with the individual States. *Manchester* v. *Massachusetts,* 139 U. S. 240, distinguished. Pp. 167–169.

4. Applying the Convention's 24-mile closing rule and the "semicircle" test for classifying bays, Monterey Bay is inland water, but none of the other coastal segments in dispute meets the requirements. Pp. 169–170.

5. California's assertion that Santa Barbara Channel may be considered a "fictitious bay" under international law cannot force the United States, which disagrees, to take such a position to extend our international boundaries. Pp. 170–172.

6. The exception to the Convention's 24-mile closing rule for "historic" bays, those over which a nation has traditionally asserted and maintained dominion, cannot benefit California unless the United States endorses its claims or there is clear historic evidence supporting such claims. None of the disputed water areas (not considering Monterey Bay which is covered by the 24-mile rule) is an historic inland water of the United States. Pp. 172–175.

7. Open roadsteads used for loading, unloading and anchoring ships are, pursuant to the Convention, areas of the territorial sea and are therefore not to be considered inland waters. P. 175.

8. The average of the lower of the two daily low tides should be used in determining the Act's "line of ordinary low water," recognized by the Convention. Pp. 175–176.

9. The sovereignty of the States extends to new land obtained by artificial accretion as well as natural modification of the shoreline. Pp. 176–177.

Special Master's Report approved as modified.

Solicitor General Cox argued the cause for the United States. With him on the briefs were *Stephen J. Pollak, George S. Swarth* and *Martin Green.*

Richard H. Keatinge, Special Assistant Attorney General of California, argued the cause for defendant. With him on the briefs were *Thomas C. Lynch,* Attorney General, *Stanley Mosk,* former Attorney General, *Charles E. Corker, Howard S. Goldin* and *Jay L. Shavelson,* Assistant Attorneys General, and *Warren J. Abbott* and *N. Gregory Taylor,* Deputy Attorneys General.

George N. Hayes, Special Assistant Attorney General of Alaska, by special leave of Court, argued the cause for the State of Alaska, as *amicus curiae.* With him on the brief were *Warren C. Colver,* Attorney General, and *Avrum M. Gross,* Special Assistant Attorney General.

John B. Ogden filed briefs for Carl Whitson, as *amicus curiae.*

773-305 O-65—14

MR. JUSTICE HARLAN delivered the opinion of the Court.

The present case requires us to determine the extent of submerged lands granted to the State of California by the Submerged Lands Act of 1953,[1] and in particular to declare whether specified bodies of water on the California coast are "inland waters" within the meaning of that Act. A substantial amount of background is necessary to place the issues in perspective.

I.

THE SETTING OF THE CASE.

This is a suit begun in 1945, brought by the United States against California to determine dominion over the submerged lands and mineral rights under the three-mile belt of sea off the coast of California. In 1947 the Court decreed:

> "The United States of America is now, and has been at all times pertinent hereto, possessed of paramount rights in, and full dominion and power over, the lands, minerals and other things underlying the Pacific Ocean lying seaward of the ordinary low-water mark on the coast of California, and outside of the inland waters, extending seaward three nautical miles . . . . The State of California has no title thereto or property interest therein." *United States* v. *California,* 332 U. S. 804, 805, *Order and Decree.*

After the entry of this decree, the United States asked that the lands awarded to it be defined in greater detail in certain areas where there was substantial oil well activity, and which California asserted lay within inland waters. The Court appointed a Special Master,[2] and directed him to consider seven specified segments of the

[1] 67 Stat. 29, 43 U. S. C. §§ 1301–1315 (1958 ed.).

[2] The late William H. Davis of New York City.

California coast [3] to determine the line of ordinary low water and the outer limit of inland waters. These segments included various bays, and, as the problem evolved, the so-called "overall unit area" consisting of the waters inside a line encompassing the islands off the shore of southern California, some as far as 50 miles out.[4] The Special Master's Report, generally favoring the position of the United States, was filed with this Court in November 1952, 344 U. S. 872. He adopted as his criteria for defining inland waters those applied by the United States

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[3] The segments were as follows:

1. From Point Conception to Point Hueneme;
2. San Pedro Bay;
3. From the southern extremity of San Pedro Bay to the western headland at Newport Bay;
4. Crescent City Bay;
5. Monterey Bay;
6. San Luis Obispo Bay;
7. Santa Monica Bay.

We directed the Special Master to recommend answers to the following questions:

"*Question 1.*—What is the status (inland waters or open sea) of particular channels and other water areas between the mainland and offshore islands, and, if inland waters, then by what criteria are the inland water limits of any such channel or other water area to be determined?

"*Question 2.*—Are particular segments in fact bays or harbors constituting inland waters and from what landmarks are the lines marking the seaward limits of bays, harbors, rivers, and other inland waters to be drawn?

"*Question 3.*—By what criteria is the ordinary low water mark on the coast of California to be ascertained?" 342 U. S. 891.

[4] California's claim to the "overall unit area" runs from Point Conception to Richardson Rock (21 miles across water), to San Miguel Island, to Santa Rosa Island, to Gull Island; thence to Begg Rock (35.8 miles), to San Nicolas Island, to San Clemente Island (43 miles); thence back to the mainland at Point Loma (56.8 miles). San Nicolas and San Clemente Islands are over 50 miles from shore. See Map attached as Appendix C to the dissenting opinion, *post*, at 178.

in the conduct of its foreign affairs as of the date of the *California* decree, October 27, 1947—in particular, a rule that only a bay having a closing line across its mouth no more than 10 miles in length and enclosing a sufficient water area to satisfy the so-called Boggs formula [5] would be inland water, with the qualification that a bay which had been historically considered inland water would so continue.[6] Both parties noted their exceptions to the

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[5] To determine whether a coastal indentation is of sufficient depth and shape to be inland water, the Boggs formula would (1) draw the closing line across the mouth of the indentation; (2) draw a belt around the shore of the indentation (similar to a small marginal belt) having a width equal to one-fourth the length of the closing line across the entrance; (3) compare the remaining area inside the closing line with the area of a semicircle having a diameter equal to one-half of the length of the closing line, and if the enclosed area is larger than that of the semicircle, the indentation is inland water. Boggs, Delimitation of the Territorial Sea, 24 Am. J. Int'l L. 541, 548.

[6] The Special Master recommended as follows:

"*Question 1:* The channels and other water areas between the mainland and the offshore islands within the area referred to by California as the 'over-all unit area' are not inland waters. They lie seaward of the baseline of the marginal belt of territorial waters, which should be measured in each instance along the shore of the adjoining mainland or island, each island having its own marginal belt.

"*Question 2:* No one of the seven particular coastal segments now under consideration for precise determination and adjudication is a bay constituting inland waters. The landmarks from which the lines marking the seaward limits (the straight-line segments of the baseline of the marginal belt) of bays, harbors, rivers and other inland waters are to be drawn, are as follows:

"*Bays*

"The extreme seaward limit of inland waters of a bay is a line ten nautical miles long. For indentations having pronounced headlands not more than ten nautical miles apart, and having a depth as hereinafter defined, a straight line is to be drawn across the entrance. Where the headlands are more than ten nautical miles apart, the straight line is to be drawn across the indentation at the point nearest the entrance at which the width does not exceed ten nautical miles. In either case the requisite depth is to be determined by the following criterion: The envelope of all arcs of circles having a radius equal

Report, but before any further action was taken, Congress enacted the Submerged Lands Act.

The Submerged Lands Act [7] grants to the States "title to and ownership of the lands beneath navigable waters

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to one-fourth the length of the straight line shall be drawn from all points around the shore of the indentation; if the area enclosed by the straight line across the entrance and the envelope of the arcs of the circles is greater than that of a semicircle with a diameter equal to one-half the length of the line across the entrance, the waters of the indentation shall be regarded as inland waters; if otherwise, the waters of the indentation shall be regarded as open sea.

"*Harbors* (*Ports*)

"In front of harbors the outer limit of inland waters is to embrace an anchorage reasonably related to the physical surroundings and the service requirements of the port, and, absent contrary evidence, may be assumed to be the line of the outermost permanent harbor works.

"*River Mouths*

"Where rivers empty into the sea, the seaward limit of inland waters is a line following the general direction of the coast drawn across the mouth of the river whatever its width. If the river flows into an estuary, the rules applicable to bays apply to the estuary.

"*Landmarks*

"Where pronounced headlands exist at tributary waterways, the appropriate landmark is the point of intersection of the plane of ordinary low water with the outermost extension of the natural headland. Where there is no pronounced headland, the landmark is the point of intersection of the ordinary low-water mark with a line bisecting the angle between the general trend line of the ordinary low-water mark along the open coast and the general trend line of the ordinary low-water mark along the shore of the tributary waterway.

"*Question 3:* The 'ordinary low-water mark on the coast of California' is the intersection with the shoreline (as it exists at the time of survey) of the plane of the mean of all low waters, to be established, subject to the approval of the Court, by the United States Coast & Geodetic Survey from observations made over a period of 18.6 years." Report of Special Master 2–5 (footnotes omitted).

[7] The Submerged Lands Act provides in relevant part:

"AN ACT

"To confirm and establish the titles of the States to lands beneath navigable waters within State boundaries and to the natural re-

within the boundaries of the respective States." § 3 (a). "Boundaries" includes the seaward boundaries of a State "as they existed at the time such State became a member of the Union, or as heretofore approved by the Congress," but subject to the limitation that

> "in no event shall the term 'boundaries' . . . be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico." § 2 (b).

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sources within such lands and waters, to provide for the use and control of said lands and resources, and to confirm the jurisdiction and control of the United States over the natural resources of the seabed of the Continental Shelf seaward of State boundaries.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the 'Submerged Lands Act.'

"TITLE I

"DEFINITION

"SEC. 2 [43 U. S. C. § 1301]. When used in this Act—

"(a) The term 'lands beneath navigable waters' means—

. . . . . .

"(2) all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles, and

"(3) all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters, as hereinabove defined;

"(b) The term 'boundaries' includes the seaward boundaries of a State or its boundaries in the Gulf of Mexico or any of the Great Lakes as they existed at the time such State became a member of the Union, or as heretofore approved by the Congress, or as extended or confirmed pursuant to section 4 hereof but in no event shall the term 'boundaries' or the term 'lands beneath navigable waters' be interpreted as extending from the coast line more than three geo-

"Coast line" is then defined as the composite "line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters." § 2 (c). For States

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graphical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico;

"(c) The term 'coast line' means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters;

. . . . . .

"TITLE II

"LANDS BENEATH NAVIGABLE WATERS WITHIN STATE BOUNDARIES

"SEC. 3 [43 U. S. C. § 1311]. RIGHTS OF THE STATES.—

"(a) It is hereby determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are hereby, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof;

"(b)(1) The United States hereby releases and relinquishes unto said States and persons aforesaid, except as otherwise reserved herein, all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources;

. . . . . .

"SEC. 4 [43 U. S. C. § 1312]. SEAWARD BOUNDARIES.—The seaward boundary of each original coastal State is hereby approved and confirmed as a line three geographical miles distant from its coast line or, in the case of the Great Lakes, to the international boundary. Any State admitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its coast line, or to the international boundaries of the United States in the Great Lakes or any other body of water traversed by such boundaries. Any claim heretofore or hereafter asserted either by constitutional provision, statute, or otherwise, indicating the intent of a State so to extend its bounda-

having no previously approved seaward boundaries the Act provides that "[a]ny State admitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its coast line . . . ." § 4.

Thus the Act effectively grants each State on the Pacific coast all submerged lands shoreward of a line three geographical miles [8] from its "coast line," derivatively defined in terms of "the seaward limit of inland waters." "Inland waters" is not defined by the Act.

In a later measure related to the Submerged Lands Act, Congress declared that the United States owned all submerged land in the continental shelf seaward of the lands granted to the States. Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U. S. C. § 1331 *et seq.*

The passage of the Submerged Lands Act marked the beginning of a long halt in the proceedings in this case. Depth of California's coastal waters increases very rapidly, and as of May 22, 1953, the date of enactment, it was impractical to drill for oil except close to the shore. By granting to California the mineral rights in the three-mile belt, the Act vested in California all the interests that were then thought to be important, and no further action was taken on the Special Master's Report. That Report was neither adopted, modified, nor rejected

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ries is hereby approved and confirmed, without prejudice to its claim, if any it has, that its boundaries extend beyond that line. Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress."

[8] One English, statute, or land mile equals approximately .87 geographical, marine, or nautical mile. The conventional "3-mile limit" under international law refers to three geographical miles, or approximately 3.45 land miles.

by this Court, but was simply allowed to lie dormant. By 1963, however, drilling techniques had improved sufficiently to revitalize the importance of the demarcation line between state and federal submerged lands. The United States filed an amended complaint reviving the Special Master's Report and redescribing the issues as modified by the Submerged Lands Act; both the United States and California filed new exceptions to the Report, and the case is now ready for decision.

The basic contention of the United States is that the Act simply moved the line of demarcation out three miles from the line established by the *California* decree. Therefore, contends the United States, the Special Master's Report on the line of ordinary low water and the outer limit of inland waters as used in the *California* decree is just as relevant now as it was before Congress acted, and, with slight modifications, the line drawn by the Special Master should be taken as the "coast line" for purposes of the Submerged Lands Act. California asserts that whereas the Special Master determined inland waters to be those which the United States would have claimed as such for purposes of international relations, the Submerged Lands Act used the term in an entirely different sense to mean those waters which the States historically considered to be inland—in California's case, those waters which the State considered to be inland at the time it entered the Union. Therefore, according to California, the line drawn in the Special Master's Report was determined under standards wholly foreign to the Submerged Lands Act.

The focal point of this case is the interpretation to be placed on "inland waters" as used in the Act. Since the Act does not define the term, we look to the legislative history.

II.

Legislative History Reveals that Congress Meant to Leave the Definition of Inland Waters to the Courts.

Two changes relevant for our purposes were made in the bill which became the Submerged Lands Act between the time it was sent to the Senate Committee on Interior and Insular Affairs and the time of its passage.

(1) As first written, the bill defined inland waters to include

> "all estuaries, ports, harbors, bays, channels, straits, historic bays, and sounds, and all other bodies of water which join the open sea."

This definition was removed by the Senate Committee.[9]

(2) The bill originally contained no limitation on the extent of historic boundaries that could be claimed. The provision limiting the extent of boundary claims to no more than three geographical miles from the coastline on the Atlantic and Pacific Oceans and three marine leagues on the Gulf of Mexico was added to the bill on the floor of the Senate in the late stages of the debates.[10]

Removal of the definition for inland waters and the addition of the three-mile limitation in the Pacific, when taken together, unmistakably show that California cannot prevail in its contention that "as used in the Act, Congress intended inland waters to identify those areas which the states always thought were inland waters." [11] By deleting the original definition of "inland waters"

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[9] S. Rep. No. 133, 83d Cong., 1st Sess., 18.

[10] 99 Cong. Rec. 4116. Senator Anderson proposed a similar amendment while the bill was in committee. Hearings before the Senate Committee on Interior and Insular Affairs on S. J. Res. 13 and other bills, 83d Cong., 1st Sess., 1348 (hereinafter cited as Senate Hearings). After discussion the proposal was voted down, *id.*, at 1416.

[11] Closing Brief of California 14.

Congress made plain its intent to leave the meaning of the term to be elaborated by the courts, independently of the Submerged Lands Act.

In response to substantial objections made in the hearings to the original bill's broad definition of inland waters on grounds that it would prejudice and limit the position which the United States could take in its future conduct of foreign affairs,[12] Senator Cordon, the manager of the bill, recommended and obtained elimination of the definition. The Committee Report which he authored explained:

> "The words 'which include all estuaries, ports, harbors, bays, channels, straits, historic bays, and sounds, and all other bodies of water which join the open sea' have been deleted from the reported bill because of the committee's belief that the question of what constitutes inland waters should be left where Congress finds it. The committee is convinced that the definition neither adds nor takes away anything a State may have now in the way of a coast and the lands underneath waters behind it." S. Rep. No. 133, 83d Cong., 1st Sess., 18.[13]

The committee's understanding that the measure "neither adds nor takes away anything a State may have now in the way of a coast and the lands underneath waters behind it," appears to be an acceptance of "inland waters" as used in the *California* and prior Court opinions, whatever that usage might have been. Various different concepts of inland waters were asserted during the Senate Hearings, based on such elements as the depth of the water,[14] the width of the opening of a coastal indentation,[15] the Boggs formula, and the common designation

[12] Senate Hearings 312–315, 1064–1065, 1085, 1304, 1378.

[13] See also Senate Hearings 1285 (remarks of Senator Cordon).

[14] Senate Hearings 275–280.

[15] *Id.*, at 1052.

of bodies of water as bays, sounds, straits, etc.[16] When it became clear that the question had highly technical aspects (see, *e. g.*, n. 5, *supra*) and was one on which differences would arise, the Senate Committee adopted the expedient solution of leaving the matter just as it had found it, neither accepting nor rejecting any particular rule or formula.[17] It intended to leave unaffected the judicial view of inland waters and the judicial responsibility for particularizing it.

Reference to Senator Cordon's request to the Senate Committee for deletion of the objectionable clause confirms that understanding. He said:

> "The matter of inland waters is one that has been defined time and time again by the courts, not, I believe, in any one all-inclusive definition, but it was felt [by those who objected to the definition during the hearings] that the use of these words were [*sic*] an attempted legislative definition of the term 'inland waters,' and it was inadvisable for us in this bill, which is a transfer of title, to attempt to make law in the other field of what is or is not inland water.
>
> "The use of the language, it was felt, would probably raise questions that have not been raised, whereas the present definitions are in the decisions and available to the court."
>
> "Senator MALONE. The inland waters had a special master for that particular job, did they not, and that is now under consideration, that is, his report is under consideration by the Supreme Court?
>
> "Senator CORDON. With respect to California, and a portion of California coast; yes." Senate Hearings 1304–1305.

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[16] *Id.*, at 1374–1380.

[17] *Id.*, at 1380–1385.

Shortly thereafter there follows a virtually conclusive statement:

> "Senator CORDON. It was not the chairman's view that we were attempting to draw a line delimiting inland waters, but that *we were using a term that is well known in the law and is defined by the Court in the California case, for instance, and in the Louisiana case, I assume. That line might still be defined,* even though the area may not now have the same legal status as it had before." [18] *Id.*, at 1376. (Emphasis added.)

California fastens on a statement made in the Committee Report with regard to the eliminated definition:

> "The elimination of the language, in the committee's opinion, is consistent with the philosophy of the Holland bill to place the States in the position in which both they and the Federal Government thought they were for more than a century and a half, and not to create any situations with respect thereto." S. Rep. No. 133, 83d Cong., 1st Sess., 18.

From this California reasons that "inland waters" must have been intended to encompass all waters which the States "thought" were inland waters, for that is the only way in which the Act can now be interpreted to effectuate fully its supposed "philosophy" of granting to the States all submerged lands within their historic boundaries.

If such a view of the bill's purpose is accepted as of the time that the Committee Report was written, there is, nonetheless, no inconsistency whatsoever between that

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[18] In the later debates, Senator Cordon answered an assertion that the committee had rejected the Boggs formula by saying, "The committee, as I recall, and I think I am correct, neither accepted nor rejected the Boggs formula or any other formula." 99 Cong. Rec. 2633. And see the material quoted in n. 23, *infra*.

purpose and a legislative intent to leave the definition of inland waters to the courts without restriction; at that time the limitation on boundary claims had not yet been incorporated into the Act; thus as the Act was then written, States could have claimed all submerged lands within their historic boundaries, no matter how "inland waters" was defined. The definition would have affected only those States which, not having adequate pre-existing seaward boundaries, chose to extend their boundaries three miles from the coastline pursuant to § 4 of the Act. As stated by Senator Cordon during the Hearings,

> "this bill has two approaches to a determination of the area of its application. The first approach is that of the boundaries of the States when they came into the Union; second, an election to any State that has not done so to extend its boundary 3 geographical miles from its present coastline, as that term is described in the present tense in the bill." Senate Hearings 1374.

Only with the adoption of the three-mile limitation on the Atlantic and Pacific Oceans and the three-league limitation in the Gulf of Mexico did the interpretations of historic boundaries and inland waters become operationally related, and any inconsistency thus created between the limitation and the prior philosophy of the Act shows only that, to the extent the limitation would come into play, the philosophy was modified.[19] This amendment was one of very few made to the bill as reported by the Senate Committee, and came as the result of continuous criticism throughout the course of the debates that the extent of the grant was indefinite,[20] and that coastal States could engage in a "claiming race" [21] for submerged lands.

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[19] See Senate Hearings 1415 (remarks of Senator Cordon).

[20] See, *e. g.*, 99 Cong. Rec. 2881, 2916, 3038–3040, 3549–3564, 3655–3656, 3884–3886, 4085–4086, 4094–4099, 4109.

[21] 99 Cong. Rec. 3655 (remarks of Senator Kilgore).

California points to language stating that adoption of the limitation worked no significant change in the bill. 99 Cong. Rec. 4114–4116 (remarks of Senator Holland). But such statements simply reflect the understanding of the major supporters of the bill that no States other than Texas and Florida (on its Gulf side) had provable claims beyond three miles, and that the claims of those two States did not go beyond three leagues.[22] If such were the case, the limitation could indeed be thought to have no effect, for no state boundaries would run afoul of it, and the vast grant of submerged lands up to three miles along the length of the Atlantic and Pacific coasts, and three leagues, subject to historical proof, in the Gulf of Mexico, would not be impaired. Senator Holland, the author of the bill, proposed the limiting boundary amendment to meet the fears of those Senators who had criticized the indefiniteness of the bill. He explained:

> ". . . I think the amendment has very little effect. But I am perfectly willing to meet the suggestions of my friends, some of whom have been opponents, and some of whom have been supporters of the joint resolution, to the effect that they would like to have the language more clearly spelled out than it was in the original measure, to the effect that there is no intention whatsoever to grant boundaries beyond 3 geographical miles in either the Atlantic or the Pacific, and that this Congress knows of no possible situation under which greater boundaries are claimed or could be granted in the Gulf of Mexico than 3 leagues; and, in that case, this Congress knows, although this amendment does not indicate it, that

[22] 99 Cong. Rec. 2695, 3039 (remarks of Senator Daniel), 2746 (remarks of Senator Holland), 2881 (remarks of Senator Anderson), 2916 (remarks of Senators Anderson and Douglas). Senate Hearings 957 (remarks of Senator Holland).

there are but 2 States affected by that particular situation." 99 Cong. Rec. 4116.

Senator Holland was aware of California's expansive inland water claims, but thought them altogether untenable.

"Mr. HOLLAND. My understanding is that California has no provable case beyond 3 miles from its mainland; and that as to the islands, its provable case would be 3 miles around each of the islands. I so stated in the hearings on this matter.

"Mr. DOUGLAS. That is a consummation devoutly to be desired, but I am not at all satisfied that that is what the Senator's joint resolution would accomplish, because the coastline is not fully and clearly defined.

. . . . . .

"Mr. HOLLAND. Under the joint resolution, no such contention could be maintained.

"Mr. DOUGLAS. Is the Senator certain of that?

"Mr. HOLLAND. That is what I believe, and that is what every legal authority I have consulted on the subject believes. Incidentally, the only reason why there was some thought to the contrary was some wording in the original joint resolution, which has been omitted, which would have made the outer boundary of inland waters farther out than that which is now provided by the joint resolution. The joint resolution simply continues the outer boundary of inland waters pursuant to the decisions of the Supreme Court already made. . . .

. . . . . .

"The Senator from Florida knows full well that if the United States Supreme Court should change its mind as to what constituted the outer limits of inland waters, and should change it to a sufficient degree,

it could open up, not only under this joint resolution, but of its own initiative, questions which would reach out much farther than anything we have been talking about here.

"The Senator from Florida believes that the laws, as announced over and over and over again by the Supreme Court, as to the delimitation of inland waters, are sufficiently fixed, definite, and certain so that it would require a complete, cataclysmic change of the Supreme Court's philosophy in that field to afford any hope for an extension of the boundaries of the good State of California so that they would go out beyond the islands as to all areas contained within an outer line. There is no way for us to foreclose the Supreme Court from changing its mind. It might change its mind with reference to inland waters and their delimitation. But failing such change, the Senator from Florida cannot see how, under this joint resolution, there could possibly be any serious question affecting California or any other State." 99 Cong. Rec. 2756–2757.

Senator Holland did not wish to foreclose California from arguing (as it has done both here and before the Special Master) that its waters are inland within the appropriate judicial definition, but it was his opinion that no such definition would permit California's claim to all waters shoreward of their remote islands to prevail. Congress could have defined inland waters as it wished for the purely domestic purposes of the Submerged Lands Act. See *United States* v. *Louisiana,* 363 U. S. 1, 30–36. It could have adopted California's theory, or the Special Master's theory, or any other. Instead, it chose to leave the definition of inland waters where it found it—in the Court's hands. The Act does not reveal a particular intent that courts should broadly interpret "inland waters" so as to restore California to its historic expectations re-

gardless of what its expectations might be.[23] Indeed, if the Court is to draw any inference from the intent and structure of the Act as to how inland waters should be

[23] Several amendments were offered and defeated which would have limited the grant to the international three-mile limit or to three miles from the shoreline around the entire coastal perimeter of the United States, thus cutting off any claims to a three-league limit by the Gulf Coast States. See 99 Cong. Rec. 4157, 4203, 4473–4478. The reason for the unacceptability of these amendments to the leaders of the measure, largely composed of Senators from the Gulf Coast States, is obvious, and had nothing to do with any particular concept of inland waters.

Senator Douglas introduced amendments specifically designed to prevent States from claiming as inland waters those water areas between the mainland and remote islands. Section 2 (c), as amended, would have read: "The term 'coast line' means the line of ordinary low water along that portion of the coast *of the main continent* which is in direct contact with the open sea and the line marking the seaward limit of inland waters, *and in the case of any island seaward of such coast, means the line of ordinary low water around such island.*" 99 Cong. Rec. 4240. (Amendments italicized.) The colloquy leading to the rejection of these amendments is extremely revealing in the total absence of hostility to the basic idea which Senator Douglas was pursuing and the absence of any understanding by the leaders of the measure that it embodied an historical definition of inland waters.

"Mr. DOUGLAS. Mr. President, this amendment is designed to clear up an ambiguity in the pending joint resolution and to conform to what the distinguished Senator from Florida [Mr. HOLLAND] the author of the joint resolution, stated was its real intention.

"One of the problems connected with the joint resolution is the problem of where the base line is, from which the submerged lands seaward from the low-water mark are to be measured. Senate Joint Resolution 13 defines this location as the 'coastline,' but it is not precisely certain in my mind or in the mind of the Senator from Oregon [Mr. CORDON] whose interpretation I requested, what is meant by the word 'coastline.' In the main debate on the joint resolution, I pointed out that this definition might mean 1 of 2 things. First, it might mean, what I hoped it would mean; namely, the shoreline of the main continental land mass and the external limits of inland

defined, the most plausible inference would be that Congress, in adopting the three-mile limitation, must have intended some base line to be used other than one de-

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waters; and then, in the case of islands, the shorelines of each of those islands.

"But I pointed out that probably there would be a contrary claim, particularly in the case of California, and that an attempt would be made to define the term 'coastline' as being a line drawn from the main continent out to and along the outer edge of the outer islands lying off the coast. This is a tremendously important subject. It involves very substantial areas, particularly in the case of California. If it is the latter definition which is to be used, then the water between the remote islands—however far out—and the main continental land mass would become inland waters, not external waters, and all the intervening submerged lands would become the property of the coastal State.

. . . . . .

"Mr. LONG. Mr. President, I can understand the argument made by the Senator from Illinois, but I believe his amendment completely fails to reach the objective he is striving to achieve.

"If one examines the testimony of the representative of the Department of State, he will see that it is the position of the State Department of the present administration, as it was also the position of the previous administration, and, so far as I know, of all other administrations, that the marginal sea begins wherever the line of inland waters ends. That is a very simple position to take in the case of a straight coast line, as is the situation with regard to the State of Texas. There the shore line and the coast line are synonymous in almost all instances.

"However, the situation becomes more complicated when we consider a coast having many indentures, islands, sounds, coves, bays, and the like. At present there is a difference of opinion between the State governments and the Federal Government as to precisely where the line of inland waters is located. But it is well agreed, as it has always been agreed, that the marginal sea begins at the point where the line of inland waters ends.

"I should like to apply that definition to the State of Louisiana. I regret that I do not have here a map of Louisiana for the purpose of demonstrating my point, but all who have made a study of the question agree that a body of water known as Chandeleur Sound is

pendent upon each State's subjective concept of its inland waters, for such a limitation would prove to have been none at all, as full acceptance of California's claims in the present case would show.

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inland water. In that area there is a large number of islands, each island close to another. It is agreed by both the Federal Government and the State government, and it has always been agreed, that Chandeleur Sound is inland water. The effect of the Douglas amendment would be to make Chandeleur Sound a part of the high seas, although the Federal Government has never contended that Chandeleur Sound was a part of the high seas, and the State government has always claimed it was inland water.

"Likewise, in the case of bays, it is the position of the State Department that bays not wider than 10 miles are inland waters. The distance of 10 miles between headlands across the mouth of a bay marks the place where the marginal sea begins. The amendment offered by the Senator from Illinois would have the effect once again of declaring such a bay to be a part of the high seas, merely because it is wider than 6 miles between headlands.

"Obviously, the Senator from Illinois is submitting his own definition of inland waters. In effect, it is a definition of inland waters which does not have the support of a single State government in the United States; it does not have the support of the State Department; it is a definition that does not meet with the approval of the Department of Justice; it is a definition, in effect, that does not meet with the approval of a single department of either the Federal Government or the State governments.

"There is no authority for accepting the inference of this amendment, namely, that the definition of inland waters is that they begin at the shore line or where 3-mile lines from headlands intersect in a bay. There is no support for this type of amendment, other than that it appeals to the Senator from Illinois.

"The committee has struggled with this problem. The committee struggled with several different formulas for defining inland waters. Originally, the joint resolution provided that inland waters should include all bays, sounds, straits, and estuaries. However, there was some objection to that definition by the Department of Justice. The Department of Justice contended that it would be far more preferable not to attempt to define inland waters, but simply to use the words 'inland waters,' to meet the standard that those words would ordinarily suggest. Therefore, at the suggestion of the Department

III.

The Meaning of "Inland Waters" in the Submerged Lands Act Should Conform to the Convention on the Territorial Sea and the Contiguous Zone.

We turn, then, to determining the judicial definition of "inland waters." It immediately appears that the bulk of cases cited by Congressmen during debates on the Submerged Lands Act for the proposition that inland waters have "been defined time and time again by the courts"

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of Justice, and I suppose with the support of the Department of State, the words 'including all bays, estuaries, straits, and sounds,' were stricken from the joint resolution.

"I submit that the language of the joint resolution is the best agreement that could be reached, upon the advice of the competent officials of the State Department and the Justice Department, as well as the advice that the committee had available to it from all the witnesses who testified, and therefore we should retain the committee language rather than accept the definition of the Senator from Illinois.

. . . . . .

"Mr. DANIEL. Is it not true that there are some islands off the main continent which are not as far as 3 miles distant, and that this amendment would confuse the situation with reference to them? . . . We would have to apply this amendment instead of the present rule of inland waters which permits both the Nation and the State to measure from the outer line along those islands.

. . . . . .

"Mr. HOLLAND. . . .

"I think I understand what the Senator [Douglas] is trying to attain. What he is trying to attain is in complete accord with the belief of the Senator from Florida, that islands which are far remote from the coast, and clear beyond inland waters by any reasonable conception, have a 3-mile submerged shelf around each of them; and while that fact is clearly shown in the statement of international law furnished to the committee in the last Congress by the Secretary of State at that time, Mr. Dean Acheson, the proposed amendment would not effectuate that situation at all . . . ."

The amendment was defeated 50 to 26. 99 Cong. Rec. 4240–4243.

deal with interior waters such as lakes and rivers, and provide no assistance in classifying bodies of water which join the open sea.[24] In this latter context no prior case in this Court has ever precisely defined the term. The 1947 *California* opinion clearly indicated that "inland waters" was to have an international content since the outer limits of inland waters would determine the Country's international coastline, but the Court did not particularize the definition.[25] It was that task which subsequently led to the appointment of the Special Master.

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[24] See, *e. g.*, 99 Cong. Rec. 3110–3112 (remarks of Senator Hill).

[25] The 1947 case raised the purely legal question—who owned the lands and mineral rights beneath the marginal sea belt? In deciding that they belonged to the United States the Court relied heavily on the international responsibilities of the Federal Government.

"But whatever any nation does in the open sea, which detracts from its common usefulness to nations, or which another nation may charge detracts from it, is a question for consideration among nations as such, and not their separate governmental units. What this Government does, or even what the states do, anywhere in the ocean, is a subject upon which the nation may enter into and assume treaty or similar international obligations." 332 U. S. 19, 35 (footnote omitted).

The opinion also established that landlocked waters not a part of the open sea are not part of the marginal belt, and belong to the States. The only problem remaining in the way of actually fixing the location of the marginal belt, and hence the dividing line of ownership between the State and the United States, was that of determining where the open sea ends and landlocked waters begin. The Court specifically left that question unresolved. It is precisely that problem of defining what constitutes open sea and what constitutes inland waters which we must decide in the present case.

Resolution of that question will (1) determine for the present the location of the marginal belt which we claim against other nations, and (2) define the areas within which ships of foreign nations have no right of innocent passage. Unquestionably, the definitions of what constitutes open sea and inland waters is, to borrow the words of the 1947 opinion, "a subject upon which the nation may enter into and assume treaty or similar international obligations." Negotiations at

The Special Master found that there was no internationally accepted definition for inland waters and decided, in those circumstances, that it was the position which the United States took on the question in the conduct of its foreign affairs which should be controlling. He considered the relevant date on which to determine our foreign policy position to be the date of the *California* decree, October 27, 1947. He therefore rejected the assertion that letters from the State Department written in 1951 and 1952 [26] declaring the then present policy of the United States were conclusive on the question before him. At the same time that decision required the Special Master to consider a great many foreign policy materials dating back to 1793 in an attempt to discern a consistent thread of United States policy on the definition of inland waters. He ultimately decided that as of 1947 the United States had taken the position that a bay was inland water only if a closing line could be drawn across its mouth less than 10 miles long enclosing a sufficient water area to satisfy the Boggs formula.[27]

Since the filing of the Special Master's Report the policy of the United States has changed significantly. Indeed it may now be said that there is a settled international rule defining inland waters. On March 24, 1961, the

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The Hague beginning in 1930 were directed to just that end, and the Convention on the Territorial Sea and the Contiguous Zone, to which we became a party in 1961, now establishes rules for separating the open sea from inland waters.

[26] Letter from Acting Secretary of State Webb to Attorney General McGrath, November 13, 1951, Senate Hearings 460; letter from Secretary of State Acheson to Attorney General McGrath, February 12, 1952, Senate Hearings 462.

[27] See n. 5, *supra*. Neither the Special Master nor the United States treated the Boggs formula as having been the "definitive" United States position. The Special Master recommended it as an "appropriate technical method" for measuring the sufficiency of the depth of bays. Report of Special Master 26.

United States ratified the Convention on the Territorial Sea and the Contiguous Zone (T. I. A. S. No. 5639) and on September 10, 1964, when the requisite number of nations had ratified it, the Convention went into force. For nations which do not use a straight-base-line method [28] to define inland waters (see *United Kingdom* v. *Norway*, [1951] I. C. J. Rep. 116), the Convention permits a 24-mile maximum closing line for bays and a "semicircle" test for testing the sufficiency of the water area enclosed. The semicircle test requires that a bay must comprise at least as much water area within its closing line as would be contained in a semicircle with a diameter equal to the length of the closing line. Unquestionably the 24-mile closing line together with the semicircle test now represents the position of the United States.[29]

The United States contends that we must ignore the Convention on the Territorial Sea and the Contiguous Zone in performing our duty of giving content to "inland waters" as used in the Submerged Lands Act, and must restrict ourselves to determining what our decision would have been had the question been presented to us for decision on May 22, 1953, the date of enactment. At that time there was no international accord on any definition of inland waters, and the best evidence (although strenuously contested by California) of the position of the United States was the letters of the State Department which the Special Master refused to treat as conclusive.

We do not think that the Submerged Lands Act has so restricted us. Congress, in passing the Act, left the responsibility for defining inland waters to this Court.[30] We think that it did not tie our hands at the same time.

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[28] See n. 34, *infra*.

[29] Letter from Dean Rusk, Secretary of State, to Robert Kennedy, Attorney General, January 15, 1963, II International Legal Materials 527.

[30] See discussion and legislative history, Part II, *supra*.

Had Congress wished us simply to rubber-stamp the statements of the State Department as to its policy in 1953, it could readily have done so itself.[31] It is our opinion that we best fill our responsibility of giving content to the words which Congress employed by adopting the best and most workable definitions available. The Convention on the Territorial Sea and the Contiguous Zone, approved by the Senate and ratified by the President,[32] provides such definitions. We adopt them for purposes of the Submerged Lands Act. This establishes a single coastline for both the administration of the Submerged Lands Act and the conduct of our future international relations (barring an unexpected change in the rules established by the Convention). Furthermore the comprehensiveness of the Convention provides answers to many of the lesser problems related to coastlines which, absent the Convention, would be most troublesome.[33]

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[31] See 99 Cong. Rec. 2633 (remarks of Senators Long and Cordon).

[32] The Convention was approved by the Senate May 26, 1960, 106 Cong. Rec. 11196, and was ratified by the President March 24, 1961, 44 State Dept. Bull. 609. See Treaties in Force—January 1, 1965, 263.

[33] In support of the position that we should ignore the developments in the law and practice of nations respecting the concept of inland waters which have transpired subsequent to the passage of the Submerged Lands Act—a position which the Solicitor General frankly recognized in his oral presentation was not an easy one for the Government to maintain—the United States cites a statement made by Senator Cordon during the hearings.

"Those who prepared the bill over the years took the view—and that is the way the bill is before us—that 'coastline' means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters. That is in the present tense. It is the coastline as of now. We have confirmed here 3 miles from the coastline as of now. . . .

"If we attempt now to discuss a coastline of 1783, or whenever the Revolutionary War was concluded and the treaty was signed—

California argues, alternatively to its claim that "inland waters" embraces all ocean areas lying within a State's historic seaward boundaries, that if Congress intended "inland waters" to be judicially defined in accordance with international usage, such definition should possess an ambulatory quality so as to encompass future changes in international law or practice. Thus, if 10 years from now the definitions of the Convention were amended, California would say that the extent of the Submerged Lands Act grant would automatically shift, at least if the effect of such amendment were to enlarge the extent of submerged lands available to the States. We reject this open-ended view of the Act for several reasons. Before today's decision no one could say with assurance where lay the line of inland waters as contemplated by the Act; hence there could have been no tenable reliance on any particular line. After today that situation will have changed. Expectations will be established and reliance placed on the line we define. Allowing future shifts of international understanding respecting inland waters to alter the extent of the Submerged Lands Act grant would substantially undercut the definiteness of expectation which should attend it. Moreover, such a view might unduly inhibit the United States in the conduct of its

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and I do not just now recall the date—if we attempt now to determine a coastline as of then, it would seem to me that we increase our difficulties beyond what, as I understand the bill, we envisioned in the first place, but which we left where they were." Senate Hearings 1354–1355.

That statement was made in reply to a suggestion that a State should have the choice of extending its boundaries three miles from its present coastline or three miles from its coastline as of the time it entered the Union. Senator Cordon's reply expresses his opposition to that idea on the ground that the exact location of the ancient shoreline would be extremely difficult to determine. It reveals no intent to restrict the courts in framing the definitions to be used to determine the present coastline.

foreign relations by making its ownership of submerged lands *vis-à-vis* the States continually dependent upon the position it takes with foreign nations. "Freezing" the meaning of "inland waters" in terms of the Convention definition largely avoids this, and also serves to fulfill the requirements of definiteness and stability which should attend any congressional grant of property rights belonging to the United States.

IV.

Subsidiary Issues.

Once it is decided that the definitions of the Convention on the Territorial Sea and the Contiguous Zone apply, many of the subsidiary issues before us fall into place.

1. *Straight Base Lines.*—California argues that because the Convention permits a nation to use the straight-baseline method for determining its seaward boundaries if its "coast line is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity," California is therefore free to use such boundary lines across the openings of its bays and around its islands.[34] We agree with the United States that the Convention rec-

[34] Article 4 of the Convention provides:

"1. In localities where the coast line is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured.

"2. The drawing of such baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.

"3. Baselines shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them.

"4. Where the method of straight baselines is applicable under the provisions of paragraph 1, account may be taken, in determining particular baselines, of economic interests peculiar to the region con-

ognizes the validity of straight base lines used by other countries, Norway for instance, and would *permit* the United States to use such base lines if it chose, but that California may not use such base lines to extend our international boundaries beyond their traditional international limits against the expressed opposition of the United States. The national responsibility for conducting our international relations obviously must be accommodated with the legitimate interests of the States in the territory over which they are sovereign. Thus a contraction of a State's recognized territory imposed by the Federal Government in the name of foreign policy would be highly questionable. But an extension of state sovereignty to an international area by claiming it as inland water would necessarily also extend national sovereignty, and unless the Federal Government's responsibility for questions of external sovereignty is hollow, it must have the power to prevent States from so enlarging themselves. We conclude that the choice under the Convention to use the straight-base-line method for determining inland waters claimed against other nations is one that rests with the Federal Government, and not with the individual States.

California relies upon *Manchester* v. *Massachusetts*, 139 U. S. 240, for the proposition that a State may draw its boundaries as it pleases within limits recognized by the law of nations regardless of the position taken by the United States. Although some dicta in the case may be read to support that view, we do not so interpret the opinion. The case involved neither an expansion of our

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cerned, the reality and the importance of which are clearly evidenced by a long usage.

"5. The system of straight baselines may not be applied by a State in such a manner as to cut off from the high seas the territorial sea of another State.

"6. The coastal State must clearly indicate straight baselines on charts, to which due publicity must be given."

traditional international boundary nor opposition by the United States to the position taken by the State.

2. *Twenty-four-mile Closing Rule.*—The Convention recognizes, and it is the present United States position,[35] that a 24-mile closing rule together with the semicircle test should be used for classifying bays in the United States.[36] Applying these tests to the segments of Cali-

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[35] Letter from Dean Rusk, Secretary of State, to Robert Kennedy, Attorney General, January 15, 1963, II International Legal Materials 527; Brief for the United States in Answer to California's Exceptions 148.

[36] The full text of Article 7 is as follows:

"1. This article relates only to bays the coasts of which belong to a single State.

"2. For the purposes of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.

"3. For the purpose of measurement, the area of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water marks of its natural entrance points. Where, because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths. Islands within an indentation shall be included as if they were part of the water areas of the indentation.

"4. If the distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.

"5. Where the distance between the low-water marks of the natural entrance points of a bay exceeds twenty-four miles, a straight baseline of twenty-four miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length.

"6. The foregoing provisions shall not apply to so-called 'historic' bays, or in any case where the straight baseline system provided for in article 4 is applied."

fornia's coast here in dispute, it appears that Monterey Bay is inland water and that none of the other coastal segments in dispute [37] fulfill these aspects of the Convention test. We so hold.

California asserts that the Santa Barbara Channel may be considered a "fictitious bay" because the openings at both ends of the channel and between the islands are each less than 24 miles.[38] The United States argues that the channel is no bay at all; that it is a strait which serves as

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[37] The parties stated that Crescent City Bay is no longer an area in dispute.

[38] The United States asserts that "international law recognizes no principle of 'fictitious bays.'" We find it unnecessary to decide that question. The Government states:

"The expression seems to have originated in a proposal by the Committee of Experts, made to the Fifth Session of the International Law Commission, suggesting a 10-mile rule for bays, a general 10-mile limit for straight baselines, providing that baselines should not be drawn to islands more than 5 miles from shore, and limiting baselines to 5 miles in groups of islands or between such groups and the mainland, except that in such a group one opening could be 10 miles. The latter situation was called a 'fictitious bay.' The Special Rapporteur adopted this proposal in an Addendum to the Second Report on the Regime of the Territorial Sea, International Law Commission, Fifth Session, 18 May 1953. English text, U. N. Doc. A/CN.4/61/Add.1, p. 7 and Annex, p. 4. The subject of groups of islands was postponed by the Commission in 1954 (Article 11, *Report of the International Law Commission Covering the Work of Its Sixth Session* (U. N. Doc. A/CN.4/88), p. 42), and there is no special provision on the subject in the Convention on the Territorial Sea and the Contiguous Zone as finally adopted. The Report of the International Law Commission on the Work of Its Eighth Session, p. 45, fn. 1 (U. N. Doc. A/C.6/L.378), makes clear that the original proposal on the subject was an attempt to formulate a rule and not an expression of a rule already in existence." Brief for the United States in Answer to California's Exceptions 149–150, n. 112.

The openings at the ends of the Santa Barbara Channel are 11 miles and 21 miles.

a useful route of communication between two areas of open sea and as such may not be classified as inland waters.[39]

By way of analogy California directs our attention to the Breton and Chandeleur Sounds off Louisiana which the United States claims as inland waters, *United States* v. *Louisiana,* 363 U. S. 1, 66–67, n. 108. Each of these analogies only serves to point up the validity of the United States' argument that the Santa Barbara Channel should not be treated as a bay. The Breton Sound is a *cul de sac.* The Chandeleur Sound, if considered separately from the Breton Sound which it joins, leads only to the Breton Sound. Neither is used as a route of passage between two areas of open sea. In fact both are so shallow as to not be readily navigable.[40] California also points to the Strait of Juan de Fuca. That strait is not claimed by the United States as a "fictitious bay" and it does not connect two areas of open sea.

Evidence submitted to the Special Master on the extent of international use made of the Santa Barbara Channel was sparse. What evidence there was indicated the usefulness of the route, but did not specify whether the ships so using it were domestic or international.[41] California

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[39] See Letter from Acting Secretary of State Webb to Attorney General McGrath, November 13, 1951. Senate Hearings 460. See also Senate Hearings 1084–1085 (remarks of Jack B. Tate).

[40] The depth in general ranges between 6 and 12 feet according to Coast and Geodetic Survey Chart No. 1270, but there is no passage as much as 12 feet deep connecting the ends of the sounds. The sounds are "navigable waters" in the legal sense even in the parts too shallow for navigation. See *United States* v. *Turner,* 175 F. 2d 644, 647, cert. denied, 338 U. S. 851.

[41] Testimony before the Special Master indicated that the channel provided a substantial amount of protection from the rough seas of the Pacific and was used as an alternate route of passage for ships "coming down from the Pacific Northwest." (Tr. 595. See also Tr. 608.) In its appendix, p. 57, California points to a statement in

now regards the point as important, for under international law as expressed in the *Corfu Channel Case*, [1949] I. C. J. Rep. 4, the International Court of Justice held that a country could not claim a strait as inland water if, in its natural state, it served as a useful route for *international* passage. We do not consider the point of controlling importance. The United States has not in the past claimed the Santa Barbara Channel as inland water and opposes any such claim now. The channel has not been regarded as a bay either historically or geographically. In these circumstances, as with the drawing of straight base lines, we hold that if the United States does not choose to employ the concept of a "fictitious bay" in order to extend our international boundaries around the islands framing Santa Barbara Channel, it cannot be forced to do so by California. It is, therefore, unnecessary to reinstitute proceedings before a master to determine the factual question of whether the passageway is internationally useful.

3. *Historic Inland Waters.*—By the terms of the Convention the 24-mile closing rule does not apply to so-called "historic" bays.[42] Essentially these are bays over which a coastal nation has traditionally asserted and maintained dominion with the acquiescence of foreign nations.[43] California claims that virtually all the waters here in dispute are historic inland waters as the term is internationally understood. It relies primarily on an interpretation of its State Constitution to the effect that

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Davidson, Coast Pilot of California, Oregon, and Washington (4th ed. 1889), p. 53, "The islands break the force of the large westerly swell of the Pacific along the coast-line, and in winter afford good lee from the full force of the southeast gales."

[42] See Art. 7, § 6, *supra*, n. 36.

[43] See generally, Juridical Regime of Historic Waters, Including Historic Bays, U. N. Doc. A/CN.4/143 (1962).

the state boundaries run three miles outside the islands and bays,[44] plus several court decisions which so interpret it as applied to Monterey, Santa Monica, and San Pedro Bays.[45] The United States counters that, as with straight base lines, California can maintain no claim to historic inland waters unless the claim is endorsed by the United States. The Special Master found it unnecessary to decide that question because, on the evidence before him, he concluded that California had not traditionally exercised dominion over any of the claimed waters.

Since the 24-mile rule includes Monterey Bay, we do not consider it here. As to Santa Monica Bay, San Pedro Bay, and the other water areas in dispute, we agree with the Special Master that they are not historic inland waters of the United States.

California contends that two studies of the criteria for determining historic waters have been made since the Special Master filed his report[46] which show that he applied the wrong standards, thus vitiating his conclusions. In particular it is said that the Special Master

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[44] Article XII of the California Constitution of 1849 described the sea boundary of the State of California as follows:

". . . thence running west and along said boundary line to the Pacific Ocean, and extending therein three English miles; thence running in a northwesterly direction and following the direction of the Pacific Coast to the 42d degree of north latitude, thence on the line of said 42d degree of north latitude to the place of beginning. Also all the islands, harbors, and bays, along and adjacent to the Pacific Coast."

[45] *Ocean Industries, Inc.* v. *Superior Court,* 200 Cal. 235, 252 P. 722 (1927); *Ocean Industries, Inc.* v. *Greene,* 15 F. 2d 862 (D. C. N. D. Cal. 1926) (Monterey Bay). *People* v. *Stralla,* 14 Cal. 2d 617, 96 P. 2d 941 (1939) (Santa Monica Bay). *United States* v. *Carrillo,* 13 F. Supp. 121 (1935) (San Pedro Bay).

[46] Historic Bays, U. N. Doc. A/CN.13/1 (1957), and Juridical Regime of Historic Waters, Including Historic Bays, U. N. Doc. A/CN.4/143 (1962).

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erroneously thought the concept of historic waters to be an exception to the general rule of inland waters requiring a rigorous standard of proof. We find no substantial indication of this in his report.

On the evidence, California's claim that its constitution set a boundary beyond the bays and islands is arguable, but many of the state statutes drawing county boundaries which supposedly run to the limit of the state boundaries cut the other way by indicating a line only three miles from shore.[47] Furthermore, a legislative declaration of jurisdiction without evidence of further active and continuous assertion of dominion over the waters is not sufficient to establish the claim.[48] There is a federal district court opinion, *United States* v. *Carrillo,* 13 F. Supp. 121 (1935), which dismissed federal criminal charges for an offense which took place more than three miles from the shore of San Pedro Bay on the ground that the bay was within California, not federal, jurisdiction; but it is difficult to see this dismissal as an assertion of dominion. In Santa Monica Bay, California did successfully prosecute a criminal offense which took place more than three miles from the shore, *People* v. *Stralla,* 14 Cal. 2d 617, 96 P. 2d 941 (1939). However, the decision stands as the only

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[47] *E. g.,* for San Diego County, see Cal. Stat. 1850, c. 15, § 2, p. 58; Cal. Stat. 1851, c. 14, § 2, p. 172; Cal. Political Code 1872, §§ 3907, 3944; Cal. Political Code 1923, § 3945; Cal. Stat. 1919, c. 470, § 38, p. 895; Cal. Stat. 1923, c. 160, § 38, p. 361; Cal. Govt. Code § 23137; Cal. Stat. 1947, c. 424, p. 1069. For Los Angeles County, see Cal. Stat. 1850, c. 15, § 3, p. 59; Cal. Stat. 1851, c. 14, § 3, p. 172; Cal. Stat. 1856, c. 46, § 1, p. 53; Cal. Political Code 1872, § 3945; Cal. Stat. 1919, c. 470, § 20, p. 877; Cal. Political Code 1923, § 3927; Cal. Stat. 1923, c. 160, § 20, p. 343; Cal. Govt. Code § 23119; Cal. Stat. 1947, c. 424, p. 1055.

[48] See generally, Juridical Regime of Historic Waters, Including Historic Bays, U. N. Doc. A/CN.4/143, ¶¶ 80–105 (1962).

assertion of criminal jurisdiction of which we have been made aware.[49]

The United States disclaims that any of the disputed areas are historic inland waters. We are reluctant to hold that such a disclaimer would be decisive in all circumstances, for a case might arise in which the historic evidence was clear beyond doubt. But in the case before us, with its questionable evidence of continuous and exclusive assertions of dominion over the disputed waters, we think the disclaimer decisive.

4. *Harbors and Roadsteads.*—The parties disagree as to whether inland waters should encompass anchorages beyond the outer harborworks of harbors. The Convention on the Territorial Sea and the Contiguous Zone (Art. 8) states without qualification that "the outermost permanent harbour works which form an integral part of the harbour system shall be regarded as forming part of the coast." We take that to be the line incorporated in the Submerged Lands Act.

As to open roadsteads used for loading, unloading and anchoring ships, the Convention (Art. 9) provides that such areas should be included in the territorial sea, and, by implication, that they are not to be considered inland waters. We adopt that interpretation.

5. *The Line of Ordinary Low Water.*—Along the California coast there are two low tides each day, one of which is generally lower than the other. The assertion of the United States, with which the Special Master agreed, is that the line of ordinary low water is obtained by taking

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[49] The United States Attorney for the Southern District of California participated as an *amicus curiae* in the *Stralla* case and supported the position of California. We do not consider this action so significant as to foreclose the United States in the controversy before us. Compare the discussion of actions taken by the Secretary of the Interior in *United States* v. *California,* 332 U. S. 19, 39–40.

the average of all the low tides. California would average only the lower low tides.

We hold that California's position represents the better view of the matter. The Submerged Lands Act defines coastline in terms of the "line of ordinary low water." The Convention (Art. 3) uses "the low-water line along the coast as marked on large-scale charts officially recognized by the coastal State" (*i. e.*, the United States). We interpret the two lines thus indicated to conform, and on the official United States coastal charts of the Pacific Coast prepared by the United States Coast and Geodetic Survey, it is the lower low water line which is marked.

6. *Artificial Accretions.*—When this case was before the Special Master, the United States contended that it owned all mineral rights to lands outside inland waters which were submerged at the date California entered the Union, even though since enclosed or reclaimed by means of artificial structures. The Special Master ruled that lands so enclosed or filled belonged to California because such artificial changes were clearly recognized by international law to change the coastline. Furthermore, the Special Master recognized that the United States, through its control over navigable waters, had power to protect its interests from encroachment by unwarranted artificial structures, and that the effect of any future changes could thus be the subject of agreement between the parties.

The United States now contends that whereas the Submerged Lands Act recognized and confirmed state title within all artificial as well as natural modifications to the shoreline prior to the passage of the Act, Congress meant to recognize only natural modifications after the date of the Act. The Act, however, makes no specific reference to artificial accretions, and nowhere in the legislative history did anyone focus on the question.[50] The United

[50] See, *e. g.*, 99 Cong. Rec. 2697 (remarks of Senator Cordon); Senate Hearings 1344–1345, 1353–1358, 1374.

States points by analogy to the rule of property law that artificial fill belongs to the owner of the submerged land onto which it is deposited. *Marine R. & Coal Co.* v. *United States,* 257 U. S. 47, 65. We think the situation different when a State extends its land domain by pushing back the sea; in that case its sovereignty should extend to the new land, as was generally thought to be the case prior to the 1947 *California* opinion.[51] The considerations which led us to reject the possibility of wholesale changes in the location of the line of inland waters caused by future changes in international law, *supra,* pp. 166–167, do not apply with force to the relatively slight and sporadic changes which can be brought about artificially. Arguments based on the inequity to the United States of allowing California to effect changes in the boundary between federal and state submerged lands by making future artificial changes in the coastline are met, as the Special Master pointed out, by the ability of the United States to protect itself through its power over navigable waters.

With the modifications set out in this opinion we approve the recommendations of the Special Master. The parties, or either of them, may, before September 1, 1965, submit a proposed decree to carry this opinion into

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[51] See, *e. g.,* Statement of Robert Moses and the discussion following it. Senate Hearings 137.

The United States points by analogy to judicial interpretations of the Swamp Land Act of 1850, 9 Stat. 519, to the effect that it granted only those lands which were swamp at the date of its passage. However, the terms of that Act were specific: ". . . those swamp and overflowed lands . . . which shall remain unsold at the passage of this act, shall be, and the same are hereby, granted . . ."; and it granted lands sovereignty over which had never been thought to change because the nature of the land changed.

effect, failing which the Court will prepare and enter an appropriate decree at the next Term of Court.

It is so ordered.

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

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, dissenting.

In 1947 in *United States* v. *California,* 332 U. S. 19, this Court held that the United States had paramount rights in the waters and submerged lands lying adjacent to its coastlines. A Special Master was appointed to apply the rule of that case to segments of submerged land off the mainland of California. In 1953 Congress, believing that this Court's decision unfairly denied to the coastal States submerged lands within their historic boundaries, passed the Submerged Lands Act to upset that decision and restore to the States what Congress believed had historically and rightfully been theirs. The Court today decides this case on the basis of the 13-year-old Master's Report which attempted to carry out the 1947 *California* opinion and decree. Instead of relying on that 1952 Report, which was based on a decision which Congress in 1953 forcefully and emphatically rejected in the Submerged Lands Act, I would refer this case to a Master for new hearings, findings and recommendations to be made in light of the Submerged Lands Act, the controlling statutory law as it now exists.

I.

The issue in this case is whether California or the United States is the owner of seven segments of land lying under the sea off the mainland of California.[1] Most

[1] See Appendix A.

of the segments lie under or outside what are called bays in popular usage, and as to them the question is whether and how much of the land underlying them and the marginal sea beyond belongs to California.[2] One large segment, which also includes two of the bays in issue, touches the sea opposite a chain of islands which lie up to approximately 50 miles off the mainland, separated by the Santa Barbara Channel, the San Pedro Channel, and the Gulf of Santa Catalina.[3] As to that segment, California claims ownership of the sea bottom under the water separating the islands from the mainland and three miles beyond the islands, while the United States argues that California owns only a strip three geographic miles wide around each island and one extending three geographic miles from the mainland shore, with the intervening submerged land all belonging to the Federal Government. In order to understand the present contentions of the parties, it is necessary to go back to the years before 1945, the year in which the dispute of which the present controversy is an aftermath came before this Court.

For many decades some of the States bordering on the sea had claimed dominion over water and submerged lands lying off their shores. Their claims usually were stated as extending into the open sea a distance of three statute

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[2] See Appendix B, which shows Monterey Bay, one of the bays in question. California claims that all the submerged land and waters landward of the line drawn across the headlands are inland waters within the historic coastline of the State, and that its historic boundary, the outer limit of its rights under the Submerged Lands Act, extends three miles seaward of that line. The United States claims that California owns only a belt of submerged lands within three miles of the low-water mark of the mainland shore.

[3] See Appendix C. California claims all the submerged land between the line drawn along the islands from the mainland, and a belt of marginal sea three miles to seaward of that line. The United States contends that California is entitled only to a belt within three miles of the mainland shore and three miles around each of the islands.

miles, three geographic miles, or three marine leagues from their "coast lines." [4] But "coast line," as the term was used in many such claims, and as it is used in modern geographic descriptions, does not mean simply the low-water mark of the mainland shore; rather, it means a legally recognized line which follows the low-water mark of the shore where the shore is relatively straight and facing open sea, and which at other points follows the recognized outside limits of "inland waters," which flow into the sea or form indentations in the land. Such "inland waters" may include certain estuaries, bays and harbors, and waters between a mainland and offshore islands.

For many years the Federal Government raised no objection to the various States' claims that their boundaries, including claims to the marginal sea, extended outward for various distances into the sea. However, by the 1930's it became apparent that the submerged lands off the shores of certain States contained rich and valuable oil reserves and other natural resources. In the late 1930's it was for the first time asserted that in spite of the States' historic claims the United States, and not the respective coastal States, was the owner of all submerged lands lying both within and without the three-mile limits, except for land under "inland waters." [5] California and other States claimed that they were the owners of all submerged lands within their historic boundaries dating back to their respective admissions to the Union, including of course both historic inland waters and a three-mile or three-league strip of marginal sea beyond. To settle this controversy the United States in 1945

[4] One geographic (or marine or nautical) mile equals approximately 1.15 statute (or land or English) miles. One marine league equals three geographic miles or approximately 3.45 statute miles.

[5] See S. Rep. No. 133, 83d Cong., 1st Sess. (hereafter cited as Senate Report), 21.

brought in this Court the action against California of which today's decision is an aftermath, alleging that the United States was "the owner in fee simple of, or possessed of paramount rights in and powers over, the lands, minerals and other things of value underlying the Pacific Ocean, lying seaward of the ordinary low water mark on the coast of California and outside of the inland waters of the State, extending seaward three nautical miles . . . ." California objected immediately that the complaint was vague because the Government did not make clear how broadly or narrowly it defined "inland waters." California also answered that its historic boundaries as set out in its constitution in 1849, approved when it was admitted to the Union, included not only a strip out to three miles from its coast, but also "all the islands, harbors, and bays along and adjacent to the Pacific coast," and that therefore "all lands under all navigable waters within the boundaries of the State" belonged to it. This Court then held in 1947 in *United States* v. *California,* 332 U. S. 19, that the United States and not California had paramount rights in all the waters and submerged lands within the three-mile belt of marginal sea "outside of the inland waters." 332 U. S. 804, 805. See also *United States* v. *Louisiana,* 339 U. S. 699; *United States* v. *Texas,* 339 U. S. 707. As for the problem of deciding what were inland waters and what were not, and of drawing an exact demarcation between the inland waters and a three-mile strip of marginal sea, this Court said that "there is no reason why, after determining in general who owns the three-mile belt here involved, the Court might not later, if necessary, have more detailed hearings in order to determine with greater definiteness particular segments of the boundary." 332 U. S., at 26.

It was not long before such hearings did become necessary, for the United States and California found themselves in sharp disagreement as to what the term "inland

waters" meant when applied to specific segments of the California coast. Both parties assumed at that time, long before the Submerged Lands Act was passed, that the term was to be given a content derived from the usage of international law and the United States' foreign relations, since the *California* decision in upholding the claim of the United States to land under the three-mile belt of marginal sea had relied on the necessity of federal protection and control of the territorial seas as an incident of national sovereignty. But the doctrines of international law were so confused and contradictory as to exactly what measurements a bay must have to be inland water, and under what conditions a channel between islands and the mainland was inland water, that both sides were able to find precedents supporting them. This Court therefore submitted the case to a Special Master to make findings of fact and recommendations of law as to whether each of seven segments of submerged land off the mainland of California, the same seven now in dispute, should be treated as "inland waters" within the meaning of the *California* opinion and decree, and therefore the property of the State.[6] 342 U. S. 891. On October 14, 1952, the Master filed his Report, 344 U. S. 872, in which he said he assumed that the test of whether the land in dispute belonged to California depended on whether it was inland water "by (1) any customary, generally recognized rule of international law . . . or by (2) effective assertion by the United States on its own behalf in its international relations." He thus considered any claim based on the historic boundaries of the State as totally irrelevant, as having been rejected in this Court's 1947 opinion, and he ruled in substance that the United States was the owner of the submerged lands in question to the extent it claimed.

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[6] The Master was asked also to consider what criteria were proper for measuring the ordinary low-water mark on the shore.

Whether the test he used correctly interpreted the opinion need not concern us at this point. California of course filed exceptions, as did the United States. Then in 1953 Congress entered the picture by passing the Submerged Lands Act, and for more than 10 years, during which neither of the parties took any further steps in this Court and the Master's Report lay dormant, it appeared that the Act of Congress had determined the dispute.

The Submerged Lands Act of 1953 [7] gave to the coastal States "title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters . . . ." [8] It defined "lands beneath navigable waters" as all submerged land lying within three geographic miles seaward of the "coast line" of the State,[9] which was in turn stated to be the low-water mark where the mainland was in direct contact with the open sea, and elsewhere the seaward limit of the "inland waters." [10] The Act said, in language of extreme importance to the resolution of the present dispute at the present time, that each State was to have title to submerged lands "to the boundary line of each such State" [11] with the term "boundaries" meaning "the seaward boundaries of a State . . . *as they existed at the time such State became a member of the Union, or as heretofore approved by the Congress,*" [12] up to a limit of three geographic miles from the coastline in the Atlantic and Pacific Oceans, and three leagues from the coastline in the Gulf of Mexico.[13] Thus each State was given title to the submerged lands

[7] 67 Stat. 29, 43 U. S. C. §§ 1301–1315 (1958 ed.).

[8] § 3, 67 Stat. 29, 30, 43 U. S. C. § 1311 (1958 ed.).

[9] § 2 (a)(2), 67 Stat. 29, 43 U. S. C. § 1301 (a)(2) (1958 ed.).

[10] § 2 (c), 67 Stat. 29, 43 U. S. C. § 1301 (c) (1958 ed.).

[11] § 2 (a)(2).

[12] § 2 (b), 67 Stat. 29, 43 U. S. C. § 1301 (b) (1958 ed.). (Emphasis supplied.)

[13] *Ibid.*

off its shores out as far as its boundaries at the time the State entered the Union, which were stated not to go more than three miles (or leagues) beyond its "coast line." The "coast line" was the outer limit of its "inland waters." The basic question here is whether the State's "coast line" as the term is used in the Act is to be determined by looking at the State's historic boundaries when it entered the Union, or by the standard used by the Master in carrying out the *California* decree.

For 10 years after the Act was passed transferring title to these submerged lands to the States, no further action in the case pending in this Court was taken by either the United States or California.[14] California's original claim that these bays and channels were inland waters within the meaning of this Court's decree had ceased to be so important, since the States had been given title to all the submerged lands out to their historic boundaries, including recognition of their claims to three miles or leagues of the marginal sea. After 10 years had passed, however, exploitation of undersea oil resources had become possible in deep water at great distances from the mainland, and the United States raised this present dispute with California concerning where the outer limit of the submerged land given the State by the Submerged Lands Act lay. The United States contends that this depends on the location of the "coast line" since the State's added rights extended three miles from the "coast line," and that the location of the "coast line" depends in turn on the location of the seaward edge of the "inland waters," which the United States argues should be measured according to the definition of "inland waters" used by the Master in his hearings in the *California* case; the United States further argues that the report of the Master settled the case, and that the subsequent passage of the Sub-

[14] The constitutional power of Congress to enact the Submerged Lands Act was upheld in *Alabama* v. *Texas*, 347 U. S. 272.

merged Lands Act had no effect on the correctness of the standard he used. California replies that since the stated purpose of the Act was to restore the States' claims to the submerged lands within their historic boundaries, which included all waters within the States' boundaries as inland waters and three miles beyond into the territorial sea, the "coast line" or seaward edge of the "inland waters" was to be defined in terms of what a State had historically claimed was its coastline, the line from which it had measured its boundary, by its three-mile claim to the marginal sea. In other words, the United States proposes that in measuring California's submerged lands even under the Submerged Lands Act this Court should start with a line of internationally defined "inland waters" as applied by the Master in carrying out the decree in the *California* case, and measure three miles out. California argues that since the effect of the *California* case was rejected by the Submerged Lands Act, this Court should look only to the Submerged Lands Act for the governing law and in defining the State's boundary should start with the coastline as historically recognized when the State was admitted to the Union, from which the State measured its three-mile claim of marginal sea, and measure three miles outward from that historic coastline, thus restoring the State's historic boundaries. I think that the language and purpose of the Submerged Lands Act of 1953 show that California is right.

II.

This Court's 1947 holding precipitated one of the most hotly contested political issues of the post-war decade. Critics of the decision said that it had come as a complete surprise and had effectively taken away from the coastal States what they and others had thought from the time they entered the Union and before belonged to them. In 1952 a resolution passed both houses of Congress designed to "restore" to the States the submerged lands which they

had thought they owned before the *California* decision.[15] Many opposed this bill as a "give away" of the federal public domain, and President Truman prevented the bill's passage by vetoing it.[16] Even in so doing, however, he recognized frankly that "Even so careful and zealous a guardian of the public interest as the late Secretary of the Interior, Harold Ickes, at first assumed that the undersea lands were owned by the States." [17]

The controversy over whether to upset the Federal Government's title which this Court had declared in the 1947 decision continued, however, and on January 9, 1953, Senator Holland of Florida on behalf of himself and 39 other Senators introduced a bill, Senate Joint Resolution 13,[18] which was identical with the bill which had passed the previous year and which, with various amendments, passed both houses of Congress, was signed by President Eisenhower, and became law as the Submerged Lands Act of 1953. The stated purpose of the law as enacted was

> "To confirm and establish the titles of the States to lands beneath navigable waters *within State boundaries* and to the natural resources within such lands and waters . . . and to confirm the jurisdiction and control of the United States over the natural resources of the seabed of the Continental Shelf *seaward of State boundaries.*" [19]

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[15] S. J. Res. 20, 82d Cong., 2d Sess. For a summary of earlier proposed legislation dealing with submerged lands, see *United States* v. *Louisiana,* 363 U. S. 1, 6, n. 4.

[16] Message from the President, May 29, 1952, S. Doc. No. 139, 82d Cong., 2d Sess.

[17] *Id.,* p. 2.

[18] S. J. Res. 13, 83d Cong., 1st Sess. A substantially identical bill, H. R. 2948, 83d Cong., 1st Sess., was introduced in the House.

[19] 67 Stat. 29. (Emphasis supplied.) The latter clause, dealing with the outer Continental Shelf, was added to the original bill in committee.

As the first witness to testify at the Senate committee hearings on his bill, Senator Holland said that

> "the general purpose of Senate Joint Resolution 13 is to recognize, confirm, establish, and vest in the several States—and this means all 48 of them—the submerged lands and the natural resources therein within their respective boundaries, subject to the exercise of all of the powers of regulation of the Federal Government for the purpose of commerce, navigation, national defense, and international affairs, none of which Federal powers include any property rights. This joint resolution will confirm to the maritime States—of which there are 20—the rights which they had respectively enjoyed since the founding of our Nation and up to the date of the decision in the California case, in *their offshore lands and waters which lie within their constitutional boundaries.*" [20]

Its object, he said, was "restoring to the States their plenary rights, property, jurisdiction, and control which they exercised without question for 150 years over the areas lying within State boundaries." [21] It dealt only, he said, with the area within "the States' historic or constitutional boundaries." [22] Those who testified in favor of the bill stated their objective the same way. Thus Secretary of the Interior McKay said:

> "I do believe that the national interest would be best served by restoring to the various States the coastal offshore lands to the limits of the line marked

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[20] Hearings before the Senate Committee on Interior and Insular Affairs on S. J. Res. 13 and Other Bills, 83d Cong., 1st Sess. (hereafter cited as Senate Hearings), 31–32. (Emphasis supplied.)

[21] Senate Hearings 49.

[22] *Id.*, 34.

by the historical boundaries of each of the respective States." [23]

There can be no doubt, I believe, and I do not understand the Court to question, that, as proposed to the Senate Committee on Interior and Insular Affairs by Senator Holland and others, the bill which became the Submerged Lands Act unquestionably was intended to give the States title to all the offshore lands going out at least as far as the respective States' historic boundaries. A brief filed in this Court in another case shows that in the reported deliberations on the bill the term "historic State boundaries" was used 813 times, "original boundaries" 121 times, and "traditional" boundaries 114 times.[24] Since I take it that the Court concedes that this was the original purpose, see *ante,* pp. 153–154, I shall not bother to set forth all the statements of proponents of the bill at the Senate hearings, as well as at the House hearings, which stated flatly that this was its purpose.

III.

We start then from the conceded fact that the bill as originally introduced gave California title to all the submerged lands off its shore out to its historic boundaries, whatever they might prove to be. The Court, however, pins its case for denying California those historic boundaries on what it calls two "relevant," indeed fundamental, changes, *ante,* p. 150, made in the bill prior to its passage, which the Court says show that the bill's sponsors suddenly altered their intent and decided instead of restoring to California and other States mineral rights within their historic boundaries, to limit them to a three-mile or three-

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[23] *Id.,* 512. Unlike the Truman Administration, the Eisenhower Administration supported legislation to grant mineral rights in submerged offshore lands to the adjacent States.

[24] Brief of the State of Texas, *United States* v. *Louisiana,* 363 U. S. 1, p. 50.

league strip of marginal waters along "coast lines" which were to be restrictively defined according to current policies of international relations adhered to by the State Department. A study of the legislative history convinces me that in making the two changes on which the Court relies, the Senators intended in no way to alter the purpose of the original Holland bill to restore to the States all the waters and submerged lands within their historic constitutional boundaries. They expressly, vigorously and repeatedly avowed that the original purpose was unchanged.

A. THE REMOVAL OF THE DEFINITION OF "INLAND WATERS."

As originally drafted, § 2 of the Holland bill defined "inland waters," which extended to the "coast line," as including

> "all estuaries, ports, harbors, bays, channels, straits, historic bays, and sounds, and all other bodies of water which join the open sea." [25]

This definition would of course unquestionably give California title to submerged lands lying under all its historically recognized bays and straits as part of California's "inland waters," quite apart from the fact that they might also lie within California's historic boundary of inland waters plus marginal sea. The Deputy Legal Adviser of the State Department testified that such a legislative definition of inland waters, even though limited to the purpose of the bill of affecting property rights between the United States and the States, "a purely domestic matter," [26] might possibly embarrass the State Department in its foreign relations if the Department asserted a different definition of the words "inland waters" in its rela-

[25] See Senate Report 14.

[26] Senate Hearings 1378 (Senator Cordon). Compare *United States* v. *Louisiana,* 363 U. S. 1, 33.

tions with foreign nations.[27] The Attorney General warned that to attempt to define the coastline in a few words might increase rather than diminish litigation.[28] As a result, Senator Cordon, the Acting Chairman of the Committee, at the conclusion of the hearings quoted the language defining "inland waters" for purposes of the Act and said:

> "That language was objectionable to the State Department and to the Department of Justice. That isn't, in itself, in my opinion, reason to strike it, but I am of the opinion that the objections were sound. The matter of inland waters is one that has been defined time and time again by the courts, not, I believe, in any one all-inclusive definition, but it was felt that the use of these words were an attempted legislative definition of the term 'inland waters,' and it was inadvisable for us in this bill, which is a transfer of title, to attempt to make law in the other field of what is or is not inland water." [29]

At another point he explained that the language was struck simply because

> "It was sought not to get into that field because you were in a field then where, in our attempts to take care of a purely domestic matter, we might be putting the United States on record with a precedent which we intended only to apply domestically but which might be applied internationally." [30]

He emphasized that

> "The elimination of the language still follows what the Chair understands to be the philosophy of the

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[27] *Id.*, 1053 (Deputy Legal Adviser Tate). Compare *United States* v. *Louisiana*, 363 U. S. 1, 30–32.

[28] *Id.*, 926. Attorney General Brownell suggested that a line be drawn on a map as part of the bill. He said that if the Committee tried "to describe in words bays or other characteristics of the coast, unnecessary litigation will almost surely result." *Ibid.*

[29] Senate Hearings 1304.

[30] *Id.*, 1378.

> bill, that we are putting the States where they thought they were, and not attempting now to create either a situation in law or a basis for a rule of evidence that may or may not have been sound when the States came into the Union." [31]

Senator Daniel of Texas, a leading advocate and sponsor of the bill, said:

> "I agree fully with the chairman that the striking of these words was not done in any manner to prejudice the rights of the States . . . . I just want to state that for the record, if this record is ever used in the future." [32]

Senator Cordon, who had proposed the change, replied:

> "I appreciate the statement of the Senator, and I concur in it, so far as the action taken here is concerned." [33]

And Senator Anderson, another member of the Committee reporting the bill, agreed:

> "I subscribe fully to what the chairman said quite awhile ago in pointing out that this bill does not seek to take away from or add to the position of these States as they came into the Union." [34]

When the bill was reported out of committee and presented to the Senate, its supporters made clear that the Committee had made no change in its original objective of restoring to the States everything within their historic boundaries. Senator Holland said it was an "obvious fact" [35] that the bill was "giving to the States that which, without question, was enjoyed by them for 150 or 160

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[31] *Id.*, 1383.

[32] *Id.*, 1384.

[33] *Ibid.*

[34] *Id.*, 1385.

[35] 99 Cong. Rec. 2746.

years, namely, the ownership of everything within State boundaries, and reserving to the Federal Government everything beyond that." [36] Senator Cordon expressed his understanding that

> "The boundaries of the States cannot be changed by Congress without the consent of the States. We cannot do anything legislatively in that field, and we have not sought to do so in this measure.
>
> "I think that answers all and every one of the discussions with reference to boundary lines of the States, including whether they are measured from low water, high water, inland water, or some island." [37]

And Senator Holland said:

> "By way of a brief summary, the general purpose of this measure as reported by the Interior and Insular Affairs Committee is to recognize, confirm, establish, and vest in and assign to the respective States the title and ownership of the lands and resources beneath navigable waters *within their respective boundaries* . . . ." [38]

And Senator Daniel explained:

> "Until recently the Federal Government never thought it owned these lands, and even until now it has never possessed or used them. The lands are still in the possession of the States . . . . The passage of the pending proposed legislation will simply permit the States to keep what they have always had since the foundation of the Union." [39]

If that were not enough to show that the removal of the definition of inland waters from § 2 of the bill as a

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[36] *Ibid.*

[37] *Id.*, 2634.

[38] *Id.*, 2744. (Emphasis supplied.)

[39] *Id.*, 2830.

courtesy to the State and Justice Departments was to have no substantive effect, the Senate Committee said at the beginning of its report on its version of the bill:

> "The committee wishes to emphasize that, as will be seen from comparison with the measure as introduced, the changes are primarily those of form and language, and the committee amendment is consistent throughout with the philosophy and intent of Senate Joint Resolution 13 as introduced. *The only change of substance is found in section 9,* in which the jurisdiction and control of the Federal Government over the natural resources of the seabed of the Continental Shelf seaward of historic State boundaries is confirmed." [40]

Thus the continued intention to confer on the States all submerged lands within their "historic boundaries" was again reiterated. And in a specific reference to the elimination of the definition of inland waters from § 2, the Committee Report said that the words had been deleted

> "because of the committee's belief that the question of what constitutes inland waters should be left where Congress finds it. The committee is convinced that the definition *neither adds nor takes away anything a State may have now in the way of a coast* and the lands underneath waters behind it." [41]

The Committee had before it the report of the Special Master in this very case [42] and did not adopt his criteria, based on the *California* decision, for determining inland waters, criteria which included the Boggs formula for determining bays, a formula which many Senators indicated they disapproved and which the Committee Report specifically stated it did not mean to establish as the law.

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[40] Senate Report 2. (Emphasis supplied.)

[41] *Id.,* 18. (Emphasis supplied.)

[42] Senate Hearings 1211–1229.

Clearly the position of the Committee was that it really cared only about restoring to the States their claims to submerged lands within their historic boundaries, which of course included all the lands, bays, harbors and channels within those boundaries—their historic coastlines—and three miles or leagues of marginal sea.[43] The Committee saw no reason to attempt to spell out its definition of inland waters, as including all historic bays and channels, when there was no reason to do so and when to do so might possibly have embarrassing repercussions on American foreign relations, where different definitions of

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[43] The Committee Report also reprinted the favorable report of a Senate Committee during a previous session of a bill which the Committee said was "identical in substance with Senate Joint Resolution 13 as introduced." Senate Report 49. That earlier report, S. Rep. No. 1592, 80th Cong., 2d Sess., as quoted, criticised the *California* decision for creating great uncertainty as to what areas would be "inland waters" within the reasoning of the opinion. Under the federal-external-sovereignty reasoning of the *California* case the Committee saw no clear answer to such questions as:

"At what precise point does a bay become a part of the open sea? Are waters landward of offshore islands inland waters? Are uplands formed by nature subsequent to the date of fixing the low-water mark subject to 'the paramount power' of the United States as defined by the Court's opinion?" Senate Report 61.

The Committee sought in the legislation to avoid these "extreme complexities," *ibid.*, by enacting "a law consonant with what the States and the Supreme Court believed for more than a century was the law," *ibid.*, and restoring to the States all their historic property rights both to inland waters and to the marginal sea. The Report said:

"Unless S. 1988 as reported, is enacted, confusion will exist as to the ownership and taxability of, and powers over, bays and the 3-mile belt . . . . We consider it against the public interest for the Federal Government to commence a series of vexatious lawsuits against the sovereign States to recover submerged lands within the boundaries of the States, traditionally looked upon as the property of the States under a century of pronouncements by the Supreme Court reflecting its belief that the States owned these lands." *Id.*, at 62.

inland waters prevailed. Lest anyone misconstrue the change, the Committee said with reference to it:

> "The elimination of the language, in the committee's opinion, is consistent with the philosophy of the Holland bill to place the States in the position in which both they and the Federal Government thought they were for more than a century and a half, and not to create any situations with respect thereto." [44]

The Court reads this change in words as showing "a legislative intent to leave the definition of inland waters to the courts without restriction." *Ante*, p. 154. The Court agrees that before this change was made, the bill gave the States all the submerged lands out to their historic boundaries. The Court admits that the 1947 *California* decision rejected the States' claims to their historic boundaries and, according to the Court, set up a test of international law and foreign-policy standards for measuring inland waters. But the Court concludes that when the Committee said that it was leaving the States with the rights to inland waters which they had before the *California* decision, it really meant to establish the international law standard, including the Boggs formula (except insofar as that formula has since been abandoned by treaty) which many Senators had so strenuously opposed and which in their Committee Report they specifically stated they did not mean to adopt. I think that a fair reading of the discussion of this change shows that the Committee members intended that all the States should have their boundaries, including a belt of marginal sea and all the lands and waters from which they had historically measured their claims to the marginal sea, which they thought would have been recognized as such by the courts up to the time of the *California* decision, and that the test of inland waters and coastlines was therefore an historical one. The Committee regarded

[44] Senate Report 18.

the *California* decision as a complete aberration, and assumed that before it all courts would have judged inland waters by historical tests, as in fact several California and federal decisions show they had.[45] I cannot understand how the Court reasons that when the Committee said that it left the States as it thought they were *before* the *California* decision, it really meant to put them in the position the Court says they were in *after* that case, insofar as inland waters and their coastlines are concerned. I think that the amendment did just what the Committee said it did: it freed Congress from the need of "having to determine matters that are highly technical," [46] and left it for the States to prove if they could the facts to support their historic claims that particular bodies were inland waters behind the coastline. Senator Kuchel of California, fully familiar with the problems of California, and on the alert to protect that State's interest in the bays and channels within its historic boundaries, interpreted the bill properly, I think, when he said:

> "In recognizing State ownership of lands beneath navigable waters within historic State boundaries, this joint resolution wisely makes no attempt to define exactly what those boundaries are. In substance, the resolution provides that each of the States has ownership of all lands beneath navigable waters extending, in the case of littoral States, 3 geographical miles seaward from its coastline, or *to its historic boundary.*" [47]

Thus up to this point in the legislative history I think it can be said that (1) the Holland bill as originally

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[45] See *infra,* p. 212. "[T]he sponsors understood this Court to have established, prior to the *California* decision, a rule of state ownership itself defined in terms of state territorial boundaries . . . ." *United States* v. *Louisiana,* 363 U. S. 1, 19–20.

[46] Senate Hearings 1383 (Senator Cordon).

[47] 99 Cong. Rec. 2984. (Emphasis supplied.)

drafted unquestionably gave the States title to all submerged lands out as far as their historic boundaries; and (2) the elimination of the legislative definition of inland waters did not alter the original intent of the bill in the slightest degree, but rather left it up to the States to prove that particular bays, channels or harbors were inside their coastlines as part of their "historic boundaries," according to "the position in which both they and the Federal Government thought they were for more than a century and a half." [48]

B. THE THREE-MILE OR THREE-LEAGUE LIMITATION.

The Court calls attention to one other change in the bill before its enactment, and on the significance attributed to this one small change depends the validity of the Court's entire opinion. The Court says that this change was fundamental, of vital importance. It says that to the extent of this change, "the philosophy [of the Holland Bill] was modified." *Ante,* p. 154. I find this altogether surprising, since when the change was introduced—by Senator Holland himself—and adopted almost immediately without any opposition being voiced, he said it was "just a minor change of verbiage," [49] one of several "minor changes for the purpose of clarification." [50] If the change was to have the dramatic effect which the Court attributes to it, Senator Holland certainly did not recognize it, for he said that it did "not depart in the slightest from the intention of the sponsors of the joint resolution." [51] This amendment along with others was adopted after discussion occupying less than two pages in the Congressional Record, without a roll-call vote, without even one single objection from the Senate floor. Fundamental

[48] Senate Report 18, *supra,* n. 44.

[49] 99 Cong. Rec. 4115.

[50] *Id.,* at 4114.

[51] *Ibid.*

changes in the basic purpose of bills are never adopted in that way. Senator Holland's explanation that this was "just a minor change of verbiage" should be accepted by this Court, as I have no doubt it was accepted by the Senate.

This change which its sponsor thought was "minor" and which the Court thinks is fundamental, and on which the Court's whole argument depends, merely modified the definition of "boundaries" in § 2 of the Act by adding:

> "but in no event shall the term 'boundaries' or the term 'lands beneath navigable waters' be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico." [52]

The Court says that this language implicitly did away with the original and continued intention of the proponents of the bill to "restore" to the States the ownership of all submerged lands lying under all waters within their historic boundaries, wherever those boundaries lay, and instead established a rule that historic boundaries would not be honored if they extended more than three miles from the coastline, *i. e.*, from the seaward edge of the inland waters as the Court today defines inland waters. The Court then reads the legislative history as destroying the historic definition of inland waters—which is, of course, all waters within a State's boundaries exclusive of claims to marginal sea—and substituting a very restrictive one based on this Court's decision in the *California* case, a reading which I have indicated above is, I think, flatly contrary to what the legislative history shows. The Court thus holds that by making two minor changes in the bill, which changes they said over and over again were of no substantive significance, the Senators supporting it silently repudiated in large measure their own intention,

[52] § 2 (b), 67 Stat. 29, 43 U. S. C. § 1301 (b) (1958 ed.).

which they had proclaimed to the public and the Senate from the beginning and continued to proclaim to the end, of restoring to the States their historic constitutional boundaries.

This three-mile or three-league limitation amendment was added for a very simple reason, which is plain in the Congressional Record and which shows that the sponsors of the bill were reaffirming rather than abandoning their basic original purpose in offering this and similar bills: they wished to restore to the States the submerged lands out to their historic boundaries, including three miles or leagues of marginal sea, but no farther. As reported from Committee, the bill gave the States submerged lands out to their boundaries at the time they entered the Union "or as heretofore or hereafter approved by Congress" without any limitation. It was feared by some that one or more of the States, none of which had ever claimed more than three miles (or leagues) of the marginal sea, might suddenly assert claims that their boundaries extended out hundreds of miles to the very limits of the Continental Shelf.[53] If allowed to do this, the fear was expressed, such States would be taking title to mineral wealth far beyond the historic boundaries to which the sponsors of the bill wished to confine them. The sponsors stated that their purpose was merely to "restore" to the States what they had thought they had had as boundaries—the outer part of the Continental Shelf was to belong to the Federal Government.[54] In order to prevent any States from trying to use the word "boundaries" in the Act to push their boundaries out beyond their his-

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[53] See, *e. g.*, 99 Cong. Rec. 2917, 2975–2977, 3040, 3273, 3336–3337, 3381, 3549, 3552–3553, 3655, 3885–3886, 4085.

[54] Compare the Outer Continental Shelf Lands Act, 67 Stat. 462, 43 U. S. C. §§ 1331–1343 (1958 ed.), passed the same year, claiming for the United States "jurisdiction, control, and power of disposition" of all submerged lands seaward of the area granted the States in the Submerged Lands Act.

toric three-mile or three-league claims to the marginal sea, Senator Holland himself introduced this amendment. It deleted the words "or hereafter," thus limiting the States to any boundaries which they had previously claimed, in spite of any claims they might make in the future; and it also set forth as a limitation the Senators' understanding of the maximum extent of the marginal sea historically claimed by any State from or as a part of its historic boundaries: three geographical miles in the Atlantic and Pacific Oceans, and three leagues in the Gulf of Mexico. As Senator Holland explained, a limitation to existing boundaries had been the intention of the bill's sponsors all along, and it had been and was the understanding of the sponsors that no States claimed that their historic boundaries extended more than three miles from their coastlines in the Atlantic or Pacific Oceans. He said the three-mile limitation was "just a minor change of verbiage" [55] made in order "to make very clear that Congress at this time is seeking to do only those things which the authors and supporters of the joint resolution have so very fully, and rather repeatedly, stated for the RECORD heretofore during the course of the debate." [56] He reiterated that

> "The amendment will simply indicate that this Senate, in the passage of the joint resolution, is certainly not inviting *additional claims*, and it knows of no *additional claims*." [57]

Senator Holland, as the record shows, and many other Senators were well aware of California's existing claim, which is now before us, and could not have considered it to be "additional." [58]

Time and time again the proponents of the bill stated before the amendment was passed that no State claimed

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[55] 99 Cong. Rec. 4115.

[56] *Ibid.*

[57] *Ibid.* (Emphasis supplied.)

[58] See, *e. g.*, Senate Hearings 48–49.

more than three miles or leagues of marginal sea as part of its historic boundaries, and no State would be given rights by the bill beyond those original claims. Said Senator Holland, "I emphasize the fact that this joint resolution does not extend the boundary of any State beyond the 3-mile limit." [59] Said Senator Daniel, again before the amendment:

> ". . . those of us who are coauthors of this measure have always understood that it was not necessary to write into the pending legislation a specific provision that it shall not apply to lands beyond 3 miles, or 3 leagues, because all the States are claiming is 3 miles, except in the Gulf of Mexico where historic boundaries are 3 leagues from shore." [60]

He added:

> "I believe that the exchange here within the past few minutes should make it very clear that the authors of this measure are not trying to give to the States, or to restore to the States, any lands outside their historic boundaries." [61]

The claims of the States to a belt of marginal waters of course did not determine the location of the coastline from which such a belt would be measured. California's historic coastline, it says, was the outer limit of the bays and islands. In limiting the States to their historic claims of three miles or three leagues from their "coast lines," wherever those "coast lines" might be, Congress unquestionably, I think, was leaving totally undisturbed the validity of their historic claims to the boundaries from which those belts would be measured.

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[59] 99 Cong. Rec. 2746.

[60] *Id.*, 3039.

[61] *Id.*, 3051.

The Court's opinion lays great stress on an opinion expressed by Senator Holland that California's claim that its historic boundary of inland waters and marginal sea extended out to and three miles beyond its offshore islands was not persuasive. The Court leaves the impression that Senator Holland made a ruling that California's claim would not be covered by the Act. In fact he did nothing of the kind, but merely expressed the opinion to opponents of the bill who said that restoring the States to their historic boundaries would give them too large an area of submerged lands and who cited California's claim to the channel as an example, that he thought California would have a difficult time in proving that its historic boundary extended so far. The context of Senator Holland's remarks is important to set out in full, since when read in context his opinion, which he later repeated on several occasions, serves to emphasize that he intended that each State be allowed to prove where its historic boundaries lay, which is all that California is asking that it be allowed to do here, and which is what the Court now denies it.

The exchange began when Senator Long of Louisiana asked Senator Holland about how far seaward Louisiana's boundary would extend under the bill. Senator Long said:

> "Now, if I understand correctly, the Senator is not proposing that the actual determination of exactly what was the historic boundary at the time Louisiana came into the Union be decided by the Congress, but rather that the question of the *historic boundary of the State* might be *one still subject to actual judicial determination.*
>
> "Senator HOLLAND. Of course, the Senator is right.
>
> . . . . .

> "Senator HOLLAND. We cannot draft general legislation that will still every possible legal question." [62]

Senator Anderson of New Mexico then asked Senator Holland whether the bill validated the claim of California that its historic boundary extended to the offshore islands with a three-mile belt of marginal sea beyond them. To this Senator Holland replied:

> "The Senator from Florida can only give his opinion, and in his opinion it would not, because of the great depths of the water that exist between the coastline of California and the extrusions from the sea bottom which appear out there, and some of which are above the level of the water. *Again, though, the Senator from Florida states that that would be a matter, naturally, on which the courts would be asked to rule.* We are not going to find any formula that displaces the function of the courts to go into cases and find which cases come within the general doctrine announced by legislation and which fall without that legislation." [63]

In other words, the bill did not settle definitively the question of fact as to whether California's historic boundary was to be measured from the outer rim of the islands. That was a question on which courts would have to hear evidence and then decide according to "the general doctrine announced by [this] legislation"—the doctrine, as Senator Holland and others repeated so many times, that the States were to be restored to their "historic boundaries." And as he said in summary, there was nothing in his bill which would diminish California's claim to the waters and submerged lands around its offshore islands.[64]

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[62] Senate Hearings 48. (Emphasis supplied.)

[63] *Id.*, 48–49. (Emphasis supplied.)

[64] *Id.*, 50–51.

In later referring to the adoption of Senator Holland's amendment to the bill, Senator Daniel of Texas said, "the intention was to write specifically into the joint resolution what the authors have said all along would be its effect—that it covered only land within the historic boundaries." [65]

As a further indication that the three-miles-from-coastline amendment was not intended to affect States' claims to their historic boundaries, the record shows that opponents of the bill subsequently tried to amend it to restrict the line from which the three-mile limits would be measured, and failed. Senator Douglas of Illinois, a leader of the opposition, proposed an amendment which would have changed the definition of "coast line" in the bill so that the three miles would be measured only from the main continent, and separately around any islands, thus cutting off California's claim to the submerged lands between the islands and the mainland, which is largely the issue before us now. Senator Douglas indicated specifically that his proposed amendment was intended to destroy California's claim to those submerged lands, and that he had warned Senator Kuchel of California of his intention to introduce it.[66] Senator Long of Louisiana objected that "the Senator from Illinois is submitting his own definition of inland waters." [67] Senator Douglas' amendment was defeated,[68] and California's historic

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[65] 99 Cong. Rec. 4175. See also *id.*, 4477, 4478 (remarks of Senator Daniel).

[66] *Id.*, 4240. Senator Douglas said that his amendment was aimed at "preventing coastal States from pushing their coastal boundaries out to a line along the outer shores of remote islands and claiming everything in between." *Id.*, 4242.

[67] *Id.*, 4241.

[68] *Id.*, 4242. An earlier attempt by Senator Douglas and others to strike from the bill reference to the historic boundaries of the States when they entered the Union, and substitute a limitation based on the marginal waters claimed by the Federal Government

claims, for whatever they might prove to be worth, were left, as Senator Holland had stated, undiminished.

I think that this review of the relevant hearings and debates in the Senate makes clear three things: (1) As originally proposed, the bill was intended to "restore" to the States title to submerged lands within their historic boundaries, whatever those might prove to be. (2) The removal of the explicit definition of inland waters, far from being, as the Court views it, fundamental, was not a "change of substance" [69] and was "not done in any manner to prejudice the rights of the States"; [70] it was intended merely to avoid possible embarrassment in the field of international relations from a bill which had noth-

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under international law, had also failed. See 99 Cong. Rec. 3957–3960, 4114. Senator Cordon had objected that the "net result" of the amendment "would be that an arbitrary 3-mile limit would be established, rather than to follow the philosophy of the joint resolution itself. The resolution provides that the limit be the statutory boundary with which a State entered the Union, or as such boundary may have been subsequently approved by an act of the Congress." 99 Cong. Rec. 4106.

Several similar attempts by opponents of the bill to amend it to restrict the States to a belt within three miles of their mainland shores also failed. Senator Monroney introduced an amendment to limit the area restored to the States to three miles seaward of the low-tide mark on the shore. 99 Cong. Rec. 4157. Senator Long, a supporter of the bill (which already contained the two changes which the Court says were fundamental) protested:

"In view of the fact that the Congress has already indicated its intention of vesting in the States proprietary rights within their historic boundaries, does the Senator have any objection to the Court's deciding what the historic boundaries are?" 99 Cong. Rec. 4160.

The proposed amendment was defeated. 99 Cong. Rec. 4203. A similar measure introduced by Senator Magnuson, which he emphasized would have limited the States to the amount of marginal sea which the United States claimed in international relations, was likewise defeated. 99 Cong. Rec. 4473–4478.

[69] Senate Report 2.

[70] Senate Hearings 1384 (Senator Daniel).

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ing to do with international relations or international law, being merely a "transfer of title." [71] (3) The addition of the limitation of boundaries to three miles beyond the coastline, far from being, as the Court views it, fundamental, was "just a minor change of verbiage" [72] intended to make clear what the bill's sponsors had intended all along: that the bill was not designed to allow States in the future to push their boundaries out to the limits of the Continental Shelf, but rather to limit them to everything within their historic boundaries, including historic coastlines and historic three-mile or three-league claims to the marginal sea beyond.

Near the conclusion of the debates on the bill Senator Holland in explaining its purpose used these words, which I do not think show any fundamental or even perceptible changes or modifications of philosophy from those he had used in his first speech on the bill:

> "The truth is that Senate Joint Resolution 13 simply restores or gives back to the States the submerged lands within their historic boundaries which they have possessed, used and developed in good faith for over 100 years. . . .
>
> . . . . . .
>
> ". . . It would write the law for the future as it was believed to exist in the past by restoring to the States all lands beneath navigable waters within their historic boundaries." [73]

C. THE HOUSE LEGISLATIVE HISTORY.

The hearings and debates in the House were less extensive than those in the Senate, but the intention of the legislators there to restore to the States all submerged

[71] *Id.*, 1304 (Senator Cordon).

[72] 99 Cong. Rec. 4115 (Senator Holland).

[73] *Id.*, 4361.

lands within their historic boundaries was no less explicit. Forty different bills, of which one [74] was identical with the Senate Joint Resolution passed by both Houses the year before and with the Senate bill introduced by Senator Holland, were considered by the House Subcommittee and Committee. The Committee chose the latter bill and with minor perfecting amendments reported it favorably to the House.[75] Typical of the testimony at the hearings was the statement by Attorney General Brownell that:

> "The States want, and we believe they are entitled to, all the development rights, you might say, in these submerged lands within their historic boundaries." [76]

The House Committee Report on the bill said:

> "Title II confirms and establishes the rights and claims of the 48 States, asserted and exercised by them throughout our country's history, to the lands beneath navigable waters within State boundaries and the resources within such lands and waters." [77]

In explaining the bill to the members of the House, Congressman Willis of Louisiana, a member of the Committee and a supporter of the bill, said:

> "First, it restores to the States complete title to the submerged lands up to the limit of their historic boundaries." [78]

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[74] H. R. 2948, 83d Cong., 1st Sess. See H. R. Rep. No. 215, 83d Cong., 1st Sess. (hereafter cited as House Report), 3.

[75] H. R. 4198, 83d Cong., 1st Sess.

[76] Hearings before Subcommittee No. 1, House Committee on the Judiciary, on H. R. 2948 and Similar Bills, 83d Cong., 1st Sess., 219–220.

[77] House Report 14.

[78] 99 Cong. Rec. 2504.

And on the floor Congressman Wilson of Texas, also a Committee member and supporter of the bill, explained its purpose in the following exchange:

> "Mr. WILSON of Texas. . . . Bear in mind that this is title II, the title that returns or restores this seaward boundary within the historical boundaries of the States to the States . . . .
>
> . . . . . .
>
> "Mr. HALLECK. If we stick to the provisions of the bill, then we are just being consistent with respect to the title to the land within the historic boundaries?
>
> "Mr. WILSON of Texas. That is true." [79]

The House bill, passed with this intention, was then sent to the Senate, which at that time was considering Senator Holland's bill, a virtually identical measure. After the Senate passed the Holland bill, with the two changes which the Court deems fundamental, Congressman Reed, Chairman of the House Judiciary Committee, which had reported the House bill, asked the members of the House to accede to their bill as amended by the Senate. He prefaced his remarks by saying:

> "Mr. Speaker, I trust that 3 minutes will be sufficient for me to say all that I deem necessary about this resolution." [80]

He then proceeded in these words to tell the members of the House what had happened to their bill as adopted by the Senate:

> "Titles I and II of the original bill, H. R. 4198, are now before us. *There have been no substantial changes made by the Senate in these titles.* They are practically the same as when passed by the House

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[79] *Id.*, 2567.

[80] *Id.*, 4897.

> except in a few instances where a few words and phrases here and there have been changed or deleted for clarification.
>
> "About the only thing that is substantially new in this bill is a reassertion by the Senate in section 9 which confirms the rights of the United States to the jurisdiction and control of the lands under the Continental Shelf outside of State boundaries." [81]

Relying on these assurances by Chairman Reed that there had been "no substantial changes" made in the bill by the Senate, the House without further discussion of the portions of the bill here involved proceeded to adopt the Senate version, which after being signed by the President became the Submerged Lands Act of 1953.

This, then, is the legislative history of the Submerged Lands Act, both in the Senate and in the House, which, according to the Court, shows that the sponsors and supporters of the Act completely altered their intention of restoring to the States the submerged lands within their historic boundaries, and instead left the States with what the Court allows them today. I think that the statements and actions of the supporters of the bill show on the contrary that the intention of restoring all submerged lands under all waters within historic state boundaries was plainly and explicitly stated and understood by all from the beginning, and, despite attacks from opponents of the bill, never varied. Time and time again the Senators and Congressmen repeated that the bill had not been changed in any way to diminish the rights granted to the States in the bill as originally introduced—rights which, as the Court does not dispute, included the right to all submerged lands under all waters within historic state boundaries. I would follow the understanding of the authors and supporters of the bill, and I would take them at their word.

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[81] *Ibid.* (Emphasis supplied.)

IV.

In light of this legislative history, of which I have set forth only a small part, I think that under the Submerged Lands Act California is entitled to all the submerged lands within its historic boundaries, and that it should be given an opportunity to try to prove in hearings before a Master where those historic boundaries were. The Court says that Congress left it up to this Court to expound the legal principles which shall determine California's claims, without any reference to the Submerged Lands Act's stated purpose to restore the mineral rights of the States in submerged lands within their historic boundaries. I think the Court is completely misreading the intentions of the authors and supporters of the Act. If there is anything clear in the legislative history, it is that Congress was not satisfied with the way in which this Court had decided the *California* case and did not approve of the considerations of external sovereignty used there in determining a domestic dispute over title. It seems to me the height of irony to hold that an Act passed expressly to escape the effect of this Court's opinion in this field is now construed as leaving us free to announce principles directly antithetic to the basic purpose of Congress of deciding that question for itself once and for all. True, the Congress left to the courts the exercise of their historic function to decide the factual question of where a State's historic boundaries, based on those approved when it was admitted to the Union, lie. But I think the Court errs in arguing repeatedly that by leaving it to the courts to decide the issues of fact in particular cases, Congress meant to leave it to this Court to determine the legal principles governing California's claim, and in particular to do so by adopting a formula of its own devising based on one used by the State Department in its handling of foreign affairs.

California has never been given an opportunity to appear at a hearing to determine where its boundaries were when it came into the Union. The 13-year-old report of the Master quite naturally considered this issue irrelevant since the Submerged Lands Act had not been passed at the time that report was made. Certainly it cannot be asserted that California's claim that its 1849 boundaries included these areas is frivolous. By the terms of its constitution approved by Congress when the State was admitted to the Union in 1850, and over the years, California appears to have claimed that its boundaries extended beyond its outlying islands and has claimed as inland waters within those boundaries all the bays, harbors and channels in question in this lawsuit. A statement in the original California Constitution,[82] several official maps, including the one used at the Cali-

[82] Article XII of the California Constitution of 1849, approved when the State was admitted to the Union (Act of Sept. 9, 1850, 9 Stat. 452), provides:

"The boundary of the State of California shall be as follows:

"Commencing at the point of intersection of forty-second degree of north latitude with the one hundred and twentieth degree of longitude west from Greenwich, and running south on the line of said one hundred and twentieth degree of west longitude until it intersects the thirty-ninth degree of north latitude; thence running in a straight line in a southeasterly direction to the river Colorado, at a point where it intersects the thirty-fifth degree of north latitude; thence down the middle of the channel of said river to the boundary-line between the United States and Mexico, as established by the treaty of May 30, 1848; thence running west and along said boundary-line to the Pacific Ocean, and extending therein three English miles; thence running in a northwesterly direction, and following the direction of the Pacific coast, to the forty-second degree of north latitude; thence on the line of said forty-second degree of north latitude to the place of beginning. *Also all the islands, harbors, and bays along and adjacent to the Pacific coast.*" (Emphasis supplied.) H. R. Doc. No. 357, 59th Cong., 2d Sess., 405.

California contends that the inclusion of the islands off the shore also includes within the boundaries all waters between the islands and the mainland.

fornia constitutional convention in 1849,[83] and other evidence tend to support California's contention that it historically owned these bays and the channel between the islands and the mainland. Both state and federal court decisions have held as a matter of fact and law that some of the very bays in question here, which the Government argues are not inland waters in the international sense, were within the boundaries of the State and subject to its jurisdiction. *Ocean Industries, Inc.* v. *Greene,* 15 F. 2d 862 (D. C. N. D. Cal.) (Monterey Bay); *United States* v. *Carrillo,* 13 F. Supp. 121 (D. C. S. D. Cal.) (San Pedro Bay); *People* v. *Stralla,* 14 Cal. 2d 617, 96 P. 2d 941 (Santa Monica Bay); *Ocean Industries, Inc.* v. *Superior Court,* 200 Cal. 235, 252 P. 722 (Monterey Bay). Indeed, in one of these cases, *People* v. *Stralla, supra,* the United States Attorney with the authorization of the Attorney General of the United States appeared as *amicus curiae* agreeing with the State's attorney that all of the bay in question there as here was within California's boundaries and subject to its exclusive territorial jurisdiction.[84]

There may be evidence which tends to disprove the historic validity of California's claims. But what California has asked here is an opportunity to prove where its boundaries historically were, to use the test of ownership fixed by Congress in the Submerged Lands Act rather than the foreign-relations tests set up by the Special Master 13 years ago and approved by this Court today for the first time. I think that the legislative history of the Submerged Lands Act shows without question that the definitions in it were to be read as preserving to the maritime States their claims to submerged lands and waters within

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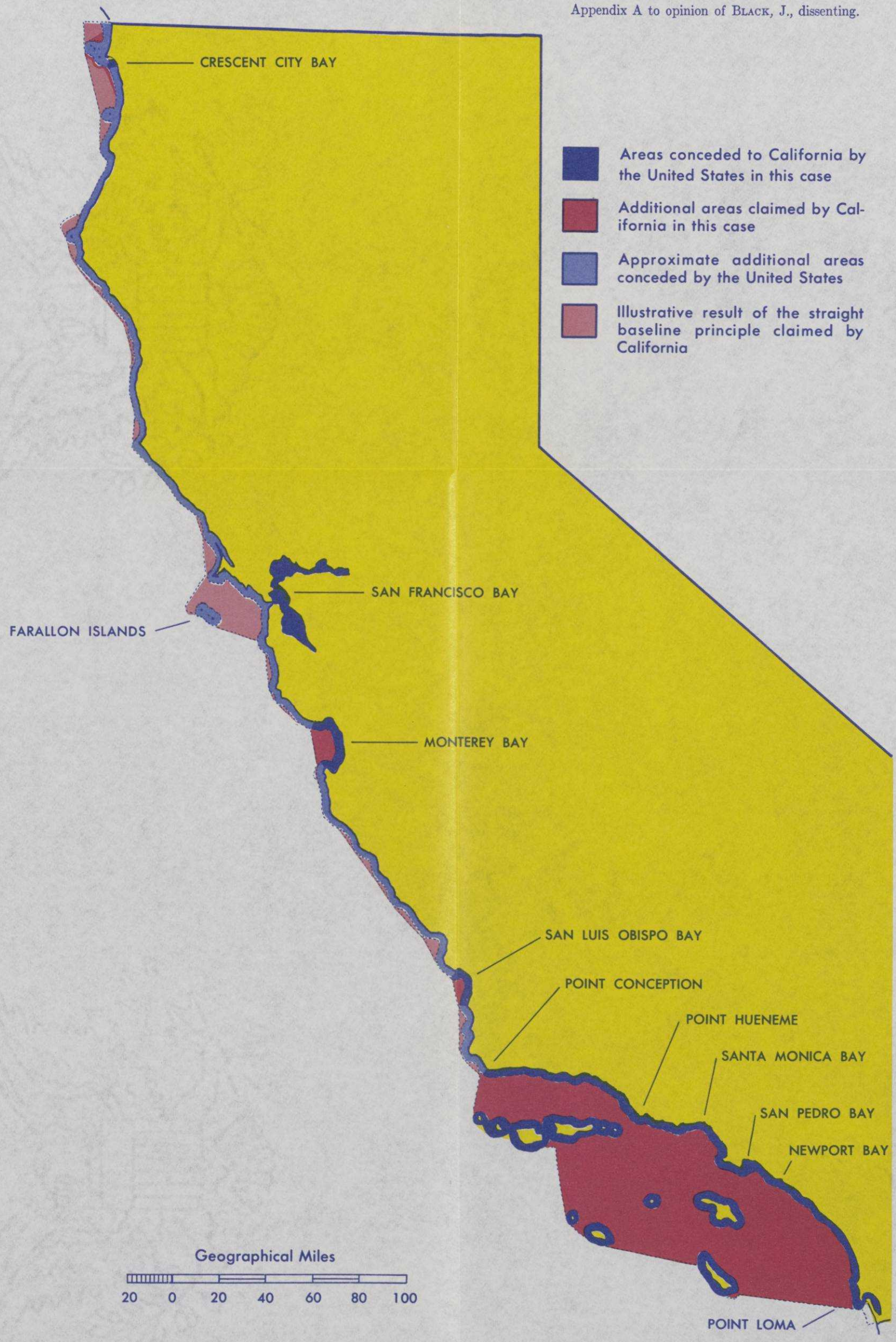
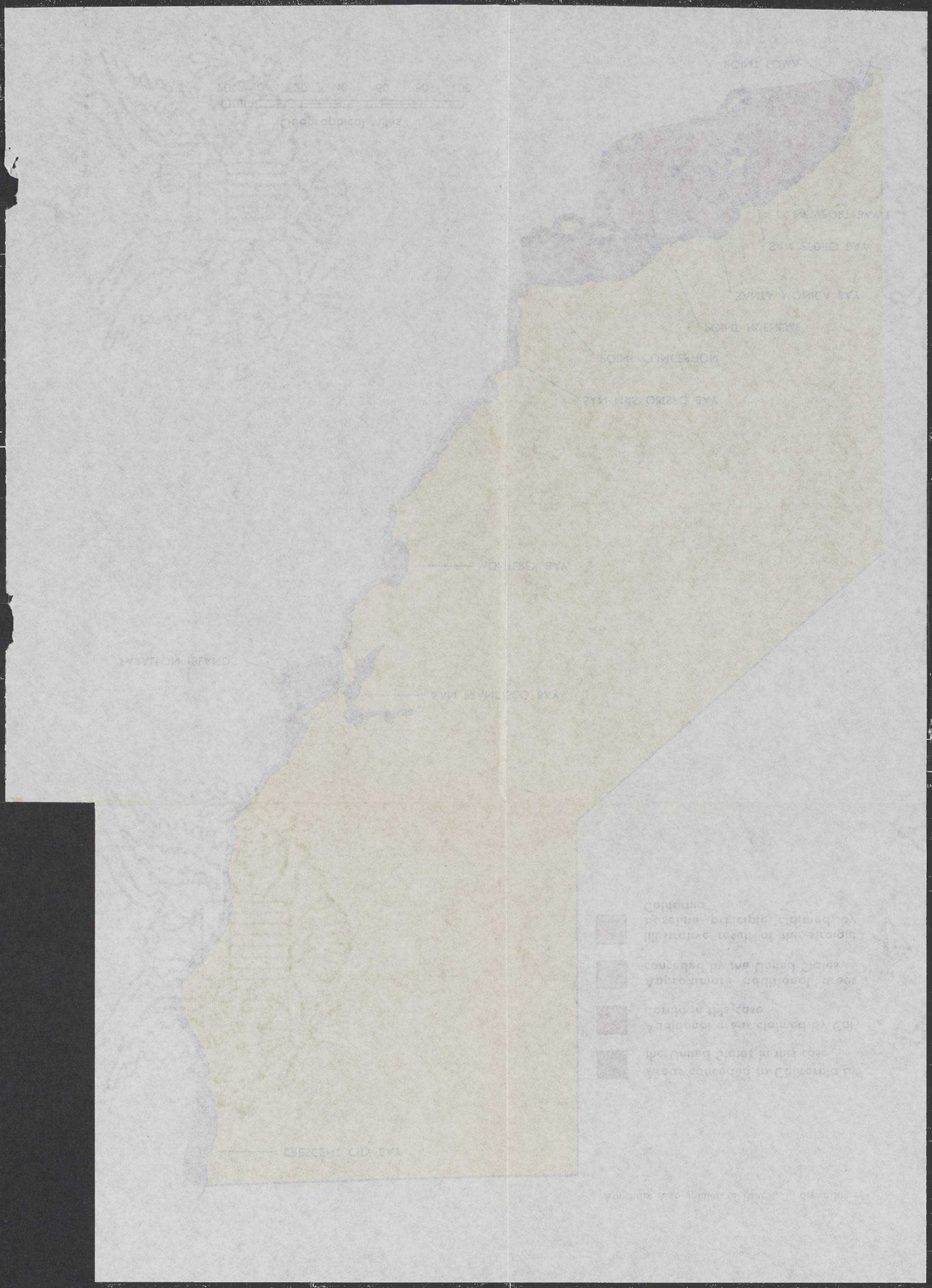
[83] Reproduced in part in Appendix D, *infra.*

[84] The brief of the United States Attorney, filed *sub nom. People* v. *Adams,* is reprinted as Appendix 3 to the Brief for the State of California in the Proceedings Before the Special Master, pp. 6–22.

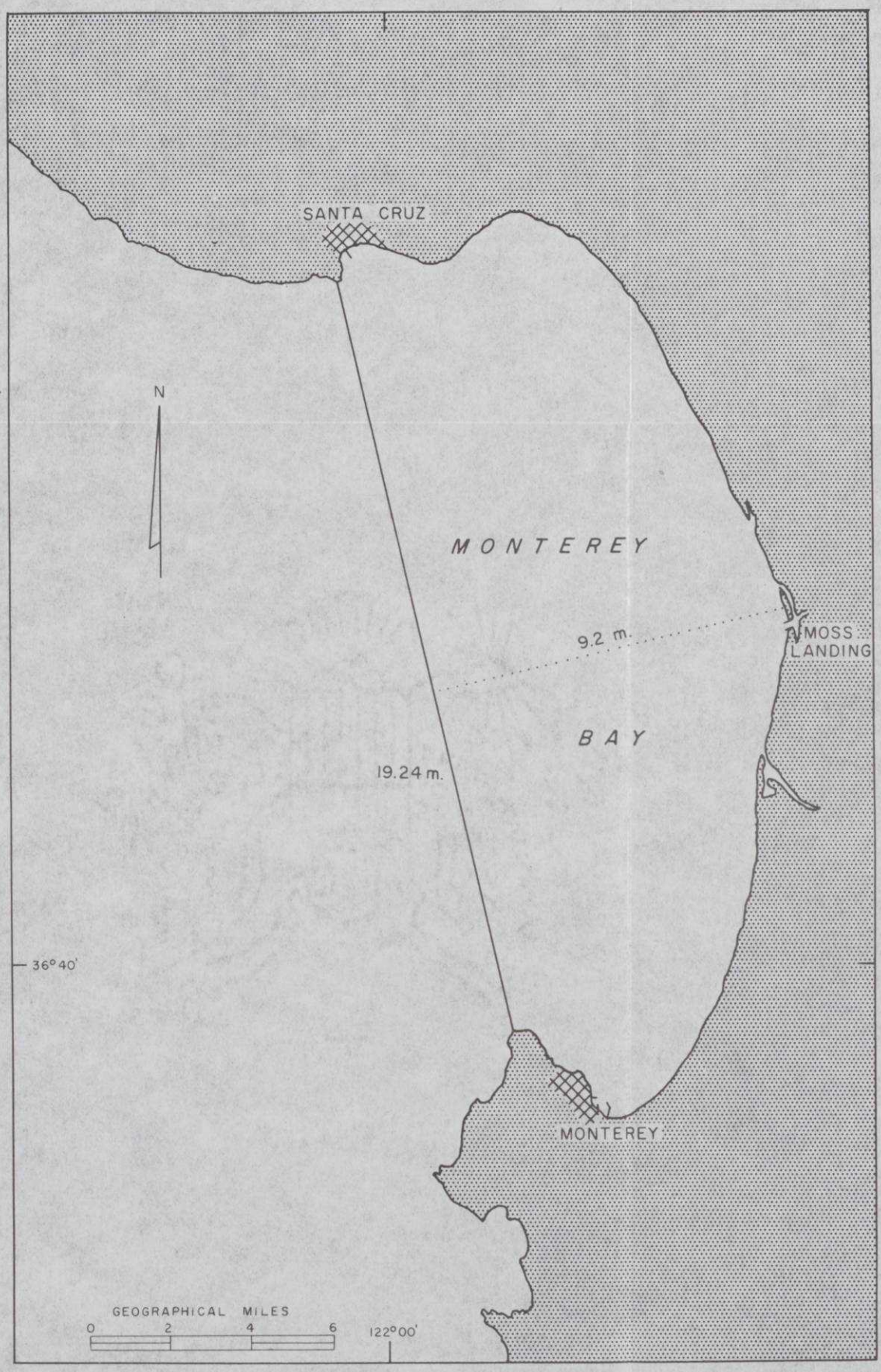
their historic boundaries, and that those who offered and supported the bill regarded California's claim to these bays, harbors and the channel out to its offshore islands as something the State would be allowed to try to prove. In litigation to determine the extent of the outer limits of the States' historic boundaries in the marginal sea in the Gulf of Mexico, Texas and Florida were allowed to prove their historic boundaries and won in *United States* v. *Louisiana,* 363 U. S. 1, and *United States* v. *Florida,* 363 U. S. 121, respectively. Louisiana, Mississippi, and Alabama based their claims in the Gulf of Mexico on historic boundaries and this Court decided against them on the facts in *United States* v. *Louisiana, supra.* All five of those States were given an opportunity to try to prove their historic boundaries, in order to determine the extent of the submerged lands to which they were entitled by the Submerged Lands Act. California has had no such opportunity. California set up as an affirmative defense in 1946 that its boundaries extended to the point it presently claims. We did not pass on this contention then, for we held that regardless of where the historic boundaries were, the United States had paramount rights in all its marginal sea. The Court today still leaves the question of the State's historic boundaries undecided, except insofar as relevant to international claims of the United States, and instead decides this case on the basis of standards of international law derived from the reasoning of the 1947 *California* case. Congress did not, I think, mean to readopt the standards of the *California* case, which the authors of the Submerged Lands Act so violently criticized, and to cut California off without any chance at all to establish ownership of these bays and channels by proving that they were within the State's historic boundaries. In order to carry out what I believe to be the congressional command in the Submerged Lands Act, I would refer the case to a Special Master to give California that chance.



733-305 O - 65 (Face p. 213, blank) No. 1

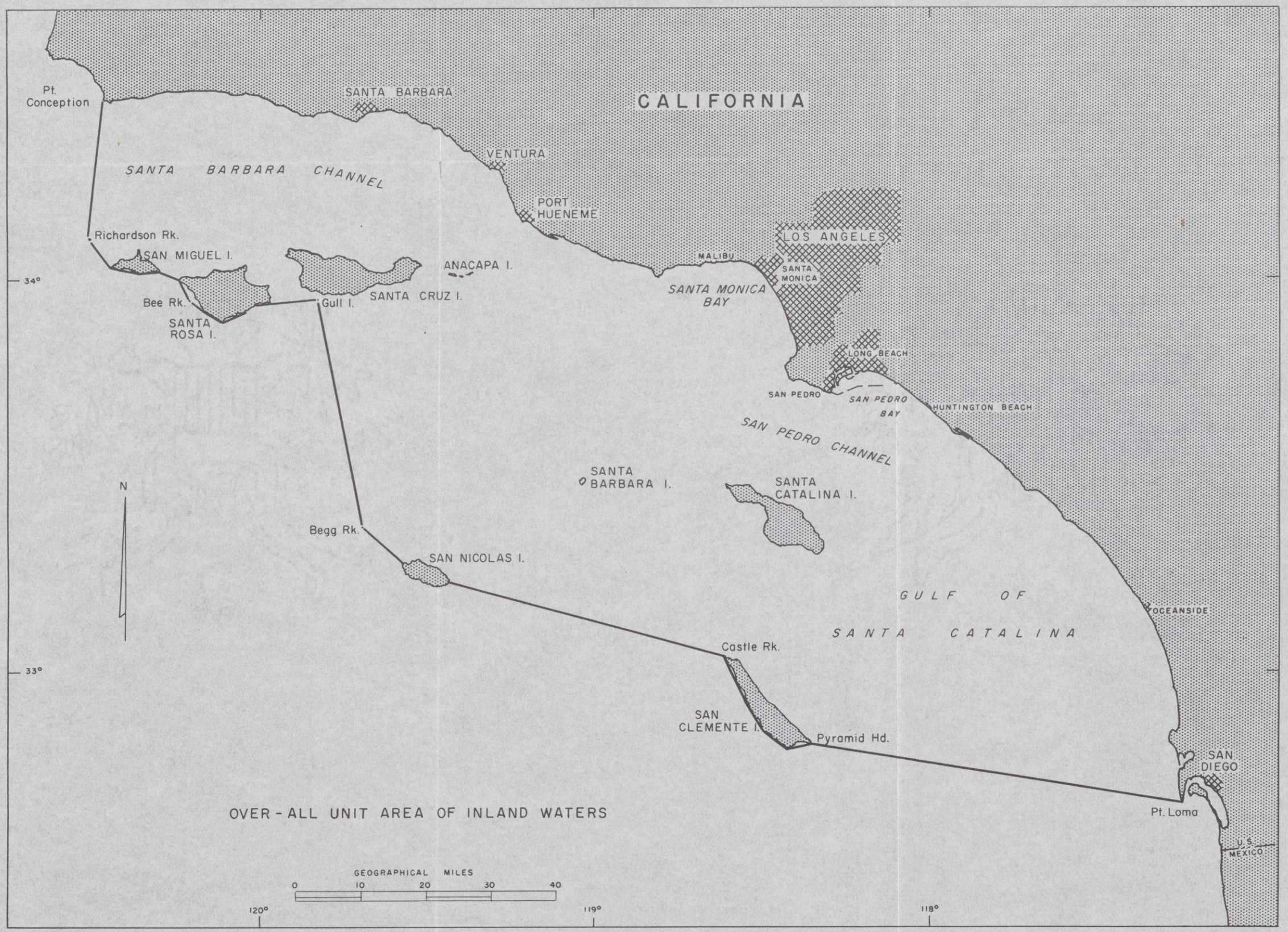


Appendix B to opinion of BLACK, J., dissenting.



773-303 O - 65 (Face back of p. 213, blank) No. 2

Appendix C to opinion of BLACK, J., dissenting.



773-303 O - 65 (Face back of p. 213, blank) No. 3

MAP OF
OREGON AND UPPER CALIFORNIA
From the Surveys of
JOHN CHARLES FREMONT
And other Authorities.

DRAWN BY CHARLES PREUSS
Under the Order of the
SENATE OF THE UNITED STATES
Washington City 1848.

Scale 1: 3,000,000

Lith. by E. Weber & Co. Balto.

Explanations

1842 or 1846 means Frémonts Exploring route in 1842 &c &c.
The arabic figures note the elevation of the country above the level of the sea.
S. before a feminine name signifies Santa, as Santa Barbara.
S. before a masculine name signifies San, as San Luis Rey. (Saint King.)
Pt. before masculine names (on the coast,) signifies Punto, or Point, according to the gender of the name, as Punto Gordo, (Big Point;) or Punta de Concepcion. (Point Conception.)
Y. before the names of islands, stands for Isla (island), as Isla de Santa Catalina, or Isla de San Clemente, Santa, or San according to the gender.

N. J. Taylor

ARCHIVUM PROVINCIAE
OLD MISSION
SANTA BARBARA, CALIF.

This Map was used by the Convention of 1849
Wm. E. Taylor
Secretary of State

63 C - 65 (Face back of p. 213, blank) No. 4

JABEN *v.* UNITED STATES.

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

No. 347. Argued March 9, 1965.—
Decided May 17, 1965.

The day before the six-year limitation period for a willful attempt to evade federal income taxes would have expired, the Government filed a complaint with a Commissioner charging petitioner with that offense. Section 6531 of the Internal Revenue Code of 1954 provides for an extension of the limitation period for nine months from the filing of a complaint. The complainant, an Internal Revenue Service Agent, swore that he had investigated petitioner's liability for the taxable year by examining petitioner's returns, by interviewing persons with whom petitioner did business and those familiar with his financial condition, and by consulting records reflecting petitioner's income; and that based on such investigation the complainant had personal knowledge of petitioner's willful attempt to evade his taxes by understating his income in the amount stated. The Commissioner determined that the complaint showed probable cause for believing that petitioner had committed the offense and issued a summons for him to appear at a preliminary hearing, which was not held, the complaint having been superseded over a month later by an indictment with a count applicable to the offense charged in the complaint. Petitioner moved to dismiss that count as insufficient because it did not show probable cause for believing that he had committed the offense, a claim which both the trial court and the Court of Appeals rejected. *Held:*

1. To initiate the time extension authorized by § 6531, it is not enough that the complaint state the essential facts of the offense of willful attempted tax evasion but the complaint must show that there is probable cause to believe that the defendant committed that offense; and all the other steps of the complaint procedure provided by Rules 3, 4 and 5 of the Federal Rules of Criminal Procedure must be satisfied. Pp. 217–221.

(a) The Commissioner's basic functions under the Rules are not just to receive a complaint such as the one here which states the essential facts of the offense but to determine that probable cause exists and to warn the defendant of his rights. Pp. 217–219.

(b) The purpose of the extension provision of § 6531 here involved is not to extend the limitation period so that the Government can develop its case but to afford the Government an opportunity to indict a criminal tax offender as to whom its case is already made in the event a grand jury is not in session at the end of the normal limitation period. Pp. 219–220.

(c) The defendant must be afforded a preliminary hearing unless, as here, a superseding indictment is obtained prior thereto. Pp. 220–221.

2. The complaint filed by an Internal Revenue Service Agent upon the basis of his investigation and containing his sworn statement of personal knowledge derived therefrom of petitioner's income afforded probable cause for believing that petitioner had committed the offense charged. *Giordenello* v. *United States*, 357 U. S. 480, distinguished. Pp. 221–225.

3. The challenged count of the indictment was not barred by the statute of limitations. P. 225.

333 F. 2d 535, affirmed.

Morris A. Shenker argued the cause for petitioner. With him on the briefs were *Bernard J. Mellman* and *Emanuel Shapiro.*

Nathan Lewin argued the cause for the United States. On the brief were *Solicitor General Cox, Assistant Attorney General Oberdorfer, Bruce J. Terris, Joseph M. Howard* and *Norman Sepenuk.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

The statute of limitations on the felony of willfully attempting to evade federal income taxes requires the Government to obtain an indictment for that offense within six years of the date of its commission, with the proviso:

> ". . . Where a complaint is instituted before a commissioner of the United States within the period above limited, the time shall be extended until the

> date which is 9 months after the date of the making of the complaint before the commissioner of the United States. . . ." Internal Revenue Code of 1954, § 6531.

On April 15, 1963, the day before the six-year period was to expire, the Government filed a complaint against petitioner Jaben charging him with willfully filing a false return for the year 1956. The Commissioner determined that the complaint showed probable cause for believing that Jaben had committed the offense, and, at the Government's request, issued a summons ordering Jaben to appear at a preliminary hearing on May 15, 1963. On May 11, 1963, the preliminary hearing on the complaint was continued to May 22, 1963, at the request of the United States Attorney, and without objection by petitioner. The preliminary hearing was never held since, on May 17, 1963, the grand jury superseded the complaint procedure by returning an indictment against Jaben, one count of which covered the 1956 attempted evasion which the complaint had charged. The indictment was not returned within the normal six-year limitation period, but if the complaint filed with the Commissioner was valid for the purpose of bringing the nine-month extension into play, then the indictment was timely. Jaben moved to dismiss the count of the indictment pertaining to 1956, arguing that the complaint was insufficient because it did not show probable cause for believing that he had committed the offense. Both the trial court and the Court of Appeals for the Eighth Circuit rejected this claim, 333 F. 2d 535. We granted certiorari, 379 U. S. 878, to resolve a conflict with *United States* v. *Greenberg,* 320 F. 2d 467, decided by the Ninth Circuit, in which an identical claim, based on a virtually identical complaint, was accepted. For reasons that follow we agree with the Eighth Circuit and affirm its judgment.

I.

Under the Government's interpretation of § 6531, probable cause is not relevant to the complaint's ability to initiate the extension of the limitation period. Section 6531 provides that the nine-month extension is brought into play "[w]here a complaint is instituted before a commissioner of the United States" within the six-year period of limitations (*supra,* pp. 215–216). Rule 3 of the Federal Rules of Criminal Procedure defines a complaint as

> ". . . a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a commissioner or other officer empowered to commit persons charged with offenses against the United States."

Since the Government's complaint stated the essential facts constituting the offense of attempted tax evasion and was made upon oath before a Commissioner, the Government contends that regardless of the complaint's adequacy for any other purposes, it was valid for the purpose of triggering the nine-month extension of the limitation period whether or not it showed probable cause. The Government would, thus, totally ignore the further steps in the complaint procedure required by Rules 4 and 5.[1] Indeed

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[1] Rule 4 (a) provides:

"If it appears from the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the request of the attorney for the government a summons instead of a warrant shall issue. . . . If a defendant fails to appear in response to the summons, a warrant shall issue."

Rule 5 (c) provides:

". . . If the defendant waives preliminary examination, the commissioner shall forthwith hold him to answer in the district court. If the defendant does not waive examination, the commissioner shall

it follows from its position that once having filed a complaint, the Government need not further pursue the complaint procedure at all, and, in the event that the defendant pressed for a preliminary hearing and obtained a dismissal of the complaint, that the Government could nonetheless rely upon the complaint as having extended the limitation period.

We do not accept the Government's interpretation. Its effort to look solely to Rule 3 and ignore the requirements of the Rules that follow would deprive the institution of the complaint before the Commissioner of any independent meaning which might rationally have led Congress to fasten upon it as the method for initiating the nine-month extension. The Commissioner's function, on that view, would be merely to rubber-stamp the complaint. The Government seeks to give his role importance in its version of § 6531 by pointing out that he would administer the oath, receive the complaint, and make sure that it stated facts constituting the offense (a requirement which would be met by a charge in the words of the statute); but surely these matters are essentially formalities. The argument ignores the fact that the Commissioner's basic functions under the Rules are to make the judgment that probable cause exists and to warn defendants of their rights. Furthermore, if we do not look beyond Rule 3, there is no provision for notifying the defendant that he has been charged and the period of limitations extended. (Indeed, it is not until we reach Rule 4 that we find a requirement that the complaint

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hear the evidence within a reasonable time. The defendant may cross-examine witnesses against him and may introduce evidence in his own behalf. If from the evidence it appears to the commissioner that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the commissioner shall forthwith hold him to answer in the district court; otherwise the commissioner shall discharge him. . . ."

must show who it was that committed the offense.) Notice to a criminal defendant is usually achieved by service upon him of the summons or arrest warrant provided for in Rule 4. Neither is appropriate absent a judgment by the Commissioner that the complaint shows probable cause, and no other form of notice is specified by the Rules.

More basically, the evident statutory purpose of the nine-month extension provision is to afford the Government an opportunity to indict criminal tax offenders in the event that a grand jury is not in session at the end of the normal limitation period. This is confirmed by the immediate precursor of the present section which provided for an extension "until the discharge of the grand jury at its next session within the district." I. R. C. 1939, § 3748 (a).[2] Clearly the statute was not meant to grant the Government greater time in which to make its case (a result which could have been accomplished simply by making the normal period of limitation six years and nine months), but rather was intended to deal with the situa-

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[2] This provision was introduced into the tax laws in 1884 by way of an amendment to a bill providing for a limitation period. In proposing the amendment on the floor of the Senate, Senator Hoar stated:

"As has already been said, this limitation which purports to be a limitation of two years is in point of fact in many districts but a limitation of one year, because the indictment must be found by a grand jury within two years within the commission of the offense. If the offense be concealed, or if it be discovered a year before the grand jury meet, it would be too late to make the prosecution. I move this amendment:

" '*Provided,* That where a complaint shall be instituted before a commissioner of the United States within the period above limited, the period shall be extended until the discharge of the grand jury at its next session within the district.'

"I think there will be no objection to that." 15 Cong. Rec. 5771. The time for which the period was extended was changed to nine months in 1954.

tion in which the Government has its case made within the normal limitation period but cannot obtain an indictment because of the grand jury schedule. The Government's interpretation does not reflect this statutory intention, for it provides no safeguard whatever to prevent the Government from filing a complaint at a time when it does not have its case made, and then using the nine-month period to make it.

The better view of § 6531 is that the complaint, to initiate the time extension, must be adequate to begin effectively the criminal process prescribed by the Federal Criminal Rules. It must be sufficient to justify the next steps in the process—those of notifying the defendant and bringing him before the Commissioner for a preliminary hearing. To do so the complaint must satisfy the probable cause requirement of Rule 4. Furthermore, we think that the Government must proceed through the further steps of the complaint procedure by affording the defendant a preliminary hearing as required by Rule 5, unless before the preliminary hearing is held, the grand jury supersedes the complaint procedure by returning an indictment. This interpretation of the statute reflects its purpose by insuring that within a reasonable time following the filing of the complaint, either the Commissioner will decide whether there is sufficient cause to bind the defendant over for grand jury action, or the grand jury itself will have decided whether or not to indict. A dismissal of the complaint before the indictment is returned would vitiate the time extension.

In this case the Government obtained a superseding indictment before any preliminary hearing took place. Under the interpretation which we have adopted it follows that if the complaint satisfied the requirements of Rules 3 and 4, in particular the probable cause standard of Rule 4, then the nine-month extension had come into

play and had not been cut off by any later dismissal of the complaint.[3] We turn then to the question whether the complaint showed probable cause.

II.

The *Jaben* complaint read as follows:

> "The undersigned complainant, being duly sworn, states:
>
> "That he is a Special Agent of the Internal Revenue Service and, in the performance of the duties imposed on him by law, he has conducted an investigation of the Federal income tax liability of Max Jaben for the calendar year 1956, by examining the said taxpayer's tax return for the year 1956 and other years; by identifying and interviewing third parties with whom the said taxpayer did business; by consulting public and private records reflecting the said taxpayer's income; and by interviewing third

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[3] A dissenting opinion accepts our interpretation of the statute, but, likening petitioner's position to one who is incarcerated awaiting a preliminary hearing, argues that petitioner was not scheduled to have a preliminary hearing within the "reasonable time" required by Rule 5 (c). We reject this view of the case. (1) Although the statute should be interpreted to reflect its intent, it greatly overplays that intent to invest the procedure required to effectuate it with the same sense of urgency which might be thought to attend a preliminary hearing for an incarcerated prisoner. (2) A defendant can fully protect himself from unreasonable delay by moving for advancement of the preliminary hearing date and by objecting to any postponements. Petitioner made no such motion or objection, and at no point in the trial or appellate review of this case has he objected to the scheduling of the preliminary hearing.

Mallory v. *United States*, 354 U. S. 449, did not deal with preliminary hearings under Rule 5 (c), but with the requirement of Rule 5 (a) that a person who is arrested must be taken "without unnecessary delay before the nearest available commissioner" so that he can be apprised of his rights.

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persons having knowledge of the said taxpayer's financial condition.

"That based on the aforesaid investigation, the complainant has personal knowledge that on or about the 16th day of April, 1957, at Kansas City, Missouri, in the Western District of Missouri, Max Jaben did unlawfully and wilfully attempt to evade and defeat the income taxes due and owing by him to the United States of America for the calendar year 1956, by filing and causing to be filed with the District Director of Internal Revenue for the District of Kansas City, Missouri, at Kansas City, Missouri, a false and fraudulent income tax return, wherein he stated that his taxable income for the calendar year 1956 was $17,665.31, and that the amount of tax due and owing thereon was the sum of $6,017.32, when in fact his taxable income for the said calendar year was the sum of $40,001.76 upon which said taxable income he owed to the United States of America an income tax of $14,562.99.

"[Signed] David A. Thompson
"Special Agent
"Internal Revenue Service
"Kansas City, Missouri."

Petitioner argues that the complaint is basically indistinguishable from that which the Court found wanting in *Giordenello* v. *United States,* 357 U. S. 480. The *Giordenello* complaint read in relevant part:

"The undersigned complainant being duly sworn states: That on or about January 26, 1956, at Houston, Texas in the Southern District of Texas, Veto Giordenello did receive, conceal, etc., narcotic drugs, to-wit: heroin hydrochloride with knowledge of unlawful importation; in violation of Section 174, Title 21, United States Code.

"And the complainant further states that he believes that ———— ————[4] are material witnesses in relation to this charge."

The complaints there and here are materially distinguishable. Information in a complaint alleging the commission of a crime falls into two categories: (1) that information which, if true, would directly indicate commission of the crime charged, and (2) that which relates to the source of the directly incriminating information. The *Giordenello* complaint gave no source information whatsoever. Its directly incriminating information consisted merely of an allegation in the words of the statute, and even then incomplete, supplemented by "on or about January 26, 1956, at Houston." If the *Jaben* complaint were as barren, it would have stated simply that "on or about April 16, 1957, at Kansas City, Missouri, Jaben willfully filed a false income tax return." In fact, it gave dollars-and-cents figures for the amounts which allegedly should have been returned and the amounts actually returned. As to sources, the affiant indicated that he, in his official capacity, had personally conducted an investigation in the course of which he had examined the taxpayer's returns for 1956 and other years, interviewed third persons with whom the taxpayer did business and others having knowledge of his financial condition, and consulted public and private records reflecting the taxpayer's income; and that the conclusion that Jaben had committed the offense was based upon this investigation.

Beyond the substance of the complaint there is a material distinction in the nature of the offense charged. Some offenses are subject to putative establishment by blunt and concise factual allegations, *e. g.*, "*A* saw narcotics in *B*'s possession," whereas "*A* saw *B* file a false tax return" does not mean very much in a tax evasion case.

[4] So in original.

Establishment of grounds for belief that the offense of tax evasion has been committed often requires a reconstruction of the taxpayer's income from many individually unrevealing facts which are not susceptible of a concise statement in a complaint. Furthermore, unlike narcotics informants, for example, whose credibility may often be suspect, the sources in this tax evasion case are much less likely to produce false or untrustworthy information. Thus, whereas some supporting information concerning the credibility of informants in narcotics cases or other common garden varieties of crime may be required, such information is not so necessary in the context of the case before us.

Giordenello v. *United States, supra,* and *Aguilar* v. *Texas,* 378 U. S. 108, established that a magistrate is intended to make a neutral judgment that resort to further criminal process is justified. A complaint must provide a foundation for that judgment. It must provide the affiant's answer to the magistrate's hypothetical question, "What makes you think that the defendant committed the offense charged?" This does not reflect a requirement that the Commissioner ignore the credibility of the complaining witness. There is a difference between disbelieving the affiant and requiring him to indicate some basis for his allegations. Obviously any reliance upon factual allegations necessarily entails some degree of reliance upon the credibility of the source. See, *e. g., Johnson* v. *United States,* 333 U. S. 10, 13. Nor does it indicate that each factual allegation which the affiant puts forth must be independently documented, or that each and every fact which contributed to his conclusions be spelled out in the complaint. Compare *United States* v. *Ventresca,* 380 U. S. 102. It simply requires that enough information be presented to the Commissioner to enable him to make the judgment that the charges are not

capricious and are sufficiently supported to justify bringing into play the further steps of the criminal process.

In this instance the issue of probable cause comes down to the adequacy of the basis given for the allegation that petitioner's income was $40,001.76 instead of the $17,665.31 he had reported. This is not the type of fact that can be physically observed. The amount of petitioner's income could only be determined by examining records and interviewing third persons familiar with petitioner's financial condition. Compare *Holland* v. *United States,* 348 U. S. 121. Here the affiant, a Special Agent of the Internal Revenue Service, swore that he had conducted just such an investigation and thereafter swore that he had personal knowledge as to petitioner's actual income. In such circumstances, the magistrate would be justified in accepting the agent's judgment of what he "saw" without requiring him to bring the records and persons to court, to list and total the items of unreported income or to otherwise explain how petitioner's actual income was calculated.

We conclude that the challenged count of this indictment is not time-barred.

Affirmed.

MR. JUSTICE WHITE, with whom MR. JUSTICE BLACK joins, concurring in the judgment.

The Court rejects the contention of the Government that the filing of a complaint fulfilling the requirements of Rule 3 suffices to trigger the provisions of § 6531 extending the period of limitations. The Court holds that the complaint must also satisfy the probable-cause requirement of Rule 4 and that the Government must proceed with the preliminary hearing under Rule 5. Section 6531 provides that "[w]here a complaint is instituted" the time shall be extended. Assuming that the "complaint"

specified in this provision is one satisfying Rule 4 as well as Rule 3, the statute affords no basis whatever for the Court's holding that the Government must proceed with the preliminary hearing and that "dismissal of the complaint before the indictment is returned would vitiate the time extension," *ante,* at 220, even though an indictment were obtained thereafter within the nine-month period. The statute is unequivocal that the period is extended when the complaint is instituted and, in my view, requires nothing further of the Government.

Because I agree with the Court that the complaint supplied an adequate foundation for the Commissioner's determination that probable cause existed, I deem it unnecessary to consider whether § 6531 contemplates a complaint establishing probable cause or merely compliance with Rule 3.

MR. JUSTICE GOLDBERG, with whom THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS join, concurring in part and dissenting in part.

I.

I agree with the Court that the purpose of the tolling provision in the statute of limitations before us, as evidenced by its language and its legislative history, is to avoid penalizing the Government when a criminal defendant cannot be indicted merely because no grand jury is sitting at the time the limitation period expires. In keeping with this purpose, the Government ought to be allowed to present a case prepared before the expiration of the limitation period to the grand jury when it next convenes, but it ought not to be allowed to take advantage of a nine-month extension to prepare a case which was not ready for submission before the end of the statutory period. I believe that the Court, therefore, is quite correct in rejecting the Government's argument that the

filing of any complaint which meets the formal requirements of Rule 3 of the Federal Rules of Criminal Procedure is sufficient to toll the statute of limitations. The Government's argument would, in effect, allow it an additional nine months in every case. Rather, the view that I would accept as correct is that the only complaint that tolls the statute is one that begins effectively the criminal process prescribed by the Federal Rules.

I further agree with the Court that a complaint has effectively begun the criminal process only when all of the pre-indictment steps detailed in Rules 3, 4, and 5 have been taken. Only when it has been determined in the preliminary hearing required by Rule 5 that probable cause exists "to believe that an offense has been committed and that the defendant has committed it" can we say with any assurance that the complaint was not filed merely to extend the limitation period, but that it was a complaint which does what a complaint normally does, namely, starts the criminal procedure in motion. A speedy determination by a disinterested magistrate—the United States Commissioner—that probable cause exists also provides assurance that the Government in fact had a case ready for presentation to the grand jury before the limitation period expired. Thus I join the Court's opinion insofar as it holds that only those complaints toll the statute of limitations which also start the criminal machinery in motion by leading to a preliminary hearing in compliance with Rules 3, 4, and 5.

II.

The facts of this case lead me to conclude, however, that the procedure outlined in Rule 5 was not followed, for a preliminary hearing was not scheduled within a reasonable time as the Rule requires. A person who is arrested must be taken before a Commissioner immediately and informed

of his rights, and a preliminary examination to determine whether probable cause exists to believe that an offense has been committed and that he committed it must be held at that time or promptly thereafter. See *Mallory* v. *United States*, 354 U. S. 449, 454. This preliminary examination must be held promptly because it normally determines whether holding a defendant in custody pending action by the grand jury is warranted. Even when a defendant is not actually in custody but is free on bond a speedy hearing is still necessary, for he should not be required to maintain bond unless it has been determined by a disinterested Commissioner that probable cause exists. While normally when a summons is issued, rather than an arrest warrant, the period of time within which a preliminary examination must be held may be longer than when a defendant has been arrested, for he is not in custody nor need he post bond, in the special circumstances present here involving a statutory period of repose, it is important that the preliminary hearing be held with expedition similar to that necessary when the defendant is in custody or free on bond. A prompt preliminary hearing in this type of case serves as a check to prevent the Government from beginning a prosecution when a case is not ready for submission to the grand jury before the limitation period expires. I should think that, in view of this purpose, it would be sound practice, consistent with the statutory policy of repose, to hold the preliminary hearing and secure a magistrate's determination of probable cause before the statutory period expires. Only then can it be certain that the Government has evidence showing probable cause at hand before the end of the limitation period. And, in an exceptional case, such as the one before us, where the complaint is filed so late that the hearing cannot be held within the limitation period, surely, in order to serve the statutory purpose, the hearing must be held with the same promptness as when

a defendant is in custody or on bond, even though a summons, rather than an arrest warrant, was issued.

In this case the complaint was filed the day before the limitation period expired. In accordance with the Government's wishes, the summons was made returnable 30 days later, and, at the Government's subsequent request, the hearing date was postponed an additional week. In my view, to schedule a hearing to be held 36 days after the limitation period expires, when that hearing normally should have been held before the end of the statutory time for prosecution, is not to schedule it within the "reasonable time" which the Court itself says is required. Nor can it be said under the circumstances here present that the petitioner waived the right to have the probable cause determination made promptly. Whatever the burden on a defendant may be under other circumstances to move to accelerate a date fixed by a Commissioner upon an *ex parte* application of the Government, it would be unjust to apply any waiver concept here. Until the holding today there was no authoritative construction that the statute, read in conjunction with the Federal Criminal Rules, entitles the charged defendant to a hearing after issuance of a summons. There is no basis, therefore, for concluding that petitioner, by being silent under these circumstances, knowingly and consciously waived his right to a speedy hearing and determination of whether probable cause existed.

I would conclude that a preliminary hearing, which was to determine whether probable cause existed, was not held within a "reasonable time" as Rule 5 requires, and that since the Government did not fulfill all the requirements of this Rule, the complaint did not serve to institute the proper pre-indictment criminal procedure. It therefore, in my view, was not the type of complaint that tolls the statute of limitations under Internal Revenue Code § 6531, and petitioner's prosecution should be barred.

III.

While it is not necessary, under my view of this case, to determine whether the complaint showed probable cause, since the Court reaches that issue, I believe it appropriate to express my disagreement with its conclusion. If the Court means that the standard of probable cause required for the issuance of a summons directing the defendant to appear for a preliminary hearing is the same as the standard required for issuance of a search warrant or an arrest warrant, which will place the defendant under immediate physical restraint, the complaint before us fails to demonstrate probable cause, for it clearly fails to meet the standards laid down in *Giordenello* v. *United States,* 357 U. S. 480, and *Aguilar* v. *Texas,* 378 U. S. 108.

This Court in *Giordenello* held that a finding of "probable cause" must be made by a "neutral and detached" magistrate who "assess[es] *independently* the probability that . . . [an accused] committed the crime charged." *Giordenello* v. *United States, supra,* at 486–487. (Emphasis added.) The Court also stated,

> "The purpose of the complaint . . . is to enable the appropriate magistrate . . . to determine whether the 'probable cause' required to support a warrant exists. The Commissioner must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion that the person whose arrest is sought has committed a crime." *Id.,* at 486.

In order to make an independent determination that probable cause exists, the magistrate must be presented with more than the fact that the affiant or his sources are reliable and the affiant's conclusion that the accused is believed to have committed a crime. As we stated in

Aguilar v. *Texas, supra,* at 114, the magistrate or commissioner must also "be informed of some of the underlying circumstances" supporting the affiant's belief that the accused has committed a crime. This statement was recently reaffirmed in *United States* v. *Ventresca,* 380 U. S. 102, 108. To allow a magistrate to find probable cause when a reliable affiant does no more than swear, as the agent did here, that his investigations led him to conclude that petitioner understated his income, is to remove the function of making an independent determination of probable cause from the hands of the magistrate and to place it in the hands of the agent.

The affidavit presented by the revenue agent in this case does no more than list the agent's *sources* of information—examination of public and private records and interviews with third persons—and concludes that the petitioner understated his income. Without the slightest indication of what the agent's examinations and interviews revealed, it is impossible for a "neutral and detached magistrate" to determine for himself whether probable cause existed. The agent need not set out *all* the information obtained, but, as we held in *Aguilar, some* of the underlying facts must be indicated.

I cannot accept the Court's view that the nature of the offense charged in this case excuses the Government from setting out *any* of the facts underlying the conclusion that the petitioner understated his income. Surely, defendants in criminal tax cases—whether based upon a net worth theory or otherwise—are as entitled to a magistrate's independent determination of "probable cause" as any other defendants. Furthermore, I do not believe it impossible, or even very difficult, for the Government to give some indication of the type of information obtained through its perusal of petitioner's books and its interviews with third persons. But I do believe that it is impossible for a magistrate or commissioner to determine

whether probable cause exists without some indication of the facts which led the affiant to his conclusion.

It is as true of the complaint before us as of the affidavit in *Giordenello* that "it is difficult to understand how the Commissioner could be expected to assess independently the probability that petitioner committed the crime charged." 357 U. S., at 486–487. In my view, *Giordenello* and *Aguilar* require that the complaint not only state the ultimate conclusion that petitioner understated his income and set out the *sources* of information leading to that conclusion, but that it also set out some of the underlying facts upon which that conclusion is based. Since none of the underlying facts are set out in the complaint before us, I conclude that the probable cause standard of *Giordenello* and *Aguilar* is not met. For all the reasons stated, I would reverse the judgment of the Court of Appeals.

UNITED STATES *v.* ATLAS LIFE INSURANCE CO.

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

No. 489. Argued March 31, 1965.—Decided May 17, 1965.

The Life Insurance Company Income Tax Act of 1959 provides for the division of an insurance company's investment income into two parts, the policyholders' share (to be added to reserves for payment of future claims), and the company's share, with a pro rata allocation of each item of income to each share including tax-exempt interest. Only the company's share is subject to the tax and from this share the Act permits a deduction of its pro rata amount of tax-exempt interest to arrive at taxable income. The Act contains exceptions where the application of the definition of taxable investment income results in the imposition of tax on "any interest which under section 103 is excluded from gross income"—interest earned on state and municipal bonds—in which case an adjustment shall be made to prevent such imposition. Respondent claims that it is entitled to deduct from total income both the full amount of the policyholders' share and the full amount of exempt interest received; otherwise, by assigning part of the exempt interest to the policyholders' share, the statute would place more taxable income in the company's share and thus the company would pay more tax because it has received tax-exempt interest, since it must allocate a portion thereof to the reserve account. Respondent sued in District Court for a refund claiming an adjustment under the statutory exceptions and asserting that the treatment of tax-exempt interest was unconstitutional and contrary to *National Life Ins. Co.* v. *United States*, 277 U. S. 508, and *Missouri Ins. Co.* v. *Gehner*, 281 U. S. 313. The District Court rejected these claims but the Court of Appeals reversed. *Held:* There is no statutory or constitutional barrier to the application in this case of the pro rata formula set forth in the Act to compute respondent's taxable income, and the statutory exceptions are not applicable. Pp. 239–251.

(a) The legislative history clearly shows that Congress intended the pro rata formula to be of general application and that Congress did not consider it to lay a tax on exempt interest in the usual case, such as this one. Pp. 239–242.

(b) This tax is not inconsistent with the rule of *National Life, supra,* that "one may not be subjected to greater burdens upon his taxable property solely because he owns some that is free," since the displacement of taxable income with exempt income under the formula reduces the tax base and the burden per taxable dollar remains the same. Pp. 243–244.

(c) The extension of the rule of *National Life* in *Missouri Ins. Co.* v. *Gehner, supra,* was unexplained and was not followed in *Denman* v. *Slayton,* 282 U. S. 514, decided but one term after *Gehner,* and *Helvering* v. *Independent Life Ins. Co.,* 292 U. S. 371, which hold that disallowance of an expense attributable to the production of nontaxable income is not to impose an impermissible tax on the exempt receipts. Pp. 244–247.

(d) Respondent has an obligation to set aside each year a large portion of its income for the benefit of policyholders, from whom it obtains most of its funds; the policyholders' claim against income is sufficiently direct and immediate to justify treating a major portion of income not as income to the company but as income to the policyholders. Pp. 247–248.

(e) The pro rata formula treats taxable and exempt income in the same way, deeming that both are saddled with an equal share of the company's obligation to policyholders. It does no more than charge the exempt income with a fair share of the burdens properly allocable to it, which is permissible under *Denman* and *Independent Life, supra.* Pp. 249–251.

333 F. 2d 389, reversed.

Solicitor General Cox argued the cause for the United States. With him on the briefs were *Assistant Attorney General Oberdorfer, Wayne G. Barnett* and *Philip B. Heymann.*

Norris Darrell argued the cause for respondent. With him on the brief were *M. Bernard Aidinoff, Kendyl K. Monroe, Dickson M. Saunders* and *Thomas C. Thompson, Jr.*

Daniel B. Goldberg argued the cause for certain state and local governments, as *amici curiae,* urging affirmance. With him on the brief were *Grant Sawyer,* Governor of Nevada, *John J. O'Connell,* Attorney General of Wash-

ington, *Jack P. F. Gremillion,* Attorney General of Louisiana, *John J. Gunther, Charles S. Rhyne, Robert B. Mathias, C. D. Ward* and *Charles E. Norman.*

MR. JUSTICE WHITE delivered the opinion of the Court.

The Life Insurance Company Income Tax Act of 1959,[1] which represents a comprehensive overhaul of the laws relating to the taxation of life insurance companies, places a tax upon taxable investment income and upon one-half the amount by which total gain from operations exceeds taxable investment income.[2] In arriving at taxable investment income and gain from operations, the 1959 Act, consistent with prior law in this regard, recognizes that

[1] 73 Stat. 112, Int. Rev. Code §§ 801–820.

[2] The Act provides a three-phase procedure for taxation of life insurance companies. Under phase one the tax base represents the life insurance company's share of income from interest, dividends, rents, royalties, and other investment sources less investment expenses and deduction of the company's share of exempt interest and other items. § 804. Under phase two the tax base represents 50% of the excess of total net income from all sources—"gain from operations"—over taxable investment income. This excess, referred to as underwriting gain, consists of mortality and loading savings, *i. e.,* savings resulting from fewer deaths per age group than were assumed in establishing premiums and reserves and any reduced expenses in servicing policies. § 809. It also may include a portion of investment income which is not taxed under phase one, since in calculating the amount of investment income to be allocated to policyholders under phase two, the reserves are multiplied by the company's required interest rate rather than the company's average or current earnings rate used in phase one. § 809 (a). This difference is minimized by other adjustments to the reserve under phase one whenever the applicable earnings rate exceeds or is less than the assumed rate. See note 4, *infra.* If there is underwriting loss under phase two, the entire loss is deducted from the taxable investment income as computed under phase one. If there is gain, half of this gain is added to the phase one tax base.

Phase three imposes a tax on certain underwriting gains made available to shareholders which are not taxed under phase two. § 815.

life insurance companies are required by law to maintain policyholder reserves to meet future claims, that they normally add to these reserves a large portion of their investment income and that these annual reserve increments should not be subjected to tax. The question in this case is whether the method by which Congress chose to deal with these annual reserve increments and to arrive at taxable investment income places an impermissible tax on the interest earned by life insurance companies from municipal bonds, within the meaning of the Act itself and the relevant cases in this Court.

I.

The 1959 Act defines life insurance company reserves,[3] provides a rather intricate method for establishing the amount which for tax purposes is deemed to be added each year to these reserves [4] and in § 804 prescribes a division

[3] Int. Rev. Code § 801 (b)(1).

Life insurance reserves may be defined simply as that fund which, together with future premiums and interest will be sufficient to pay future claims. Under the statute such reserves are defined as amounts computed or estimated on the basis of recognized mortality tables and assumed rates of interest, set aside to mature or liquidate future claims arising from life, annuity, and noncancellable health and accident insurance policies, and required by law, with some exceptions not pertinent here.

[4] Int. Rev. Code § 805.

This amount is called the "policy and other contract liability requirements" and is determined by a series of calculations. The company's "adjusted life insurance reserves" are multiplied by the current earnings rate or the average earnings rate for the current and four preceding years, whichever is lower. "Adjusted life insurance reserves" are the life insurance reserves required by law adjusted for the difference between the assumed interest rate used by the company in computing such reserves and the actual earnings rate. The reserve is reduced by 10% for every 1% by which the applicable earnings rate exceeds the company's assumed interest rate. To the amount so calculated are added pension plan reserves multiplied by the current earnings rate and interest paid during the taxable year.

of the investment income of an insurance company into two parts, the policyholders' share and the company's share.[5] More specifically, the total amount to be added to the reserve—the policy and other contract liability requirements—is divided by the total investment yield [6] and the resulting percentage is used to allocate each item of investment income, including tax-exempt interest, partly to the policyholders and partly to the company. In this case, approximately 85% of each item of income was assigned to the policyholders and was, as the Act provides, excluded from the company's taxable income. The remainder of each item is considered to be the company's share of investment income. From the total amount allocated to the company the Act allows a deduction of the company's share of tax-exempt interest (and of other nontaxed items) to arrive at taxable investment income.[7] The taxable investment income for the pur-

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[5] Int. Rev. Code § 804 (a)(1):

"Exclusion of policyholders' share of investment yield.—The policyholders' share of each and every item of investment yield (including tax-exempt interest, partially tax-exempt interest, and dividends received) of any life insurance company shall not be included in taxable investment income. For purposes of the preceding sentence, the policyholders' share of any item shall be that percentage obtained by dividing the policy and other contract liability requirements by the investment yield; except that if the policy and other contract liability requirements exceed the investment yield, then the policyholders' share of any item shall be 100 percent."

[6] Investment yield is gross investment income less specified deductions, including investment expenses, real estate expenses, depreciation, depletion and trade and business expenses, subject to certain exceptions and limitations. Int. Rev. Code §§ 804 (b), (c).

[7] Included in the investment yield which is divided between the policyholders and company, in addition to interest on state and municipal bonds, are partially nontaxed interest on federal bonds and intracorporate dividends. Section 804 (a)(2) permits deduction of the company's nontaxed share of these items along with interest on exempt bonds.

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poses of arriving at the portion of gain from operations which is to be subjected to tax is arrived at by much the same process as above described.

Section 804 (a)(6), however, provides as follows:

> "(6) *Exception.*—If it is established in any case that the application of the definition of taxable investment income contained in paragraph (2) results in the imposition of tax on—
>
> "(A) any interest which under section 103 is excluded from gross income,
>
> . . . . .
>
> "adjustment shall be made to the extent necessary to prevent such imposition."

An identical exception is contained in § 809 (b)(4) providing for the calculation of gain from operation. Section 103 of the Code provides for the exclusion from gross income of the interest earned on state and municipal bonds.

According to the Commissioner, the company's income from investments includes only its pro rata share of tax-exempt interest and since this share is fully deductible by the company, the law imposes no tax at all on exempt interest. Atlas, however, claims otherwise: The company is entitled to deduct from total investment income both the full amount of the annual addition to reserves and the full amount of exempt interest received; by assigning part of exempt interest to the reserve account rather than assigning only taxable income, the Act necessarily places more taxable income in the company's share of investment return; the company thus pays more tax because it has received tax-exempt interest of which a portion must be allocated to the reserve account.

Claiming that it was entitled to the adjustments provided for in §§ 804 (a)(6) and 809 (b)(4), the company sued for a refund in the District Court. The complaint

also alleged the treatment accorded tax-exempt interest was contrary to the Constitution of the United States and to the principles set forth in *National Life Ins. Co.* v. *United States,* 277 U. S. 508, and *Missouri Ins. Co.* v. *Gehner,* 281 U. S. 313. The District Court rejected these claims, 216 F. Supp. 457 (D. C. N. D. Okla.), but the Court of Appeals reversed, 333 F. 2d 389 (C. A. 10th Cir.). That court considered the 1959 formula to impose a tax on tax-exempt interest within the meaning of the *National Life* and *Gehner* cases and hence by the terms of §§ 804 (a)(6) and 809 (b)(4) an adjustment was required. We granted certiorari to consider this important question relating to the taxation of life insurance companies. 379 U. S. 927.

We reverse, holding that in the circumstances of this case there is no statutory or constitutional barrier to the application of the formula provided in § 804 to arrive at the taxable investment income of Atlas and hence the exceptions provided in §§ 804 (a)(6) and 809 (b)(4) are not applicable.

II.

Under the 1959 Act the undivided part of a life insurance company's assets represented by its reserves is considered as a fund held for the benefit of the policyholders. The required annual addition to reserve is drawn from the income earned from investments of the commingled assets. Each item of investment income, including tax-exempt interest, is divided into a policyholders' share and a company's share. The policyholders' share is added to the reserve, is excluded for tax purposes from the gross income of the company and is not taxed to either the company or the policyholders. The company's share of investment income is then reduced by its share of tax-exempt interest to arrive at taxable investment income. It is apparent from the face of the Act that this is the formula which Congress intended to be of general appli-

cation and that Congress did not consider the application of the formula in the usual case to lay a tax on exempt interest, or to have any such effect, so as to bring the exception clauses into operation. Otherwise the exception would become the rule and the general formula of little, if any, utility.

This view of the section is fully supported by its legislative history. As H. R. 4245 came to the Senate after passage by the House, it provided for deducting the annual addition to reserves, but to prevent a "double deduction" reduced the deduction by a portion of tax-exempt interest.[8] This treatment of tax-exempt interest was one of many subjects of comment in the extensive hearings which followed before the Senate Committee on Finance. It was repeatedly and strongly argued by many that life insurance companies were entitled to deduct in full both the annual addition to reserves and the entire amount of tax-exempt interest, that the provisions of H. R. 4245 with regard to tax-exempt interest discriminated against the insurance companies, that the section was constitutionally invalid under the *National Life* and *Gehner* cases and that the formula would have adverse consequences on the municipal bond market.[9] Other witnesses, however, including those representing the Treasury Department, supported the bill and considered it to accord proper and constitutionally permissible treatment to municipal bond interest.[10] It is very doubtful that there remained at the conclusion of the hearings any unexplored facts or legal arguments concerning this aspect of the bill.

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[8] H. R. Rep. No. 34, 86th Cong., 1st Sess., 28–29, 31.

[9] See Hearings on H. R. 4245 before the Senate Committee on Finance, 86th Cong., 1st Sess., 45–46, 48, 121, 187, 248–266, 304–318, 404–409, 516–518, 613–614, 694–699, 700–702.

[10] *Id.*, at 19–60, 646–654.

The Senate Committee, with the hearings behind it, reported out a bill with amendments which, among other things, took a decidedly different approach to the ascertainment of the annual addition to reserves and to the handling of tax-exempt interest. This approach was essentially that which is contained in the statute as described above.[11]

As time and again stated in the Committee Report and by those who presented the bill on the floor of the Senate, the purpose of the formula provided by the Senate was to avoid taxing exempt interest.[12] Senator Byrd, the

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[11] S. Rep. No. 291, 86th Cong., 1st Sess., 6.

[12] As stated in the Senate Report on H. R. 4245, the Committee on Finance was of the opinion that the formula provided in § 804 did not impose a tax on tax-exempt interest—"[t]he purpose of your committee in providing this treatment is to exempt a life insurance company from tax on any tax-exempt interest . . . ." S. Rep. No. 291, 86th Cong., 1st Sess., 17. See also pp. 6, 18, 46.

Senator Byrd in explaining the bill to the Senate presented a letter from the Department of the Treasury which said that the formula provided by the bill did not place a tax on exempt interest, that the additional language of § 804 (a)(6) establishing an exception was not at all necessary but that just to make sure it had been provided that in any case the formula resulted in taxing interest excludable under § 103, an adjustment would be made. 105 Cong. Rec. 8402. The more detailed explanation of the bill by Senator Byrd was to the same effect. 105 Cong. Rec. 8404. Senator Curtis, a member of the Senate Committee, delivered a comprehensive speech in support of the bill in the course of which he said that his earlier concern about inadvertently taxing exempt interest had been fully met by the bill. After reviewing the formula, with examples illustrating its operation and without mentioning the exception of § 804 (a)(6) he remarked that "no tax-exempt income or credits of life insurance companies will be included in the tax base of such companies, under this bill. This should allay any fear that any constitutional provision is transgressed." 105 Cong. Rec. 8429. The bill passed in the Senate, 105 Cong. Rec. 8438, and the Conference Report, which

Committee chairman, stated that "[i]n providing the formula I have described to the Senate it was the intention of the committee not to impose any tax on tax-exempt interest." 105 Cong. Rec. 8401. It is extremely difficult to read the hearings, the reports, and the debates without concluding that in the opinion of Congress the formula it provided, without adjustment under § 804 (a)(6) or § 809 (b)(4), did not impose a tax on exempt interest in either the statutory or constitutional sense.

None of the materials called to our attention, however, explain why or for what purpose §§ 804 (a)(6) and 809 (b)(4) were added to the Act, save for mere recitations in the reports and the debates that an adjustment would be required in any case where tax-exempt interest was shown to be subjected to tax.[13] It may be that Congress thought that peculiar facts and circumstances in particular cases would require different treatment than the general formula would provide. If this was the case, no examples or illustrations of these aberrational situations were referred to or explained. And if this was to be the sole function of §§ 804 (a)(6) and 809 (b)(4) the Commissioner is surely entitled to a judgment, for there is

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may be said to have adopted the Senate approach to the problem involved in this case, H. R. Rep. No. 520, 86th Cong., 1st Sess., 4, 14–15, 105 Cong. Rec. 10412, was adopted by both Houses.

[13] See S. Rep. No. 291, 86th Cong., 1st Sess., 17, 24; H. R. Rep. No. 520, 86th Cong., 1st Sess., 15; 105 Cong. Rec. 8401, 10400, 10412–10414. Representative Mills, Chairman of the House Ways and Means Committee, stated:

"As agreed to by the conferees, the final version of H. R. 4245 extensively rewrites the provisions of the House bill dealing with tax-exempt interest and dividends received, including the addition of a proviso to the effect that if in any particular case the formula under the bill does not provide the proper treatment of these items, appropriate adjustment will be made. It is my belief that the appropriate deduction was allowed by the House bill and that these provisions of the final bill, which closely follow the Senate amendment, make no change of substance." 105 Cong. Rec. 10412.

nothing in this record indicating that this case is anything but the typical one to which Congress intended to apply the general formula.

Atlas, however, in effect views §§ 804 (a)(6) and 809 (b)(4) as built-in safety valves to be triggered and become fully operational by a final determination in a lawsuit, such as this one, that the new formula, contrary to the judgment of Congress, does indeed place a tax on exempt interest within the meaning of the relevant cases heretofore decided by this Court. This is not an unreasonable view of the purposes which Congress may have had in writing the exception provisions into the Act, but we cannot agree with Atlas or the Court of Appeals that *National Life,* 277 U. S. 508, and *Gehner,* 281 U. S. 313, provide the necessary triggering to bring these clauses into play.

III.

In *National Life,* the Court struck down a provision of the federal income tax law which permitted insurance companies to exclude municipal bond interest from their gross income and at the same time reduce the reserve deduction otherwise available to the company by the full amount of the exempt interest which was excluded from gross income, the result being that the company paid as much tax as it would have paid had the same total income been entirely from taxable sources. Under that provision, a company shifting its investments from taxable to nontaxable securities would have lowered neither its taxable income nor its total tax. As compared with the company deriving its income only from taxable sources, the enterprise with the same total amount of investment income derived partly from exempt and partly from taxable sources would pay more tax per dollar of taxable gross income, *i. e.,* taxable income before deduction for the reserve. Unable to perceive any purpose in reducing one deduction by the full amount of another, save for an

intent to impose a tax on exempt receipts, the Court ruled that "[o]ne may not be subjected to greater burdens upon his taxable property solely because he owns some that is free." 277 U. S., at 519.

It is obvious that this is not the case under the 1959 Act. Here, a company receiving income from both exempt and nonexempt securities pays not the same, but less, tax than the company with an identical amount of gross income derived from only taxable sources. As the taxpayer displaces taxable income with exempt income, the size of the tax base, and the tax, are reduced. The tax burden per taxable dollar of taxable gross income does not increase, but remains the same.[14]

But Atlas urges that the rule of *National Life*, when read in conjunction with *Missouri Ins. Co.* v. *Gehner*, 281 U. S. 313, means that a tax is imposed on tax-exempt interest whenever the liability of the taxpayer receiving such interest is greater than it would have been if the tax-exempt interest had not been received. In the *Gehner* case a state ad valorem property tax was imposed on the net personal property of an insurance company. Exempt government bonds were excluded from the tax base but only 84%—the ratio of taxable assets to total assets—of

[14] Where income from taxable sources is displaced by the same amount of income from exempt bonds, the total investment yield and the reserve exclusion remain the same. Thus the proportion of each item of income allocated to the policyholders' share and the company's share also remains the same. Since the amount of exempt income allocated to the company is larger and that share is fully deductible, the tax base is correspondingly smaller.

The result is a decrease in the tax commensurate with the extent to which the company's taxable income is taxed. With a fully taxable investment yield of $1,000,000 and a policyholders' share of $800,000, 20% of the investment yield would be included in gain from operations. Gain from operations would be reduced by 20% of any part of the investment yield that was shifted from taxable income to tax-exempt income.

the legally required reserves was allowed as a deduction. The Court considered *National Life* to hold that "a State may not subject one to a greater burden upon his taxable property merely because he owns tax-exempt government securities." 281 U. S., at 321. This paraphrase of the *National Life* holding was correct and states the principle for which both of these cases have been cited.[15] But it is obvious that the tax in *Gehner* did not infringe this rule. Reducing the reserve deduction by the ratio of taxable assets to total assets did not result in an increased tax burden on taxable property. The Court, nevertheless, invalidated the tax because "the ownership of United States bonds is made the basis of denying the full exemption which is accorded to those who own no such bonds." 281 U. S., at 321–322. The company was apparently to have the full benefit of both the exclusion of the government bonds and the deduction for the full amount of policyholder reserves. Otherwise, the law would not disregard the ownership of the bonds in exacting the tax. The *Gehner* case does, therefore, condemn more than an increase in the tax rate on taxable dollars for those owning exempt securities.

This extension of *National Life* was soon repudiated.[16] In *Denman* v. *Slayton,* 282 U. S. 514, decided but one Term after *Gehner,* the Court unanimously upheld § 214 (a)(2) of the Revenue Act of 1921, which permitted the deduction of interest generally except interest on

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[15] See, *e. g., Denman* v. *Slayton,* 282 U. S. 514, 519; *Helvering* v. *Independent Life Ins. Co.,* 292 U. S. 371, 381; *Schuylkill Trust Co.* v. *Pennsylvania,* 296 U. S. 113, 119; *New Jersey Realty Title Ins. Co.* v. *Division of Tax Appeals,* 338 U. S. 665, 674–675, 677.

[16] This is true insofar as *Gehner* rested on a doctrine of implied constitutional immunity. The tax there was a state ad valorem property tax said to be on federal bonds and then, as now, a federal statute insulated such bonds from state taxation. See 73 Stat. 622, § 105 (a), 31 U. S. C. § 742 (1958 ed., Supp. V).

indebtedness incurred or continued to purchase or carry tax-exempt securities, as applied to a dealer in securities whose disallowed interest incurred to carry exempt bonds exceeded the return from the bonds. Although the parties argued both *Gehner* and *National Life,* the Court did not mention *Gehner* and said *National Life* was radically different, since the dealer "was not in effect required to pay more upon his taxable receipts than was demanded of others who enjoyed like incomes solely because he was the recipient of interest from tax-free securities." 282 U. S., at 519. But he was, like the taxpayer in *Gehner,* required to pay a greater tax than would be the case if the exempt securities were ignored entirely; absent ownership of the exempt bonds, the disallowed interest would have been deductible from taxable income. Ownership of exempt bonds was indeed the "basis of denying the full exemption which is accorded to those who own no such bonds." *Gehner,* 281 U. S., at 321–322. Thus the Court not only refused to follow the implications of *Gehner* in the context of the federal income tax, but also sustained the propriety of disallowing an expense attributable to the production of nontaxable income. Such disallowance was not to impose an impermissible burden on the exempt receipts. "While guaranteed exemptions must be strictly observed, this obligation is not inconsistent with reasonable classification designed to subject all to the payment of their just share of a burden fairly imposed." 282 U. S., at 519.

The Court followed *Denman,* and again distinguished *National Life,* without mentioning *Gehner,* in *Helvering* v. *Independent Life Ins. Co.,* 292 U. S. 371, where the Revenue Acts of 1921 and 1924 permitted deduction of depreciation and expenses of buildings owned by life insurance companies only if the company included in its gross income the rental value of space it occupied. The Court assumed that the rental value was not income,

and could not constitutionally be taxed, but upheld the measure as a valid apportionment of expenses attributable to the space occupied by the company and the space for which rents are received. *Denman* v. *Slayton* was said to make clear the distinction between a permissible exclusion from deductions of the amount attributable to exempt income and a tax on exempt property. This apportionment fell within the former and did not lay a tax on the rental value of the owner's use of his building.

IV.

We affirm the principle announced in *Denman* and *Independent Life* that the tax laws may require tax-exempt income to pay its way. In our view, Congress has done no more in the 1959 Act than to particularize this principle in connection with taxing the income of life insurance companies.

An insurance company obtains most of its funds from premiums paid to it by policyholders in exchange for the company's promise to pay future death claims and other benefits. The company is also obligated to maintain reserves, which, if they are to be adequate to pay future claims, must grow at a sufficient rate each year. The receipt of premiums necessarily entails the creation of reserves and additions to reserves from investment income. Thus the insurance company is not only permitted to invest, but it *must* invest; and it *must* return to the reserve a large portion of its investment income. As no insurance company would deny, there is sufficient economic and legal substance to the company's obligation to return a large portion of investment income to policyholder reserves to warrant or require the exclusion of investment income so employed from the taxable income of the company. And we think the policyholders' claim against investment income is sufficiently direct and immediate to justify the Congress in treating a major

part of investment income not as income to the company but as income to the policyholders. Whether viewed as income to the policyholders, or, as Atlas would have it, as the principal cost of carrying on the business which produces the company's net investment income,[17] a large

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[17] The statement of Stanford Rothschild, a representative of one of the life insurance companies objecting to the proposed pro rata disallowance of the reserve deduction in H. R. 4245, before the Senate Committee provides a clear exposition of this view:

"Life insurance companies have two kinds of gross investment income: On the one hand, there is the income which has to be set aside to cover actual expenses and the liabilities to the policyholders. On the other hand, there is free investment income, not needed for the operation of the company; this excess income is fully taxable.

"All tax laws dealing with life insurance companies have allowed deductions from income for required interest. Even the excise tax formulas have provided for such deductions. The basic reason for this deduction is that required interest cannot be construed to be true income or profit, just as the cost of goods sold by a merchant must be eliminated from his gross income." Hearings on H. R. 4245 before the Senate Committee on Finance, 86th Cong., 1st Sess., 696–697.

Under this view of the reserve increment, we think this case is strikingly similar to *Denman* v. *Slayton*. On this theory the reserve increment is an accrued expense in the nature of interest on the funds obtained from policyholders for investment, and the denial of that part of the deduction which exempt income bears to total investment receipts represents disallowance of an expense attributable to the production of exempt income, which is precisely what *Denman* permits. It is argued, however, that the rule of *Denman* disallowing deduction of exempt interest is limited to "but for" situations: Interest incurred on loans used to purchase exempt bonds may be disallowed only where there would have been no interest charge except for the purchase of exempt securities. It is by no means clear that this is not the case here, for there is a relationship between the amount of the reserve increment, representing interest on funds obtained from policyholders, and the amount of a company's investments, exempt or otherwise, unless it be assumed that a company does not sell policies and obtain funds for the purpose of investment. However this may be, we do not read *Denman* so narrowly. We think interest can be

portion of total investment income is credited to the reserve and eliminated from taxable investment income.

Under the 1959 Act this portion is arrived at by subjecting each dollar of investment income, whatever its source, to a pro rata share of the obligation owed by the company to the policyholders, from whom the invested funds are chiefly obtained. In our view, there is nothing inherently arbitrary or irrational in such a formula for setting aside that share of investment income which must be committed to the reserves. Undoubtedly policyholders have not contracted to have assigned to them either taxable or exempt dollars. Their claim can be fully satisfied with either, but it runs against all investment income, whatever its source. We see no sound reason, legal or economic, for distinguishing between the taxable and nontaxable dollar or for saying that the reserve must be satisfied by resort to taxable income alone. Interest on municipal bonds may be exempt from tax, but this does not carry with it exemption from the company's obligation to add a large portion of investment income to policyholder reserve.[18]

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said to be incurred or continued as a cost of producing exempt income whenever a taxpayer borrows for the purpose of making investments and in fact invests funds in exempt securities.

There was no problem of allocating interest in *Denman,* but surely no one doubts that the case would not have been any different if the dealer there borrowed and purchased taxable securities with half the loan and used the other half to purchase exempt securities.

[18] There is nothing to the argument that since the reserve obligation remains the same whether there is exempt income or not, no part of the obligation is fairly chargeable to exempt income. It could as well be argued that because the reserve requirement is the same whether there is taxable income or not, none of the reserve increment may be obtained by pre-empting taxable income. The fact is that the annual addition to reserve must be made up from investment income, whatever its source, and the company owes to its policyholders a share of the tax-exempt dollar fully as much and in the same sense that it owes a part of the taxable dollar.

Tax exemption cannot change the substance of this undertaking. And the statutory formula allocating so much of each dollar of investment income as the reserve increment bears to total investment income is quite clearly consistent with it. For the formula treats taxable and exempt income in the same way, deeming that both are saddled with an equal share of the company's obligation to policyholders. We think that Congress can treat the receipts from investment of a pool of fungible assets in this manner and that the taxpayer's desired allocation of these receipts is not constitutionally required.

It is said, however, that a company investing "idle" assets in municipal bonds and thereby adding exempt interest to its income will pay more tax, and at a higher rate per dollar of taxable income, than if it had not made the additional investment at all. Likewise, it is claimed, two companies having the same amount of investment in taxable securities and the same amount of commitments to policyholders, but one having some municipal securities in addition, will have a different tax bill, the latter paying more tax and at a higher rate because of the ownership of the bonds. But insurance companies accumulate funds to invest and they must, and do, invest. Their choice is not between investing and not investing at all but between investing in one kind of securities or another. Under the 1959 formula investing in exempt securities results in a lower total tax than investing in taxable securities and the tax rate per taxable dollar does not increase. It is likewise unrealistic to compare the tax burdens of two companies, each with the same amount of taxable income but one with exempt income in addition, and to assume in the comparison that each has the same obligation to augment reserves. The likelihood is that if the one company has additional exempt income which the other does not have, it also has more assets, larger reserves and a greater reserve claim against invest-

ment income, which will reduce taxable income and substantially offset the alleged disparity in tax burden between the two companies.

Undoubtedly the 1959 Act does not wholly ignore the receipt of tax-exempt interest in arriving at taxable investment income. The formula does pre-empt a share of tax-exempt interest for policyholders and the company will pay more than it would if it had the full benefit of the exclusion for reserve additions and at the same time could reduce taxable income by the full amount of exempt interest. But this result necessarily follows from the application of the principle of charging exempt income with a fair share of the burdens properly allocable to it. In the last analysis Atlas' insistence on both the full reserve and exempt-income exclusions is tantamount to saying that those who purchase exempt securities instead of taxable ones are constitutionally entitled to reduce their tax liability and to pay less tax per taxable dollar than those owning no such securities. The doctrine of intergovernmental immunity does not require such a benefit to be conferred on the ownership of municipal bonds. Congress was entitled to allocate investment income to policyholders as it did. The formula "was designed to subject all to the payment of their just share of a burden fairly imposed," *Denman, supra,* at 519, and as applied to this case did not impose a tax on income excludable under § 103 of the Internal Revenue Code.

Reversed.

WATERMAN STEAMSHIP CORP. *v.* UNITED STATES.

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

No. 245. Argued April 26–27, 1965.—Decided May 17, 1965.

During the period 1942–1946 petitioner purchased 18 government-built ships from the United States Maritime Commission for $46,973,167 after a trade-in allowance for four of its own ships. Petitioner then chartered the ships back to the Government, receiving $13,430,431 in charter hire, on which petitioner paid federal income taxes. The subsequently enacted Merchant Ship Sales Act of 1946 provided for sale of war-built ships well below the Commission's wartime prices. By treating wartime sales as made when the Act was passed, § 9 afforded ship purchasers like petitioner an opportunity to apply for a downward adjustment by reducing the purchase price paid to the new statutory price and unwinding the wartime transactions, including tax payments. Section 9 (c)(1) required an applicant for adjustment to agree, *inter alia,* that pre-Act government charter hire received be treated for federal tax purposes as not having been received or accrued as income but as a repayment of the purchase price. Petitioner applied for and by agreement was given such an adjustment, the statutory sales price being fixed at $17,685,424 (giving petitioner a gross sales price adjustment of $29,287,743); and the unwinding of the pre-Act transactions left the Government a net credit after appropriate tax adjustments of $8,818,838, which reduced petitioner's net 1946 sales price adjustment to $20,468,904. In its federal income tax returns for 1947–1950 petitioner took depreciation on the vessels on the basis of the $17,685,424 statutory sales price, but in 1959 sued for a refund, contending that its real cost (and hence its basis for depreciation) was the difference, amounting to $26,504,263, between the original sales price and the net 1946 sales price adjustment credited to petitioner. The Government contended that under the statutory scheme petitioner's real cost was the $17,685,424 statutory sales price. The difference of $8,818,838 between the two figures was the net credit in the Government's favor received by petitioner in charter hire from the Government and which petitioner contended was received as income and therefore could not be taken to reduce its cost; while the Government,

conceding that amount to have been originally received as income, contended that it had to be treated under the statutory unwinding scheme as a return of capital. The District Court upheld petitioner's position and the Court of Appeals reversed. *Held:* Under the Act the $8,818,838 net charter hire must be treated as a return of capital against petitioner's original purchase price of the ships which thus, along with the 1946 lump-sum payment to petitioner of $20,468,904, reduced petitioner's cost, and hence its basis for depreciation, to $17,685,424, the statutory sales price. Pp. 260–270.

(a) To realize the statutory purpose of putting petitioner and the Government in the positions they would have occupied had the sales been made on the 1946 statutory enactment date petitioner had to refund the $8,818,838 net charter hire. P. 261.

(b) Though petitioner received $20,468,904 in the form of a lump-sum payment as of 1946, it had also received $8,818,838 in 1942–1946 in government payments which but for its ownership of the ships (which the Act unwinds) it would not have received. P. 262.

(c) As part of the statutory unwinding, petitioner's income taxes were recomputed on the statutory assumptions that it did not receive charter hire on the 18 ships bought from the Government in 1942–1946, but that it did receive charter hire on the four ships it traded in, and interest on its investment in the 18 ships. P. 263.

(d) Petitioner's position would result in the anomaly that due to the unwinding operation it would pay no federal income taxes on the $8,818,838, which it claims is income. P. 264.

(e) Petitioner's position that the original ship acquisition costs be adjusted to 1946 prices but that its costs as a basis for depreciation should relate back to the original acquisition dates contravenes the terms and legislative history of the Act, the date of whose enactment fixes the sales prices, and its purpose of putting pre-Act and post-Act purchasers "on exactly the same basis." Pp. 264–266.

(f) Congressional passage in 1950 of a "clarifying" amendment to the 1946 Act which would have provided the tax result urged by petitioner, vetoed by President Truman, would not supplant the contemporaneous intent of the Congress which enacted the statute. *Fogarty* v. *United States,* 340 U. S. 8, followed. Pp. 268–270.

330 F. 2d 128, affirmed.

773-305 O-65-21

John W. McConnell, Jr., argued the cause for petitioner. With him on the briefs was *William H. Armbrecht.*

Paul Bender argued the cause for the United States, *pro hac vice,* by special leave of Court. With him on the brief were *Solicitor General Cox, Assistant Attorney General Oberdorfer, I. Henry Kutz, David I. Granger* and *Theodore D. Peyser.*

Briefs of *amici curiae,* urging reversal, were filed by *Jacquin D. Bierman* for National Bulk Carriers, Inc., and by *George E. McMurray, Jr., Cornelius P. Coughlan, H. Maurice Fridlund* and *Leslie C. Krusen* for American Merchant Marine Institute, Inc.

MR. JUSTICE GOLDBERG delivered the opinion of the Court.

This case involves the tax consequences of the purchase by petitioner of a number of ships from the United States Government during the Second World War and the subsequent post-war refund by the Government, pursuant to an Act of Congress, of a substantial portion of the purchase price.

At various times during the years 1942 through 1946, petitioner purchased from the United States Maritime Commission a total of 18 ships that had been built by the United States Government. It paid a total of $46,973,167 for these vessels (after an allowance for the trade-in by petitioner of four of its own ships).[1] The vessels purchased by petitioner were immediately chartered back, by bareboat charters, to the United States so that the Gov-

[1] The total purchase price (without trade-in allowance) was $49,582,767. The trade-in allowance was $2,609,600. The net purchase price of $46,973,167 consisted of a cash payment of $6,449,107 and mortgage indebtedness of $40,524,060. For simplicity in this opinion, the $46,973,167 purchase price will be considered as if it had all been paid in cash.

ernment continued to operate them.[2] The United States paid a total of $13,430,431 in charter hire to petitioner for the wartime use of these ships during the years 1942 through 1946, which amount petitioner reported in its federal income tax returns for those years.

On March 8, 1946, Congress enacted the Merchant Ship Sales Act of 1946, 60 Stat. 41, as amended, 50 U. S. C. App. § 1735 *et seq.* (1958 ed.), which gave American citizens the right to purchase war-built ships from the United States at statutory sales prices which were substantially below the prices at which such vessels were sold by the Commission during the war. Section 9 of the Act, 50 U. S. C. App. § 1742 (1958 ed.), provided the opportunity, upon application, for those, like petitioner, who had bought ships during the war years to obtain a downward adjustment in their sales price "by treating the vessel as if it were being sold to the applicant on the date of the enactment of this Act [March 8, 1946], and not before that time." The details of a § 9 adjustment are complex. They consist, however, essentially of two parts: (1) an adjustment in the purchase price down to the new statutory price (§§ 9 (b)(1)–(4)); and (2) an unwinding of the transactions, including tax payments, that occurred as a result of the sale prior to 1946 (§§ 9 (b)(5), (6), (c)(1)).[3]

Petitioner applied for a downward adjustment of the sales price of its 18 ships purchased prior to the Act. The Maritime Commission granted such an adjustment,

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[2] The last two vessels purchased by petitioner were delivered on February 27, 1946, and March 11, 1946, respectively, one just before and the other just after the date (March 8, 1946) of the Merchant Ship Sales Act of 1946, 60 Stat. 41, as amended, 50 U. S. C. App. § 1735 *et seq.* (1958 ed.), and thus were not chartered to the Government before the Act.

[3] Section 9, in relevant part, is set out in the Appendix to this opinion.

determining that under the statute the sales price of these vessels should be $17,685,424.[4] Petitioner therefore was credited with $29,287,743, the difference between the statutory sales price and the original price of $46,973,167.[5]

The pre-Act transactions were then unwound, pursuant to the statute, as follows: (1) the Government was credited $13,430,431, representing the charter hire which had been paid by the Government to petitioner for use of the 18 vessels from 1942 to 1946; [6] (2) the Government was debited $1,495,125, representing charter hire which would have been paid by the Government to petitioner prior to 1946 for use of the four ships traded in by petitioner on the original purchase; (3) the Government was debited $2,686,262, representing a return of the interest petitioner paid on the mortgages and interest income which petitioner could have earned on the cash invested in the 18 vessels prior to the date of the Act had this cash not been so committed; and (4) the Government was debited $430,206, representing an overpayment by petitioner of federal income taxes, which, under the Act, were recalculated to give effect to the foregoing unwinding.[7] The sum of the unwinding credits and debits was a net credit in favor of the Government of $8,818,838. This

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[4] As with the original purchase price, this figure is after an allowance for the four vessels traded in. The statutory price (without trade-in allowance) was $17,997,981. The trade-in allowance (determined under § 9 (b)(7) was $312,557. For simplicity, in the remainder of this opinion, the figures used for both the original sales price and the statutory sales price will be those of the price after these respective trade-in allowances.

[5] The total $29,287,743 purchase price credit was comprised of a cash credit of $11,735,951 and a reduction of mortgage indebtedness of $17,551,792. As with the original purchase price, see note 1, *supra,* for simplicity this total credit will be considered as if it were all a cash credit.

[6] See note 2, *supra.*

[7] This recalculation included a readjustment of previous depreciation allowed.

amount reduced petitioner's credit on the original sales price of $46,973,167 from $29,287,743 to $20,468,904.[8]

In tabular form, the computations and credits made under the Act were as follows:

Statutory Adjustments.

1. Original sales price	$46,973,167	
2. Statutory sales price	17,685,424	
3. Gross sales price adjustment (§§ 9 (b)(1)–(4) and (7))		$29,287,743
4. Credit to Government:		
5. Charter hire on 18 vessels (§ 9 (b)(6))	13,430,431	
6. Debits against Government:		
7. Charter hire on 4 ships traded in (§ 9 (b)(6))	(1,495,125)	
8. Interest on petitioner's investment (§ 9 (b)(5))	(2,686,262)	
9. Overpayment by petitioner of federal income taxes (§ 9 (b)(8))	(430,206)	
10. Net credit in favor of Government (line 5 minus lines 7–9)		8,818,838
11. Net 1946 sales price adjustment (line 3 minus line 10)		$20,468,904 [9]

Neither party here disputes the accuracy of any of these computations. The issue between the parties is the effect of these determinations on the tax treatment of the ships for the years following this 1946 adjustment. In its federal income tax returns for the years 1947 through 1950 petitioner took depreciation on these vessels on the

[8] The figure $20,468,904 is one dollar smaller than the difference between $29,287,743 and $8,818,838. This discrepancy is caused by the omission from the calculation of figures of amounts less than one dollar. This net credit of $20,468,904 was divided into a cash credit to petitioner of $2,917,112 and a reduction of the mortgage indebtedness by $17,551,792. Again, for simplicity, this 1946 net credit will be considered as if it were all a cash credit. See notes 1 and 5, *supra*.

[9] See note 8, *supra*.

assumption that its cost was $17,685,424, the statutory sales price. In 1959, however, petitioner sued in the United States District Court for the Southern District of Alabama for a tax refund, contending that its real cost and therefore its basis for depreciation was not the statutory sales price, $17,685,424, but rather $26,504,263, the difference between $46,973,167, the original sales price, and $20,468,904, the net 1946 sales price adjustment credited to petitioner. The District Court agreed with petitioner that its real cost was $26,504,263 and that this was its depreciation basis for tax purposes. 203 F. Supp. 915. The Court of Appeals for the Fifth Circuit reversed, however, holding that, under the statutory scheme, petitioner's real cost was $17,685,424, the statutory sales price, and that this therefore was its proper depreciation basis. 330 F. 2d 128. The difference between the lower courts' determinations of the real cost to petitioner of these 18 ships is $8,818,838,[10] the net credit in favor of the Government in the preceding calculations of the 1946 sales price adjustment. We granted certiorari, 379 U. S. 927, to resolve a conflict between Courts of Appeals and the Court of Claims on the issue here involved.[11] For the reasons set forth below, we agree with the Court of Appeals in this case and consequently affirm the judgment.

Petitioner's argument, put quite simply, is that during the war it paid $46,973,167 for the ships. In 1946, petitioner asserts, it was paid back $20,468,904. Thus petitioner concludes that its cost and therefore its depreciation basis for tax purposes in these ships is the difference

[10] See note 14, *infra*.

[11] The Court of Appeals for the Third Circuit agrees with the result of the Court of Appeals in this case. See *National Bulk Carriers, Inc.* v. *United States*, 331 F. 2d 407. However, these decisions conflict with that of the Court of Claims in *Socony Mobil Oil Co.* v. *United States*, 153 Ct. Cl. 638, 287 F. 2d 910, upon which the District Court in the instant case relied.

between these two figures, or $26,504,263.[12] The Government agrees that petitioner paid $46,973,167 during the war and received back $20,468,904 in 1946. It points out, however, that from 1942 through 1946 petitioner also received from the Government in charter hire for the use of the ships, a net of $8,818,838 (the net credit to the Government under the unwinding provisions of the Act), which petitioner would not have received had it not bought these ships prior to the date of the Act. The Government contends that when this $8,818,838 paid to petitioner from 1942 to 1946 is added to the amount of $20,468,904 paid as a lump sum to petitioner in 1946, it is clear that petitioner has received a total of $29,287,743 [13] from the Government. The Government concludes that petitioner's cost and therefore its basis for depreciation for tax purposes in these ships is the difference between the original sales price, $46,973,167, and this total refund, $29,287,743, or $17,685,424—the statutory sales price. Petitioner cannot and does not dispute the fact that it received this $8,818,838 from the Government from 1942 through 1946. It argues, however, that this sum was received as income and thus cannot be taken to reduce petitioner's cost. The Government, on the other hand,

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[12] As stated in note 1, *supra*, the original purchase price of $46,973,167 consisted of a $6,449,107 cash payment and $40,524,060 in mortgage indebtedness. By the statutory enactment date of March 8, 1946, petitioner had paid an additional $9,786,339 on the mortgage. At that date therefore the original $46,973,167 purchase price consisted of a cash payment of $16,235,446 and a now reduced mortgage indebtedness of $30,737,721. As stated in note 8, *supra*, the 1946 payment to petitioner was comprised of a cash credit of $2,917,112 and a reduction of the mortgage indebtedness by $17,551,792. Thus under petitioner's calculations, after the 1946 adjustment its cost of the vessels was the sum of its cash investment of $13,318,334 ($16,235,446 minus $2,917,112) and its mortgage indebtedness of $13,185,929 ($30,737,721 minus $17,551,792), or $26,504,263.

[13] See note 8, *supra*.

contends that, although the $8,818,838 was undoubtedly originally received as income, under the statutory unwinding scheme this amount must be deemed a return of capital which has reduced petitioner's cost. The only issue dividing the parties, therefore, is the proper treatment of this $8,818,838, an issue which must be determined by reference to the 1946 Act.[14]

Section 9 of the Merchant Ship Sales Act of 1946 expressly provides that, upon application, a statutory adjustment "shall be made, as hereinafter provided, by treating the vessel as if it were being sold to the applicant on the date of the enactment of this Act [March 8, 1946], and not before that time." It is clear that if petitioner had bought the ships on the date of the Act its cost and depreciation basis would have been the statutory sales price of $17,685,424 and that petitioner would not have received net charter hire from the Government of $8,818,838—a

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[14] The figure of $8,818,838 is one dollar lower than the difference between the basis figures as asserted by the two parties. This discrepancy is brought about by the fact that all figures have been rounded off to dollar amounts. Also, the asserted basis figures given in the text are based upon the parties' contentions as to the correct cost figure for the 18 ships. They do not take into account the undisputed figure of $175,876 which represents the basis of the four ships traded in and which both parties agree should be added to their respective cost bases as given in text. In tabular form, the tax contentions are as follows:

	Government	*Petitioner*
1. Original sales price	$46,973,167	$46,973,167
2. Net charter payments by the Government to petitioner from 1942–1946	(8,818,838)	(.....)
3. Lump sum payment by Government to petitioner in 1946	(20,468,904)	(20,468,904)
4. Adjusted sales price	17,685,424	26,504,263
5. Basis of ships traded in	175,876	175,876
6. Basis as of March 8, 1946	$17,861,300	$26,680,139

payment attributable to the fact that the vessels involved were sold to it before the date of the 1946 Act.[15]

In order to achieve the statutory purpose of putting petitioner and the Government in the positions they would have occupied had petitioner bought the ships on the 1946 statutory enactment date and not before that time, it was necessary that this $8,818,838 net charter hire be refunded to the Government. In effect this is just what § 9 provides. As applied to this case, petitioner was first credited with $29,287,743, the difference between the original sales price, $46,973,167, and the lower statutory sales price, $17,685,424. The Government owed this amount of $29,287,743 to petitioner. Because of the unwinding of the pre-Act transactions pursuant to the statutory scheme, however, the Government was credited with $8,818,838, representing the net amount, after appropriate tax adjustments, which petitioner received from the United States Government from 1942 through 1946 over and above the amount which it would have earned had it not purchased the ships from the Government prior to the statutory adjustment date. Petitioner owed this amount of $8,818,838 to the Government.

The Government could have paid its obligation to petitioner by its check in the amount of $29,287,743. Petitioner, in turn, could have paid its obligation to the Government by its check in the amount of $8,818,838. Obviously, it makes no difference that this same result was reached through an offsetting of the mutual debts which

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[15] As we have already discussed, this $8,818,838 represents the $13,430,431 charter hire which petitioner received from the Government because it owned these ships during the war, as offset by debits to the Government and credits to petitioner representing the charter hire which petitioner would have received on its four ships which it traded in, interest on petitioner's investment in the ships during this period, and a refund of income taxes paid on this unwound charter hire.

resulted in a net credit to petitioner of their difference—$20,468,904.[16] Thus petitioner is correct in its assertion that it only received $20,468,904 as a lump sum payment in 1946. It is not correct, however, in its assertion that this was the total amount it received in repayment of the sales price. The total it received was $29,287,743; it received $20,468,904 of this amount in a lump sum in 1946 and $8,818,838[17] in the years 1942 through 1946 in government payments which it would not have received had it not owned the ships during those years—an ownership which the statute unwinds. This $29,287,743 total refund must be credited against petitioner's original cost of $46,973,167, producing a net cost to petitioner and thus a basis for depreciation of $17,685,424—the statutory sales price.[18]

In order to give effect to the statutory scheme, therefore, this $8,818,838 must be treated not as income but as a return of capital against the original $46,973,167 purchase price. That this is the proper way of treating this amount for tax purposes is made clear by the statutory language which directs recomputation of an applicant's federal income taxes based upon the unwinding of the pre-Act transactions. As a condition of receiving an adjustment under the Act, § 9 (c)(1) requires the applicant to agree (1) that the charter hire actually received from

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[16] See note 8, *supra*.

[17] See note 8, *supra*.

[18] As noted above, notes 1, 5, 8, 12, *supra*, these figures are stated on the basis that the whole transaction was for cash. The same result is achieved, however, when the transaction is viewed on the mortgage basis as set forth in note 12, *supra*. When this is done the $8,818,838 is seen as a cash payment by the Government to petitioner which must be credited against its asserted net cash investment of $13,318,-334, reducing it to $4,499,496. On this basis, petitioner's cost therefore is its net cash investment of $4,499,496 plus its mortgage indebtedness of $13,185,929, or $17,685,424—the statutory sales price. (Again there is a one-dollar discrepancy because of the rounding off of all figures to dollar amounts.)

the United States for the ships prior to the Act "shall be treated for Federal tax purposes *as not having been received or accrued as income*" (emphasis added); (2) that "depreciation and amortization allowed or allowable with respect to the vessel up to the date of the enactment of this Act for Federal tax purposes shall be treated as not having been allowable"; and (3) that the return of interest paid on the mortgages plus the income attributed to the applicant which it would have received as charter hire on the ships traded in and interest on the cash invested which it could have earned had it not bought the ships prior to the date of the Act "shall be treated for Federal tax purposes as having been received and accrued as income . . . ." The net sum derived from these tax computations is assigned as a credit to the party in whose favor they run, and payment of this credit is explicitly deemed to constitute payment of the tax overpayment or deficiency created by the recomputations. (§ 9 (b)(8)).

All of these provisions, as we have already stated, were given effect in this case. Pursuant to agreement between petitioner and the Government, petitioner's federal income taxes were recomputed on the statutory assumptions that it did not receive the charter hire on the 18 vessels purchased from the Government from 1942 through 1946, but did receive charter hire on the four ships it traded in and interest on its investment in the 18 ships during this period. Based on this recalculation, petitioner was held entitled to a tax refund of $430,206, for which the Government was debited in the unwinding computations. See the table on p. 257, *supra*. The total impact of these tax provisions makes it quite clear that the net amount the Government paid to petitioner as a result of its owning the ships prior to 1946, $8,818,838, as the statute specifically states, "shall be treated for Federal tax purposes as not having been received or accrued as income," but

rather shall be treated as a repayment of the purchase price, or, in other words, a return of capital reducing basis. Moreover, the result contended for by petitioner would produce the anomaly that, due to the unwinding calculations, there is no income tax paid or to be paid on the $8,818,838 which petitioner claims is income earned during 1942 to 1946. This anomaly is only avoided if, as Congress obviously intended, this amount be treated not as income but rather as a return of capital.

Furthermore, petitioner's argument is necessarily predicated on the theory that, although the original acquisition cost of the ships should, under the statutory scheme, be adjusted to the lower 1946 price, nevertheless, petitioner's cost as a basis for depreciation should remain the higher one determined on the assumption that the ships were purchased not in 1946 but at the time of their original acquisitions, dating back to 1942. It could only be under such a theory that the $8,818,838 net charter hire received by petitioner from the Government could be considered to be income and not a return of capital. But the Act vitiates any such theory in its express statement that the statute treats "the vessel as if it were being sold to the applicant on the date of the enactment of this Act, and not before that time." Nothing in the language or legislative history of the Act supports petitioner's contention that this statutory treatment was to apply to give petitioner a lower actual cost of acquisition but that the contrary treatment sought by petitioner was to apply to give it, at the same time, a higher cost basis for depreciation purposes.

Indeed, our conclusion derived from the plain words of the statute is confirmed fully by the legislative history of the Act. As originally reported out of the House Committee on the Merchant Marine and Fisheries, see H. R. Rep. No. 831, 79th Cong., 1st Sess., and the Senate Committee on Commerce, see S. Rep. No. 807, 79th Cong., 1st

Sess., the bill contained petitioner's assumption that the sale took place not on the date of the Act, but at its original date and at the lower statutory sales price. On the floor of the House, however, a committee amendment was proffered and accepted which rejected this assumption and premised the operation of § 9 on the contrary assumption that the sale took place on the date of the enactment of the Act and not before. 91 Cong. Rec. 9281. This committee amendment is the version of the Act that was enacted into law. See H. R. Conf. Rep. No. 1526, 79th Cong., 2d Sess., 17.

Representative (now Senator) Henry Jackson, the manager of the committee amendments on the House floor, explained it as follows:

> "Section 9 of H. R. 3603 provides for a refund to operators who purchased vessels during the war, at war cost, back to the statutory sales price contained in section 3 of the bill. Such an adjustment is fair. We do not want to place the wartime purchaser at a disadvantage with his competitor who acquires a similar vessel under the provisions of this bill.
>
> "However, section 9 contains many loopholes which in my opinion places the wartime purchaser in a far better position than future purchasers. For one thing, the wartime purchaser, under section 9, would be allowed trade-in allowances far in excess of those provided under the committee amendment to section 8.
>
> "If there is to be equality between past and future purchases there must be comparable terms and nothing less. . . .
>
> . . . . .
>
> "I have proposed certain modifications to section 9 of H. R. 3603 which has been accepted as a committee amendment. The effect of this amendment

is to treat prior sales as having taken place on the date of the enactment of this bill. The operator is compensated for all actual money investment to date by an allowance of 3½ percent interest thereon.

. . . . . .

"The committee amendment treats all of these prior sales as being made on the date of the bill's enactment and not before that time, so that the previous purchaser and a future purchaser will be put on exactly the same basis. In order to accomplish this result it is necessary to 'unwind' a previous transaction, and most of the provisions of the committee amendment which appear complicated are the provisions describing how this unwinding is to be done.

. . . . . .

"These are the provisions which the amendment includes for the purpose of unwinding the previous transaction. The basic principle of the amendment is very simple—the previous transaction is to be looked upon as having taken place not when it actually did but as taking place on the date of the bill's enactment and subject to all of the bill's provisions. . . ." (Emphasis added.) 91 Cong. Rec. 9182, 9185, 9282.

Treating pre-Act and post-Act purchasers as having the same tax basis in the vessels—the statutory sales price—serves the congressional purpose of putting the two groups "on exactly the same basis." Otherwise, pre-Act purchasers, with a higher basis for federal income tax purposes, would have competitive advantages over post-Act purchasers in the ability of pre-Act purchasers to take higher depreciation deductions from income, thus paying lower taxes on the same income than their post-Act purchaser competitors. In fact, this advantage over

post-Act purchasers is exactly what petitioner seeks in this case. Both petitioner and a post-Act purchaser of comparable ships would pay a statutory sales price of $17,685,424. Yet petitioner seeks a depreciation basis of $26,504,263 while the post-Act purchaser would only have a basis of $17,685,424. This varying result is prohibited by the statute.

Petitioner argues, however, that the Senate predecessor to § 9 of the 1946 Act contained an express provision that, if an adjustment in the purchase price is made for a pre-Act purchaser, for purposes of federal income taxes, "the vessel shall be considered as having been acquired at the adjusted purchase price [the statutory sales price] . . . ." See § 9 (e)(1) of H. R. 3603, as amended by the Senate Committee on Commerce, 79th Cong., 1st Sess., 91 Cong. Rec. 11535. Petitioner states that this provision, which would confirm the result here contended for by the Government, was eliminated from the version of the Act that was finally adopted. From these facts, petitioner would have us infer that Congress rejected the notion that the statutory sales price should be the cost basis of the ships for depreciation. This contention of petitioner, however, completely overlooks the fact that the provision upon which petitioner relies was in an early version of the bill which at that time was premised not on the assumption finally accepted that the sales took place on the 1946 statutory enactment date, but rather on the contrary theory that the sales took place at the statutory prices but on their original dates. On this latter assumption which the bill then contained, the express provision of the Senate bill was necessary to prevent the very result for which petitioner now contends. However, as we have already pointed out, in the legislative consideration of the bill as finally enacted, the early version of the bill premised on the assumption that the sales took place at their original dates was rejected and the bill revised to

embrace the contrary assumption that the sales took place at the date of the enactment of the Act and not before that time. See pp. 264–266, *supra*. Once this revision in the bill's basic approach was made there was no longer any necessity to provide, as the earlier Senate version had, that for tax or any other specific purpose "the vessel shall be considered as having been acquired at the . . . [statutory sales] price . . . ." For in the bill as finally enacted, it was expressly provided that the vessel is to be treated "as if it were being sold to the applicant on the date of the enactment of this Act, and not before that time," and explicit provision was made for unwinding all pre-Act transactions, including taxes. We therefore reject this argument of petitioner.

Finally, petitioner argues that the congressional history subsequent to the enactment of the 1946 statute supports its interpretation of the Act. In 1950, Congress passed an amendment to the 1946 Act, designed to provide precisely the tax result here contended for by petitioner.[19] This amendment, however, was vetoed by President Truman. While both House and Senate Committee Reports contain statements that this amendment was deemed simply a clarifying one which expressed the intent of the original Act, see H. R. Rep. No. 1342, 81st Cong., 1st Sess., 1; S. Rep. No. 1915, 81st Cong., 2d Sess., 1, it was vetoed by President Truman on the ground that, on the contrary, he considered it to vitiate the intent of Con-

[19] The amendment provided, as an addition to subsection 9 (b) of the Act:

"From and after March 8, 1946, the cost basis of a vessel in respect of which the price adjustment is made shall be the undepreciated original purchase price reduced by the net amount of such adjustment in favor of the applicant resulting from the application of all of the foregoing provisions of this subsection."

See H. R. Rep. No. 1342, 81st Cong., 1st Sess., 5; S. Rep. No. 1915, 81st Cong., 2d Sess., 5.

gress in enacting the 1946 Act. The President's veto message stated:

> "[O]ther provisions of the Merchant Ship Sales Act already provide that for certain purposes the cost basis of the vessels owned by prior purchasers shall be the statutory sales price. The consistent pattern of treatment provided in the act would be destroyed by granting in this one subsection the concession on cost basis entailed in this measure. Finally, the benefits accruing to prior purchasers, if they are allowed to capitalize these amounts above the statutory sales price, would afford them the special operating advantages which arise from the higher depreciation allowances possible under this measure." 96 Cong. Rec. 15792.

Thus, it is apparent that the President and Congress disagreed over the meaning of a law passed by a prior Congress, and that the President, deeming the amendment to depart from the purpose of the original statute, refused to approve it so that the amendment was not enacted into law. This Court has pointed out on previous occasions that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States* v. *Price,* 361 U. S. 304, 313; *United States* v. *Philadelphia National Bank,* 374 U. S. 321, 348–349. This is particularly true where a President (the same President who signed the original Act) vetoes a "clarifying" amendment on the grounds that, in his view, it does not clarify but rather vitiates the intent of the Congress that passed the original Act. As this Court held in *Fogarty* v. *United States,* 340 U. S. 8, in considering a similar situation, the abortive action of the subsequent Congress "would not supplant the contemporaneous intent of the Congress which enacted the . . . Act." *Id.,* at 14. See also *United States* v. *Wise,* 370 U. S. 405, 411.

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For all the reasons set forth above, we conclude that, under the statutory scheme which unwinds the pre-Act transactions, petitioner's real cost and thus its basis for depreciation was the statutory sales price of $17,685,424.[20] Consequently, the judgment of the Court of Appeals is

Affirmed.

APPENDIX TO OPINION OF THE COURT.

Section 9 of the Merchant Ship Sales Act of 1946, 60 Stat. 46, 50 U. S. C. App. § 1742 (1958 ed.), provides in relevant part:

"SEC. 9. (a) A citizen of the United States who on the date of the enactment of this Act—

"(1) owns a vessel which he purchased from the Commission prior to such date, and which was delivered by its builder after December 31, 1940; . . .

. . . . . .

"shall, except as hereinafter provided, be entitled to an adjustment in the price of such vessel under this section if he makes application therefor, in such form and manner as the Commission may prescribe, within sixty days after the date of publication of the applicable prewar domestic costs in the Federal Register under section 3 (c) of this Act. . . .

"(b) Such adjustment shall be made, as hereinafter provided, by treating the vessel as if it were being sold to the applicant on the date of the enactment of this Act, and not before that time. The amount of such adjustment shall be determined as follows:

"(1) The Commission shall credit the applicant with the excess of the cash payments made upon the original purchase price of the vessel over 25 per centum of the statutory sales price of the vessel as of such date of enactment. If such payment was less than 25 per centum of

[20] See note 14, *supra*.

the statutory sales price of the vessel, the applicant shall pay the difference to the Commission.

"(2) The applicant's indebtedness under any mortgage to the United States with respect to the vessel shall be adjusted.

"(3) The adjusted mortgage indebtedness shall be in an amount equal to the excess of the statutory sales price of the vessel as of the date of the enactment of this Act over the sum of the cash payment retained by the United States under paragraph (1) plus the readjusted trade-in allowance (determined under paragraph (7)) with respect to any vessel exchanged by the applicant on the original purchase. The adjusted mortgage indebtedness shall be payable in equal annual installments thereafter during the remaining life of such mortgage with interest on the portion of the statutory sales price remaining unpaid at the rate of 3½ per centum per annum.

"(4) The Commission shall credit the applicant with the excess, if any, of the sum of the cash payments made by the applicant upon the original purchase price of the vessel plus the readjusted trade-in allowance (determined under paragraph (7)) over the statutory sales price of the vessel as of the date of the enactment of this Act to the extent not credited under paragraph (1).

"(5) The Commission shall also credit the applicant with an amount equal to interest at the rate of 3½ per centum per annum (for the period beginning with the date of the original delivery of the vessel to the applicant and ending with the date of the enactment of this Act) on the excess of the original purchase price of the vessel over the amount of any allowance allowed by the Commission on the exchange of any vessel on such purchase; the amount of such credit first being reduced by any interest on the original mortgage indebtedness accrued up to such date of enactment and unpaid. Interest so accrued and unpaid shall be canceled.

"(6) The applicant shall credit the Commission with all amounts paid by the United States to him as charter hire for use of the vessel (exclusive of service, if any, required under the terms of the charter) under any charter party made prior to the date of the enactment of this Act, and any charter hire for such use accrued up to such date of enactment and unpaid shall be canceled; and the Commission shall credit the applicant with the amount that would have been paid by the United States to the applicant as charter hire for bare-boat use of vessels exchanged by the applicant on the original purchase (for the period beginning with date on which the vessels so exchanged were delivered to the Commission and ending with the date of the enactment of this Act).

"(7) The allowance made to the applicant on any vessel exchanged by him on the original purchase shall be readjusted so as to limit such allowance to the amount provided for under section 8.

"(8) There shall be subtracted from the sum of the credits in favor of the Commission under the foregoing provisions of this subsection the amount of any overpayments of Federal taxes by the applicant resulting from the application of subsection (c) (1), and there shall be subtracted from the sum of the credits in favor of the applicant under the foregoing provisions of this subsection the amount of any deficiencies in Federal taxes of the applicant resulting from the application of subsection (c) (1). If, after making such subtractions, the sum of the credits in favor of the applicant exceeds the sum of the credits in favor of the Commission, such excess shall be paid by the Commission to the applicant. If, after making such subtractions, the sum of the credits in favor of the Commission exceeds the sum of the credits in favor of the applicant, such excess shall be paid by the applicant to the Commission. Upon such payment by the Commission or the applicant, such overpayments

shall be treated as having been refunded and such deficiencies as having been paid.

"For the purposes of this subsection, the purchase price of a vessel on account of which a construction-differential subsidy was paid or agreed to be paid under section 504 of the Merchant Marine Act, 1936, as amended, shall be the net cost of the vessel to the owner.

"(c) An adjustment shall be made under this section only if the applicant enters into an agreement with the Commission binding upon the citizen applicant and any affiliated interest to the effect that—

"(1) depreciation and amortization allowed or allowable with respect to the vessel up to the date of the enactment of this Act for Federal tax purposes shall be treated as not having been allowable; amounts credited to the Commission under subsection (b)(6) shall be treated for Federal tax purposes as not having been received or accrued as income; amounts credited to the applicant under subsection (b)(5) and (6) shall be treated for Federal tax purposes as having been received and accrued as income in the taxable year in which falls the date of the enactment of this Act . . . ."

("Secretary," meaning Secretary of Commerce, was substituted for "Commission" in the above statute, except where otherwise indicated by the context, on authority of 1950 Reorg. Plan No. 21, effective May 24, 1950, 15 Fed. Reg. 3178, 64 Stat. 1273.)

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

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

No. 262. Decided May 17, 1965.

Certiorari granted and judgment reversed.

Reported below: 330 F. 2d 163.

Solicitor General Cox, Assistant Attorney General Oberdorfer and *Melva M. Graney* for petitioner.

PER CURIAM.

The petition for writ of certiorari is granted. The judgment is reversed. *Paragon Jewel Coal Co.* v. *Commissioner of Internal Revenue,* 380 U. S. 624.

MR. JUSTICE BLACK and MR. JUSTICE GOLDBERG dissent for the reasons stated in MR. JUSTICE GOLDBERG'S dissenting opinion in *Paragon Jewel Coal Co.* v. *Commissioner of Internal Revenue,* 380 U. S., at 639.

ALLEN *v.* HOFFIUS ET AL.

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

No. 994, Misc. Decided May 17, 1965.

Appeal dismissed and certiorari denied.

PER CURIAM.

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

HOWELL *v.* OHIO.

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

No. 789. Decided May 17, 1965.

Certiorari granted, judgment vacated and case remanded.
Reported below: 177 Ohio St. 19, 201 N. E. 2d 529.

Bernard A. Berkman for petitioner.

Thomas H. Sutherland for respondent.

PER CURIAM.

The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the Supreme Court of Ohio for further consideration in light of *Griffin* v. *California,* 380 U. S. 609.

THE CHIEF JUSTICE took no part in the consideration or decision of this case.

WATSON *v.* MISSOURI.

APPEAL FROM THE SUPREME COURT OF MISSOURI.

No. 1031, Misc. Decided May 17, 1965.

Appeal dismissed and certiorari denied.
Reported below: 386 S. W. 2d 24.

PER CURIAM.

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

TURNEY *v.* ARKANSAS.

APPEAL FROM THE SUPREME COURT OF ARKANSAS.

No. 967. Decided May 17, 1965.

Appeal dismissed and certiorari denied.
Reported below: 237 Ark. 569, 375 S. W. 2d 375.

Thomas J. Gentry for appellant.

Bruce Bennett, Attorney General of Arkansas, and *Richard B. Adkisson,* Chief Assistant Attorney General, for appellee.

PER CURIAM.

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

McKINLEY *v.* REILLY ET AL.

APPEAL FROM THE SUPREME COURT OF ARIZONA.

No. 1000. Decided May 17, 1965.

Appeal dismissed for want of a substantial federal question.
Reported below: 96 Ariz. 176, 393 P. 2d 268.

Mark Wilmer for appellant.

Darrell F. Smith, Attorney General of Arizona, *Phillip M. Haggerty* and *Jerry W. Lawson,* Assistant Attorneys General, and *John E. Madden,* for appellees.

PER CURIAM.

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

O'CONNELL ET AL. *v.* MANNING ET AL.

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

No. 454. Decided May 17, 1965.*

Judgment vacated and cases remanded to District Court with directions to dismiss complaint as moot.

Reported below: 329 F. 2d 11.

Martin C. Seham for petitioners in No. 454.

Arthur M. Wisehart for petitioner in No. 455.

Asher W. Schwartz and *Walter N. Kaufman* for respondents in both cases.

PER CURIAM.

The motions of the petitioners to vacate are granted. The judgment of the United States Court of Appeals for the Second Circuit is vacated and the cases are remanded to the United States District Court for the Southern District of New York with directions to dismiss the complaint as moot.

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

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*Together with No. 455, *American Airlines, Inc.* v. *Manning et al.*, also on certiorari to the same court.

KILLGORE *v.* BLACKWELL, WARDEN.

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

No. 363, Misc. Decided May 17, 1965.*

Certiorari granted, judgment reversed and case remanded.
Reported below: 332 F. 2d 585.

Petitioner *pro se.*

Solicitor General Cox, Assistant Attorney General Marshall and *Harold H. Greene* for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. In accordance with the suggestion of the Solicitor General and upon an examination of the entire record the judgment is reversed and the case is remanded to the United States District Court for the Middle District of Pennsylvania with instructions to reinstate petitioner's adult sentence of October 19, 1962, and release him in accordance with the terms of that sentence.

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*[REPORTER'S NOTE: This opinion is reported as amended on May 24, 1965.]

Syllabus.

FEDERAL COMMUNICATIONS COMMISSION *v.* SCHREIBER ET AL.

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

No. 482. Argued April 27, 1965.—Decided May 24, 1965.

To secure comprehensive information about various practices in the television industry, the Federal Communications Commission initiated an investigatory proceeding pursuant to § 403 of the Communications Act. The Presiding Officer, assigned to conduct the proceeding, was authorized by the Commission to subpoena witnesses and to compel the production of any records or documents deemed relevant. The proceedings were to be public unless the Presiding Officer found that "the public interest, the proper dispatch of the business . . . or the ends of justice" would be served by nonpublic sessions. The Presiding Officer issued a subpoena *duces tecum* directing respondent Schreiber, an executive of respondent Music Corporation of America, Inc. (MCA), to produce lists of network programs which MCA had produced (Annex A to subpoena) or packaged (Annex B). Respondent Schreiber produced the material called for in Annex A, but, claiming that public disclosure of the Annex B information might reveal trade secrets and confidential data, refused to produce said information unless assured that it would be received and held in confidence. The Presiding Officer rejected the demand. The full Commission upheld the Presiding Officer and reaffirmed its resolve to permit nonpublic sessions only in extraordinary situations where it was shown that irreparable damage to private competitive interests outweighed the public interest in disclosure. The Commission noted that the Presiding Officer had acted consistently with that standard and held that respondents' claim of likely competitive injury was unsupported by the pleadings and contrary to the record. Upon remand, the Presiding Officer rejected respondents' broadened claim for confidential treatment of all information to be elicited from them, but respondent Schreiber persisted in his refusal to comply with the Commission's orders and subpoena. The District Court granted the Commission's petition for enforcement, but "to preclude disclosure of trade secrets of which [MCA's] competitors might take advantage" ordered that the material be received and held in confidence. The court's order further pro-

vided that after the investigation of respondents had been completed, the Commission could move the court, upon good cause, for an order permitting such testimony and documents to be made public. The Court of Appeals affirmed, holding that the District Court had not abused its discretion in conditioning the enforcement of the Commission's subpoena and orders. *Held:*

1. Under the broad delegation of procedural rule-making authority in § 4 (j) of the Communications Act, which authorizes the Commission to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice," the Commission was empowered to promulgate the procedural rule requiring public proceedings except where the proponents of a request for *in camera* treatment have demonstrated the need therefor. Pp. 289–294.

2. In providing for judicial review of administrative rule-making, Congress has not empowered district courts to substitute their judgment for that of the agency; instead, judicial responsibility is limited to insuring consistency with governing statutes and the demands of the Constitution. Pp. 290–291.

3. The Commission did not abuse its discretion in applying its procedural rule and in rejecting respondents' requests for confidential treatment of all material to be elicited in the future, pp. 295–298, and for confidential treatment of the Annex B information, pp. 298–300.

329 F. 2d 517, modified and remanded.

Assistant Attorney General Douglas argued the cause for petitioner. With him on the brief were *Solicitor General Cox, Nathan Lewin, Sherman L. Cohn, Harvey L. Zuckman* and *Henry Geller.*

Allen E. Susman argued the cause for respondents. With him on the brief were *Jeffrey L. Nagin* and *Harry M. Plotkin.*

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

At issue in this case are the extent of the Federal Communications Commission's authority to promulgate procedural standards for determining whether testimony

taken and documents produced during an investigatory proceeding should be accorded confidential treatment, and the scope of judicial review of determinations made pursuant to such standards.

This case had its origin in a subpoena and various orders issued during the course of an investigatory proceeding conducted by the Federal Communications Commission pursuant to § 403 of the Communications Act of 1934, as amended, 48 Stat. 1094, 47 U. S. C. § 403 (1958 ed.).[1] The proceeding, financed by specific congressional appropriation,[2] was initiated on February 26, 1959, and had as its objective the gathering of

> "comprehensive information concerning the respective roles played by the networks, advertisers, agencies, talent, film producers and distributors, and other major elements in the television industry." [3]

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[1] Section 403 provides:

"The Commission shall have full authority and power at any time to institute an inquiry, on its own motion, in any case and as to any matter or thing concerning which complaint is authorized to be made, to or before the Commission by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. The Commission shall have the same powers and authority to proceed with any inquiry instituted on its own motion as though it had been appealed to by complaint or petition under any of the provisions of this Act, including the power to make and enforce any order or orders in the case, or relating to the matter or thing concerning which the inquiry is had, excepting orders for the payment of money."

[2] Independent Offices Appropriations Act, 1956, 69 Stat. 199, 201–202.

[3] Statement of Commission Chairman McConnaughey; Hearings before the Subcommittee of the Senate Appropriations Committee, Independent Offices Appropriations for 1956, 84th Cong., 1st Sess., p. 293. Chairman McConnaughey also noted that "[o]nly with this information can the problems affecting the further expansion of television outlets be adequately identified and evaluated, and appropriate recommendations made for their solution." *Id.*, at 294. See

As an initial step in the investigation, the Commission ordered that an

> "inquiry be made to determine the policies and practices pursued by the networks and others in the acquisition, ownership, production, distribution, selection, sale and licensing of programs for television exhibition, and the reasons and necessity in the public interest for said policies and practices . . . ." [4]

The Commission authorized its chief hearing examiner to conduct the investigation. He was empowered, *inter alia,* to subpoena witnesses, compel their attendance,

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also Hearings before the Subcommittee of the House Appropriations Committee, Independent Offices Appropriations for 1956, 84th Cong., 1st Sess., pp. 663–664.

[4] The purpose and scope of the inquiry are set forth in the Commission's order of Feb. 26, 1959. 24 Fed. Reg. 1605. On Nov. 10, 1959, the Commission entered a supplemental order

"[t]hat the inquiry and investigatory proceeding instituted pursuant to the Commission's Order of February 26, 1959 (FCC 59–166), be and is hereby amended and enlarged to determine the policies, practices, mechanics and surveillance pursued and carried out by networks, station licensees and others in connection with the acquisition, ownership, production, distribution, selection, sale and licensing of programs for radio and television exhibition and the policies and practices pursued by networks, station licensees and others in connection with the selection, presentation and supervision of advertising material for broadcast to the public and the reasons and necessity in the public interest for said policies and practices . . . ." *Id.*, at 9275, 9276.

In its orders the Commission noted that the information sought was necessary (1) to complete its general investigation of radio and television broadcasting pursuant to the Independent Offices Appropriations Act; (2) to determine "what, if any, rules, regulations, legislation or other actions are necessary or desirable in the public interest in connection with" television programming; (3) to determine where the public interest lies in the granting of construction permits, station licenses, modifications and renewals; and (4) to enable the Commission to report and make specific recommendations to Congress in relation to the regulation of broadcasting. *Id.*, at 1605, 9275.

and require the production of any records or documents deemed relevant to the inquiry.[5] The Commission ordered that

> "said investigatory proceeding shall be a public proceeding except that the said presiding officer may order non-public sessions of the said investigatory proceeding where and to the extent that the public interest, the proper dispatch of the business of said proceeding, or the ends of justice will be served thereby." [6]

In October 1960, public sessions were held in Los Angeles, California, at which time evidence was received concerning the functions, policies and practices of television companies, talent agencies and representatives, program "packagers," [7] sales representatives, and others. On October 17, 1960, the Presiding Officer issued a subpoena *duces tecum* to respondent Schreiber, a Vice President of respondent Music Corporation of America, Inc. (MCA)—one of the largest packagers and producers of network television programs,[8] directing him to appear at

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[5] *Id.*, at 1605.

[6] *Ibid.*

[7] "Packagers" develop and assemble the talent and scripts for a particular program or programs. A "producer" has general charge of the process of preparing the package for television showing.

[8] The Commission's unchallenged finding was:

"that MCA, Inc., (a) represents a large share of the talent, both acting and creative, engaged in television programming; (b) produces television programs; (c) packages and/or sells such programs; (d) maintains and leases production facilities for such programs and generally engages, on a large scale, in all facets of television program production. The record of the proceeding to date clearly establishes that failure fully to explore the policies, practices and activities of MCA, Inc., in connection with television programming would seriously impair, if not render nugatory, any attempt on the Commission's part to understand and delineate the policies, practices and activities involved in the creation, production, sale and licensing of television filmed programs . . . ." R. 16.

the hearing and to produce certain documents described in the annexes to the subpoena. Respondent Schreiber appeared and produced the material specified in Annex A.[9] He refused, however, to submit without qualification the material called for in Annex B,[10] which included a list of the programs packaged by MCA. Respondent Schreiber stated that he would produce the subpoenaed materials only "if the Commission will take this information and assure us that it will be held in confidence, will not be published, and will not be made available to other people, other than those on the Commission, and that serve the Commission." As grounds for confidential treatment, he asserted that the information sought might disclose trade secrets and confidential data, and that the information was outside the scope of the hearing. He

[9] "(A) A list by name or title of all television programs whether series programs, special programs, or otherwise, which appeared or were exhibited by or through the facilities of the television networks operated by NBC, CBS, or ABC since September 1, 1958, which programs were produced by MCA, Inc. or Revue Productions, Inc. and/or in which MCA, Inc. or Revue Productions, Inc. has or had a financial or proprietary interest or with regard to which MCA, Inc. or Revue Productions, Inc. is or was entitled to receive or has received a percentage of the profits or other compensation or fees in connection with the production or exhibition of such programs other than remuneration or compensation for the representation as agent of individual natural persons as talent."

[10] "(B) A list of all television programs whether series programs, special programs, or otherwise, which appeared on or were exhibited by or through the facilities of the television networks of NBC, CBS, or ABC, since September 1, 1958, in which MCA, Inc. or any predecessor affiliate or subsidiary of MCA, Inc. acted as packager and/or, by agreement or otherwise, is entitled to receive or has received a percentage of the cost or selling price of said program or was or is entitled to receive or has received other compensation, remuneration or fees in connection with the packaging, licensing for broadcast or selling of said program, otherwise than as remuneration or compensation for the representation as agent of individual natural persons as talent."

also objected generally to the procedures governing the hearing on the ground that they would require "public disclosure of trade secrets and confidential data of my company which might be of aid to its many competitors in this highly competitive television industry." The Presiding Officer found "no doubt" as to the relevance of the material and rejected, as "without merit," the claim that the information should be received in confidence.

Respondents then petitioned the Commission for review. On January 25, 1961, the Commission affirmed the Presiding Officer and ordered respondents to appear, testify and produce the material subpoenaed at a reconvened hearing. In its opinion the Commission stressed the importance of publicizing the information gathered during the course of the investigation [11] and reaffirmed its resolve to permit *in camera* sessions only in extraordinary situations:

> "[W]e determined that public proceedings should be the rule herein, and that non-public procedures should be used only in those extraordinary instances where disclosure would irreparably damage private, competitive interests and where such interests could be found by the Presiding Officer to outweigh the paramount interest of the public and the Commission in full public disclosure."

The Commission noted that the Presiding Officer and Commission counsel had made "every effort to avoid public disclosure of detailed internal financial information or detailed contractual arrangements which might in fact irreparably harm private interests without sufficient compensating benefit to the public," and found that they had not departed from this standard in rejecting respondents' claim of likely competitive harm which, the Commission held, was "totally unsupported by their pleadings and

[11] See *infra*, pp. 293–294.

contrary to the record." Accordingly, the Commission ordered respondents "to testify . . . regarding all matters deemed relevant by said Presiding Officer," and to produce the information required by the subpoena and "such other information and data as may be deemed relevant and ordered or directed to be produced by the said Presiding Officer." On remand, a broader claim for confidentiality was made by respondents. They requested that all testimony and documentary evidence to be elicited from them be received in nonpublic sessions, and disclosed only if a court, in subsequent litigation, should authorize its public disclosure. The contention was rejected by the Presiding Officer, but respondent Schreiber persisted in his refusal to comply with the subpoena and the Commission's orders.[12]

The Commission thereupon petitioned the United States District Court for the Southern District of California for the enforcement of its subpoena and orders. The District Court found that the investigation was statutorily authorized, that the information requested in Annex B was relevant to the inquiry, and that respondents had disobeyed valid orders and a valid subpoena.[13] Accordingly, the District Court ordered respondents to appear at a reconvened hearing and to comply with the Commission's subpoena and orders. However, the court, in order to protect "respondents' rights and to preclude disclosure of trade secrets of which competitors might

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[12] On review of the Presiding Officer's first order, the Commission, although dealing with the merits of that order, held "that the orders and directions of the Presiding Officer as to relevance and public disclosure of evidence, information and data are interlocutory in nature, do not of themselves 'aggrieve' any person, and are not, as of right, appealable to the Commission." This holding precluded an application to the Commission for review of the Presiding Officer's second order.

[13] Respondents do not challenge these findings.

take advantage," ordered that all testimony given and documents produced by respondents be received and held in confidence.[14] The court's order further provided that, after the investigation of respondents had been completed, the Commission could move the court for an order, "should good cause exist therefor," permitting such testimony and documents to be made public. 201 F. Supp. 421.

On appeal, a divided Court of Appeals for the Ninth Circuit affirmed that portion of the District Court's order which pertains to the questions now before this Court.[15]

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[14] Paragraph 2 of the District Court's order provides:

"It is Further Ordered that any further interrogation of respondents and any documents produced by respondents be taken and held by the Commission in private and confidential session, that the public be excluded therefrom, that all testimony adduced and documents produced be maintained in confidence by the Commission, that the Commission by motion duly made and served, may move the Court upon the conclusion of such interrogation and production for an order, should good cause exist therefor, permitting such testimony and documents to be made public, and that respondents shall retain the right to oppose such motion if and when so made."

[15] Under the procedures established by the Presiding Officer, counsel for a witness could not, during the course of interrogation of his client, take exception to, request clarification of, or object to any question, nor could he initiate consultation with his client. Counsel could consult with his client only upon the request of the client if approved by the Presiding Officer. The District Court held that under § 6 (a) of the Administrative Procedure Act, 60 Stat. 240, respondents were entitled to the assistance of counsel in the following respects: the right to have counsel object to any question and state his reasons therefor, and the right to have counsel initiate consultation without interference by the Commission or its agents. The Court of Appeals disagreed, concluding that the procedures established by the Presiding Officer were not violative of any constitutional or statutory provisions. On Sept. 2, 1964, the Commission amended Part I of its Rules and Regulations, permitting counsel for any person compelled to appear in Commission proceedings to advise his client either upon his own initiative or that of his client, "to make objections on the

The Court of Appeals held that the District Court had not abused its discretion in conditioning its order to require confidential treatment of the information sought. 329 F. 2d 517. In dissent, Judge Browning stated that the Commission's procedural rule, requiring public hearings unless *in camera* proceedings could be justified by those from whom the information was sought, was well within the Commission's power. It was Judge Browning's view that the District Court could require confidential treatment only if the Commission's application of its procedural rule and consequent refusal to accord confidential treatment were found to be arbitrary or an abuse of the Commission's discretion. *Id.*, at 528–534. Because this case presents important questions concerning the respective roles to be performed by federal courts and the Federal Communications Commission in the administration of the Communications Act of 1934, we granted certiorari. 379 U. S. 927.

We hold that the Commission's rule—requiring public disclosure except where the proponents of a request for confidential treatment have demonstrated that the public interest, proper dispatch of business, or the ends of justice would be served by nonpublic sessions—was well within the Commission's statutory authority. We further find that the Commission did not abuse its discretion in applying this rule. Accordingly, we modify the decision below insofar as it affirms the District Court's imposition of conditions upon the enforcement of the subpoena and orders issued by the Commission.

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record, and to state briefly the basis for such objections." 29 Fed. Reg. 12774–12775. Finding this amendment to be "in accord with respondents' legal position on this matter," respondents did not seek review of the ruling below. Given the change in the Commission's rules, we need not, and do not, express any views as to the legality of the prior rules concerning a witness' right to the assistance of counsel.

I.

Section 4 (j) of the Communications Act of 1934, as amended, 48 Stat. 1068, 47 U. S. C. § 154 (j) (1958 ed.), empowers the Federal Communications Commission to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice." This Court has interpreted that provision as "explicitly and by implication" delegating to the Commission power to resolve "subordinate questions of procedure . . . [such as] the scope of the inquiry, whether applications should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another's proceedings, and similar questions." *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138. The statute does not merely confer power to promulgate rules generally applicable to all Commission proceedings, cf. *Federal Communications Comm'n* v. *WJR*, 337 U. S. 265, 282; it also delegates broad discretion to prescribe rules for specific investigations, cf. *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 321–322, and to make *ad hoc* procedural rulings in specific instances, *Federal Communications Comm'n* v. *Pottsville Broadcasting Co., supra.* Congress has "left largely to its judgment the determination of the manner of conducting its business which would most fairly and reasonably accommodate" the proper dispatch of its business and the ends of justice. *Federal Communications Comm'n* v. *WJR, supra.*[16]

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[16] The Commission's own conception of its authority is similarly broad. Section 1.1 of the Commission's General Rules of Practice and Procedure provides that procedures to be followed in investigative proceedings shall "be such as in the opinion of the Commission will best serve the purposes of such proceeding." 47 CFR § 1.1 (1965).

In the *Pottsville Broadcasting* case, this Court stressed, in upholding this delegation of broad procedural authority, the established principle that administrative agencies "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." 309 U. S., at 143. This principle, which has been upheld in a variety of applications,[17] is an outgrowth of the congressional determination that administrative agencies and administrators will be familiar with the industries which they regulate and will be in a better position than federal courts or Congress itself to design procedural rules adapted to the peculiarities of the industry and the tasks of the agency involved. Thus, underlying the broad delegation in § 4 (j) of procedural rule-making power to the Federal Communications Commission is a "recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors." *Federal Communications Comm'n* v. *Pottsville Broadcasting Co., supra,* at 138.

To permit federal district courts to establish administrative procedures *de novo* would, of course, render nugatory Congress' effort to insure that administrative procedures be designed by those most familiar with the regulatory problems involved. Thus, in providing for judicial review of administrative procedural rule-making, Congress has not empowered district courts to substitute

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[17] *Civil Aeronautics Board* v. *Hermann,* 353 U. S. 322; *Oklahoma Press Pub. Co.* v. *Walling,* 327 U. S. 186; *Wallace Corp.* v. *National Labor Relations Board,* 323 U. S. 248; *Endicott Johnson Corp.* v. *Perkins,* 317 U. S. 501; *Utah Fuel Co.* v. *National Bituminous Coal Comm'n,* 306 U. S. 56; *Norwegian Nitrogen Co.* v. *United States,* 288 U. S. 294.

their judgment for that of the agency. Instead, it has limited judicial responsibility to insuring consistency with governing statutes and the demands of the Constitution. *Oklahoma Press Pub. Co.* v. *Walling*, 327 U. S. 186, 214–218; *Federal Communications Comm'n* v. *Pottsville Broadcasting Co., supra*, at 144–145; *Federal Radio Comm'n* v. *Nelson Bros. Co.*, 289 U. S. 266, 276–277.

It is apparent that the courts below did not respect this congressional distribution of authority. The Commission promulgated a rule governing disclosure in this investigation. Yet, neither the District Court nor the Court of Appeals inquired into the validity of the Commission's exercise of its rule-making authority. Instead, the District Court devised procedures to be followed by the Commission on the basis of the court's conception of how the public and private interests involved could best be served. In reviewing this determination, the Court of Appeals found that the District Judge had not abused *his discretion*, "but, on the contrary, established a fair and just procedure whereby a most important investigation could proceed without being unduly disrupted, obstructed or prolonged, and at the same time afford [respondents] protection against the improvident disclosure of possible valuable trade secrets." 329 F. 2d, at 524. In so doing, the Court of Appeals erred. The question for decision was whether the exercise of discretion *by the Commission* was within permissible limits, not whether the District Judge's substituted judgment was reasonable.

It is also evident that the Commission's procedural rule—requiring public proceedings except where it is shown that the public interest, the dispatch of business, or the ends of justice would be served by nonpublic sessions—was well within the Commission's power. Grants of agency authority comparable in scope to § 4 (j) have

been held to authorize public disclosure of information,[18] or receipt of data in confidence,[19] as the agency may determine to be proper upon a balancing of the public and private interests involved. That § 4 (j) is broad enough to empower the Commission to establish standards for determining whether to conduct an investigation publicly or in private is demonstrated by this Court's decision in *Norwegian Nitrogen Co.* v. *United States,* 288 U. S. 294. There, the Court pointed out that a similar grant of rulemaking authority—§ 315 (c) of the Tariff Act of 1922, 42 Stat. 941, 942–943—which authorizes the Tariff Commission "to adopt such reasonable procedure, rules, and regulations as it may deem necessary," empowered the Commission

> "to shape its course within reasonable limits by its own conception of the promptings of policy and fairness. It would have kept within the statute even though it had made the hearings private and had refrained from the publication of anything, either the records of its agents or the testimony of witnesses. . . . Instead, it made the hearing public, and exposed everything to view except only when publication was likely in its judgment to result in hardship or injustice." 288 U. S., at 321–322.

The delegated power, of course, may not be exercised arbitrarily, but its exercise may not be impeached merely because reasonable minds might differ on the wisdom thereof. *Oklahoma Press Pub. Co.* v. *Walling,* 327 U. S. 186, 215–218; *Isbrandtsen-Moller Co.* v. *United States,* 300 U. S. 139, 146; *Norwegian Nitrogen Co.* v. *United States, supra,* at 321–322. It is apparent, however, that

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[18] *Isbrandtsen-Moller Co.* v. *United States,* 300 U. S. 139; *American Sumatra Tobacco Corp.* v. *Securities & Exchange Comm'n,* 71 App. D. C. 259, 110 F. 2d 117 (1940); *E. Griffiths Hughes, Inc.* v. *Federal Trade Comm'n,* 61 App. D. C. 386, 63 F. 2d 362 (1933).

[19] *Norwegian Nitrogen Co.* v. *United States, supra.*

the Commission's determination in the present case that "public proceedings should be the rule" with exceptions granted "only in those extraordinary instances where disclosure would irreparably damage private, competitive interests and where such interests could be found by the Presiding Officer to outweigh the paramount interest of the public and the Commission in full public disclosure" was not an arbitrary exercise of the Commission's authority. The procedural rule, establishing a presumption in favor of public proceedings, accords with the general policy favoring disclosure of administrative agency proceedings.[20] Moreover, the reasons advanced by the Commission in support of its determination to make public hearings the norm and to place the burden of justifying confidential treatment upon those from whom information is sought amply demonstrate that the Commission's exercise of its delegated powers may not be successfully attacked as arbitrary or capricious. The investigative inquiry was designed to secure information to aid the Commission in the discharge of its many functions. The Commission stated that the subject matter of the inquiry is "complex and generally unknown" involving "many-sided transaction[s]" among "networks, advertis-

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[20] Section 3 (c) of the Administrative Procedure Act, 60 Stat. 238, 5 U. S. C. § 1002 (c) (1958 ed.), provides:

"Save as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found."

This statute has been interpreted to apply to all information received in any "formal proceeding." Attorney General's Manual on the Administrative Procedure Act 24 (1947). In construing § 3 (c), the District Court for the District of Columbia has stated: "Of course, the public interest in open hearings places the burden on the plaintiffs to show that their documents should be received in confidence." *Graber Mfg. Co.* v. *Dixon*, 223 F. Supp. 1020, 1022 (D. C. D. C. 1963). See also Davis, Administrative Law § 8.09 (1958).

ing agencies, program producers, program packagers, talent agencies" and others. Therefore, the Commission determined, in order "to obtain a full and rounded picture of such transactions, it is highly desirable that the facts, information, data and opinion supplied by one group or individual be known to other groups and individuals involved, so that they may verify, refute, explain, amplify or supplement the record from their own diverse points of view." The Commission observed that, in addition to stimulating the flow of information, public hearings serve to inform those segments of the public primarily affected by the agency's regulatory policies and those likely to be affected by subsequent administrative or legislative action of the factual basis for any action ultimately taken—a practical inducement to public acceptance of the results of the investigation.[21] Also implicit in the Commission's discourse is a recognition that publicity tends to stimulate the flow of information and public preferences which may significantly influence administrative and legislative views as to the necessity and character of prospective action. The Commission further pointed out that public disclosure is necessary to the execution of its duty under § 4 (k) of the Communications Act of 1934, as amended, 48 Stat. 1068, 47 U. S. C. § 154 (k) (1958 ed.), to make annual reports to Congress. Significantly, this investigation was specifically authorized by Congress so that Congress might "draw upon the facts which are obtained." [22]

We hold, therefore, that the Commission's adoption of the procedural rule favoring public disclosure and placing upon those from whom information is sought the burden of demonstrating the need for *in camera* proceedings is statutorily authorized.

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[21] See generally Rourke, Law Enforcement Through Publicity, 24 U. Chi. L. Rev. 225 (1957); Note, 72 Yale L. J. 1227 (1963).

[22] Statement of Senator Magnuson, 101 Cong. Rec. 7629.

II.

Remaining for determination is whether the Commission's application of its disclosure rule and the consequent rejection of respondents' requests for confidential treatment were so arbitrary or unreasonable as to warrant the imposition by the District Court of conditions upon enforcement of the Commission's subpoena and orders.[23]

Upon remand from the Commission, respondents moved that *all* testimony and documents to be elicited from them—not merely Annex B—should be received *in camera*. Respondents asserted that in light of the announced scope of the inquiry, the Commission's order to produce documents upon request and to testify "regarding all matters deemed relevant" would require MCA "to disclose all of its business information to its many competitors and to make a public record of all of its activities," and that such a disclosure, if demanded, would necessarily include confidential business secrets. No factual showing was made; there was only the argument.

The District Court accepted the argument, finding "well-grounded [the] fears of the respondents that the testimony to be given might result in disclosure of trade-secrets, of which competitors might take advantage." 201 F. Supp., at 425. Accordingly, the court ordered that all testimony and documents adduced by respondents be received in confidence. In so doing the District Court erred, for it is clear that the Presiding Officer did not abuse his discretion in rejecting this request for blanket nondisclosure.

The Presiding Officer did not know what information would actually be sought, what questions asked. Indeed, he could only speculate as to whether the Commission would seek to elicit any data which, if disclosed to MCA's

[23] Respondents do not contend that a denial of confidential treatment would result in the abridgment of any constitutional right.

competitors, would work competitive harm. He could not ascertain the likelihood of irreparable damage to private competitive interests, nor could he discern whether the private interest outweighed the public interest in disclosure. If and when information was demanded which if disclosed might in fact injure MCA competitively, there would be ample opportunity to request that it be received in confidence, and to seek judicial protection if the request were denied. Cf. *Reisman* v. *Caplin*, 375 U. S. 440. The Presiding Officer would have abused his discretion in denying the request only if it were shown that *no* information could have been elicited from respondents which could be publicly disclosed. The record affords no justification for such a proposition.

The only other possible basis for the District Court's order would be an assumption that the Presiding Officer would consistently require disclosure even if a balancing of public and private interests compelled secrecy. There is no support for such an assumption in the record and it runs contrary to the presumption to which administrative agencies are entitled—that they will act properly and according to law.

Nor can the District Court's order be saved on the ground that it did not direct that all information be held in confidence, but merely deferred the determination of whether the information was entitled to confidential treatment until after the inquiry of respondents had been completed. The order directs that there be no disclosure until the court so orders, "should good cause exist therefor." Not only does this order seem to shift the burden of proof to the Commission to justify publication, despite the valid rule to the contrary, but it also permits respondents to avoid submitting the issue of disclosure to the Presiding Officer despite the "long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed

administrative remedy has been exhausted." *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50–51; *Reisman* v. *Caplin, supra.* Moreover, the District Court's order forbids disclosure until completion of the investigation of respondents without any showing that secrecy is justified. During this period the Commission could not make the information available to Congress, and the Commission would be denied the benefit of other evidence stimulated by disclosure. And the period during which the benefits of disclosure would be denied would inevitably be long. Respondent first appeared before the Presiding Officer on October 21, 1960, and resolution of the issues then raised has caused a delay of more than four and one-half years.

We do not find forceful respondents' contention that the District Court's order was necessary to protect against the discriminatory treatment of MCA by the Commission. The allegation finds little support in the record; moreover, no reference is made to this factor in the District Court's opinion or findings of fact. Respondents' assertions that "the Commission's interest in MCA was deep" and that "concentration upon MCA was unique," even if true, would not demonstrate the need for secrecy. Instead, such assertions merely lend credence to the Commission's unchallenged finding that because of the importance of MCA in the industry, the failure to explore fully the policies and practices of MCA "would seriously impair, if not render nugatory, any attempt on the Commission's part to understand and delineate the policies, practices and activities involved in the creation, production, sale and licensing of television filmed programs." Furthermore, it is clear that respondents are adequately protected against improvident disclosure, even if the Commission should unfairly seek disclosure of information which would be competitively disastrous to respondents. Not only does the administrative remedy exist, but judi-

cial protection against Commission overreaching also remains available with respect to any requests for information made in the future.

We conclude, therefore, that the Commission did not abuse its discretion in rejecting respondents' requests for blanket nondisclosure and accordingly hold that the District Court erred in ordering the Commission to afford confidential treatment to all information elicited from respondents.

Respondents also moved that confidential treatment be accorded Annex B which called for the production of a list of programs as to which MCA served as a "packager" and those in which MCA had a financial interest. Respondent Schreiber testified that the information sought would disclose MCA's confidential agency relationships with clients, "might be used detrimentally," and "would be possibly advantageous to our competitors."

We find that the Commission's affirmance of the Presiding Officer's determination that the material sought in Annex B should be received in public session was clearly proper. Certainly private agreements between MCA and its clients not to disclose facts without the client's consent could not affect the Commission in the discharge of its public duties. See 8 Wigmore, Evidence § 2286 (McNaughton rev. 1961). And the naked assertion of possible competitive injury does not establish that the Presiding Officer abused his discretion in declining to accord confidential treatment. Moreover, there is nothing in the District Court's opinion, findings or conclusions of law which indicates the likelihood, or even the possibility, of competitive harm from public disclosure of the Annex B information. MCA's competitors and others engaged in similar businesses had furnished publicly the same type of information without objection. Respondents did not attempt before the Commission or on review to distinguish the information furnished by MCA's competitors or the

list of programs produced by MCA (subpoenaed in Annex A) which was introduced without objection by respondent Schreiber. Nor did respondents file affidavits in support of their position. But, even if it were conceded that disclosure of Annex B might have some competitive impact, there is no warrant for concluding that the Presiding Officer abused his discretion in finding that respondents had not sustained their burden of demonstrating that the private interest involved outweighed the public interest in disclosure.

One further point should be discussed. During oral argument counsel for respondents suggested that his clients were prejudiced in their efforts to demonstrate the need for confidential treatment of the information contained in Annex B by restrictions imposed upon the participation of counsel by the then-prevailing Commission rules.[24] We do not find this contention persuasive. Respondents filed a petition, prepared and signed by counsel, seeking review before the full Commission of the Presiding Officer's rejection of their confidentiality request. Subsequently, they filed a second motion for confidential treatment with the Presiding Officer and respondents' counsel was afforded an opportunity to argue orally in support of the motion. Thus, it is evident that the then-existing Commission rules restricting the rights of counsel did not prejudice respondents in their efforts to secure *in camera* proceedings with regard to Annex B,[25] and hence

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[24] See note 15, *supra*.

[25] It should also be noted that during the initial proceeding before the Presiding Officer when respondent Schreiber first objected to disclosure of the Annex B information, he was afforded an opportunity to consult with counsel. In addition, the Commission rules then in effect contained no restrictions on the right of counsel to prepare written documents in support of requests for confidential treatment or on the right of witnesses, such as respondent Schreiber, to submit such documents.

there is no occasion to order that respondents be afforded an additional opportunity to present objections to the disclosure of the information subpoenaed in Annex B.

The judgment of the Court of Appeals is modified so as to strike paragraph 2 of the District Court's order, and the cause is remanded to the District Court with directions to enforce the Commission's orders and subpoena without qualification.

It is so ordered.

LAMONT, DBA BASIC PAMPHLETS *v.* POSTMASTER GENERAL.

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

No. 491. Argued April 26, 1965.—Decided May 24, 1965.*

These cases challenge the constitutionality of § 305 (a) of the Postal Service and Federal Employees Salary Act of 1962, which requires the Postmaster General to detain and deliver only upon the addressee's request unsealed foreign mailings of "communist political propaganda." Under procedure effective March 15, 1965, the Post Office sends to the addressee a card which can be checked to have the mailing delivered. The card states that if it is not returned within 20 days, it will be assumed that the addressee does not want that publication or any similar one in the future. When the addressees in these cases received the Post Office notices they sued to enjoin enforcement of the statute. *Held:* The Act as construed and applied is unconstitutional since it imposes on the addressee an affirmative obligation which amounts to an unconstitutional limitation of his rights under the First Amendment. Pp. 305–307.

229 F. Supp. 913, reversed; 236 F. Supp. 405, affirmed.

Leonard B. Boudin argued the cause for appellant in No. 491. With him on the briefs were *Victor Rabinowitz, Norman Dorsen* and *Henry Winestine.*

Solicitor General Cox argued the cause for appellee in No. 491 and appellants in No. 848. With him on the brief were *Assistant Attorney General Yeagley, Nathan Lewin, Kevin T. Maroney* and *Lee B. Anderson.*

Marshall W. Krause argued the cause for appellee in No. 848. With him on the brief was *Lawrence Speiser.*

Nanette Dembitz and *Melvin L. Wulf* filed a brief for the American Civil Liberties Union, as *amicus curiae,* urging reversal in No. 491 and affirmance in No. 848.

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*Together with No. 848, *Fixa, Postmaster, San Francisco, et al.* v. *Heilberg,* on appeal from the United States District Court for the Northern District of California.

773-305 O-65-24

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

These appeals present the same question: is § 305 (a) of the Postal Service and Federal Employees Salary Act of 1962, 76 Stat. 840, constitutional as construed and applied? The statute provides in part:

> "Mail matter, except sealed letters, which originates or which is printed or otherwise prepared in a foreign country and which is determined by the Secretary of the Treasury pursuant to rules and regulations to be promulgated by him to be 'communist political propaganda,' shall be detained by the Postmaster General upon its arrival for delivery in the United States, or upon its subsequent deposit in the United States domestic mails, and the addressee shall be notified that such matter has been received and will be delivered only upon the addressee's request, except that such detention shall not be required in the case of any matter which is furnished pursuant to subscription or which is otherwise ascertained by the Postmaster General to be desired by the addressee." 39 U. S. C. 4008 (a).

The statute defines "communist political propaganda" as political propaganda (as that term is defined in § 1 (j) of the Foreign Agents Registration Act of 1938 [1]) which is

[1] "The term 'political propaganda' includes any oral, visual, graphic, written, pictorial, or other communication or expression by any person (1) which is reasonably adapted to, or which the person disseminating the same believes will, or which he intends to, prevail upon, indoctrinate, convert, induce, or in any other way influence a recipient or any section of the public within the United States with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party or with reference to the foreign policies of the United States or promote in the United States racial, religious, or social dissensions, or (2) which advocates, advises, instigates, or promotes any racial, social, political, or religious

issued by or on behalf of any country with respect to which there is in effect a suspension or withdrawal of tariff concessions or from which foreign assistance is withheld pursuant to certain specified statutes. 39 U. S. C. § 4008 (b). The statute contains an exemption from its provisions for mail addressed to government agencies and educational institutions, or officials thereof, and for mail sent pursuant to a reciprocal cultural international agreement. 39 U. S. C. § 4008 (c).

To implement the statute the Post Office maintains 10 or 11 screening points through which is routed all unsealed mail from the designated foreign countries. At these points the nonexempt mail is examined by Customs authorities. When it is determined that a piece of mail is "communist political propaganda," the addressee is mailed a notice identifying the mail being detained and advising that it will be destroyed unless the addressee requests delivery by returning an attached reply card within 20 days.

Prior to March 1, 1965, the reply card contained a space in which the addressee could request delivery of any "similar publication" in the future. A list of the persons thus manifesting a desire to receive "communist political propaganda" was maintained by the Post Office. The Government in its brief informs us that the keeping of this list was terminated, effective March 15, 1965. Thus, under the new practice, a notice is sent and must be returned for each individual piece of mail desired. The only standing instruction which it is now possible to leave with the Post Office is *not* to deliver any "communist po-

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disorder, civil riot, or other conflict involving the use of force or violence in any other American republic or the overthrow of any government or political subdivision of any other American republic by any means involving the use of force or violence." 22 U. S. C. § 611 (j).

litical propaganda." [2] And the Solicitor General advises us that the Post Office Department "intends to retain its assumption that those who do not return the card want neither the identified publication nor any similar one arriving subsequently."

No. 491 arose out of the Post Office's detention in 1963 of a copy of the *Peking Review #12* addressed to appellant, Dr. Corliss Lamont, who is engaged in the publishing and distributing of pamphlets. Lamont did not respond to the notice of detention which was sent to him but instead instituted this suit to enjoin enforcement of the statute, alleging that it infringed his rights under the First and Fifth Amendments. The Post Office thereupon notified Lamont that it considered his institution of the suit to be an expression of his desire to receive "communist political propaganda" and therefore none of his mail would be detained. Lamont amended his complaint to challenge on constitutional grounds the placement of his name on the list of those desiring to receive "communist political propaganda." The majority of the three-judge District Court nonetheless dismissed the complaint as moot, 229 F. Supp. 913, because Lamont would now receive his mail unimpeded. Insofar as the list was concerned, the majority thought that any legally significant harm to Lamont as a result of being listed was merely a speculative possibility, and so on this score the controversy was not yet ripe for adjudication. Lamont appealed from the dismissal, and we noted probable jurisdiction. 379 U. S. 926.

Like Lamont, appellee Heilberg in No. 848, when his mail was detained, refused to return the reply card and

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[2] A Post Office regulation permits a patron to refuse delivery of any piece of mail (39 CFR § 44.1 (a)) or to request in writing a withholding from delivery for a period not to exceed two years of specifically described items of certain mail, including "foreign printed matter." *Ibid.* And see Schwartz, The Mail Must Not Go Through, 11 U. C. L. A. L. Rev. 805, 847.

instead filed a complaint in the District Court for an injunction against enforcement of the statute. The Post Office reacted to this complaint in the same manner as it had to Lamont's complaint, but the District Court declined to hold that Heilberg's action was thereby mooted. Instead the District Court reached the merits and unanimously held that the statute was unconstitutional under the First Amendment. 236 F. Supp. 405. The Government appealed and we noted probable jurisdiction. 379 U. S. 997.

There is no longer even a colorable question of mootness in these cases, for the new procedure, as described above, requires the postal authorities to send a separate notice for each item as it is received and the addressee to make a separate request for each item. Under the new system, we are told, there can be no list of persons who have manifested a desire to receive "communist political propaganda" and whose mail will therefore go through relatively unimpeded. The Government concedes that the changed procedure entirely precludes any claim of mootness and leaves for our consideration the sole question of the constitutionality of the statute.

We conclude that the Act as construed and applied is unconstitutional because it requires an official act (*viz.*, returning the reply card) as a limitation on the unfettered exercise of the addressee's First Amendment rights. As stated by Mr. Justice Holmes in *Milwaukee Pub. Co.* v. *Burleson*, 255 U. S. 407, 437 (dissenting): "The United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues . . . ." [3]

[3] "Whatever may have been the voluntary nature of the postal system in the period of its establishment, it is now the main artery through which the business, social, and personal affairs of the people are conducted and upon which depends in a greater degree than upon

We struck down in *Murdock* v. *Pennsylvania*, 319 U. S. 105, a flat license tax on the exercise of First Amendment rights. A registration requirement imposed on a labor union organizer before making a speech met the same fate in *Thomas* v. *Collins*, 323 U. S. 516. A municipal licensing system for those distributing literature was held invalid in *Lovell* v. *Griffin*, 303 U. S. 444. We recently reviewed in *Harman* v. *Forssenius*, 380 U. S. 528, an attempt by a State to impose a burden on the exercise of a right under the Twenty-fourth Amendment. There, a registration was required by all federal electors who did not pay the state poll tax. We stated:

> "For federal elections, the poll tax is abolished absolutely as a prerequisite to voting, and no equivalent or milder substitute may be imposed. Any material requirement imposed upon the federal voter solely because of his refusal to waive the constitutional immunity subverts the effectiveness of the Twenty-fourth Amendment and must fall under its ban." *Id.*, p. 542.

Here the Congress—expressly restrained by the First Amendment from "abridging" freedom of speech and of press—is the actor. The Act sets administrative officials astride the flow of mail to inspect it, appraise it, write the addressee about it, and await a response before dispatching the mail. Just as the licensing or taxing authorities in the *Lovell*, *Thomas*, and *Murdock* cases sought to control the flow of ideas to the public, so here federal agencies regulate the flow of mail. We do not have here, any more than we had in *Hannegan* v. *Esquire, Inc.*, 327 U. S. 146, any question concerning the extent to which Congress may

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any other activity of government the promotion of the general welfare." *Pike* v. *Walker*, 73 App. D. C. 289, 291, 121 F. 2d 37, 39. And see Gellhorn, Individual Freedom and Governmental Restraints, p. 88 *et seq.* (1956).

classify the mail and fix the charges for its carriage. Nor do we reach the question whether the standard here applied could pass constitutional muster. Nor do we deal with the right of Customs to inspect material from abroad for contraband. We rest on the narrow ground that the addressee in order to receive his mail must request in writing that it be delivered. This amounts in our judgment to an unconstitutional abridgment of the addressee's First Amendment rights. The addressee carries an affirmative obligation which we do not think the Government may impose on him. This requirement is almost certain to have a deterrent effect, especially as respects those who have sensitive positions. Their livelihood may be dependent on a security clearance. Public officials, like schoolteachers who have no tenure, might think they would invite disaster if they read what the Federal Government says contains the seeds of treason. Apart from them, any addressee is likely to feel some inhibition in sending for literature which federal officials have condemned as "communist political propaganda." The regime of this Act is at war with the "uninhibited, robust, and wide-open" debate and discussion that are contemplated by the First Amendment. *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 270.

We reverse the judgment in No. 491 and affirm that in No. 848.

It is so ordered.

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

MR. JUSTICE BRENNAN, with whom MR. JUSTICE GOLDBERG joins, concurring.

These might be troublesome cases if the addressees predicated their claim for relief upon the First Amendment rights of the senders. To succeed, the addressees

would then have to establish their standing to vindicate the senders' constitutional rights, cf. *Dombrowski* v. *Pfister,* 380 U. S. 479, 486, as well as First Amendment protection for political propaganda prepared and printed abroad by or on behalf of a foreign government, cf. *Johnson* v. *Eisentrager,* 339 U. S. 763, 781–785. However, those questions are not before us, since the addressees assert First Amendment claims in their own right: they contend that the Government is powerless to interfere with the delivery of the material because the First Amendment "necessarily protects the right to receive it." *Martin* v. *City of Struthers,* 319 U. S. 141, 143. Since the decisions today uphold this contention, I join the Court's opinion.

It is true that the First Amendment contains no specific guarantee of access to publications. However, the protection of the Bill of Rights goes beyond the specific guarantees to protect from congressional abridgment those equally fundamental personal rights necessary to make the express guarantees fully meaningful. See, *e. g., Bolling* v. *Sharpe,* 347 U. S. 497; *NAACP* v. *Alabama,* 357 U. S. 449; *Kent* v. *Dulles,* 357 U. S. 116; *Aptheker* v. *Secretary of State,* 378 U. S. 500. I think the right to receive publications is such a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.

Even if we were to accept the characterization of this statute as a regulation not intended to control the content of speech, but only incidentally limiting its unfettered exercise, see *Zemel* v. *Rusk,* 381 U. S. 1, 16–17, we "have consistently held that only a compelling [governmental] interest in the regulation of a subject within [governmental] constitutional power to regulate can jus-

tify limiting First Amendment freedoms." *NAACP* v. *Button,* 371 U. S. 415, 438. The Government's brief expressly disavows any support for this statute "in large public interests such as would be needed to justify a true restriction upon freedom of expression or inquiry." Rather the Government argues that, since an addressee taking the trouble to return the card can receive the publication named in it, only inconvenience and not an abridgment is involved. But inhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government. See, *e. g., Freedman* v. *Maryland,* 380 U. S. 51; *Garrison* v. *Louisiana,* 379 U. S. 64; *Speiser* v. *Randall,* 357 U. S. 513. The registration requirement which was struck down in *Thomas* v. *Collins,* 323 U. S. 516, was not appreciably more burdensome. Moreover, the addressee's failure to return this form results in nondelivery not only of the particular publication but also of all similar publications or material. Thus, although the addressee may be content not to receive the particular publication, and hence does not return the card, the consequence is a denial of access to like publications which he may desire to receive. In any event, we cannot sustain an intrusion on First Amendment rights on the ground that the intrusion is only a minor one. As the Court said in *Boyd* v. *United States,* 116 U. S. 616, 635:

> "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. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance.

> It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

The Government asserts that Congress enacted the statute in the awareness that Communist political propaganda mailed to addressees in the United States on behalf of foreign governments was often offensive to the recipients and constituted a subsidy to the very governments which bar the dissemination of publications from the United States. But the sensibilities of the unwilling recipient are fully safeguarded by 39 CFR § 44.1 (a) (Supp. 1965) under which the Post Office will honor his request to stop delivery; the statute under consideration, on the other hand, impedes delivery even to a willing addressee. In the area of First Amendment freedoms, government has the duty to confine itself to the least intrusive regulations which are adequate for the purpose. Cf. *Butler* v. *Michigan,* 352 U. S. 380. The argument that the statute is justified by the object of avoiding the subsidization of propaganda of foreign governments which bar American propaganda needs little comment. If the Government wishes to withdraw a subsidy or a privilege, it must do so by means and on terms which do not endanger First Amendment rights. Cf. *Speiser* v. *Randall, supra.* That the governments which originate this propaganda themselves have no equivalent guarantees only highlights the cherished values of our constitutional framework; it can never justify emulating the practice of restrictive régimes in the name of expediency.

MR. JUSTICE HARLAN concurs in the judgment of the Court on the grounds set forth in this concurring opinion.

Syllabus.

MINNESOTA MINING & MANUFACTURING CO. *v.* NEW JERSEY WOOD FINISHING CO.

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

No. 291. Argued April 29, 1965.—Decided May 24, 1965.

Respondent filed this private antitrust suit in 1961, alleging violations of § 7 of the Clayton Act and §§ 1 and 2 of the Sherman Act, arising out of petitioner's acquisition in 1956 of the assets of Insulation and Wires, Inc., which had been the primary distributor of electric insulation materials manufactured by respondent. Petitioner claimed that the action was barred by the four-year limitation provision of § 4B of the Clayton Act, but respondent asserted that the bar of the statute was tolled under § 5 (b) by a proceeding timely filed in 1960 against petitioner pursuant to § 7 of the Clayton Act by the Federal Trade Commission (FTC). That proceeding resulted in a consent order under which petitioner was directed to divest itself of the acquired assets. Section 5 (a) of the Clayton Act makes a final judgment or decree in any civil or criminal proceeding brought by or on behalf of the United States prima facie evidence in later private suits as to all matters respecting which that judgment or decree would be an estoppel as between the parties. Section 5 (b) provides that a civil or criminal proceeding instituted by the United States to prevent, restrain or punish violations of the antitrust laws tolls the statute of limitations during the pendency thereof and for one year thereafter for private actions arising under those laws and based on any matter complained of in the government suit. The District Court held that the statute had been tolled by § 5 (b) and that the suit was timely filed, and the Court of Appeals affirmed. *Held:*

1. Sections 5 (a) and 5 (b) of the Clayton Act are not wholly interdependent or coextensive. Pp. 316–318.

(a) The words "final judgment or decree" are important in the application of § 5 (a), while § 5 (b), which applies to every private right of action based on any matter complained of in the government suit and is not limited to matters which would operate as an estoppel, tolls the statute of limitations regardless of whether a final judgment or decree is entered. Pp. 316–317.

(b) In § 5 (a) Congress was concerned with the narrow issue of the use of judgments or decrees as prima facie evidence in private suits, whereas in § 5 (b) Congress meant to assist private litigants in obtaining all the benefits they might cull from government antitrust actions. P. 317.

2. Absent any specific legislative history on the inclusion of FTC actions within the tolling provision, the issue is resolved by reliance on the clear expression of congressional intention that private suitors be given the benefits of prior government actions, which would necessarily include FTC proceedings. The benefits of § 5 (b) should not depend on an arbitrary allocation of enforcement responsibility between the Department of Justice and the FTC. Pp. 320–322.

3. Petitioner's Sherman Act claims, arising from the asset acquisition which was the basis of the FTC proceeding, although requiring a greater burden of proof than the Clayton Act charges, clearly are based "in part on any matter complained of" in the FTC action. Pp. 322–324.

332 F. 2d 346, affirmed.

Sidney P. Howell, Jr., argued the cause for petitioner. With him on the briefs were *Charles C. Trelease* and *Edwin E. McAmis.*

Albert G. Besser argued the cause and filed a brief for respondent.

Lewis C. Green and *Gustav B. Margraf* filed a brief for Reynolds Metals Co., as *amicus curiae,* urging reversal.

Briefs of *amici curiae,* urging affirmance, were filed by *Solicitor General Cox, Assistant Attorney General Orrick, Frank Goodman, Robert B. Hummel* and *Irwin A. Seibel* for the United States, and by *Alex Akerman, Jr., Thomas A. Ziebarth* and *Robert E. Staed* for Highland Supply Corp.

MR. JUSTICE CLARK delivered the opinion of the Court.

This private treble-damage antitrust action was brought by the New Jersey Wood Finishing Company against Minnesota Mining and Manufacturing Company and the

Essex Wire Corporation.[1] Respondent's original complaint was filed on November 20, 1961.[2] It alleged violations of § 7 of the Clayton Act,[3] a conspiracy to restrain commerce in electrical insulation products in violation of § 1 of the Sherman Act and an attempt to monopolize the same as prohibited by § 2.[4] The substance of the complaint concerned the acquisition in 1956 of all the assets of Insulation and Wires, Inc., a subsidiary of Essex, by Minnesota Mining and an alleged conspiracy to restrain trade in electrical insulation products. The latter claimed that the suit was barred by the four-year limitation provision of the Clayton Act.[5] However, New Jersey Wood asserted that the bar of the statute had been tolled by a proceeding filed in 1960 against Minnesota Mining by the Federal Trade Commission under § 7 of the Clayton Act. That action resulted in a consent order under which Minnesota Mining was directed to divest itself of the assets acquired. Section 5 (b) of the Clayton Act [6] pro-

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[1] The case was considered on interlocutory appeal. 28 U. S. C. § 1292 (b) (1958 ed.). Essex did not appeal and is not a party here.

[2] During the pendency of the case in the District Court respondent filed an amended complaint. However, respondent's theories of recovery and the controlling legal questions are common to both pleadings.

[3] 38 Stat. 731, as amended, 15 U. S. C. § 18 (1964 ed.).

[4] 26 Stat. 209, as amended, 15 U. S. C. §§ 1, 2 (1964 ed.).

[5] Section 4B of the Clayton Act, 69 Stat. 283, 15 U. S. C. § 15b (1964 ed.), provides that:

"Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15a and 16 of this title shall be revived by said sections."

[6] Section 5 (b), 38 Stat. 731, as amended, 15 U. S. C. § 16 (b) (1964 ed.), provides:

"(b) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any

vides that a "civil or criminal proceeding . . . instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws" suspends the running of the statute of limitations during the pendency thereof and for one year thereafter with respect to private actions arising under those laws and based on any matter complained of in the government suit. The questions here are whether proceedings by the Federal Trade Commission toll the running of the § 4B statute of limitations to the same extent as do judicial proceedings and, if they do, whether the claim of New Jersey Wood is based on "any matter complained of" in the Commission action. The District Court denied Minnesota Mining's motion to dismiss, holding that the four-year statute had been tolled by § 5 (b) and that this suit was timely filed. 216 F. Supp. 507. The Court of Appeals affirmed. 332 F. 2d 346. We granted certiorari because of a conflict between circuits [7] and the importance of the question in the administration of the Clayton Act. 379 U. S. 877.

I.

New Jersey Wood is engaged in the manufacture of electrical insulation materials, some of which it sells to independent distributors who, in turn, sell to wire and

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of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

[7] See *Highland Supply Corp.* v. *Reynolds Metals Co.*, 327 F. 2d 725 (C. A. 8th Cir. 1964).

cable manufacturers and fabricators. Minnesota Mining is a diversified company, with one of its divisions producing electrical insulation materials. Essex is a substantial consumer of electrical insulation material. It owned Insulation Wires which distributes that type of material.

In August 1956 Minnesota Mining bought all the assets of Insulation Wires and in 1960 the Federal Trade Commission filed a proceeding against it under § 7 of the Clayton Act which resulted in a consent order directing the divestiture by Minnesota Mining of the assets so acquired. This order was dated August 24, 1961. The Commission charged that prior to 1953 Minnesota Mining was the leading manufacturer of electrical insulation tape; that through five transactions in the years 1952 through 1956 it had also brought under its control substantial shares of other major electrical product lines; and that its subsequent acquisition of two of the three largest distributors of these products might have the effect of actually or potentially lessening competition and tending to create a monopoly in various aspects of that commerce. One of the two distributors so acquired was Insulation Wires.

Thereafter, within a year, this suit was filed. We need not detail the allegations of the complaint. It is sufficient to say that the gist of it was that prior to August 1956 Insulation Wires was the primary distributor of New Jersey Wood products throughout the United States; that in August 1956 Minnesota Mining acquired all of the assets of Insulation Wires and during the next month notified New Jersey Wood that beginning in January 1957 Insulation Wires would no longer distribute its products. The complaint also charged Minnesota Mining and Essex with conspiring to restrain trade and commerce in the manufacture, sale and distribution of electrical insulation products beginning with the acquisition of Insulation

Wires and continuing until the filing of this suit. There were numerous overt acts alleged as being in furtherance of the conspiracy, the first of which was that acquisition.

II.

At the outset it is necessary to examine § 5 (a) of the Clayton Act [8] and its relationship to § 5 (b). The former makes a final judgment or decree in any civil or criminal proceeding brought by or on behalf of the United States prima facie evidence in subsequent private suits "as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto." Several distinctions between these sections are apparent and suggest that they are not wholly interdependent. First, the words "final judgment or decree" are used in § 5 (a) and are of crucial significance in its application. However, § 5 (b) tolls the statute of limitations set out in § 4B from the time suit is instituted by the United States regardless of whether a final judgment or decree is ultimately entered. Its applicability in no way turns on the success of the Government in prosecuting its case. Moreover, under § 5 (a) the judgment or decree may be used only as to matters respecting which it would operate as an estoppel between the parties. No such limitation ap-

[8] Section 5 (a), 38 Stat. 731, as amended, 15 U. S. C. § 16 (a) (1964 ed.), provides:

"(a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under section 15a of this title, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided,* That this section shall not apply to consent judgments or decrees entered before any testimony has been taken or to judgments or decrees entered in actions under section 15a of this title."

pears in the tolling provision. It applies to every private right of action based in whole or in part on "any matter" complained of in the government suit.

When we turn from the express language of these two statutory provisions to the congressional policies underlying them, it becomes even more apparent that the applicability of § 5 (a) to Federal Trade Commission actions should not control the question whether such proceedings toll the statute of limitations. We have discussed these policies at greater length below. At this juncture it is sufficient to say that in framing § 5 (a) Congress focused on the narrow issue of the use by private parties of judgments or decrees as prima facie evidence. This was recognized in *Emich Motors Corp.* v. *General Motors Corp.*, 340 U. S. 558 (1951), where we stated that the purpose of § 5 (a) was "to minimize the burdens of litigation for injured private suitors by making available to them all matters previously established by the Government in antitrust actions" and to permit them "as large an advantage as the estoppel doctrine would afford had the Government brought suit." *Id.*, at 568. As we shall show, however, its purpose in adopting § 5 (b) was not so limited, for it was not then dealing with the delicate area in which a judgment secured in an action between two parties may be used by a third. Whatever ambiguities may exist in the legislative history of these provisions as to other questions, it is plain that in § 5 (b) Congress meant to assist private litigants in utilizing any benefits they might cull from government antitrust actions. See S. Rep. No. 619, 84th Cong., 1st Sess., 6. The distinction was emphasized in *Union Carbide & Carbon Corp.* v. *Nisley*, 300 F. 2d 561 (1962), where the court, after noting the analysis of § 5 (a) set out in *Emich Motors Corp.*, *supra*, stated that:

> "The corollary purpose of the tolling provisions of the second paragraph of Section 5 [now § 5 (b)] is

> to vouchsafe the intended benefits of related government proceedings by suspending the running of the statute of limitations until the termination of the government proceedings, and allowing the private suitor one year thereafter in which to prepare and file his suit. The competency of a government judgment in a private suit is necessarily restricted to the requirements of due process. But the tolling of the statute during the pendency of the government litigation is not so limited." *Id.*, at 569.

In our view, therefore, the two sections are not necessarily coextensive; they are governed by different considerations as well as congressional policy objectives. This makes § 5 (b) readily severable from § 5 (a). Even if we assumed *arguendo* that § 5 (a) is inapplicable to Commission proceedings—a question upon which we venture no opinion—that conclusion would be immaterial in our consideration of § 5 (b) and § 4B. Congress has expressed its belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws. This construction will lend considerable impetus to that policy.

III.

Section 5, later §§ 5 (a) and 5 (b), was passed in response to the plea of President Wilson. In a speech to the Congress on January 20, 1914, he urged that a law be enacted which would permit victims of antitrust violations to have "redress upon the facts and judgments proved and entered in suits by the Government" and that "the statute of limitations . . . be suffered to run against such litigants only from the date of the conclusion of the Government's action." 51 Cong. Rec. 1964. The broad aim of this enactment was to use "private self-interest as a means of enforcement" of the antitrust laws. *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U. S. 743, 751

(1947). The "entire provision [was] intended to help persons of small means who are injured in their property or business by combinations or corporations violating the antitrust laws." H. R. Rep. No. 627, 63d Cong., 2d Sess., 14. See S. Rep. No. 619, *supra,* at 6.

It may be, as Minnesota Mining contends, that when it was enacted the tolling provision was a logical backstop for the prima facie evidence clause of § 5 (a). But even though § 5 (b) complements § 5 (a) in this respect by permitting a litigant to await the outcome of government proceedings and use any judgment or decree rendered therein—a benefit which often is of limited practical value [9]—it is certainly not restricted to that effect. As we have pointed out, the textual distinctions as well as the policy basis of § 5 (b) indicate that it was to serve a more comprehensive function in the congressional scheme of things. The Government's initial action may aid the private litigant in a number of other ways. The pleadings, transcripts of testimony, exhibits and documents are available to him in most instances. In fact, the rules of the Commission so provide. 16 CFR § 1.132 (e). See generally 16 CFR § 1.131 *et seq.* Moreover, difficult questions of law may be tested and definitively resolved before the private litigant enters the fray. The greater resources and expertise of the Commission and its staff render the private suitor a tremendous benefit aside from any value he may derive from a judgment or decree. Indeed, so useful is this service that government proceedings are recognized as a major source of evidence for private parties. See Bicks, The Department of Justice and Private Treble Damage Actions, 4 Antitrust Bull. 5 (1959); Loevinger, Handling a Plaintiff's Antitrust Damage Suit, 4 Antitrust Bull. 29 (1959).

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[9] See *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.,* 346 U. S. 537 (1954).

Admittedly, there is little in the legislative history to suggest that Congress consciously intended to include Commission actions within the sweep of the tolling provision. But neither is there any substantial evidence that it consciously intended to exclude them. The fact of the matter is that the record of the 1914 legislative proceedings reveals an almost complete absence of any discussion on the tolling problem. It seems that Congress simply did not consider the extent of its coverage in the course of its deliberations.

It is in light of this legislative silence that we must determine whether § 4B is tolled by Commission proceedings. In resolving this question we must necessarily rely on the one element of congressional intention which is plain on the record—the clearly expressed desire that private parties be permitted the benefits of prior government actions. Implicit in such an objective is the necessity that the tolling provision include Commission proceedings. Otherwise the benefits flowing from a major segment of the Government's enforcement effort would, in many cases, be denied to private parties. In this connection, and of crucial significance, is the fact that the potential advantages available to such litigants because of § 5 (b) reach far beyond the specific and limited benefits accruing to them under § 5 (a). Furthermore, the § 5 (b) advantages flow as naturally from Commission proceedings as they do from Justice Department actions. Yet petitioner contends that § 4B must be tolled in the latter but not in the former. Such a grudging interpretation of the interrelationship of § 5 (b) and § 4B, however, would collide head-on with Congress' basic policy objectives. Acceptance of petitioner's position would make enjoyment of these intended benefits turn on the arbitrary allocation of enforcement responsibility between the Department and the Commission, and we must therefore reject it.

It is true that the precise language of § 5 (b) does not clearly encompass Commission proceedings. But it is not the literal wording of such a provision that is controlling where, as here, Congress has evidenced neither acceptance nor rejection of either interpretation, yet one effects a clearly expressed congressional purpose while the other defeats it. We stated the pivotal question for determination in such an event only this Term in *Burnett* v. *New York Central R. Co.*, 380 U. S. 424, 427 (1965): "[W]hether congressional purpose is effectuated by tolling the statute of limitations in given circumstances." In order to determine that intent, we must examine "the purposes and policies underlying the limitation provision, the Act itself, and the remedial scheme developed for the enforcement of the rights given by the Act." *Ibid.* Guided by these criteria, we think it clear that congressional policy sustaining § 5 (b) would be effectively served only by tolling the statute of limitations in cases such as this, and we deem that policy controlling. This analysis is not a novel one. Mr. Justice Holmes, sitting on circuit, noted in *Johnson* v. *United States*, 163 F. 30, 32:

> "A statute may indicate or require as its justification a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur to the mind. The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before."

We hold, therefore, that the limitation provision of § 4B is tolled by Commission proceedings to the same ex-

tent and in the same circumstances as it is by Justice Department actions. In so holding we give effect to Congress' basic policy objectives in enacting § 5 (b)—objectives which would be frustrated should we reach a contrary conclusion and thereby deprive large numbers of private litigants of the benefits of government antitrust suits simply because those suits were pursued by one governmental agency rather than the other.

IV.

Minnesota Mining further contends that even though § 5 (b) tolls Commission proceedings, the suit here, insofar as it asserts Sherman Act claims, is not based in part on any matter complained of in the Commission's proceeding. We cannot agree.

New Jersey Wood's Sherman Act claims rest on an alleged conspiracy to restrain and attempt to monopolize trade and commerce in the manufacture, sale and distribution of electrical insulation products. The purposes of the conspiracy were alleged to be: (1) to control Insulation Wires; (2) to prevent it from distributing New Jersey Wood products; (3) to insure that Insulation Wires' supplies were purchased from a Minnesota Mining subsidiary; (4) to effect tie-in sales of electrical insulation products with other Minnesota Mining products; and (5) to have Essex deal only with Insulation Wires in purchasing electrical insulation products to the exclusion of competitive distributors handling New Jersey Wood products. The effect of the conspiracy was alleged to be the complete disruption of the pattern of manufacture, sale and distribution that New Jersey Wood had enjoyed with Insulation Wires and denial to it of access to substantial national markets for electrical insulation products.

Certainly the allegations are based "in part" on the Commission action. It charged that the Insulation Wires acquisition, along with that of another distributor, placed

in the hands of Minnesota Mining, a manufacturer, two of the three largest distributors in the business; that following the acquisitions these distributors discontinued distribution of the products of a number of manufacturers who had used them prior to their acquisition by Minnesota Mining; and that the effect of such action by Minnesota Mining was "the actual or potential lessening of competition" in the manufacture, sale and distribution of insulation products and the foreclosure of other manufacturers from a substantial share of the markets for said products. It appears to us that both suits set up substantially the same claims. It is true that the Commission's Clayton Act proceeding required proof only of a potential anticompetitive effect while the Sherman Act carries the more onerous burden of proof of an actual restraint. The Commission complaint, however, did allege an "actual" as well as a "potential" lessening of competition, *i. e.*, manufacturers "have been foreclosed from a substantial share of the markets." Moreover, the monopolization count was phrased in terms of an "attempt to monopolize," which may be illegal though not successful. See *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 525, 531–532 (1948).

Minnesota Mining's claim seems to be that the crucial difference between the Commission and the New Jersey Wood proceedings is that the former alleges conduct that *may* substantially lessen competition while the latter asserts activity that has *actually* done so. We think that this is a distinction without a difference and does not deprive New Jersey Wood of the tolling effect of § 5 (b). That clause provides for tolling as long as the private claim is based "in part on any matter complained of" in the government proceedings. The fact that New Jersey Wood claims that the same conduct has a greater anticompetitive effect does not make the conduct challenged any less a matter complained of in the government action.

It merely requires it to meet a greater burden of proof as to the effect of the conspiracy before a Sherman Act claim can be sustained.

Affirmed.

MR. JUSTICE HARLAN and MR. JUSTICE STEWART did not participate in the decision of this case.

MR. JUSTICE BLACK, dissenting.

Section 4B of the Clayton Act bars a private antitrust damage suit unless brought within four years after the cause of action arises.[1] Section 5 (b) of the Act, as amended, 15 U. S. C. § 16 (b) (1964 ed.), however, suspends the running of this limitation period "[w]henever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws . . . ." I am unable to agree with the Court's holding that a purely administrative proceeding initiated by the Federal Trade Commission and decided by that same regulatory agency is the kind of "civil or criminal proceeding . . . instituted by the United States . . ." which tolls the statute of limitations under § 5 (b). The Court itself concedes that even as amended "the precise language of § 5 (b) does not clearly encompass Commission proceedings" and that "there is little in the legislative history to suggest that Congress consciously intended to include Commission actions within the sweep of the tolling provision." And the Solicitor General, while urging as *amicus curiae* the result the Court reaches today, candidly admits that this "result is difficult and perhaps impossible to justify in terms of conventional analysis of the text and legislative history . . . ." It is

[1] Section 4B of the Clayton Act, 69 Stat. 283, 15 U. S. C. § 15b (1964 ed.), provides that:

"Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued."

because I think both the language of the statute and the legislative history persuasively, if not conclusively, show that Congress did not intend the construction the Court gives § 5 (b) today, that I am unable to agree with its decision.

The whole of § 5, now divided into subdivisions (a) and (b), was passed in reponse to President Wilson's 1914 plea to Congress to enact a law designed to make it easier for antitrust victims to collect damages through private lawsuits since preparing an antitrust case against a major corporate defendant was a larger task than most injured persons could undertake. To accomplish that single purpose he recommended to Congress, as the Court notes, two things—that these victims be permitted to seek "redress upon the facts and judgments proved and entered in suits by the Government" and also that "the statute of limitations . . . be suffered to run against such litigants only from the date of the conclusion of the Government's action." 51 Cong. Rec. 1964. Congress accepted the President's recommendation and passed § 5, a single section in two paragraphs, making "a final judgment or decree . . . rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States . . . prima facie evidence" against a civil antitrust defendant and tolling the statute of limitations during the pendency of "any suit or proceeding in equity or criminal prosecution . . . instituted by the United States . . . ." This language of § 5 as it passed the Congress in 1914 clearly did not refer to administrative proceedings but to antitrust suits or criminal prosecutions instituted by the Government in civil or criminal courts. Moreover, the purpose and effect of the two parts of this provision were obviously complementary, permitting the injured party to utilize a final judgment obtained by the Government and also providing a means whereby the injured party could await the result of the government ac-

tion confident that his suit would not be barred by the statute of limitations. In the words of one of the committee reports, the "*entire provision* is intended to help persons of small means who are injured in their property or business by combinations or corporations violating the antitrust laws." H. R. Rep. No. 627, 63d Cong., 2d Sess., 14. (Emphasis supplied.) See S. Rep. No. 698, 63d Cong., 2d Sess., 45. Therefore, both the language and the complementary nature of the two paragraphs of § 5 ought to show beyond any doubt that the whole section as passed was intended to apply to the same kind of proceeding in the same kind of tribunal—that is a proceeding brought in a civil or criminal court, the only tribunal which in common understanding has power to render the kind of "final judgment or decree" mentioned in § 5 (a).[2] Furthermore, since the two paragraphs of § 5 when offered and when passed were regarded as an entity because of their identical language and purpose, it is not surprising that the Senators and Congressmen addressing themselves to § 5 did not specifically direct their remarks to the tolling provision as distinct from the effect to be given a court judgment or decree. Those discussing the measure naturally treated the "suit or proceeding in equity" or "criminal prosecution" set out in both paragraphs in identical terms as referring to the same kind of proceeding in the same kind of tribunal, namely a court. It is true that the language was changed in 1955 from "suit or proceeding in equity" and "criminal

[2] And of course, it is not at all clear that this is a suit "instituted by the United States." The Department of Justice brings suits and criminal prosecutions in the name of the United States, while an independent regulatory agency sues and is sued in its own name. And the United States does not initiate the proceedings before an administrative agency. Here for example the Federal Trade Commission filed the proceeding against petitioner. However, because of the view I take of the other language in the section, I find it unnecessary to decide this question.

prosecution" to "civil or criminal proceeding," the present language, but the legislative history of the 1955 amendment affirmatively shows that there was no intention to affect in any way the kind of court proceedings necessary to suspend the statute of limitations. Thus, I am unable to go along with the Court in construing the tolling provision of § 5 (b) as though it applies to both court and Trade Commission proceedings while treating § 5 (a) as though it may apply to court proceedings only. Such a holding would, in my judgment, run counter to the whole legislative history of the 1914 Act.

I am setting out as an Appendix some of the legislative history of the original Act and of the 1955 amendment, which points out specifically something which does not surprise me at all: that while Congress was ready to make the *final judgment of a court* prima facie evidence against a defendant, it was at the same time entirely unwilling to give such effect to *administrative hearings and orders* and was also unwilling to toll the statute of limitations during the pendency of such proceedings. It is true that many administrative agencies now conduct hearings, make findings, and issue orders in a way more or less comparable to courts. I doubt, however, that the time has even yet come when Congress would be willing to compel judges and juries to treat administrative orders as prima facie proof of a violation of law, either civil or criminal, or to treat those proceedings as though they were conducted in a court of law with all the protections there afforded litigants.

I would reverse this judgment.

APPENDIX TO OPINION OF MR. JUSTICE BLACK, DISSENTING.

THE 1914 ACT.

Herewith for illustration are statements made about § 5 of the 1914 Clayton Act by Senators and Congressmen

particularly interested in § 5, all of whom took part in the preparation and sponsorship of the 1914 bill or the discussions that took place as it went through the House and Senate.

Senator Walsh, the spokesman for the Judiciary Committee, led the fight for the House version of § 5 and defended it on the ground that the defendant "has had an opportunity to try out before a court, with all the forms of the law, every question involved in the *lawsuit*. . . ." 51 Cong. Rec. 13851. (Emphasis added.) And Senator Walsh later added that "Here the party has had his day in *court*. He has tried every issue, and it is simply a question, now that he has had it tried, whether he may insist upon a second *trial*." 51 Cong. Rec. 13857. (Emphasis added.) Opponents of the "conclusive evidence" proposal of the House bill never challenged the premise, implicit in the remarks of Senator Walsh and others, that only judgments rendered in judicial proceedings were contemplated by § 5. Not once did any member of Congress suggest that under the House version, administrative findings based upon evidence which would not be admissible in a court should be conclusive of the defendant's liability in a later treble-damage action.

Senator Walsh, in arguing that his proposal would not violate the Constitution, again emphasized that § 5 did not apply to administrative orders, but only to judgments or decrees of the courts:

> "I want to say just a word with reference to the authorities to which the attention of the Senate has been invited . . . . Nobody questions them. They all lay down the rule that in an action brought against an individual who has never theretofore had his *day in court* you can not make a certificate or a recital or an order of an administrative board or anything of that kind conclusive evidence against him." 51 Cong. Rec. 13856–13857. (Emphasis added.)

On the other hand, there were Senators who thought a judgment or decree for a defendant should be equally binding on a treble-damage plaintiff. In opposing this idea, Senator White argued:

> "Then, Mr. President, as has been said, it is burdensome enough to require parties to the litigation themselves to be bound by the findings of a *court* or *jury* in a particular case. So many things that we can not at the time possibly foresee influence such decisions. The way in which the evidence is produced may have its effect upon a *jury* or a *court*.
>
> "The manner in which the case is handled by the lawyers employed may determine in the mind of a *jury* or a *court* what the *verdict* or the *judgment* shall be, and yet, Mr. President, those things should probably not have been controlling influences in the conclusions reached." 51 Cong. Rec. 13900. (Emphasis added.)

And Senator Cummins said: "But when the suit is brought, then the judgment or decree of the *court* in the *suit* that has been brought by the Government would be prima facie evidence of violation of the antitrust law . . . ." 51 Cong. Rec. 13850. (Emphasis added.)

When the bill left the conference committee and went back to the House, the managers were called on to defend the changes against charges that elimination of the criminal penalties had emasculated the bill. Chairman Webb of the House Judiciary Committee attempted to describe the proposed enforcement procedures in the strongest possible light. After reading the provision vesting enforcement responsibility in the Trade Commission, he stated:

> "Now, the value of these two sections is this: That they not only give the individual the right to sue for treble damages where he pleases, and we not only

suspend the statute of limitations against an individual if a *Government* suit is brought against a trust, but we also require the *Federal Trade Commission* to stop these practices and take those guilty of such practices into court.

"But that is not all. Some argue that after the Trade Commission takes jurisdiction that excludes individuals from pursuing these other remedies. The bill further provides:

" 'No order of the commission or board or the judgment of the court to enforce the same shall in any wise relieve or absolve any person from any liability under the antitrust acts.'

"So you have three or four distinct remedies, all of which may be invoked at the same time." 51 Cong. Rec. 16274. (Emphasis added.)

It is clear therefore that Chairman Webb distinguished between suits by the "Government"—the suits to which the tolling provision applied—and proceedings of the Federal Trade Commission. He believed that the statute was suspended only when actions were brought under the direction of the Attorney General. This was confirmed a few moments later by the following exchange:

"Mr. HARDY. Under the bill does the Government have the authority to bring suit for injunction as well as private parties?

"Mr. WEBB. Yes. Section 15 gives the district attorneys under the direction of the Attorney General the right to apply for an injunction." 51 Cong. Rec. 16276.

The day following Chairman Webb's remarks Representative Floyd, another of the House managers, again attempted to persuade the House that the enforcement scheme contemplated by the bill was strong:

"That is not all. Under section 5 of the bill any private litigant injured by the unlawful acts of any

corporation where the *Government of the United States* has proceeded against such corporation and obtained a judgment, either in a *court of law or equity,* is allowed the use of that judgment or decree to show the unlawful acts of the combination to the full extent that it would be an estoppel between the Government and the original offender. . . . That is a new remedy and a most efficient remedy. The *Government of the United States,* acting in behalf of all of its citizens, prosecutes a trust, convicts it either in a *criminal court or a civil court,* and the private litigant, injured by the unlawful acts of such trust, has nothing to do in order to recover the three-fold damages except to prove the amount of damages and that the injury was done by this trust or corporation. . . .

. . . . . .

"But that is not all. There are several other remedies provided in this bill. Under section 11 the violation of sections 2, 3, 7, and 8 may be enforced, respectively, by *the Trade Commission,* by the Interstate Commerce Commission, or by the Federal Reserve Board." 51 Cong. Rec. 16319. (Emphasis added.)

Another relevant discussion in the House is the following:

"Mr. McKENZIE: If this section is left in the bill, do you not feel and believe that this decree that is mentioned in this section should be the decree of the court of last resort—the Supreme Court of the land?

"Mr. VOLSTEAD. No.

. . . . . .

"Mr. McKENZIE. You think it would be good policy to leave a matter of such great importance in the hands of an inferior court?

"Mr. VOLSTEAD. Yes." 51 Cong. Rec. 9079.

As originally presented to the House, § 5 also made a "judgment or decree" rendered in a "suit or proceeding in equity brought by or on behalf of the United States" conclusive against any prospective treble-damage plaintiff. Opponents of this clause vigorously challenged the constitutionality of binding a party who had never had his "day in court." The debates made it clear time and again that the proceeding contemplated was an action brought for the United States by the Attorney General, not an administrative proceeding:

> "Mr. SISSON. . . . [D]oes the gentleman believe that his rights in the court should be determined upon the questions raised by the Attorney General of the United States?
>
> "Mr. PROUTY. Why, certainly not; the Constitution expressly prohibits it. In other words, the Attorney General could go in and prevent my having a trial before a jury.
>
> "Mr. SISSON. That is the point I had in mind.
>
> "Mr. PROUTY. By instituting a proceeding in equity and having the case tried.
>
> "Mr. SISSON. That is the point I had in mind, that the Attorney General, if he was disposed to do so—we would not charge that of any particular Attorney General—might cook up a case which would directly defeat the rights of every individual if he had been injured." 51 Cong. Rec. 9492.

Defenders of the proposition, on the other hand, stated:

> "Mr. CULLOP. My question is this: Supposing a collusive suit was brought and the defendant won on the issue, then is every outsider barred from any further suit? According to this language he is.
>
> "Mr. FLOYD of Arkansas . . . .
>
> ". . . My answer to that proposition is that if the time ever comes in this Government when any Attor-

> ney General will enter into collusive suits with corporations and combinations engaged in unlawful acts, it will be an evil day for our Republic, a day when every statute will become useless and justice will become a mockery." 51 Cong. Rec. 9489.

Furthermore, an amendment was in fact offered to the Senate which arguably would have resulted in bringing administrative proceedings within the scope of the phrase "suit or proceeding." The amendment met with opposition and was withdrawn. The House bill originally dealt only with a "suit or proceeding in equity," and did not apply to criminal proceedings. After the bill reached the Senate, Senator Bryan moved to strike out the words "in equity," so the provision would read simply "any suit or proceeding." As observed by Senator Reed, "That would cover any kind of proceeding." Senator Culberson proposed a substitute adding the phrase "criminal prosecution or," and retaining the phrase "in equity." Senator Bryan withdrew his broader proposal and accepted Senator Culberson's limited substitute. 51 Cong. Rec. 13897–13898.

The House initially passed the Act with four substantive sections, each having a criminal penalty attached. All of the criminal penalties were removed in the Senate or in conference. Senator Reed of Missouri, leading the opposition to the bill, charged repeatedly that the Clayton Act had been stripped of all force and effectiveness:

> "We end by providing a smooth and easy road which may be traveled through the years, until finally a *commission* shall issue an innocuous, nonenforcible decree, a decree that can be vitalized only by being affirmed by a court. At the conclusion of all the litigation we propose to impose no penalty, levy no fine, send no one to jail, and we permit the culprit to preserve his swag!" 51 Cong. Rec. 15867. (Emphasis added.)

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Had the proponents of the measure contemplated the use of administrative findings as evidence it appears that the obvious answer to Senator Reed would have been that the bill does have teeth for the Commission's order would be admissible as prima facie evidence against the "culprit," and private claimants would be able to reclaim "his swag," three times over. Neither this, nor any other answer challenging the accuracy of Senator Reed's statement, was heard on the Senate floor, although his complaint was repeatedly made. And in the House, Representative Nelson charged:

> "Finally, the penalty is cut out; they can do all these things, and the Trade Commission can only say, 'You must not do it any more.' Then there is the long delay in an appeal to the courts; and they go through the courts. And then what? There may be an injunction issued, but they have got away with the loot with impunity." 51 Cong. Rec. 16325.

For further examples see 51 Cong. Rec. 9079, 9169, 9488–9490, 9492, 9494–9495, 12789–12790, 13850–13851, 13856–13857, 13897–13898, 13900, 14262, 14328, 15867, 15948, 15950, 16003, 16044, 16046, 16149, 16154, 16274, 16281, 16319, 16325.

THE 1955 AMENDMENT.

The committee reports on the amendment detailed carefully every change the bill would make, but there is absolutely no evidence that there was any intent to amend § 5 (b) for the purpose of suspending the statute of limitations during the pendency of Federal Trade Commission hearings. See H. R. Rep. No. 422, 84th Cong., 1st Sess.; S. Rep. No. 619, 84th Cong., 1st Sess. And the debates and the hearings affirmatively show that no change was intended. For example, in the 1951 hearings Representative Patman appeared before the House subcommittee considering the bill and questioned whether § 5 had been changed to deny the right of a pri-

vate litigant to use a judgment obtained by the Government. Representative Wilson assured him that: "This doesn't change the present law." Representative Keating, the author of the bill, then commented: "I think there is a slight change in existing law where it refers to the subsequent numbers. There has to be a change in phraseology in that because of what we have done in section 4. I believe that is the only change." Hearings on H. R. 3408 before the Subcommittee on Study of Monopoly Power of the House Committee on the Judiciary, 82d Cong., 1st Sess., Part 3, 98–100. And on the floor of the House in the discussion of the bill which became the present law, Representative Quigley stated:

> "It was the specific purpose of the committee in reporting this bill to in no way affect the substantive rights of individual litigants. It is simply a procedural change and suggested with the thought of setting up a uniform statute of limitations. That is the sole purpose." 101 Cong. Rec. 5131.

MR. JUSTICE GOLDBERG, dissenting.

With all deference, I dissent. I agree with the Court, *ante,* at 321, that, as we recently stated in *Burnett* v. *New York Central R. Co.,* 380 U. S. 424, 427, the pivotal question for determination is "whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances." I cannot agree, however, that the Court has correctly applied that test in this case. As my Brother BLACK has so well demonstrated in his dissenting opinion, both the language and legislative history of the statutes before us clearly show that Congress did not intend that the statute of limitations applicable to private antitrust actions be tolled by the institution of a Federal Trade Commission administrative proceeding. Cf. *United States* v. *Welden,* 377 U. S. 95. It frustrates rather than effectuates congressional purpose to fail to honor the express intent of Congress in this given circumstance.

CASE *v.* NEBRASKA.

CERTIORARI TO THE SUPREME COURT OF NEBRASKA.

No. 843. Argued April 28, 1965.—Decided May 24, 1965.

Petitioner filed a habeas corpus petition in a Nebraska state court claiming unconstitutional denial of the right to counsel when he pleaded guilty to a burglary charge. The State Supreme Court affirmed the trial court's dismissal of the petition on the ground that habeas corpus was unavailable in Nebraska to release a prisoner if the sentencing court had requisite jurisdiction and the sentence was within its power. After this Court granted certiorari Nebraska enacted a postconviction procedure statute apparently providing a hearing for petitions such as petitioner's. *Held:* The judgment is vacated and the cause remanded to the Nebraska Supreme Court for reconsideration in light of the supervening statute.

177 Neb. 404, 129 N. W. 2d 107, vacated and remanded.

Daniel J. Meador, by appointment of the Court, 379 U. S. 995, argued the cause and filed a brief for petitioner.

Melvin Kent Kammerlohr, Assistant Attorney General of Nebraska, argued the cause for respondent. With him on the brief was *Clarence A. H. Meyer,* Attorney General.

PER CURIAM.

Petitioner sought a writ of habeas corpus in the District Court for Lancaster County, Nebraska, alleging that he was unconstitutionally denied the assistance of counsel when he entered a plea of guilty in that court to a charge of burglary. The trial court dismissed the petition without a hearing, and filed no opinion. The Nebraska Supreme Court affirmed. 177 Neb. 404, 129 N. W. 2d 107. The Supreme Court's opinion recognized that petitioner's allegations, if true, would establish a violation of the Federal Constitution. 177 Neb., at 410, 129 N. W. 2d, at 111. The Supreme Court held, however, that, in Nebraska,

"Habeas corpus is not available to discharge a prisoner from a sentence of penal servitude if the court imposing it had jurisdiction of the offense and of the person charged with the crime, and the sentence was within the power of the court." 177 Neb., at 412, 129 N. W. 2d, at 112. We granted certiorari, 379 U. S. 958, to decide whether the Fourteenth Amendment requires that the States afford state prisoners some adequate corrective process for the hearing and determination of claims of violation of federal constitutional guarantees.

After certiorari was granted, the Nebraska Legislature enacted a statute providing a postconviction procedure. Neb. Leg. Bill 836, Seventy-fifth Session, effective April 12, 1965. On its face, the statute provides for a hearing of petitions such as this one, alleging denial of federal constitutional rights. Therefore, the judgment is vacated and the cause remanded to the Nebraska Supreme Court for reconsideration in light of the supervening statute.

It is so ordered.

MR. JUSTICE CLARK, concurring.

As the Court points out, we granted certiorari in this case "to decide whether the Fourteenth Amendment requires that the States afford state prisoners some adequate corrective process for the hearing and determination of claims of violation of federal constitutional guarantees." Happily, Nebraska in the interim has adopted just such a procedure thus obviating the necessity of our passing upon the question.

It should be pointed out, however, that as early as 1949 this Court in *Young* v. *Ragen,* 337 U. S. 235, articulated the principle that the States must afford prisoners some "clearly defined method by which they may raise claims of denial of federal rights." *Id.,* at 239. But compare *Mooney* v. *Holohan,* 294 U. S. 103 (1935). In stating

that proposition the Court noted: "The doctrine of exhaustion of state remedies, to which this Court has required the scrupulous adherence of all federal courts . . . presupposes that some adequate state remedy exists. We recognize the difficulties with which the Illinois Supreme Court is faced in adapting available state procedures to [this] requirement . . . . Nevertheless, that requirement must be met." *Young* v. *Ragen, supra,* at 238–239.

Thereafter, the Illinois Post-Conviction Hearing Act was adopted.[1] It was followed by passage of a statute in North Carolina in 1951 which was "modeled" on the Illinois Act.[2] *Miller* v. *State,* 237 N. C. 29, 51, 74 S. E. 2d 513, 528 (1953). Nebraska is the seventh State to adopt such a statute since *Young* v. *Ragen, supra.*[3] There exists in some States a wide variety of procedural techniques that have been used to deal with due process attacks on criminal convictions, *i. e.,* basic common-law remedies such as habeas corpus, *coram nobis* and delayed motions for new trial. But the great variations in the scope and availability of such remedies result in their being entirely inadequate.

As a consequence there has been a tremendous increase in habeas corpus applications in federal courts. Indeed, in the Supreme Court alone they have increased threefold in the last 15 years. This has brought about much public

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[1] Ill. Rev. Stat., c. 38, §§ 122–1—122–7 (1963).

[2] N. C. Gen. Stat. §§ 15–217—15–222 (Supp. 1963).

[3] Maryland, Maine, Oregon and Wyoming have passed similar legislation. Md. Ann. Code, Art. 27, §§ 645A to 645J (Supp. 1964); Me. Rev. Stat. Ann., c. 126, §§ 1–A to 1–G (Supp. 1963); Ore. Rev. Stat. §§ 138.510–138.680 (1963); Wyo. Stat. Ann. §§ 7–408.1 to 7–408.8 (1963 Cum. Supp.). It should be noted, however, that six other States have adopted similar procedures by rule of court. See Alaska Sup. Ct. Rule 35 (b); Del. Super. Ct. Crim. Proc. Rule 35; Fla. Rules Crim. Proc. 1; Ky. Rules Crim. Proc. 11.42; Mo. Sup. Ct. Rule 27.26; N. J. Crim. Prac. Rules of Super. and County Cts., Rule 3:10A–2.

agitation and debate over proposed limitations of the habeas corpus jurisdiction of federal courts. The necessity for such proposals has been based on various grounds, including that of federal-state comity; inordinate delay in the administration of criminal justice in the state courts; and the heavy burden on the federal judiciary. None of these will survive careful scrutiny.

Strangely enough there has been little light thrown on the necessity for more effective postconviction remedies in the States. In 1958 the Burton Committee [4] reported out a preliminary draft of findings in which it stated

> "that the law of state post-conviction process in many states was wholly inadequate to cope with the demands now being placed upon it. In some jurisdictions prisoners were altogether precluded from direct access to the courts. [*Cochran* v. *Kansas,* 316 U. S. 255 (1942); *Dowd* v. *Cook,* 340 U. S. 206 (1951).] . . . In many more, the procedures recognized by state law failed to provide genuine opportunities for testing constitutional issues of the most numerous and important types. The result was that prisoners often failed to obtain hearings on their allegations in the state courts. This, in turn, increased the number of petitions in state and federal courts and was generally productive of frustrations in all persons concerned with the process." [5]

Believing that the practical answer to the problem is the enactment by the several States of postconviction

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[4] The late Mr. Justice Burton of revered memory was Chairman of the Committee on Post Conviction Remedies of the American Bar Association's Section of Judicial Administration. In August 1958 it circulated a preliminary draft of a study entitled Effective State Post-Conviction Procedures—Their Nature and Essentialities, which was prepared by the Seminar in Criminal Procedure of the University of Chicago Law School under the direction of Professor Francis A. Allen.

[5] *Id.,* at 2–3.

remedy statutes I applaud the action of Nebraska. This will enable prisoners to "air out" their claims in the state courts and will stop the rising conflict presently being generated between federal and state courts. This has proven true in Illinois where it is reported that federal applications from state prisoners dropped considerably after its Act was adopted. I understand that the Illinois Legislature is now considering the enlargement of the five-year limitations period of its present Act to a 20-year period. The consensus is that this will solve the problem entirely in Illinois, which was originally the "sore spot" of the Nation in this regard.

I hope that the various States will follow the lead of Illinois, Nebraska, Maryland, North Carolina, Maine, Oregon and Wyoming in providing this modern procedure for testing federal claims in the state courts and thus relieve the federal courts of this ever-increasing burden.

MR. JUSTICE BRENNAN, concurring.

The petitioner entered his plea of guilty on April 18, 1963, one month after this Court's decision in *Gideon* v. *Wainwright,* 372 U. S. 335, holding the Sixth Amendment guarantee of counsel applicable to state prosecutions by virtue of the Fourteenth Amendment.[1] The Nebraska

[1] The petition for habeas corpus reads:

"Petitioner, Paul Vernon CASE, was sentenced to five (5) years in the Nebraska Penal and Correctional Complex on May 3, 1963, A. D.

"Petitioner was 'fast talked' and forcibly coerced into waiving his rights (U. S. Constitutional Rights) to have advice and counsel; to have a Preliminary Hearing, and to plead not-guilty.

"Mr. William D. Blue told Petitioner he, Petitioner, would be charged with being 'An Habitual Criminal' if he did not waive these rights. He, Petitioner was held in Solitary Confinement in City Jail, until such time as he would agree—under cruel and unusual circumstances.

"The basic rights waived by this Petitioner are guaranteed him under the Sixth Amendment of the U. S. Constitution and are so

Supreme Court followed prior Nebraska decisions in holding that, in a habeas corpus action brought by a convicted prisoner, judicial inquiry is limited to the jurisdiction of the convicting court over the offense and over the person of the accused, and to the question whether the sentence imposed was within the power of the court.[2] The State conceded in its response to the petition for certiorari that habeas corpus was unavailable to hear petitioner's claim and that petitioner had no other remedy in the state courts.[3]

On oral argument, counsel appointed for petitioner, see 379 U. S. 995, conceded the relevancy of the new Nebraska postconviction procedure,[4] but contended that petitioner

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fundamental and essential to a fair trial that they are made obligatory upon the States, *All* states, by way of the Fourteenth Amendment. For reference see Gideon vs. Wainwright in the U. S. Supreme Court. October 1962, Term, No. 155; all Justices concurring."

[2] See *Jackson* v. *Olson*, 146 Neb. 885, 893–894, 22 N. W. 2d 124, 129–130; *In re Dunn*, 150 Neb. 669, 35 N. W. 2d 673; *Hawk* v. *Olson*, 145 Neb. 306, 16 N. W. 2d 181, rev'd 326 U. S. 271, on remand, 146 Neb. 875, 22 N. W. 2d 136.

[3] The response stated: "For all practical purposes, there is no collateral remedy available in the Nebraska courts to a state prisoner who alleges that a violation of his federal constitutional rights occurred in connection with his conviction and whose claim has not yet been considered by the state courts, unless the prisoner's claim is predicated upon a lack of jurisdiction of the sentencing court over the offense or over the person of the accused."

In addition to this concession that the State provided no remedy whatever, petitioner cites *Carlsen* v. *State*, 129 Neb. 84, 261 N. W. 339, as authority for the unavailability of *coram nobis;* Neb. Rev. Stat. § 29–2103 (1964 Reissue), as barring a motion for a new trial; and Neb. Rev. Stat. § 25–1912 (1964 Reissue), as barring an appeal.

[4] The new statute, Neb. Leg. Bill 836, 75th Session, effective April 12, 1965, provides:

"Sec. 1. A prisoner in custody under sentence and claiming a right to be released on the ground that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Constitution of this state or the Constitution

was nevertheless entitled to a declaration that he had been unconstitutionally denied a hearing by the Nebraska courts, and to a reversal of the judgment of the Nebraska Supreme Court and a mandate directing that

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of the United States, may file a verified motion at any time in the court which imposed such sentence, stating the grounds relied upon, and asking the court to vacate or set aside the sentence.

"Unless the motion and the files and records of the case show to the satisfaction of the court that the prisoner is entitled to no relief, the court shall cause notice thereof to be served on the county attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States, the court shall vacate and set aside the judgment and shall discharge the prisoner or resentence him or grant a new trial as may appear appropriate. Proceedings under the provisions of this act shall be civil in nature. Costs shall be taxed as in habeas corpus cases.

"A court may entertain and determine such motion without requiring the production of the prisoner, whether or not a hearing is held. Testimony of the prisoner or other witnesses may be offered by deposition. The court need not entertain a second motion or successive motions for similar relief on behalf of the same prisoner.

"Sec. 2. An order sustaining or overruling a motion filed under the provisions of this act shall be deemed to be a final judgment, and an appeal may be taken to the Supreme Court therefrom as provided for in appeals in civil cases; *Provided,* that a prisoner may in the discretion of the Supreme Court upon application to the court be released on such recognizance as the Supreme Court shall fix pending the determination of the appeal.

"Sec. 3. The remedy provided by this act is cumulative and is not intended to be concurrent with any other remedy existing in the courts of this state. Any proceeding filed under the provisions of this act which states facts which if true would constitute grounds for relief under another remedy shall be dismissed without prejudice.

"Sec. 4. The district court may appoint an attorney or attorneys, not exceeding two, to represent the prisoners in all proceedings under the provisions of this act and fix their compensation as provided in section 29–1803, Reissue Revised Statutes of Nebraska, 1943."

by some procedure the petitioner's claim be adequately adjudicated.[5]

Petitioner concedes that the Court's practice has been to remit prisoners to their federal habeas corpus remedy. See, *e. g., Jennings* v. *Illinois,* 342 U. S. 104. But he con-

[5] The petitioner states in his brief:

"At this stage of the litigation the Court need not pass on the steps to be taken if the Nebraska court should fail to comply with a mandate requiring corrective process for petitioner. It might be suggested, however, that the problem essentially is no different from actual or potential disobedience of the mandate in many other cases remanded by this Court. If on the remand Nebraska failed to make corrective process available, petitioner could return here with a fresh petition for certiorari. This Court could then order petitioner's discharge from custody. That is the ultimate sanction behind the due process requirement of state corrective process. See *Dowd* v. *Cook,* 340 U. S. 206, 209–10."

In support of this contention, the petitioner argues that the Supremacy Clause and the fundamental Fourteenth Amendment right to a hearing constitutionally require the States to afford corrective judicial process to remedy federal constitutional defects in their criminal prosecutions, citing *Frank* v. *Mangum,* 237 U. S. 309, 335; *Moore* v. *Dempsey,* 261 U. S. 86, 91; *Mooney* v. *Holohan,* 294 U. S. 103, 113; *New York ex rel. Whitman* v. *Wilson,* 318 U. S. 688, 690; *Carter* v. *Illinois,* 329 U. S. 173, 175–176; *Foster* v. *Illinois,* 332 U. S. 134, 139; *Taylor* v. *Alabama,* 335 U. S. 252, 272 (concurring opinion); *Young* v. *Ragen,* 337 U. S. 235, 238–239. In addition to the cases cited involving criminal convictions, petitioner cites as other applications of the general principle *General Oil Co.* v. *Crain,* 209 U. S. 211, 228; *Kenney* v. *Supreme Lodge,* 252 U. S. 411, 415; *Ward* v. *Love County,* 253 U. S. 17; *McKnett* v. *St. Louis & S. F. R. Co.,* 292 U. S. 230; *Testa* v. *Katt,* 330 U. S. 386. He also argues that, since Nebraska allowed habeas corpus to attack convictions for jurisdictional defects based on Nebraska law, the Nebraska Supreme Court unconstitutionally discriminated against federal law by refusing habeas corpus for jurisdictional defects based on the Fourteenth Amendment. For the proposition that a State may not discriminate against rights arising under federal laws, petitioner cites *McKnett* v. *St. Louis & S. F. R. Co., supra,* and *Testa* v. *Katt, supra,* and for the proposition that an unconstitutional denial of counsel is a jurisdictional defect relies on *Johnson* v. *Zerbst,* 304 U. S. 458.

tends that substituting federal for state corrective process, instead of directing the State itself to meet its obligation, is a disservice to sound principles of federalism.[6] He points to the vast increase in the number of federal habeas corpus applications by state prisoners as evidence that lack of adequate state procedures has put an intolerable strain on the federal writ and has brought about mounting friction between state and federal courts. See *Henry* v. *Mississippi*, 379 U. S. 443, 453. In short, he contends that if the evolution in the coverage of the Fourteenth Amendment and in the scope of federal habeas corpus, see *Fay* v. *Noia*, 372 U. S. 391, is not to pull the federal judiciary increasingly into state criminal administration, the States must provide broader procedures more hospitable to federal constitutional claims.

The desirability of minimizing the necessity for resort by state prisoners to federal habeas corpus is not to be denied. Our federal system entrusts the States with primary responsibility for the administration of their criminal laws. The Fourteenth Amendment and the Supremacy Clause make requirements of fair and just procedures an integral part of those laws, and state procedures should ideally include adequate administration of these guarantees as well.[7] If, by effective corrective processes,

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[6] Petitioner refers to *Young* v. *Ragen*, *supra*, where, in vacating the denial of state habeas corpus, the Court said: "If there is now no post-trial procedure by which federal rights may be vindicated in Illinois, we wish to be advised of that fact upon remand of this case." 337 U. S., at 239. He also cites *Jackson* v. *Denno*, 378 U. S. 368; *Boles* v. *Stevenson*, 379 U. S. 43; *Henry* v. *Mississippi*, 379 U. S. 443; and Note, Effect of the Federal Constitution in Requiring State Post-Conviction Remedies, 53 Col. L. Rev. 1143 (1953).

[7] Dean Griswold of the Harvard Law School, in an address, "The States and Criminal Law," given on May 13, 1965, to the Cleveland Bar Association, said:

"For, after all, the basic responsibility for the enforcement of the criminal law remains with the States. The States are, or should be, as much concerned with high standards as is the Federal govern-

the States assumed this burden, the exhaustion requirement of 28 U. S. C. § 2254 (1958 ed.) would clearly promote state primacy in the implementation of these guarantees. Of greater importance, it would assure not only that meritorious claims would generally be vindicated without any need for federal court intervention, but that nonmeritorious claims would be fully ventilated, making easier the task of the federal judge if the state prisoner pursued his cause further. See *Townsend* v. *Sain,* 372 U. S. 293, 312–318. Greater finality would inevitably attach to state court determinations of federal constitutional questions, because further evidentiary hearings on federal habeas corpus would, if the conditions of *Townsend* v. *Sain* were met, prove unnecessary.

None can view with satisfaction the channeling of a large part of state criminal business to federal trial courts. If adequate state procedures, presently all too scarce,[8]

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ment. The States should, in my view, welcome the determinations of the Supreme Court that the high standards prescribed by our Federal Constitution are to be taken seriously and should be enforced. What is needed now is for the States to accept this responsibility, and to adopt means to carry it out. With proper explanation and understanding, this can, I believe, be done without impairing our enforcement of the criminal law. When the States do fully meet this responsibility, we will all be better off, and we will more nearly have realized the potentialities of our Great Federal form of Government."

[8] The Uniform Post-Conviction Procedure Act, 9B Uniform Laws Ann. 352–359, designed to provide adjudication of federal claims, has had but slight influence in the States. Arkansas adopted the Uniform Act in 1957, but repealed it two years later. 2 Acts of Arkansas (1959) 1160–1161. Six States in addition to Nebraska have adopted their own statutes. Ill. Rev. Stat., c. 38, §§ 122–1 to 122–7 (1963); Me. Rev. Stat. Ann., c. 126, §§ 1–A to 1–G (Supp. 1963); Md. Ann. Code, Art. 27, §§ 645A to 645J (Supp. 1964); N. C. Gen. Stat. §§ 15–217 to 15–222 (Supp. 1963); Ore. Rev. Stat. §§ 138.510–138.680 (1963); Wyo. Stat. Ann. §§ 7–408.1 to 7–408.8 (1963 Cum. Supp.). Procedures have been adopted by rule of court in six States. Alaska Sup. Ct. Rule 35 (b); Del. Super. Ct. Crim. Proc. Rule 35 (a); Fla. Rules Crim. Proc. 1; Ky. Rules Crim. Proc. 11.42; Mo. Sup. Ct. Rule

were generally adopted, much would be done to remove the irritant of participation by the federal district courts in state criminal procedure. The 1954 Report of the Special Committee on Habeas Corpus of the Conference of Chief Justices pointed the way in urging that "State statutes should provide a postconviction process at least as broad in scope as existing Federal statutes under which claims of violation of constitutional right asserted by State prisoners are determined in Federal courts under the Federal habeas corpus statutes," and recommending provisions for hearing, a record, fact findings and conclusions of law. H. R. Rep. No. 1293, 85th Cong., 2d Sess., p. 7 *et seq.*

These are similar to other suggestions of desirable attributes of a state postconviction procedure which should reduce the necessity for exercise of federal habeas corpus jurisdiction.[9] The procedure should be swift and

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27.26; N. J. Crim. Prac. Rules of Super. and County Cts., Rule 3:10A–2. Some state courts are apparently broadening existing postconviction remedies by judicial construction. See, *e. g.*, *People* v. *Huntley*, 15 N. Y. 2d 72, 204 N. E. 2d 179 (1965); *State ex rel. Banach* v. *Boles*, 147 W. Va. 850, 858, 131 S. E. 2d 722, 728 (1963); *Hunt* v. *Warden*, 335 F. 2d 936, 941–942 (C. A. 4th Cir.) (discussing the expanding Maryland remedy). See also the views expressed in *People* v. *Wilson*, 18 App. Div. 2d 424, 430, 239 N. Y. S. 2d 900, 906; *Ex parte Aaron*, 275 Ala. 377, 381–382, 155 So. 2d 334, 337–338 (dissenting opinion); *Donnell* v. *Nash*, 323 F. 2d 850 (C. A. 8th Cir.); *Cobb* v. *Balkcom*, 339 F. 2d 95, 100 (C. A. 5th Cir.). Proposals that the States make their postconviction procedures coextensive with federal habeas corpus are found in Meador, Accommodating State Criminal Procedure and Federal Postconviction Review, 50 A. B. A. J. 928 (1964); National Assn. of Attys. Gen., Conference Proceedings, 1964, pp. 42–43 (remarks of Arthur J. Sills, Atty. Gen. of New Jersey), 149–150 (resolution of the Association); Brennan, Some Aspects of Federalism, 39 N. Y. U. L. Rev. 945, 957–959 (1964).

[9] See Meador, *supra*, 50 A. B. A. J., at 929–930; Brennan, *supra*, 39 N. Y. U. L. Rev., at 958–959; cf. Report No. 23, ABA Section of Criminal Law (Mid-Winter Meeting, Feb. 1965) 5, 7.

simple and easily invoked. It should be sufficiently comprehensive to embrace all federal constitutional claims. In light of *Fay* v. *Noia, supra,* it should eschew rigid and technical doctrines of forfeiture, waiver, or default. See *Douglas* v. *Alabama,* 380 U. S. 415, 422–423; *Henry* v. *Mississippi, supra.* It should provide for full fact hearings to resolve disputed factual issues, and for compilation of a record to enable federal courts to determine the sufficiency of those hearings. *Townsend* v. *Sain, supra.* It should provide for decisions supported by opinions, or fact findings and conclusions of law, which disclose the grounds of decision and the resolution of disputed facts. Provision for counsel to represent prisoners, as in § 4 of the Nebraska Act, would enhance the probability of effective presentation and a proper disposition of prisoners' claims.

But there is no occasion in this case to decide whether due process requires the States to provide corrective process. The new statute on its face is plainly an adequate corrective process. Every consideration of federalism supports our conclusion to afford the Nebraska courts the opportunity to say whether that process is available for the hearing and determination of petitioner's claim.

May 24, 1965. 381 U. S.

COLUMBIA ARTISTS MANAGEMENT INC. ET AL. *v.* UNITED STATES ET AL.

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

No. 775. Decided May 24, 1965.

Affirmed.

Seymour D. Lewis and *Ralph F. Colin* for appellants.

Solicitor General Cox, Assistant Attorney General Orrick, Lionel Kestenbaum and *Elliott H. Moyer* for the United States, and *Theodore R. Kupferman* for appellee Summy-Birchard, Inc.

PER CURIAM.

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

MR. JUSTICE HARLAN, MR. JUSTICE STEWART, and MR. JUSTICE GOLDBERG, dissenting.

An examination of the proceedings in this case convinces us that a summary disposition of this matter is not appropriate.

In 1955 the Government brought an antitrust action against appellant Columbia, appellant Community Concerts, Inc. (Columbia's wholly owned subsidiary), and two corporations whose successor is appellee Summy-Birchard, Inc.* Columbia and Summy-Birchard manage professional concert artists, and their affiliates, Community and the Civic Concert Service division of Summy-Birchard, are "concert services," organizing and maintain-

*Summy-Birchard is successor to both the National Concert and Artists Corp. and its wholly owned subsidiary, Civic Concert Services, Inc.

ing local nonprofit "audience associations" throughout the country which sponsor concert series. Normally an audience association pays an artist an established fee set by the artist and his manager, out of which the artist's manager retains a share and the concert service also retains a share known as the "margin." The Government's complaint charged a conspiracy to monopolize the business of managing and booking concert artists and the business of forming and maintaining audience associations.

On October 20, 1955, a consent decree was entered by the District Court for the Southern District of New York, the terms of which provide that the managing companies must make their artists available to all concert services at the same rate and that the concert services must make performers available to audience associations without reference to the management of the artists. Paragraph VI (D) of the decree requires that each defendant make available "to any financially responsible concert service any artist managed by such defendant and reasonably available for the desired performance, at the same margin allowed to the defendant or its affiliate concert service by that artist for a performance for the same fee."

Columbia's standard contract with concert services contains a provision, which Columbia argues is required by a collective bargaining agreement among managers and the concert artists' union, prohibiting a concert service from booking an engagement at less than the artist's established fee without the consent of the artist. After Summy-Birchard protested against signing contracts containing this provision on the ground that it constituted illegal resale price maintenance, Columbia petitioned the District Court on July 18, 1963, for a construction of the 1955 consent decree, alleging in part that the decree specifically sanctioned this contract provision and thus insulated it from attack by a party to the decree. The Government and Summy-Birchard were joined as parties. The

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District Court held that this contract provision prevented competition among concert services, for it required all of them to be paid the same "margin" for each artist, and concluded that such a provision was illegal. After reargument, the District Court reaffirmed its prior opinion and stated in its final order:

> "The provision in Columbia's contract . . . that each engagement before an audience association shall be performed at the artist's established fee constitutes illegal resale price maintenance and is a *per se* violation of Section 1 of the Sherman Act (15 U. S. C. § 1). To the extent that the Final Judgment operates to allow Columbia to set such resale prices, it is illegal and void as contrary to the Sherman Act, and any continued reliance by Columbia upon such portion or portions of the Final Judgment will not be construed by the Court to be in any way valid."

Columbia appeals from this judgment claiming that it constitutes a modification of the 1955 consent decree and that the District Court is without power to modify the decree without Columbia's agreement.

I.

In our view there is substance to Columbia's contention that the District Court modified the 1955 consent decree. As we read the District Court's opinion, that court held that the 1955 decree affirmatively sanctioned the use of the contract provision, and then went on to modify the decree, invalidating that portion of the decree which permitted Columbia to include the provision at issue in its contracts. The District Judge stated in his original opinion:

> "The scheme of the concert service business conducted by Community and the Civic division of Summy-Birchard which is embodied in the decree

> clearly envisions that the artist or his manager will be able to control the ultimate price paid by the 'consumer'—audience association, impresario, or whoever assumes the risk of 'producing' a show. Were this not so, the definition of 'margin' in the decree would be meaningless. Since this court by its decree—albeit a consent order—has sanctioned *pro tanto* this structuring of the industry, it should not be slow to consider charges of illegality against the system."

The District Judge suggested that Summy-Birchard's answer might be treated as a "petition for declaratory judgment" or a "petition for modification." After discussing whether or not the contract provision constituted resale price maintenance, he concluded by stating:

> "Thus, insofar as the decree-imposed requirement of margin operates to allow Columbia to set resale prices, the decree is illegal and void as contrary to the letter and policy of the Sherman Act, and this court will not construe Columbia's continued reliance upon that portion of the decree to be in any way valid."

The District Judge characterized what he had done as "[i]nvalidation of . . . part of the consent decree." The District Court's opinion on rehearing states, "The opinion of November 19 is accordingly reaffirmed," and the judgment of the District Court, set out above, states that "[t]o the extent that the Final Judgment operates to allow Columbia to set such resale prices, it is illegal and void as contrary to the Sherman Act." In our view the language of the opinion and judgment of the District Court conclusively shows that the court modified the 1955 consent decree despite Columbia's opposition to such modification.

We believe that the modification of a previously entered consent decree under the circumstances present here raises

substantial questions of law. This Court has held that a consent decree ordinarily may not be modified without the consent of the parties involved. In *United States* v. *Swift & Co.*, 286 U. S. 106, 119, Mr. Justice Cardozo stated for the Court: "Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned." See *United States* v. *International Harvester Co.*, 274 U. S. 693; *Ford Motor Co.* v. *United States*, 335 U. S. 303. While the Court has allowed modifications in consent decrees upon occasion, see *Chrysler Corp.* v. *United States*, 316 U. S. 556; cf. *Hughes* v. *United States*, 342 U. S. 353, a showing of changed circumstances is usually necessary. Whether a modification of the consent decree was proper in this case, where no changed circumstances were claimed, should not be determined by this Court summarily. Additionally, the District Court's determination that Columbia's contract provision constitutes resale price maintenance prohibited by the Sherman Act, 26 Stat. 209, raises substantial issues of antitrust law which we believe also ought to be briefed and argued.

II.

Apart from what has already been said, there is another reason why this case should not be dealt with summarily. If the District Court's action is not viewed as a modification of the decree, but rather as a determination that the decree neither specifically sanctioned nor prohibited Columbia's contract provision, the court's judgment must be viewed as a declaratory judgment that Columbia's conduct violated the Sherman Act. In that event no appeal lies to this Court, for the Expediting Act, 32 Stat. 823, as amended, 15 U. S. C. § 29, allows direct appeals to this Court only in civil actions "wherein the United States is complainant." If appellant is appealing from a declar-

atory judgment, this case should be transferred to the Court of Appeals for the Second Circuit. If the Court is holding by its action that the case is properly here because of the fact that the 1955 action was commenced by the Government, then the case raises substantial questions as to the scope of the Expediting Act which should be resolved only after plenary consideration. See *Shenandoah Valley Broadcasting, Inc.* v. *ASCAP,* 375 U. S. 39.

We would therefore "postpone jurisdiction" and set the case for argument.

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

BAXA ET AL. *v.* UNITED STATES.

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

No. 957. Decided May 24, 1965.

Certiorari granted, judgment vacated and case remanded.
Reported below: 340 F. 2d 259.

Melvin B. Lewis and *Howard W. Minn* for petitioners.

Solicitor General Cox, Acting Assistant Attorney General Vinson, Beatrice Rosenberg and *Kirby W. Patterson* for the United States.

PER CURIAM.

The petition for writ of certiorari is granted. On consideration of the confession of error by the Solicitor General and upon examination of the entire record, the judgment is vacated and the case is remanded to the United States District Court for the Southern District of Illinois for a new trial.

SAMARA ET AL. *v.* OKLAHOMA CAPITOL IMPROVEMENT AUTHORITY.

APPEAL FROM THE SUPREME COURT OF OKLAHOMA.

No. 1002. Decided May 24, 1965.

Appeal dismissed and certiorari denied.
Reported below: 398 P. 2d 89.

Leroy Powers and *Gus Rinehart* for appellants.

Charles Nesbitt, Attorney General of Oklahoma, and *Harvey H. Cody* and *Joseph C. Muskrat,* Assistant Attorneys General, for appellee.

PER CURIAM.

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

BILLY *v.* OKLAHOMA.

APPEAL FROM THE COURT OF CRIMINAL APPEALS OF OKLAHOMA.

No. 1034. Decided May 24, 1965.

Appeal dismissed and certiorari denied.
Reported below: 397 P. 2d 913.

Sid White for appellant.

PER CURIAM.

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

WALKER *v.* GEORGIA.

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

No. 1072. Decided May 24, 1965.

Certiorari granted and judgment reversed.

Reported below: 220 Ga. 415, 139 S. E. 2d 278.

Jack Greenberg, James M. Nabrit III and *Donald L. Hollowell* for petitioner.

Lewis R. Slaton and *Carter Goode* for respondent.

PER CURIAM.

The petition for writ of certiorari is granted and the judgment is reversed. *Hamm* v. *City of Rock Hill* and *Lupper* v. *Arkansas*, 379 U. S. 306.

MR. JUSTICE STEWART would vacate the judgment and remand the case to the Supreme Court of Georgia for reconsideration in the light of supervening federal legislation, in accordance with the views expressed in his dissenting opinion in *Hamm* v. *City of Rock Hill*, 379 U. S. 306, 326.

MR. JUSTICE BLACK, MR. JUSTICE HARLAN, and MR. JUSTICE WHITE would affirm the judgment of the Supreme Court of Georgia for the reasons stated in their dissenting opinions in *Hamm* v. *City of Rock Hill*, 379 U. S. 306, 318, 322, 327.

McLEOD *v.* OHIO.

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

No. 1117, Misc. Decided May 24, 1965.

Certiorari granted and judgment reversed.

Reported below: 1 Ohio St. 2d 60, 203 N. E. 2d 349.

Petitioner *pro se.*

James V. Barbuto and *John D. Smith* for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is reversed. *Massiah* v. *United States,* 377 U. S. 201.

Syllabus.

ATLANTIC REFINING CO. *v.* FEDERAL TRADE COMMISSION.

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

No. 292. Argued March 30, 1965.—Decided June 1, 1965.*

The Atlantic Refining Co., a major producer and distributor of gasoline and oil products on the eastern seaboard, agreed with the Goodyear Tire & Rubber Co., the country's largest manufacturer of rubber products, to sponsor the sale of the latter's tires, batteries and accessories (TBA) to its many retail service station dealers and wholesale outlets. Atlantic was primarily responsible for promoting the sale of Goodyear products to its dealers and assisting in their resale, for which it received a commission on all sales made to the wholesalers and dealers. The Federal Trade Commission (FTC) enjoined the use of direct methods of coercion by Atlantic on its dealers in the inauguration and promotion of the plan, and Atlantic does not seek review of this aspect of the case. The FTC also found the sales-commission plan illegal as a classic example of the use of economic power in one market to destroy competition in another, and prohibited both Atlantic and Goodyear from participating in such arrangements. The Court of Appeals affirmed. *Held:*

1. Where Congress has empowered the FTC to determine whether the methods, acts or practices of competition are unfair, the function of the courts is to determine whether the FTC's decision is warranted by the record and has a reasonable basis in law. Pp. 367–368.

2. The record contains substantial evidence to support the FTC's findings. Pp. 368–369.

(a) Atlantic and its dealers did not bargain as equals, in the light of Atlantic's leverage of short-term leases, equipment loans to dealers, control of gasoline and oil supplies, and control of dealer advertising. P. 368.

(b) Atlantic not only exercised the persuasion that resulted from its economic power, but coupled it with threats of reprisal which the FTC enjoined. P. 368.

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*Together with No. 296, *Goodyear Tire & Rubber Co.* v. *Federal Trade Commission,* also on certiorari to the same court.

(c) The effectiveness of Atlantic's sponsorship of Goodyear's products is measured by the increase in sales soon after the plan was put in operation. Pp. 368–369.

3. A violation of § 5 of the Federal Trade Commission Act consists of conduct contrary to the public policy declared in the Act, and the FTC may use as a guideline recognized violations of the antitrust laws. Pp. 369–371.

(a) The FTC found that the sales-commission plan impaired competition at all three levels of the TBA industry: manufacturing, wholesaling and retailing. P. 370.

(b) The FTC was warranted in finding that the plan, which had a substantial effect on commerce, had the same effect as though Atlantic had agreed to, and did, require its dealers to buy Goodyear products. P. 370.

(c) Since the effect of the plan is similar to that of a tie-in, it is not necessary to embark on a full-scale economic analysis of competitive effect. P. 371.

(d) In view of the destructive effect on commerce of the widespread use of the sales-commission plan, the FTC was justified in refusing to consider evidence of business justification for the program. P. 371.

4. The FTC's order prohibiting each petitioner from entering into or performing any similar agreement is not unreasonable. Pp. 372–377.

(a) It is within the FTC's authority to determine that the long existence of the plan, coupled with Atlantic's coercion of its dealers, warranted a complete prohibition of the practice by Atlantic. Pp. 372–373.

(b) Goodyear was an active participant in carrying out the sales-commission plan and the prohibition directed against it is within the FTC's power. Pp. 373–375.

(c) There was ample evidence, including 9 sales-commission agreements with other oil companies which the FTC found to be substantially identical with the Atlantic-Goodyear contract, of Goodyear's conduct for more than 14 years aimed at using oil company power structures to curtail competition in TBA. The FTC could conclude therefrom that such conduct required proscribing the use of the sales-commission plan by Goodyear. Pp. 375–376.

(d) If Goodyear has an agreement with another company which differs from that involved herein, it may seek a reopening of the FTC's order. P. 377.

331 F. 2d 394, judgments affirmed.

Frederic L. Ballard, Jr., argued the cause for petitioner in No. 292. With him on the briefs were *Charles I. Thompson, Jr., Tyson W. Coughlin, Roy W. Johns, Joel L. Carr* and *Harry W. Gill, Jr.*

John F. Sonnett argued the cause for petitioner in No. 296. With him on the briefs were *Arthur Mermin, David Ingraham* and *Marshall H. Cox, Jr.*

Daniel M. Friedman argued the cause for respondent in both cases. With him on the brief were *Solicitor General Cox, Assistant Attorney General Orrick, Lionel Kestenbaum, James McI. Henderson, Alvin L. Berman* and *Lester A. Klaus.*

Cecil E. Munn filed a brief for Champlin Petroleum Co., as *amicus curiae,* urging reversal in No. 292.

Harold T. Halfpenny and *Mary M. Shaw* filed a brief for the Automotive Service Industry Association, as *amicus curiae,* urging affirmance in No. 292.

William F. Kenney, William Simon and *John Bodner, Jr.*, filed a brief for Shell Oil Co., as *amicus curiae,* in both cases.

MR. JUSTICE CLARK delivered the opinion of the Court.

The Federal Trade Commission has found that an agreement between the Atlantic Refining Company (Atlantic) and the Goodyear Tire & Rubber Company (Goodyear), under which the former "sponsors" the sale of the tires, batteries and accessory (TBA) products of the latter to its wholesale outlets and its retail service station dealers, is an unfair method of competition in violation of

§ 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U. S. C. § 45 (1964 ed.).[1] Under the plan Atlantic sponsors the sale of Goodyear products to its wholesale and retail outlets on an overall commission basis. Goodyear is responsible for its sales and sells at its own price to Atlantic wholesalers and dealers for resale; it bears all of the cost of distribution through its warehouses, stores and other supply points and carries on a joint sales promotion program with Atlantic. The lat-

[1] Section 5 provides in pertinent part:

"(a) (1) Unfair methods of competition in commerce, and unfair . . . acts or practices in commerce, are declared unlawful.

. . . . . .

"(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in commerce and unfair . . . acts or practices in commerce.

"(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair . . . act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. . . . If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by [this Act], it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. . . . After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require . . . ."

ter, however, is primarily responsible for promoting the sale of Goodyear products to its dealers and assisting them in their resale; for this it receives a commission on all sales made to its wholesalers and dealers. The hearing examiner, with the approval of the Commission and the Court of Appeals, enjoined the use of direct methods of coercion on the part of Atlantic upon its dealers in the inauguration and promotion of the plan. Atlantic does not seek review of this phase of the case. However, the Commission considered the coercive practices to be symptomatic of a more fundamental restraint of trade and found the sales-commission plan illegal in itself as "a classic example of the use of economic power in one market . . . to destroy competition in another market . . . ." 58 F. T. C. 309, 367. It prohibited Atlantic from participating in any such commission arrangement.[2] Similarly, it forbade

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[2] Atlantic was ordered to cease and desist from:

"1. Entering [into] or continuing in operation or effect any contract, agreement or combination, express or implied, with The Goodyear Tire & Rubber Company, or The Goodyear Tire & Rubber Company, Inc., or with any other rubber company or tire manufacturer, or any other supplier of tires, batteries, and/or accessories, whereby The Atlantic Refining Company receives anything of value in connection with the sale of TBA products to any wholesaler or retailer of Atlantic petroleum products by any marketer or distributor of TBA products other than The Atlantic Refining Company;

"2. Accepting or receiving anything of value from any manufacturer, distributor, wholesaler, or other vendor of TBA products, for acting as sales agent or for otherwise sponsoring, recommending, urging, inducing, or promoting the sale of TBA products, directly or indirectly, by any such vendor to any wholesaler or retailer of Atlantic petroleum products;

"3. Using or attempting to use any contractual or other device, such as, but not limited to, agreements, leases, training programs, promotions, dealer meetings, dealer discussions, service station identification, credit cards, and financial loans, to sponsor, recommend, urge, induce, or otherwise promote the sale of TBA products by any distributor or marketer of such products other than The Atlantic

Goodyear from continuing the arrangement with Atlantic or any other oil company.[3] Goodyear and Atlantic filed separate appeals. The Court of Appeals approved the findings of the Commission and affirmed its order. "Ap-

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Refining Company to or through any wholesaler or retailer of Atlantic petroleum products;

"4. Employing any method of inspecting, reporting, or surveillance or using or attempting to use, in any manner, its relationship with Atlantic outlets to sponsor, recommend, urge, induce, or otherwise promote the sale of any specified brand or brands of TBA products by any distributor or marketer of such products other than The Atlantic Refining Company to any wholesaler or retailer of Atlantic petroleum products;

"5. Intimidating or coercing or attempting to intimidate or coerce any wholesaler or retailer of Atlantic petroleum products to purchase any brand or brands of TBA products;

"6. Preventing or attempting to prevent any wholesaler or retailer of Atlantic [petroleum] products from purchasing and reselling, merchandising, or displaying TBA products of his own independent choice." 58 F. T. C., at 369–370.

[3] Goodyear was ordered to cease and desist from:

"1. Entering into or continuing in operation or effect any contract, agreement or combination, express or implied with The Atlantic Refining Company or with any other marketing oil company whereby Goodyear, directly or indirectly, pays or contributes anything of value to any such marketing oil company in connection with the sale of TBA products by Goodyear or any distributor of Goodyear products to any wholesaler or retailer of petroleum products of such marketing oil company;

"2. Paying, granting or allowing, or offering to pay, grant or allow, anything of value to The Atlantic Refining Company or to any [other] marketing oil company for acting as sales agent or for otherwise sponsoring, recommending, urging, inducing or promoting the sale of TBA products, directly or indirectly, by Goodyear or any distributor of Goodyear products to any wholesaler or retailer of petroleum products of such marketing oil company;

"3. Reporting or participating in the reporting to The Atlantic Refining Company or any other marketing oil company concerning sales of TBA products to wholesalers or retailers of petroleum products, individually or by groups, of any such marketing oil company." 58 F. T. C., at 370–371.

praising the broader aspects of the system [used by Atlantic and Goodyear] as a tying arrangement," it agreed with the Commission that it injured "competition in the distribution of TBA at the manufacturing, wholesale, and retail levels." 331 F. 2d 394, 402. We granted certiorari, 379 U. S. 943, because of the importance of the questions raised and especially in light of the holding of the Court of Appeals for the District of Columbia Circuit in *Texaco, Inc.* v. *Federal Trade Comm'n*, 118 U. S. App. D. C. 366, 336 F. 2d 754, which is in apparent conflict with these cases. We affirm the judgments of the Court of Appeals.

I.

Since Atlantic has not sought review of paragraphs 5 and 6 of the Commission's order as to its use of overt acts of coercion on its wholesalers and retailers those portions of the order are final. We therefore do not set out in detail all of the facts which are so carefully examined in the opinion of the Court of Appeals.

Atlantic is a major producer, refiner and distributor of oil and its by-products. Its market is confined to portions of 17 States along the eastern seaboard.[4] Its distribution system consists of wholesale distributors who purchase gasoline and lubricants in large quantities and retail service station operators who do business either as lessees of Atlantic or as contract dealers selling its products. In 1955 Atlantic had 2,493 lessee dealers, who purchased 39.1% of its gasoline sales, and 3,044 contract dealers, who bought 18.1%.[5] About half of the contract

[4] In 1948 these States accounted for 36.7% of the gasoline sales in the United States. Atlantic's share of this market was 6.8%; its share of the national market was 2.5%. It had total operating revenues exceeding $500,000,000 in 1954.

[5] Lessee dealers lease their stations from Atlantic, while contract dealers either own their own stations or lease them from some party other than Atlantic.

dealers were service station operators; the remainder were operators of garages, grocery stores and other outlets which sell gasoline but do not handle tires, batteries and accessories.

Goodyear is the largest manufacturer of rubber products in the United States with sales of over $1,000,000,000 in 1954. It distributes tires, tubes and accessories through 57 warehouses located throughout the country. It does not warehouse batteries; "Goodyear" batteries are tradenamed by it but manufactured and directly distributed to Goodyear outlets by the Electric Auto-Lite Company and Gould-National Batteries, Inc. Goodyear also sells its products at wholesale and retail through about 500 company-owned stores and through numerous independent dealers. These independent franchised dealers number more than 12,000, there being among them a number of Atlantic wholesale petroleum distributors and retail petroleum jobbers. Goodyear has also had a substantial number of nonfranchised dealers which includes most service station customers, including the Atlantic stations involved here.

Gasoline service stations are particularly well suited to sell tires, batteries and accessories. They constitute a large and important market for those products. Since at least 1932 Atlantic has been distributing such products to its dealers. In 1951 it inaugurated the sales-commission plan.[6] Its contract with Goodyear covered three

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[6] Prior to 1951 Atlantic distributed tires, batteries and accessories to its dealers through a purchase-resale plan, whereby it would purchase Lee tires, Exide batteries and various accessories directly from the manufacturers and resell them to its dealers and wholesalers.

Atlantic also entered into a sales-commission agreement with the Firestone Tire & Rubber Company in 1951. Firestone products were to be marketed in the Eastern Pennsylvania, Western Pennsylvania and Southern regions of Atlantic's sales territory, but Firestone is not a party to this action.

regions: Philadelphia-New Jersey, New York State and New England.

The Goodyear-Atlantic agreement required Atlantic to assist Goodyear "to the fullest practicable extent in perfecting sales, credit, and merchandising arrangements" with all of Atlantic's outlets. This included announcement to its dealers of its sponsorship of Goodyear products followed by a field representative's call to "suggest . . . the maintenance of adequate stocks of merchandise" and "maintenance of proper identification and advertising" of such merchandise.[7] Atlantic was to instruct its salesmen to urge dealers to "vigorously" represent Goodyear, and to "cooperate with and assist" Goodyear in its "efforts to promote and increase the sale" by Atlantic dealers of Goodyear products. And it was to "maintain adequate dealer training programs in the sale of tires, batteries, and accessories." In addition, the companies organized joint sales organization meetings at which plans were made for perfecting the sales plan. One project was a "double teaming" solicitation of Atlantic outlets by representatives of both companies to convert them to Goodyear products. They were to call on the dealers together, take stock orders, furnish initial price lists and project future quotas of purchases of Goodyear products. Goodyear also required that each Atlantic dealer be assigned to a supply point maintained by it, such as a warehouse, Goodyear store, independent dealer or designated Atlantic distributor or retail dealer. Atlantic would not receive any commission on purchases made outside of an assigned supply point. Its commission of 10% on sales to Atlantic dealers and 7.5% on sales to its wholesalers was paid on the basis of a master sheet prepared

[7] While Atlantic controlled the placement of advertising in the dealers' stations, Goodyear furnished and erected the displays. Atlantic permitted no signs or displays other than those of sponsored products.

by Goodyear and furnished Atlantic each month. This list was broken down so as to show the individual purchases of each dealer (except those whose supply points for Goodyear products were Atlantic wholesalers). Under this reporting technique, the Commission found, "Atlantic may determine the exact amount of sponsored TBA purchased by each Atlantic outlet . . . ." 58 F. T. C. 309, 351. Goodyear also furnished, this time at the specific request of Atlantic, a list of the latter's recalcitrant dealers who refused to be identified with the "Goodyear Program." These lists Atlantic forwarded to its district offices for "appropriate action." On one occasion a list of 46 such dealers was furnished Atlantic officials by Goodyear. The Commission found that "the entire group . . . was thereafter signed to Goodyear contracts and Goodyear advertising signs were installed at their stations." *Id.*, at 346–347.

The effectiveness of the program is evidenced by the results. Within seven months after the agreement Goodyear had signed up 96% and 98%, respectively, of Atlantic's dealers in two of the three areas assigned to it. In 1952 the sale of Goodyear products to Atlantic dealers was $4,175,890—40% higher than Atlantic's sales during the last year of its purchase-resale plan with Lee tires and Exide batteries. By 1955 these sales of Goodyear products amounted to $5,700,121. Total sales of Goodyear and Firestone products from June 1950 to June 1956 were over $52,000,000. This enormous increase, the findings indicate, was the result of the effective policing of the plan. The reports of sales by Goodyear to Atlantic enabled it to know exactly the amount of Goodyear products the great majority of its dealers were buying.

The Commission stressed the evidence showing that "Atlantic dealers have been orally advised by sales officials of the oil company that their continued status as Atlantic

dealers and lessees will be in jeopardy if they do not purchase sufficient quantities of sponsored" tires, batteries and accessories. *Id.*, at 342. Indeed, some dealers lost their leases after being reported for not complying with the Goodyear sales program. But we need not detail this feature of the case since Atlantic has conceded the point by not perfecting an appeal thereon.

II.

Section 5 of the Federal Trade Commission Act declares "[u]nfair methods of competition in commerce, and unfair . . . acts or practices in commerce . . . unlawful." In a broad delegation of power it empowers the Commission, in the first instance, to determine whether a method of competition or the act or practice complained of is unfair. The Congress intentionally left development of the term "unfair" to the Commission rather than attempting to define "the many and variable unfair practices which prevail in commerce . . . ." S. Rep. No. 592, 63d Cong., 2d Sess., 13. As the conference report stated, unfair competition could best be prevented "through the action of an administrative body of practical men . . . who will be able to apply the rule enacted by Congress to particular business situations, so as to eradicate evils with the least risk of interfering with legitimate business operations." H. R. Conf. Rep. No. 1142, 63d Cong., 2d Sess., 19. In thus divining that there is no limit to business ingenuity and legal gymnastics the Congress displayed much foresight. See *Federal Trade Comm'n* v. *Cement Institute,* 333 U. S. 683, 693 (1948). Where the Congress has provided that an administrative agency initially apply a broad statutory term to a particular situation, our function is limited to determining whether the Commission's decision "has 'warrant in the record' and a reasonable basis in law." *Labor Board* v. *Hearst*

Publications, Inc., 322 U. S. 111, 131 (1944). While the final word is left to the courts, necessarily "we give great weight to the Commission's conclusion . . . ." *Federal Trade Comm'n* v. *Cement Institute, supra,* at 720.

III.

Certainly there is "warrant in the record" for the findings of the Commission here. Substantial evidence supports the conclusion that notwithstanding Atlantic's contention that it and its dealers are mutually dependent upon each other, they simply do not bargain as equals. Among the sources of leverage in Atlantic's hands are its lease and equipment loan contracts with their cancellation and short-term provisions. Only last Term we described the power implications of such arrangements in *Simpson* v. *Union Oil Co.*, 377 U. S. 13 (1964), and we need not repeat that discussion here. It must also be remembered that Atlantic controlled the supply of gasoline and oil to its wholesalers and dealers. This was an additional source of economic leverage, *United States* v. *Loew's, Inc.*, 371 U. S. 38, 45 (1962), as was its extensive control of all advertising on the premises of its dealers.

Furthermore, there was abundant evidence that Atlantic, in some instances with the aid of Goodyear, not only exerted the persuasion that is a natural incident of its economic power, but coupled with it direct and overt threats of reprisal such as are now enjoined by paragraphs 5 and 6 of the order. Indeed, the Commission could properly have concluded that it was for this bundle of persuasion that Goodyear paid Atlantic its commission. We will not repeat the manner in which this sponsorship was carried out. It is sufficient to note that the most impressive evidence of its effectiveness was its undeniable success within a short time of its inception. In 1951, seven months after the sales-commission plan had gone into effect, Goodyear had enjoyed great success in signing

contracts with Atlantic dealers despite the fact that a 1946–1949 survey had shown that 67% of the dealers had preferred Lee tires and 76% Exide batteries.

With this background in mind, we consider whether there was a "reasonable basis in law" for the Commission's ultimate conclusion that the sales-commission plan constituted an unfair method of competition.

IV.

At the outset we must stress what we do not find present here. We recognize that the Goodyear-Atlantic contract is not a tying arrangement. Atlantic is not required to tie its sale of gasoline and other petroleum products to purchases of Goodyear tires, batteries and accessories. Nor does it expressly require such purchases of its dealers. But neither do we understand that either the Commission or the Court of Appeals held that the sales-commission arrangement was a tying scheme. What they did find was that the central competitive characteristic was the same in both cases—the utilization of economic power in one market to curtail competition in another. Here that lever was bolstered by actual threats and coercive practices. As our cases hold, all that is necessary in § 5 proceedings to find a violation is to discover conduct that "runs counter to the public policy declared in the" Act. *Fashion Originators' Guild* v. *Federal Trade Comm'n*, 312 U. S. 457, 463 (1941). But this is of necessity, and was intended to be, a standard to which the Commission would give substance. In doing so, its use as a guideline of recognized violations of the antitrust laws was, we believe, entirely appropriate. It has long been recognized that there are many unfair methods of competition that do not assume the proportions of antitrust violations. *Federal Trade Comm'n* v. *Motion Picture Advertising Service Co.*, 344 U. S. 392, 394 (1953). When conduct does bear the characteristics

of recognized antitrust violations it becomes suspect, and the Commission may properly look to cases applying those laws for guidance.

Although the Commission relied on such cases here, it expressly rejected a mechanical application of the law of tying arrangements. Rather it looked to the entire record as a basis for its conclusion that the activity of Goodyear and Atlantic impaired competition at three levels of the tires, batteries and accessories industry. It found that wholesalers and manufacturers of competing brands, and even Goodyear wholesalers who were not authorized supply points, were foreclosed from the Atlantic market. In addition, it recognized the obvious fact that Firestone and Goodyear were excluded from selling to Atlantic's dealers in each other's territories. Both of these effects on competition flowed from the contract itself. It also found that the plight of Atlantic wholesalers and retailers was equally clear. They had to compete with other wholesalers and retailers who were free to stock several brands, but they were effectively foreclosed from selling brands other than Goodyear. This restraint is in this respect broader than the one found in *International Salt Co.* v. *United States,* 332 U. S. 392 (1947), where the dealers could stock other salt if they could buy it at lower prices. Here the dealers could buy only at Goodyear's price.

Thus the Commission was warranted in finding that the effect of the plan was *as though* Atlantic had agreed with Goodyear to require its dealers to buy Goodyear products and had done so. It is beyond question that the effect on commerce was not insubstantial. In *International Salt Co.,* the market foreclosed was $500,000 annually. Firestone and Goodyear sales alone exceeded $11,000,000 in 1955 and $50,000,000 in six years, and more than 5,500 retailers and wholesalers were affected.

Goodyear and Atlantic contend that the Commission should have made a far more extensive economic analysis of the competitive effect of the sales-commission plan, examining the entire market in tires, batteries and accessories. But just as the effect of this plan is similar to that of a tie-in, so is it unnecessary to embark upon a full-scale economic analysis of competitive effect. We think it enough that the Commission found that a not insubstantial portion of commerce is affected. See *United States* v. *Loew's, Inc.*, 371 U. S. 38, 45, n. 4 (1962); *International Salt Co.* v. *United States*, 332 U. S. 392 (1947).

Nor can we say that the Commission erred in refusing to consider evidence of economic justification for the program. While these contracts may well provide Atlantic with an economical method of assuring efficient product distribution among its dealers they also amount to a device that permits suppliers of tires, batteries and accessories, through the use of oil company power, to effectively sew up large markets. Upon considering the destructive effect on commerce that would result from the widespread use of these contracts by major oil companies and suppliers, we conclude that the Commission was clearly justified in refusing the participants an opportunity to offset these evils by a showing of economic benefit to themselves. *Northern Pacific R. Co.* v. *United States*, 356 U. S. 1, 6–7 (1958).

The short of it is that Atlantic, with Goodyear's encouragement and assistance, has marshaled its full economic power in a continuing campaign to force its dealers and wholesalers to buy Goodyear products. The anticompetitive effects of this program are clear on the record and render unnecessary extensive economic analysis of market percentages or business justifications in determining whether this was a method of competition which Congress has declared unfair and therefore unlawful.

V.

We now turn to the matter of relief. As we have said, the Commission's order forbids Atlantic's participation in any contract with any supplier of tires, batteries and accessories whereby it receives anything of value in connection with the sale of such products by any marketer. It also prohibits Goodyear from continuing or effecting any contract with Atlantic, "or with any other marketing oil company," whereby Goodyear pays anything of value to the oil company in connection with the sale of tires, batteries and accessories by Goodyear to wholesalers or retailers of the oil company.

1. We first consider Atlantic, whose major argument is that the order is arbitrary and goes too far. It disallows the sales-commission plan, Atlantic says, but permits reinstitution of the old purchase-resale plan even though the latter has the same anticompetitive effects and is a less effective method of distribution. This position flows from the language of the order which prohibits Atlantic's receipt of anything of value in connection with the sale of tires, batteries and accessories by any marketer "other than The Atlantic Refining Company." The merits of the purchase-resale plan, however, were not before the Commission and we therefore have no occasion to pass upon them. Nor do we believe that the order is too broad. Section 5 (b) empowers the Commission to issue a cease-and-desist order against anyone using an unfair method of competition in commerce. The Commission was of the opinion that to enjoin the use of overt coercive tactics was insufficient. We think it was justified in this conclusion. The long existence of the plan itself, coupled with the coercive acts practiced by Atlantic pursuant to it, warranted a decision to require more. The Commission could have decided that to uproot the practice required its complete prohibition; otherwise dealers would

not enjoy complete freedom from unfair practices which the Act condemns. These are matters well within the ambit of the Commission's authority.

2. As for Goodyear we hold that the order is entirely within the power of the Commission. Both the Commission and the Court of Appeals stressed that the sales-commission plan enabled Goodyear "to integrate [into] its own nationwide distribution system the economic power possessed by Atlantic over its wholesale and retail petroleum outlets." 58 F. T. C., at 348. In addition, the Commission dedicated a considerable portion of its opinion to Goodyear's role in carrying it out. Thus, although it is the oil company's power and overt acts toward its outlets that outlaw the commission plan, the Commission was not restricted solely to an examination of its activity. Rather, in deciding upon the relief to be entered against Goodyear, it could appropriately consider its propensity for harnessing and utilizing that power. Because of the relevance of that evidence to our present inquiry we will consider it here in some detail.

Goodyear was no silent or inactive partner in the implementation of the sales-commission plan. It did not simply sit back and passively accept whatever benefits might accrue to it from the Atlantic contract. Indeed, the most striking aspect of the program, in the Commission's view, was the degree to which the petitioners worked together to achieve the program's success. A Goodyear representative put it very neatly when he said: "After years of courtship Atlantic and Goodyear have wed. . . . We welcome wholeheartedly this merger."

Examples of this close cooperation were numerous. Atlantic had a rather large turnover in dealerships, as well as a substantial number of new station openings each year. With the selection of persons to man these stations, Goodyear supply points were notified by Atlantic before they actually began operations, thus allowing

Atlantic-Goodyear teams an opportunity to call on the prospective dealer, to get initial orders before local competitors and to condition acceptance of the Goodyear line. Goodyear brands were used for demonstration in Atlantic training schools for these new dealers, and discussions of tires, batteries and accessories at these schools were often conducted by representatives of both Atlantic and Goodyear.

Moreover, Atlantic gave Goodyear lists of its dealers so that the latter could remove advertising for other products and replace it with its own. Goodyear sent lists of dealers refusing to accept its advertising to Atlantic for "appropriate action"; and it will be recalled that on one occasion when a list of 46 such dealers was forwarded to Atlantic, all soon fell into line. This is a particularly impressive example of Goodyear's inclination to use Atlantic's power for its own benefit. And there are more.

The reporting technique used by petitioners was especially revealing. Through it, Atlantic could determine the exact amount of sponsored products purchased by each Atlantic retail outlet from its assigned supply point. Goodyear supplied this information *sua sponte* insofar as the record shows. Ostensibly it was used in determining commissions due Atlantic. What makes it suspect is the detail with which it was compiled—wholly unnecessary for commission-payment purposes. Its potential use for channeling pressures upon recalcitrant dealers is obvious. And when considered alongside the admitted overt coercive practices of Atlantic, this list becomes a potent device in ensuring the success of the program.

The Commission also found that Goodyear and Atlantic concluded that the most effective merchandising tactic was dual solicitation or so-called "double-teaming." Goodyear relied heavily on this technique and had urged it on the oil companies in a 1951 letter from its sales-commission program manager. The Commission found

that "Goodyear thus appeared confident that the presence of an Atlantic salesman together with the Goodyear representative would render unnecessary any higgling or haggling over price *before* obtaining an initial order for TBA from Atlantic dealers." 58 F. T. C., at 355. (Emphasis in original.) Goodyear's confidence was justified, for as the Commission observed, the annual dealer evaluation by Atlantic salesmen carried substantial weight when the district managers decided upon annual lease extensions, and dealers were therefore understandably susceptible to the encouragement of Goodyear salesmen when Atlantic men were nearby looking over their shoulders. Thus, the Commission was well justified in concluding that Goodyear had in effect purchased a "captive market."

With the preceding discussion in mind, we turn to Goodyear's relationships with other oil companies. As of December 1964 it had sales-commission agreements with 20 other oil companies. Nine of these contracts were before the Commission in the instant case and were found to be "in all material respects identical with the Goodyear-Atlantic contract." *Id.*, at 352. They similarly require the companies to assist actively in the "selling and promotion" of Goodyear products. There is specific evidence in the record of the short-term lease agreements used by Shell, Sinclair and Sherwood Bros., three of the companies with which Goodyear has such agreements. Moreover, there was some indication that only three oil companies use three-year leases. Furthermore, there was evidence of practices by at least four oil companies and Goodyear similar to those existing under the Atlantic arrangement. These included threats as well as more subtle pressures.

Goodyear complains that there is no evidence of the economic power of many of the companies with which it has sales-commission plans. However, the Commis-

sion's order does not directly restrict the activities of these companies. Goodyear, on the other hand, was before the Commission and was found to be a transgressor. There was substantial evidence of its propensity to use the power structure of Atlantic and at least four other oil companies to further its own distribution program. Nor is it any objection for Goodyear to claim that it did not exert any overt coercive pressures on the oil companies' outlets. It is of little consequence that Atlantic actually applied the pressure. For so close was the teamwork of the two companies that, even with blinders on, Goodyear could not have been ignorant of those practices. It is difficult to escape the conclusion that there would have been little point in paying substantial commissions to oil companies were it not for their ability to exert power over their wholesalers and dealers—an ability adequately demonstrated on this record. Its allowance of these substantial overriding commissions in fact paid off handsomely. Goodyear's sales under its various sales-commission contracts rose from $16,700,000 in 1951 to $36,000,000 in 1955.

The Commission, of course, has "wide discretion in its choice of a remedy deemed adequate to cope with . . . unlawful practices . . . ." *Jacob Siegel Co.* v. *Federal Trade Comm'n,* 327 U. S. 608, 611 (1946). Furthermore, it acts within the limits of its authority when it bars repetitions of similar conduct with other parties. *Federal Trade Comm'n* v. *Henry Broch & Co.,* 368 U. S. 360, 364 (1962). There was ample evidence establishing on Goodyear's part a course of conduct lasting over 14 years aimed at utilizing oil company power structures to curtail competition in tires, batteries and accessories. We think that the Commission could appropriately conclude that this course of conduct required forbidding the use of sales-commission plans by Goodyear completely.

This order does not necessarily prohibit Goodyear from making contracts with companies not possessed of eco-

nomic power over their dealers. The evidence in this particular record, however, does involve relationships such as it has enjoyed with Atlantic and its propensity to use those relationships for an unfair competitive advantage. Goodyear offered no evidence that it has arrangements differing from those mentioned in the instant case. In these circumstances it is sufficient to point out that in the event it has such a contract with such a company it may seek a reopening of the order approved today. The Commission has statutory power to reopen and modify its orders at all times. But Congress has placed in the Commission in the first instance the power to shape the remedy necessary to deal with unfair methods of competition. We will interfere only where there is no reasonable relation between the remedy and the violation. *Federal Trade Comm'n* v. *Ruberoid Co.*, 343 U. S. 470, 473 (1952). On this record we cannot say that the Commission's remedy is unreasonable and the judgments are therefore

Affirmed.

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

That part of the Commission's order enjoining the petitioners from engaging in "coercive conduct" designed to compel Atlantic dealers to handle Atlantic-sponsored tires, batteries, and accessories is clearly correct. There is ample evidence that Atlantic coerced its dealers into the exclusive handling of the sponsored goods by threatening the cancellation of dealer franchises. Not only was there direct evidence of the making of such threats; the nearly universal shift to Goodyear's products, coming shortly after the dealers expressed their preference for competing brands, would itself indicate that the change was wrought by something more than simple persuasion. On the basis of this evidence, the Commission reasonably concluded that Atlantic had imposed on its dealers an arrangement

whereby continued maintenance of their relationship with Atlantic depended upon their handling the sponsored products, despite the absence of contractual terms to this effect and Atlantic's protests that its "official" policy was one of free choice.

But granting that the Commission validly found that the petitioners had engaged in coercive practices amounting to a violation of § 5 of the Act does not lead me to conclude that its order enjoining the use of any sales-commission plan of distribution is supportable. In essence, the sales-commission agreement between Atlantic and Goodyear provided Atlantic with a commission on all sales made by Goodyear to the Atlantic dealers in exchange for Atlantic's sponsorship of the Goodyear products. The responsibility for making the sales and deliveries was Goodyear's, though Atlantic undertook to engage in various activities in support of the Goodyear sales effort. This method of distribution was adopted by Atlantic to replace a purchase-resale plan which it had previously employed and found unsatisfactory. Under the purchase-resale plan, Atlantic purchased the tires, batteries, and accessories, warehoused them, and sold them to its dealers. The principal advantage accruing to Atlantic from adoption of the sales-commission plan was that it enabled Atlantic to dispense with maintaining its own storage and distribution facilities. Under both systems, Atlantic had a financial interest in the sale of the sponsored products and, for all that appears, the same incentive to maximize its dealers' purchases of them.

There is no reason to assume that the sales-commission plan of distribution gave to Atlantic any distinctive capacity to effect the arrangement which is the gravamen of the violation proved. The core of that violation is Atlantic's coercion of its dealers into handling only sponsored products by threatening to cancel their franchises and indulging in a variety of related coercive practices, thereby

raising substantial barriers to competition in that segment of the market for tires, batteries, and accessories represented by its dealers. This it could have done as easily under the sales-commission plan, the purchase-resale plan, or any plan of distribution which gave it a financial interest in the sale of any particular line of tires, batteries, and accessories.

Indeed the Commission itself recognized that whatever power Atlantic may have over its dealers does not derive from this particular means of distribution:

> "Atlantic has sufficient economic power with respect to its wholesale and retail petroleum distributors to cause them to purchase substantial quantities of sponsored TBA even without the use of overt coercive tactics or of written or oral tying agreements, and this power is a fact existing independently of the particular method of distributing or sponsoring TBA used by Atlantic." *

Therefore, to the extent that the Commission's order is based on the premise that the sales-commission plan confers upon Atlantic some distinctive capacity to coerce its dealers into handling sponsored products, and thereby exclude competing suppliers, it is without foundation. Insofar as this exclusion resulted from threats of franchise cancellation and related coercive tactics, that part of the order directed at these practices will afford the necessary relief.

The Commission's order need not be justified on a showing that the plan confers any distinctive capacity for coercion upon Atlantic, however, if it can be demonstrated that the plan is merely one variant of a broader category of activity which could be prohibited under § 5. It would be less than candid to deny that aggressive salesmanship by Atlantic representatives is apt to meet with more than

*58 F. T. C. 309, at 364–365.

ordinary success when directed at Atlantic dealers, even though the most scrupulous obedience is accorded to the Commission's order prohibiting coercion. Given the disparity of financial resources and the natural desire of the dealers to maintain a cordial relationship with Atlantic, some competitive advantage will necessarily accrue to Atlantic's sponsorship of a particular line of tires, batteries, and accessories under any plan of distribution. This advantage is the inevitable result of the market structure in which Atlantic and its dealers find themselves, and has nothing to do with the particular method which Atlantic might use to market a line of products. The disparity in size and financial strength, the short term of the prevailing leases, the dire financial consequences attendant upon lease cancellation, and the established market preference for certain brands of gasoline—all contribute to give Atlantic a leverage over its dealers and a corresponding power to effect some exclusion of competition.

The Commission's order can thus be understood as a measure to prevent such exclusion by taking a step toward the total exclusion of Atlantic from the marketing of tires, batteries, and accessories. Indeed, once it is conceded that the sales-commission plan makes no distinctive contribution to Atlantic's coercive capacity, this would seem the only conceivable justification for the Commission's order. This justification, however, is without foundation in law, for it assumes that § 5 of the Federal Trade Commission Act, which proscribes unfair methods of competition, prohibits the marketing of complementary goods by a manufacturer or processor enjoying some undefined measure of economic leverage *vis-à-vis* his distributors. So long as the manufacturer does enjoy some such leverage, his marketing of complementary goods through an established system of distributorships will tend to effect some exclusion of competition, whether those goods be

distributed by another through a sales-commission plan, or purchased and resold by the manufacturer, or indeed manufactured and sold by him.

I cannot believe that § 5 was intended to allow the Commission to block the expansion of an enterprise into the marketing of such complementary items. Section 5 prohibits unfair methods of competition. The coercive practices enjoined by paragraphs five and six of the order apart, no unfairness is claimed in any of the practices employed by Atlantic. All concede that the continuing exclusionary pressure, to the extent it exists, derives from the imbalance of economic power between the two parties, rather than from any unfair feature of the sales-commission plan. To use an unfair practice charge to punish an enterprise for consequences inevitably flowing from its position in the structure of commerce is a grave distortion of the statute, imposing a massive and unjustifiable restraint on entrepreneurial action. Henceforth, large concerns marketing their products through smaller distributors stand vulnerable to the charge that their methods of competition are unfair because they have done no more than add a complementary product to those already sold through their distributors. I can find no warrant for this position in the words of the statute, in the economic policy it reflects, or in any of the cases decided under it.

In short, there is no justification whatever for that part of the Commission's order which prohibits the petitioners from employing the sales-commission plan of distribution. An order based on the premise that the Commission could enjoin Atlantic from any marketing at all of tires, batteries, and accessories is without foundation in the statute; an order based on the premise that the plan confers on Atlantic some distinctive capacity for coercion is without foundation in fact. Baseless in fact and in law, this order inflicts significant and undeserved damage upon Atlantic. Unjustifiable Commission orders imposing such

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damage on corporate enterprise, and ultimately on the public, cannot be sanctioned by invocation of abstractions regarding the deference properly owed expert tribunals in devising remedial measures. It is to avoid just such errors as inhere in this order that the power of judicial review was granted to the courts—errors which, serving no public purpose, impose senseless damage on the private sector of our economy.

For these reasons I would reverse the judgment of the Court of Appeals approving the Commission's prohibition of the use of the sales-commission plan by Atlantic. I think the Commission's order as to Goodyear should likewise have been set aside by the Court of Appeals. That order is not only riven with the same defects, but in addition prohibits Goodyear from entering into sales-commission agreements with oil companies which, so far as we know, have never practiced the coercive techniques used by Atlantic, and which are not in a position to exercise any leverage at all over their dealers.

MR. JUSTICE GOLDBERG, dissenting.

I would vacate the judgments below and remand these cases to the Commission, since in my view the Commission has not set forth the basis for its broad orders with sufficient clarity and completeness, so that they can be properly reviewed. Cf. *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 511; *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 197; *Burlington Truck Lines* v. *United States*, 371 U. S. 156; *Labor Board* v. *Metropolitan Ins. Co.*, 380 U. S. 438.

Atlantic does not here dispute the fact that it engaged in practices to coerce its dealers into purchasing the sales-commission-sponsored TBA. Moreover, I agree with the Court that the record is sufficient to support the finding that Goodyear participated in these coercive practices. *Ante*, at 373–375. Therefore, I would have no difficulty

in affirming the Commission's orders if the Commission had ordered Atlantic and Goodyear to cease using sales-commission TBA plans as a remedy necessary to cure these coercive practices and prevent their recurrence. See *United States* v. *Loew's, Inc.*, 371 U. S. 38, 53.

The Commission's opinion however, does not appear to rest these orders on such a basis. Rather, it considered Atlantic's coercive activities "as mere symptoms of a more fundamental restraint of trade *inherent in the sales commission itself.*" 58 F. T. C. 309, 348. (Emphasis added.) Apparently it was because the Commission believed that Atlantic's participation in a sales-commission plan inherently restricted its dealers' free choice in TBA purchasing that it enjoined Atlantic and Goodyear from entering into any sales-commission plans, with each other or others. It is on this basis that the Commission action must be reviewed. The propriety of agency action must be judged "solely by the grounds invoked by the agency," *Securities Comm'n* v. *Chenery Corp.*, 332 U. S. 194, 196. See *Labor Board* v. *Metropolitan Ins. Co., supra; Burlington Truck Lines* v. *United States, supra,* at 168.

When looked at on this basis, however, it becomes obvious that the Commission has not supported its decision with adequate findings and conclusions, set forth with sufficient clarity, so that proper review is possible. This is seen when the Commission's opinion is analyzed and read in conjunction with its orders, particularly its order enjoining Goodyear from participating in sales-commission arrangements with any oil company.

Apparently the Commission's conclusion that the Atlantic-Goodyear sales-commission plan operates as an inherently unfair method of competition was based upon a determination that the Atlantic dealers were in an economically subservient position to Atlantic. This determination in turn was founded upon the facts that the Atlantic lease-franchise arrangements were only for short one-year terms

enabling Atlantic to terminate them without cause at the end of any year and that it was the practice of many of the dealers to borrow money from Atlantic in order to stock their inventories. This subservient position of the dealers was held to put them in a position where "Atlantic has sufficient economic power with respect to its wholesale and retail petroleum distributors to cause them to purchase substantial quantities of sponsored TBA even without the use of overt coercive tactics or of written or oral tying agreements, and this power is a fact existing independently of the particular method of distributing or sponsoring TBA used by Atlantic." 58 F. T. C., at 364–365.

Though apparently deciding this case on the basis of Atlantic's economic power over its dealers, the Commission then enjoined Goodyear from continuing existing sales-commission arrangements or entering into new ones with any oil company. This was done without any analysis of the relationship which other oil companies may have with their dealers. The Commission determined only the following with respect to other oil companies: (1) the sales-commission contracts between Goodyear and the other oil companies are in all material respects identical to the Goodyear-Atlantic sales-commission contract and (2) one of the other 20 oil companies with which Goodyear has these sales-commission contracts has, in the past, practiced coercion on its dealers. 58 F. T. C., at 352–353. Moreover, in a related case, the Commission expressly held illegal a TBA sales-commission arrangement between Texaco Inc. and the B. F. Goodrich Company without analysis of the relationship between Texaco and its dealers. See *Texaco, Inc.* v. *FTC*, 118 U. S. App. D. C. 366, 336 F. 2d 754 (C. A. D. C. Cir.). This case and another related case, *The Firestone Tire & Rubber Company*, 58 F. T. C. 371, resulted in both B. F. Goodrich and Firestone, as well as Goodyear, being enjoined from

engaging in any sales-commission plan with any oil company.

Moreover, the Commission in this case relied upon the facts "that Atlantic, which describes itself as '. . . a large producer and distributor of petroleum products' whose operating revenue 'totalled more than one half billion dollars' in 1954, distributes gasoline directly to more than 5,500 retail service stations and through wholesale distributors to more than 2,800 additional service stations in 17 states along the Atlantic Seaboard. Approximately 81 percent of Atlantic's total sales of gasoline in 1955 were accounted for by these approximately 8,300 retail service stations." 58 F. T. C., at 364. These facts were stated to show that Atlantic's position in the petroleum retail market was sufficiently great so as to make its dealerships desirable and unique and that, therefore, Atlantic had power over its dealers sufficient to induce them to buy Atlantic-sponsored TBA. Yet, while relying on these facts about Atlantic, the Commission made no distinction between large or small companies in its order that precluded Goodyear from participating in any sales-commission plan. And, as discussed above, in related cases, B. F. Goodrich and Firestone as well have been enjoined from participating in any TBA sales-commission plan, regardless of the size of the oil company or its relation to its dealers.

An *amicus* brief filed on behalf of a small oil company asserts, however, that small oil companies need sales-commission TBA plans in order to compete effectively with the large companies. Since the Commission had only large companies before it in these cases, however, this contention has not adequately been explored. Despite this fact, the Commission has clearly precluded Goodyear, Firestone and B. F. Goodrich from entering into sales-commission arrangements with any oil company no matter how small the company and no matter what the

competitive factors involved are. Moreover, the Commission's opinion here, while again not unambiguous on the point, indicates that it would be *per se* an unfair method of competition for any tire company to enter into a sales-commission TBA promotion arrangement with any oil company. Yet the whole basis for such a holding rests upon the limited economic facts of the Atlantic situation. This is not to say that the Commission could not conclude, after adequate factual determinations, that a general rule applicable to all companies is correct. It is to say that the Commission must have before it a sufficient record and must make the necessary findings supportive of a rule of broad application before a reviewing court can adequately perform its function.

Finally, the opinion and order of the Commission seem to draw a distinction between sales-commission and purchase-resale methods of oil company TBA promotion. These are alternative methods by which oil companies sponsor TBA purchasing by their dealers. In fact, prior to 1951, Atlantic distributed TBA through a purchase-resale plan. Atlantic-sponsored TBA was purchased by Atlantic from various manufacturers and distributed to the Atlantic dealers through warehouses owned by Atlantic. In some areas the warehouses were supplemented by Atlantic dealers who acted as supply point subdistributors to other dealers. In March 1951, Atlantic changed from the purchase-resale method to the sales-commission plan for the announced reason that the latter arrangement would produce a substantial saving in operating and capital costs, plus a substantial improvement in service to Atlantic dealers. Under the sales-commission plan, the tire company—rather than the oil company—performs the distribution function. The sponsored TBA is manufactured or purchased by the tire company and is distributed through warehouses owned by the tire company. Also, the tire company uses as supply points its

own outlets (both company-owned and independent) as well as some oil company dealers, who are franchised by the tire company for this purpose. Under both purchase-resale and sales-commission plans, the oil company is primarily responsible for selling the TBA to its dealers and assisting them in selling it to their motorist customers. Under both plans the tire company salesman occasionally accompanies the oil company salesman to explain new TBA products, but the day-to-day promoting and selling are done by the oil company salesman.

In its order the Commission enjoined Atlantic from using any sales-commission TBA plan, but expressly excepted from the injunction the use by Atlantic of a purchase-resale TBA arrangement. This exception was made over the objection of the Commission staff that both methods of TBA sponsorship should be condemned and enjoined. In answer to the argument that it is irrational to condemn sales-commission systems but not purchase-resale plans, the Commission did not even attempt to distinguish the two based on any difference concerning what it considered to be the essential core of the violation by Atlantic, "the use [by the oil company] of economic power in one market (here, gasoline distribution) to destroy competition in another market (TBA distribution)." 58 F. T. C., at 367. Indeed, it would seem difficult to draw any distinction between the two plans on this basis. While the Commission did attempt to distinguish the two systems on other bases, this crucial aspect of the decision was handled in a short, summary fashion, without factual findings or analysis. Moreover, the Commission did not even discuss the argument that any distinction which permits purchase-resale but prohibits sales-commission plans discriminates against the smaller oil companies in favor of larger companies. It has been argued earnestly by an *amicus* that the capital investment required for a purchase-resale plan is so great that the

smaller oil companies cannot afford it and presently only the very large Gulf and Esso companies use such a method. The record in this case is clear that Atlantic switched from purchase-resale to sales-commission TBA promotion since it found the capital costs of purchase-resale to be unduly onerous.

In his brief in this Court the Solicitor General, on behalf of the Commission, did not even argue that there was a rational distinction between purchase-resale and sales-commission TBA plans. Rather he argued that the Commission had not really approved the purchase-resale plan in failing to enjoin Atlantic's use of it. This argument fails to account for the language of the Commission opinion and the fact that the Commission rejected the staff recommendation, both of which to me are quite persuasive for the conclusion that the Commission has approved purchase-resale. Moreover, it ignores the fact that in the related *Firestone* case the Commission distinguished its earlier decision in *General Motors Corp.*, 34 F. T. C. 58, which, while condemning and enjoining coercion, did not condemn General Motors' plan of inducing its dealers to buy General Motors automotive parts and accessories. A major ground used by the Commission in distinguishing the *General Motors* case from the TBA cases, was that the *General Motors* case involved a purchase-resale plan whereas the TBA cases before the Commission involve sales-commission arrangements. While it would therefore seem to me on the current state of the record that the Commission has approved purchase-resale TBA promotion by oil companies while condemning similar sales-commission promotions, at the very least, this is yet another ambiguity in the opinion.

In short, the Commission opinions in this and the related cases are bathed in confusion and leave unanswered a number of questions necessarily involved in the decision of these cases. Are TBA sales-commission plans only un-

fair methods of competition if the oil company has used coercive tactics on its dealers? If they are illegal without past or present evidence of coercion, are they illegal for oil companies which do not have the same relation with their dealers as Atlantic has with its dealers? Are they illegal for oil companies which do not have the same market position as Atlantic? Has the Commission drawn a distinction between sales-commission and purchase-resale TBA promotion plans, condemning the former but ap-approving the latter? If it has, is there a rational basis, consistent with the policies of § 5, for such a distinction? All of these questions appear to me to be inadequately answered by the Commission's opinion.

I do not mean to imply what the answers to any of these questions should be. Congress has entrusted the initial and primary responsibility for answering them to the Commission. However, as this Court has recognized, "We must know what a decision means before the duty becomes ours to say whether it is right or wrong." *United States* v. *Chicago, M., St. P. & P. R. Co., supra,* at 511. "The administrative process will best be vindicated by clarity in its exercise." *Phelps Dodge Corp.* v. *Labor Board, supra,* at 197. When the Commission "exercises the discretion given to it by Congress, it must 'disclose the basis of its order' and 'give clear indication that it has [properly] exercised the discretion with which Congress has empowered it.' " *Labor Board* v. *Metropolitan Ins. Co., supra,* at 443. See *Burlington Truck Lines* v. *United States, supra,* at 167–169. Administrative agency action is not to be sustained where "its explication is . . . inadequate, irrational or arbitrary . . . ." *Labor Board* v. *Erie Resistor Corp.,* 373 U. S. 221, 236.

Moreover, if in these and the related cases the Commission is laying down the broad rule that all sales-commission TBA promotion arrangements in the oil industry are *per se* unfair methods of competition, such a rule has

neither been clearly articulated nor supported with adequate economic analysis. In *White Motor Co.* v. *United States,* 372 U. S. 253, this Court reversed a district court that had developed a *per se* rule of antitrust liability without regard to an analysis of the economics of the situation. The Court stated, "This is the first case involving a territorial restriction in a *vertical* arrangement; and we know too little of the actual impact of both that restriction and the one respecting customers to reach a conclusion on the bare bones of the documentary evidence before us." 372 U. S., at 261.

Similarly in this case, the Commission has not provided us with a factual record or analysis sufficient to reach the conclusion that sales-commission plans are *per se* illegal in the oil industry. In condemning such arrangements the Commission would be upsetting long-established practices prevalent in the oil industry. It would be affecting the entire oil industry, small companies as well as large, not just the particular parties involved in these cases. Finally, it must be remembered that the Commission is an expert administrative body set up by Congress in order to provide adequate economic fact finding and analyses of complicated problems such as the ones here presented. The integrity of this congressional scheme is violated by the Commission's entering and the courts' affirming broad industry-wide orders the meaning and bases of which are unclear and the factual and economic analysis of which is inadequate.

I do not mean by this that the Commission is required to use a rule-making rather than a case-by-case approach to decision-making in this area, although it would seem that rule-making would here be the preferable approach. Cf. Elman, Comment, Rulemaking Procedures in the FTC's Enforcement of the Merger Law, 78 Harv. L. Rev. 385 (1964). The Commission has the general power to choose to proceed in this field, as in others, through

either rule-making or the process of case-by-case adjudication. See *Securities Comm'n* v. *Chenery Corp., supra,* at 201–202; *California* v. *Lo-Vaca Gathering Co.,* 379 U. S. 366, 371. Whichever method the Commission chooses to use, however, it seems obvious to me that the Commission must formulate a clear rational rule which is based on an adequate economic explication and takes into consideration the situation of all industry members affected by the rule. Since its failure to do so precludes proper judicial review of these cases, I would vacate the judgments below and remand these cases to the Commission so that it can, with clarity, exercise the administrative process entrusted to the Commission by Congress.

UNITED GAS IMPROVEMENT CO. *v.* CONTINENTAL OIL CO. ET AL.

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

No. 644. Argued April 28, 1965.—Decided June 1, 1965.*

Texas Eastern, which operates an interstate natural gas transmission system, agreed with certain producers to purchase for resale in interstate commerce their natural gas production in a substantially developed field with proven reserves. Before the Federal Power Commission (FPC) acted on the examiner's recommendation that certificates be granted, the *"Catco"* case (*Public Serv. Comm'n of New York* v. *FPC*, 257 F. 2d 717, affirmed *sub nom. Atlantic Refining Co.* v. *Public Serv. Comm'n of New York*, 360 U. S. 378) decided that the certificate applicants there involved had not satisfied their burden of justifying the natural gas sales price they proposed, which was lower than what Texas Eastern had agreed to pay. The parties here then framed a new plan in lieu of the previous conventional wellhead purchase arrangement but the economic effect of which was much the same. They agreed that Texas Eastern would purchase the producers' leasehold interests, covering only natural gas and condensate, in the lands where the gas was located. The FPC in proceedings reopened at Texas Eastern's request issued it a certificate to build connecting pipeline facilities, and, in connection with objections that the leases were not justified, noted that it had no authority to issue a certificate authorizing the leases. Section 1 (b) of the Natural Gas Act makes the Act applicable "to the sale in interstate commerce of natural gas for resale" but not "to the production or gathering of natural gas." On review of the FPC's action the Court of Appeals for the District of Columbia Circuit set aside the certificate order and remanded the case on the ground that the FPC's opinion appeared to approve the pricing aspects of the gas lease acquisitions without evidentiary support. That the gas would be acquired by lease transactions not subject to FPC regulation was unimportant, the court thought, since FPC could regulate the purchaser through its certification authority over the connecting facilities. The FPC thereafter

*Together with No. 693, *Federal Power Commission* v. *Marr et al.*, also on certiorari to the same court.

reopened the proceedings and, concluding that it was not foreclosed by either its previous rulings or the Court of Appeals' mandate, decided that it had jurisdiction over the lease-sales. The FPC held that it would not be in the public interest to certificate the transaction since it was not satisfied that the unit cost of the gas was reasonable or could be accurately determined. The parties were given a period to reframe the transaction. Under the alternative appeal route provided by § 19 (b) of the Act, an appeal was taken to the Court of Appeals for the Fifth Circuit, which reversed on the ground that the FPC had no jurisdiction over leases since they relate to the production and gathering of natural gas. *Held:*

1. Sales of the leasehold interests in a proven and substantially developed natural gas field are "sales" of natural gas within the meaning of § 1 (b) of the Act. Pp. 399–401.

(a) The purposes of the Act would be frustrated if regulation thereunder were made to depend upon technical title concepts of local law. P. 400.

(b) The determinative economic fact is that the sale of the leases in a field where the supply was proven and the facilities were well developed accomplished the transfer of large amounts of natural gas to an interstate pipeline for resale in other States. P. 401.

2. A sale of leasehold interests in proven reserves for transmission and resale in interstate commerce is not within the "production or gathering" exemption of the Act; the facts of this case are distinguishable from those in *FPC* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, where the leases were undeveloped and the sale of the natural gas was in intrastate commerce. Pp. 402–404.

3. Neither the mandate of the Court of Appeals for the District of Columbia Circuit nor the original FPC order established as the "law of the case" that the FPC lacked jurisdiction over the leasehold transfers. Pp. 404–406.

(a) The issue of the FPC's jurisdiction over such transfers was not before the Court of Appeals for the District of Columbia Circuit, which had held that the FPC could regulate the purchaser, regardless of the status of the seller. Pp. 404–405.

(b) Any doubts about construction of the mandate of the initial reviewing court should be resolved in the FPC's favor since routing of the appeal to a different court precludes clarification of the mandate by the court which issued it. P. 405.

(c) The FPC was free in considering the question of production costs on remand to reconsider its initial erroneous position on the jurisdictional question. *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 145, followed. P. 406.

336 F. 2d 320, reversed.

William T. Coleman, Jr., argued the cause for petitioner in No. 644. With him on the briefs were *Richardson Dilworth* and *Harold E. Kohn*.

Solicitor General Cox argued the cause for petitioner in No. 693. With him on the briefs were *Ralph S. Spritzer, Frank Goodman, Richard A. Solomon, Howard E. Wahrenbrock, Robert L. Russell* and *Peter H. Schiff*.

David T. Searls argued the cause for respondents in both cases. With him on the brief were *Abe Fortas, Bruce R. Merrill, Lloyd F. Thanhouser, W. McIver Streetman, Stanley M. Morley, Donley C. Wertz, John T. Guyton, Robert E. May, John A. Ward III, Herf M. Weinert* and *W. D. Deakins, Jr.*

Briefs of *amici curiae*, urging reversal, were filed by *Richard E. Tuttle* and *J. Calvin Simpson* for the State of California et al. in No. 693, and by *John Ormasa, L. T. Rice, Milford Springer, J. David Mann, Jr.*, and *John E. Holtzinger, Jr.*, for Southern California Gas Co. et al. in both cases.

MR. JUSTICE HARLAN delivered the opinion of the Court.

In *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, the Court held that Federal Power Commission jurisdiction under the Natural Gas Act, as amended, 52 Stat. 821, 15 U. S. C. § 717 *et seq.* (1964 ed.), extended to what are described colloquially and perhaps somewhat loosely as "wellhead" sales of natural gas by producers to interstate pipeline companies for resale in interstate commerce. The issue in the present cases is whether sales to an inter-

state pipeline company of leases covering proven and substantially developed reserves of gas to be sold in interstate commerce are also subject to Commission jurisdiction. We hold that they are.

I.

In 1957, Texas Eastern, a natural gas company which owns and operates an interstate transmission system extending from Texas to the Philadelphia-Newark area, executed gas purchase contracts with Continental Oil Company, M. H. Marr, Sun Oil Company, and General Crude Oil Company, to purchase their natural gas production in Rayne Field, Louisiana, at an initial price of 23.9¢ per Mcf.[1] The producers applied to the Commission for certificates of public convenience and necessity authorizing them to sell their gas to Texas Eastern. Texas Eastern applied for a certificate permitting it to build new pipeline facilities to connect its system to Rayne Field. After a hearing, and in spite of objections by several intervenors to the 23.9¢ price, the examiner issued a decision recommending a grant of the requested certificates. However, before the Commission acted on the examiner's decision, the Court of Appeals for the Third Circuit handed down its decision in *Public Serv. Comm'n of New York* v. *FPC*, 257 F. 2d 717 [2] (the *"Catco"* case), reversing an order of the Commission granting unconditional certificates for sales of natural gas on the ground that the certificate applicants had the burden of showing that the proposed sale price of 22.4¢ was justified by public convenience and necessity, and that the burden had not been sustained. Thereafter the producers in the present case requested the Commission to permit withdrawal of their applications for sales to Texas Eastern at

[1] The price included 1.3¢ per Mcf. for reimbursement of state taxes.

[2] Affirmed *sub nom. Atlantic Refining Co.* v. *Public Serv. Comm'n of New York*, 360 U. S. 378.

23.9¢ (1.5¢ higher than the Catco price) and canceled the sales contracts. The parties then agreed on a different method for achieving their objectives.

Under the new plan formulated by the parties, Texas Eastern, instead of making conventional wellhead purchases of natural gas, proposed to buy the producers' leasehold interests in the Rayne Field lands in which the natural gas was located. The provisions of the lease-sale agreements were such that they were very close in economic effect to conventional sales of natural gas. The gas reserves in Rayne Field were proven, and the field substantially developed.[3] Texas Eastern was still to build the connecting facilities to the field which had been called for under the original plan, and the same volumes of gas were to flow into its system. The lease-sales were to cover no minerals except natural gas and condensate, all other mineral rights being reserved to the lease-sellers, and by a management agreement Continental Oil, one of the sellers, was to continue to do the bulk of production work.[4] Payments on the purchase price could be accelerated if gas production exceeded a specified amount, and the leases were purchased through an intermediate corporation so that Texas Eastern's liability would be substantially limited if production from the field fell below expectations.[5]

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[3] Nineteen wells were in the ground; respondents state that seven more were to be drilled.

[4] Texas Eastern had the right to make major production decisions such as what volume of gas to nominate for production each month and whether new wells should be drilled.

[5] The Commission found:

"(1) Only gas in particular strata is conveyed; and the producers retain their interest in oil and other minerals;

"(2) In effect the transaction is for the sale of stripped gas inasmuch as the producers are to receive a production payment from Texas Eastern from the sale of natural gas liquids;

"(3) While the payment for the leases is represented by notes and spread over a 16-year period, the notes have an acceleration clause

Completion of the transfers was conditioned upon issuance of the necessary certificates by the Commission.

The Commission granted Texas Eastern's request to reopen the proceedings in order to consider the lease-sale plan, and issued an unconditional certificate to Texas Eastern permitting it to build the pipeline facilities necessary to connect with Rayne Field. In issuing the certificate the Commission overruled objections made by the New York Public Service Commission that the prices paid for the leases were not justified, and noted that "Texas Eastern has not filed an application for a certificate authorizing the acquisition of the Rayne Field leases and we have no authority to issue such a certificate." 21 F. P. C. 860, 864.

Soon thereafter the lease-sale transactions were completed and Texas Eastern began to receive gas from Rayne Field for interstate distribution. However, on review of the Commission's action the Court of Appeals for the District of Columbia Circuit set aside the certificate order because the language and tenor of the Commission's opinion appeared to approve the prices paid for the leases under the acquisition agreement. *Public Serv. Comm'n of New York* v. *FPC,* 109 U. S. App. D. C. 289, 287 F. 2d 143. The court thought it of "no importance here that the transactions by which Texas Eastern proposes to

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by which payment is accelerated if production is increased, so that Texas Eastern's payments would be geared to production;

"(4) By a management agreement dated July 27, 1959, Continental agrees to operate the field, including drilling wells and managing all wells and equipment, and to deliver to Texas Eastern specified minimum daily quantities of gas; Texas Eastern will reimburse Continental for its expenses in operating the field but the assignment of the leases shows that the costs of operating the leases will be defrayed out of the production payments to which Continental is entitled;

"(5) It is Louisiana Gas [the intermediary corporation], not Texas Eastern which is liable on the notes to the producers, so that the true purchaser of the gas is not bound by the principal obligation of the lease sale transaction." 29 F. P. C. 249, 254.

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acquire the gas will themselves be, by virtue of a change in form, beyond the regulatory control of the Commission," *id.*, at 292, 287 F. 2d, at 146, since the Commission could regulate Texas Eastern through its certification authority over the connecting facilities regardless of its jurisdiction over the lease-sale transactions themselves. The Court therefore remanded, stating that:

> "Two courses are open to the Commission. It may, by clarification of the order presently under review, expressly disclaim any approval of the price to be paid for natural gas by the applicant. . . . Or it may reopen the record in the certificate proceeding to permit Texas Eastern to establish by adequate evidence that the acquisition costs which it proposes to incur will be consistent with the public convenience and necessity." *Ibid.*

The Commission chose to reopen the proceedings. After hearings before an examiner, it decided that the question of its jurisdiction over the lease-sales themselves, as opposed to authority over Texas Eastern's connecting facilities, was not foreclosed either by previous Commission rulings or the mandate of the Court of Appeals for the District of Columbia Circuit. On the merits, it decided that a holding that it had no jurisdiction to inquire into production costs because the transaction was cast as a sale of leases instead of a sale of natural gas "would exalt form over substance, would give greater weight to the technicalities of contract draftsmanship than to the achievement of the purposes of the Natural Gas Act, and would impair our ability to control the price received for gas sold to the pipelines in interstate commerce to the detriment of the ultimate consumer." 29 F. P. C. 249, 256.

After asserting jurisdiction over the lease-sales, the Commission concluded that it would not be in the public interest to certificate them. Reasoning that the trans-

action was not subject to effective regulation because of the difficulty of estimating the unit price paid for the gas and the impossibility of providing continuing price regulation because of the one-shot nature of the sale, it ordered that the parties be given a six-month period in which to reframe the transaction so as to rectify these alleged infirmities.

Appeal was taken, not to the Court of Appeals for the District of Columbia Circuit, but to the Fifth Circuit pursuant to the alternative routes of appeal provided by § 19 (b) of the Act.[6] That court reversed. It interpreted this Court's decision in *FPC* v. *Panhandle Eastern Pipe Line Co.,* 337 U. S. 498, as holding that leases such as those here involved "relate to the production or gathering of natural gas and are thus outside Commission jurisdiction . . . ." 336 F. 2d 320, 325. Under this view, it was unnecessary for the court to decide whether the earlier decision of the Court of Appeals for the District of Columbia Circuit had established "the law of the case" on the jurisdictional question. We granted certiorari, 379 U. S. 958, because of the importance of the issue to the proper administration of the Natural Gas Act. It should be noted that no questions are before us relating to the propriety of the Commission's disposition of the case following its assertion of jurisdiction. It is only the jurisdictional question which we must answer. We reverse.

II.

Section 1 (b) of the Natural Gas Act provides that "[t]he provisions of this Act shall apply . . . to the sale

[6] 52 Stat. 831, 15 U. S. C. § 717r (b) (1964 ed.). It provides:

"Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia . . . ."

in interstate commerce of natural gas for resale . . . but shall not apply . . . to the production or gathering of natural gas." 52 Stat. 821, 15 U. S. C. § 717 (b) (1964 ed.).

Without impugning in any way the good faith and genuineness of the transactions, we think it clear that the lease-sales here in question can nonetheless be considered "sales" of natural gas in interstate commerce for purposes of the Act. A regulatory statute such as the Natural Gas Act would be hamstrung if it were tied down to technical concepts of local law.[7] The Court recognized as much in *Labor Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, when it held that "employee" as used in the National Labor Relations Act was to be defined by reference "to the purpose of the Act and the facts involved in the economic relationship" (*id.*, at 129) rather than exclusively by reference to common law standards or local law. *Gray* v. *Powell*, 314 U. S. 402, decided under the Bituminous Coal Act of 1937, is also closely analogous to this phase of the cases at bar. The Act provided for establishment of minimum and maximum prices for soft coal, and specified that "the sale or delivery or offer for sale of coal at a price below such minimum or above such maximum shall constitute a violation of the code . . . ." 50 Stat. 80. A large coal consumer leased coal lands on which established mine facilities were located, and entered into management agreements with a contractor to whom the landowners had leased the mine facilities. It then claimed that the coal it had thus obtained was not subject to the Act because there had been no "sale or delivery or offer for sale"

[7] Respondents point to Louisiana law which does not recognize a sale of gas in place. *Frost-Johnson Lumber Co.* v. *Salling's Heirs*, 150 La. 756, 91 So. 207; La. Rev. Stat. Tit. 9, § 1105 (1962 Cum. Supp.); La. Code of Civ. Proc., Art. 3664. Other producing States, including Texas and Kansas, do recognize ownership of gas in place. 1 Williams and Meyers, Oil and Gas Law, pp. 26–47 (1962 ed., and 1963 Cum. Supp.).

by the producers, but only the sale of leases in the coal lands. The Court rejected this claim, stating that "the purpose of Congress, which was to stabilize the industry through price regulation, would be hampered by an interpretation that required a transfer of title, in the technical sense, to bring a producer's coal, consumed by another party within the ambit of the coal code." 314 U. S., at 416.

The implications of the *Hearst* and *Gray* v. *Powell* approaches for the cases at hand are manifest. The sales of leases here involved were, in most respects, equivalent to conventional sales of natural gas which unquestionably would be subject to Commission jurisdiction under *Phillips Petroleum Co.* v. *Wisconsin,* 347 U. S. 672. Indeed, the context of this case shows that when the first plan was aborted by the *Catco* case, the parties did not alter their objectives, but merely the method of attaining them. The Court of Appeals for the District of Columbia Circuit described the lease-sale plan as a "change in form." There are differences, to be sure, between the original sale agreements and the lease-sale plan. For example, Texas Eastern has the power to make the major decisions controlling further development of the field, and we are told that the lease-sales will not trigger "favored nation" clauses in other gas contracts. But it is perfectly clear that the sales of these leases in Rayne Field, a proven and substantially developed field, accomplished the transfer of large amounts of natural gas to an interstate pipeline company for resale in other States. That is the significant and determinative economic fact. To ignore it would substantially undercut *Phillips,* and because of it the Commission (unless foreclosed, *infra,* pp. 404–406) acted properly in treating these sales of leasehold interests as sales of natural gas within the meaning of the Natural Gas Act.

We turn then to the question whether these lease-sales, even though sales of natural gas within the meaning of the Act, are nonetheless outside Commission jurisdiction because of the exemption for "production or gathering."

The statement in *Phillips* that "production and gathering, in the sense that those terms are used in § 1 (b), end[ed] before the sales by Phillips occur[red]" (347 U. S., at 678), could be read to turn the "production or gathering" exemption purely on a matter of the timing of the title transfer. That would mean, of course, that the lease-sales here involved were within the production or gathering exemption, for at the time of the transfer the gas was still in the ground. The same would be true for any sale of gas in place. Acceptance of any such narrow interpretation would make *Phillips* a shadow. Its substance lies, instead, in the judgment that "[p]rotection of consumers against exploitation at the hands of natural-gas companies was the primary aim of the Natural Gas Act," *id.*, at 685, and "congressional intent [was] to give the Commission jurisdiction over the rates of all wholesales of natural gas in interstate commerce." *Id.*, at 682. We have not limited *Phillips* to a matter of the timing of the transaction, see *Cities Service Gas Co.* v. *State Corp. Comm'n of Kansas,* 355 U. S. 391, reversing, *per curiam,* 180 Kan. 454, 304 P. 2d 528, and consider that it would be a mistake to do so.

We conclude that even though a sale of natural gas in interstate commerce occurs before production or gathering is ended, it is nonetheless subject to regulation. In the context of such a sale, as distinguished from the situation in *FPC* v. *Panhandle Eastern Pipe Line Co.,* 337 U. S. 498, to be discussed hereafter, the "production or gathering" exemption relates to the physical activities, processes and facilities of production or gathering, but not to sales of the kind affirmatively subjected to Commission jurisdiction. This accommodation of the two relevant

clauses of § 1 (b) gives content to the national objectives of the Natural Gas Act as expounded in *Phillips,* and to the Commission's jurisdiction to accomplish them, while in no way interfering with state regulatory power over the physical processes of production or gathering in furtherance of conservation or other legitimate state concerns.

Respondents argue that the Court's decision in *FPC* v. *Panhandle Eastern Pipe Line Co., supra,* precludes this result. In *Panhandle* an interstate pipeline company transferred undeveloped leases to a production company. The Government asserted that Commission jurisdiction should attach because the gas reserves covered by the leases had been included in the interstate company's rate base computation and because the lessening of its natural gas reserves might affect the pipeline company's ability to perform adequately the obligations for which it had been certificated. This Court disagreed, holding that the disposition of undeveloped leases was encompassed by the production or gathering exemption.

Two distinctions between *Panhandle* and the present case are apparent. *First,* the *Panhandle* leases were undeveloped. The Rayne Field leaseholds were substantially developed.[8] Natural gas would and did begin to flow into the Texas Eastern system immediately upon completion of its connection with the field. The substantiality of development is a relevant consideration, for the more that must be done before the gas begins its interstate journey, the less the transaction resembles the conventional wellhead sale of natural gas in interstate commerce which, as *Phillips* held, the Act has affirmatively placed within Commission jurisdiction. *Second, Panhandle* did not involve a sale of natural gas for resale in interstate commerce, but a transfer by an interstate transmission company to a production company for sale of the gas in

[8] See n. 3, *supra.*

*intra*state commerce. Hence, the *Panhandle* court did not have before it the present problem—whether the transfer to an interstate pipeline company for transmission and resale in interstate commerce of proven and substantially developed gas reserves is subject to Commission jurisdiction. This was largely the problem which the Court later faced in *Phillips* and resolved in favor of jurisdiction.

The language of *Panhandle* is unquestionably broad. But flat statements such as "[o]f course leases are an essential part of production," 337 U. S., at 505, should not be taken to cover more than the particular kind of leases that were before the Court; it should not be considered as embracing each and every transfer that can be put in lease form. Concepts of *stare decisis* in statutory interpretation apply to the *holdings* with which the case-by-case method of decision surrounds a statute. To recognize no differences between the *Panhandle* transfers and those in issue here, and in the name of *stare decisis* to hold that Commission jurisdiction depends on the form rather than the substance of the transaction, would turn the case-by-case process against itself.

III.

Because we differ with the court below on the jurisdictional issue, it is necessary for us to reach the question which the Fifth Circuit did not decide—whether the mandate of the Court of Appeals for the District of Columbia Circuit or the prior ruling of the Commission established the law of the case.

The original Commission order granting Texas Eastern a certificate to construct its connecting facilities proceeded on the basis that the Commission lacked authority to certificate the leasehold transfers. That question was not put in issue before the Court of Appeals for the District of Columbia Circuit. The opinion assumed its correct-

ness with the single statement, citing *Panhandle,* that "the Commission has been held to lack jurisdiction over gas leases," 109 U. S. App. D. C., at 291, 287 F. 2d, at 145, and concluded that "[t]he relevance of Texas Eastern's acquisition costs to these matters is unaffected by the form of the transaction; the Commission's warrant to inquire arises by virtue of its responsibility to regulate the purchaser, regardless of the status of the seller." *Id.,* at 292, 287 F. 2d, at 146. On remand, the Commission stated that in its previous decision it had "merely noted without discussion that we had no authority to issue a certificate for the acquisition of the leases . . . . It is apparent the issue was hardly considered in the earlier phase of this proceeding." 29 F. P. C. 249, 253. In exercising the warrant to inquire, the Commission became aware of the difficulties of inquiring into the reasonableness of the acquisition prices without having jurisdiction over the transfers, and as a result, reconsidered the jurisdictional question.

We do not think that either the prior Commission decision or the initial opinion on review foreclosed that possibility. It is extremely doubtful that certiorari would have been appropriate from the decision which the Court of Appeals for the District of Columbia Circuit allegedly made on the jurisdictional question, with the result that review by this Court would be precluded on this basic question of Commission jurisdiction. Furthermore, in light of the fact that this case followed two different routes of appeal,[9] thus eliminating the possibility that the initial reviewing court would clarify the extent of its mandate, compare *Colgate-Palmolive Co.* v. *FTC,* 326 F. 2d 517, it is appropriate to resolve doubts about the construction of the initial mandate in the Commission's favor.

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[9] See n. 6, *supra.*

We believe that the Commission's decision to reconsider the jurisdictional issue was consistent with a decision to inquire into the acquisition costs. "On review the court may thus correct errors of law and on remand the Commission is bound to act upon the correction. . . . But an administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge." *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 145.

Reversed.

MR. JUSTICE DOUGLAS, dissenting.

While I dissented in *Federal Power Comm'n* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, it is not conceivable to me that the majority that made up the Court in that case would adhere to what is done today. That would be irrelevant if we dealt with a constitutional matter, as issues of that magnitude are always open for reexamination. But since we deal with the vagaries of a statute with no constitutional overtones, I think the matter should be left where *Panhandle Eastern Pipe Line* left it, saving for the Congress, of course, the power to expand the regime of the federal bureaucracy if it desires. It is sometimes customary for a court to distinguish precedents to the vanishing point, creating an illusion of certainty in the law while leaving only a shadow of an ancient landmark. That is within the judicial competence and has been done before. But where the issue has been so hotly contested as it was in *Panhandle Eastern Pipe Line* and when the Court has been so explicit in bringing traffic in gas leases under the "production or gathering of natural gas" which Congress left to the States, I would adhere to that result until Congress changes it.

Syllabus.

SCOTT, TREASURER OF ILLINOIS, ET AL. *v.* GERMANO ET AL.

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

No. 1152. Decided June 1, 1965.

After invalidating senatorial apportionment provisions in the Illinois Constitution and statutes, a Federal District Court ordered that any corrective provisions be submitted to it before any election thereunder, failing which it would issue a show-cause order as to why State Senators should not be elected at large in 1966 and thereafter. Previously a case had been filed in state court attacking the composition of the legislature which, after the federal court order, the State Supreme Court decided on appeal, holding the State Senate composition invalid. The court expressed confidence that the legislature at its current session would take corrective action and retained jurisdiction to insure that the 1966 election was pursuant to a valid plan. Thereafter appellant here unsuccessfully moved the District Court to vacate its order and stay proceedings in light of the State Supreme Court opinion. *Held:* Appropriate state action to correct malapportionment is to be encouraged. The District Court order is vacated and the case remanded for the fixing of a reasonable time for valid senatorial redistricting by an agency of the State, including its Supreme Court, before the 1966 election, with retention of jurisdiction by the District Court for appropriate action, including an order for a valid reapportionment plan, failing timely state action.

241 F. Supp. 715, vacated and remanded.

Don H. Reuben, Howard J. Trienens and *D. Lawrence Gunnels* for appellants.

Bernard Kleiman and *Lester Asher* for Germano et al., and *William G. Clark,* Attorney General of Illinois, and *Richard A. Michael,* Assistant Attorney General, for Kerner et al., appellees.

PER CURIAM.

Upon remand of this case, 378 U. S. 560 (1964), for further proceedings consistent with the views stated in *Reynolds* v. *Sims,* 377 U. S. 533 (1964), the District Court on January 22, 1965, entered a judgment declaring invalid Art. IV, § 6, of the Illinois Constitution and Ill. Rev. Stat., c. 46, §§158–1 to 158–5 (1963), apportioning the Illinois Senate; directing that all members of the Illinois General Assembly be made parties defendant; and requiring that "any implementation, amendment or substitution of all or part of the said defective portions" of the Illinois Constitution or legislation be submitted to it for approval before the holding of any election thereunder. It further held that if no such "implementation, amendment or substitution" was submitted it would order the parties to show cause why all Illinois State Senators should not be elected from the State at large in the 1966 election and every four years thereafter.

In April 1964 the case of *People ex rel. Engle* v. *Kerner* was filed in the Circuit Court of Sangamon County, Illinois. It contested the composition of both houses of the General Assembly but was dismissed by the trial court. Upon appeal the Supreme Court of Illinois on February 4, 1965, held the composition of the Illinois Senate invalid; the court expressed confidence that the General Assembly would "successfully perform its duty to enact a constitutionally valid plan during its current session" which expires July 1, 1965. However, the court retained jurisdiction of the case "for the purpose of taking such affirmative action as may be necessary to insure that the 1966 election is pursuant to a constitutionally valid plan." 32 Ill. 2d 212, 225, 205 N. E. 2d 33, 41.

On February 8, 1965, the appellants here moved that the United States District Court reconsider and vacate its order of January 22, 1965, and stay further proceedings

in light of the Supreme Court of Illinois' opinion in *Engle, supra.* This the District Court refused to do. Direct appeal was perfected here, 28 U. S. C. § 1253 (1958 ed.), and the appellants have now moved to stay the judgment of the District Court.*

We believe that the District Court should have stayed its hand. The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged. *Maryland Committee* v. *Tawes,* 377 U. S. 656, 676 (1964); *Scranton* v. *Drew,* 379 U. S. 40 (1964), citing *Butcher* v. *Bloom,* 415 Pa. 438, 203 A. 2d 556 (1964); *Jackman* v. *Bodine,* 43 N. J. 453, 473, 205 A. 2d 713, 724 (1964). See also *Kidd* v. *McCanless,* 200 Tenn. 273, 292 S. W. 2d 40 (1956), and discussion thereof in *Baker* v. *Carr,* 369 U. S. 186, 235–236 (1962).

We therefore vacate the order of the District Court dated May 7, 1965. The case is remanded with directions that the District Court enter an order fixing a reasonable time within which the appropriate agencies of the State of Illinois, including its Supreme Court, may validly redistrict the Illinois State Senate; provided that the same be accomplished within ample time to permit such plan to be utilized in the 1966 election of the members of the State Senate, in accordance with the provisions of the Illinois election laws. Ill. Rev. Stat., c. 46 (1963).

The District Court shall retain jurisdiction of the case and in the event a valid reapportionment plan for the State Senate is not timely adopted it may enter such orders as it deems appropriate, including an order for a valid reapportionment plan for the State Senate or an

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*The motion to dispense with the printing of the jurisdictional statement is granted.

order directing that its members be elected at large pending a valid reapportionment by the State itself.

It is so ordered.

MR. JUSTICE HARLAN concurs in the result.

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

SMITH *v.* WARDEN, CONNECTICUT STATE PRISON.

APPEAL FROM THE SUPERIOR COURT OF CONNECTICUT, HARTFORD COUNTY.

No. 934, Misc. Decided June 1, 1965.

Appeal dismissed and certiorari denied.

PER CURIAM.

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

WARD *v.* NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 1158, Misc. Decided June 1, 1965.

Appeal dismissed and certiorari denied.

PER CURIAM.

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

AIR DISPATCH, INC., ET AL. *v.* UNITED STATES ET AL.

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

No. 1004. Decided June 1, 1965.

237 F. Supp. 450, affirmed.

Arthur R. Littleton, Harold S. Shertz, Louis P. Haffer and *Robert M. Beckman* for appellants.

Solicitor General Cox, Assistant Attorney General Orrick, Lionel Kestenbaum, Robert W. Ginnane and *Leonard S. Goodman* for the United States et al.; *Robert J. Corber, Drew L. Carraway, John S. Fessenden, Peter T. Beardsley, Richard R. Sigmon* and *Bryce Rea, Jr.*, for National Association of Motor Bus Owners et al.; and *Russell S. Bernhard* for Air Cargo, Inc., appellees.

PER CURIAM.

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

UNITED STATES *v.* LEITER MINERALS, INC., ET AL.

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

No. 950. Decided June 1, 1965.*

Certiorari granted, judgment vacated and cases remanded to District Court with directions to dismiss the complaint as moot.

Reported below: 329 F. 2d 85.

Solicitor General Cox and *Roger P. Marquis* for the United States.

Francis R. Kirkham, Turner H. McBaine, Eugene D. Saunders and *Charles D. Marshall* for petitioners in No. 951.

Saul Stone and *E. Drew McKinnis* for Buras et al.

PER CURIAM.

The motion of Alma Buras et al. to be added as parties respondent is granted.

Upon consideration of the joint suggestion of mootness, the petitions for writs of certiorari are granted and the judgment of the United States Court of Appeals for the Fifth Circuit is vacated. The cases are remanded to the United States District Court for the Eastern District of Louisiana with directions to dismiss the complaint as moot.

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*Together with No. 951, *California Co. et al.* v. *Leiter Minerals, Inc., et al.*, also on petition for writ of certiorari to the same court.

KENNECOTT COPPER CORP. *v.* UNITED STATES.

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

No. 995. Decided June 1, 1965.

231 F. Supp. 95, affirmed.

Arthur H. Dean and *Howard T. Milman* for appellant.

Solicitor General Cox, Assistant Attorney General Orrick, Lionel Kestenbaum, Jerome S. Wagshal and *Donald L. Hardison* for the United States.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed. *Brown Shoe Co.* v. *United States,* 370 U. S. 294 and *United States* v. *Aluminum Co. of America,* 377 U. S. 271.

MR. JUSTICE HARLAN and MR. JUSTICE GOLDBERG, dissenting.

We would note probable jurisdiction and set the case for argument. In so voting, we indicate no opinion on the merits. Under the Expediting Act, 32 Stat. 823, as amended, 15 U. S. C. § 29 (1964 ed.), this is appellant's first and only appeal. So long as this statute remains on the books and Congress provides no intermediate review, see *United States* v. *Singer Mfg. Co.,* 374 U. S. 174, 175, it is our view that the policy of the Act is, in general, best served by plenary rather than summary dispositions of such appeals. *Ibid.* Of course, if the question presented by an appeal is plainly insubstantial or directly governed by a controlling decision of this Court, summary disposition would still be appropriate. Since we do not believe that this can be said of this case, we would give plenary consideration to this appeal.

JORDAN, SECRETARY OF STATE OF CALIFORNIA, ET AL. *v.* SILVER.

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

No. 935. Decided June 1, 1965.

Affirmed.

Thomas C. Lynch, Attorney General of California, *Charles E. Corker* and *Charles A. Barrett,* Assistant Attorneys General, *Sanford N. Gruskin,* Deputy Attorney General, and *Herman F. Selvin* for appellants.

Phill Silver, appellee, *pro se.*

PER CURIAM.

The motion of the appellant the Senate of the Legislature of California to take judicial notice of official judicial records is denied. The motion to strike the motion to dismiss or affirm is also denied. The motion to affirm is granted and the judgment is affirmed.

MR. JUSTICE HARLAN, whom MR. JUSTICE CLARK and MR. JUSTICE STEWART join, concurring.

The California Constitution reserves to the people of the State the initiative power to propose constitutional amendments by filing a petition with the Secretary of State.[1] If the petition is signed by 8% of the persons who voted in the preceding gubernatorial election, the proposed amendment will be submitted to the people at the next general election, and only a bare majority vote of the people is required in order to pass the amendment.

Prior to 1926 the California Constitution, Art. IV, § 6, provided that both houses of the legislature would be apportioned on the basis of population.[2] In 1926 an

[1] Calif. Const., Art. IV, § 1.

[2] "For the purpose of choosing members of the legislature, the state shall be divided into forty senatorial and eighty assembly districts, as nearly equal in population as may be, and composed of contiguous

initiative measure, known as Proposition 28, was submitted to the voters which deleted the requirement that the Senate be apportioned on a strict population basis, leaving the method of apportioning the Assembly unaffected.[3] The statements accompanying the measure, which were distributed to all voters, described the proposition as an attempt to provide a federal-type plan for California, similar to the apportionment of the United States Congress, and summarized the arguments pro and con the proposal.[4] Proposition 28 was approved by a

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territory, to be called senatorial and assembly districts." Calif. Const. of 1879, Art. IV, § 6, in Calif. Laws 1925, p. xi.

[3] "For the purpose of choosing members of the legislature, the state shall be divided into forty senatorial and eighty assembly districts to be called senatorial and assembly districts. Such districts shall be composed of contiguous territory, and assembly districts shall be as nearly equal in population as may be. Each senatorial district shall choose one senator and each assembly district shall choose one member of assembly. . . . [I]n the formation of senatorial districts no county or city and county shall contain more than one senatorial district, and the counties of small population shall be grouped in districts of not to exceed three counties in any one senatorial district . . . ." Calif. Laws 1927, p. lxxxv.

Another measure, Proposition 20, was also submitted to the voters in the 1926 election, which would have preserved the apportionment of both houses on a strict population basis. This proposition was defeated by a vote of 492,923 to 319,456. Record 37.

[4] "Argument in Favor of Legislative Reapportionment Initiative Measure.

"'FEDERAL PLAN.'

"This proposed constitutional amendment will take the place of section 6, article 4, of the constitution of California, which now provides that the state shall be divided into forty senatorial districts and eighty assembly districts 'as nearly equal in population as may be, and composed of contiguous territory.'

"The growth of city population in California, and particularly the unprecedented development of the two great urban regions of the state, will have the effect, if representation is reapportioned according to present law, of consolidating political power in the inhabitants of 3 per cent of the area of the state to the prejudice of the representa-

popular vote of 437,003 to 363,208 in the November 1926 election, and the following year the legislature adopted apportionment statutes to effectuate the constitutional

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tive rights of the balance of the population who inhabit 97 per cent of the area of the state. The state legislature, foreseeing disadvantages to the general interests of the state, has repeatedly declined, since the publication of the last federal census, to reapportion representation on the basis of the existing law.

"The present amendment would alter the constitution so as to enable the legislature to find a solution to the difficulty that will protect the right of the great bulk of the state to fair representation.

"The plan is called the 'Federal Plan' because its provisions resemble those of the federal constitution with respect to representation in the United States congress. It rests upon a principle widely recognized in American government and other governments that representation in a public assembly is equitably apportioned not according to population alone but according to two factors—population and territory.

"The measure will preserve to rural California and the great agricultural producing areas which comprise it, the control of one house of the state legislature, namely: the senate. The measure makes no change in assembly districts. It does not increase the members of the legislature. It can not, in any way, add to state expense.

"Under this plan no county or city and county has more than one senator. The small counties are grouped, but are given at least one senator to each three counties. There are fifty-eight counties in the state and forty senators. To illustrate the working of the plan, twenty-seven of these counties might, by reason of superior population, each elect one senator; sixteen counties grouped in twos might elect eight; and fifteen counties grouped in threes might elect five. Every large homogeneous geographical area of the state is assured one representative in the senate.

"Twenty-nine states of the Union have based their legislative representation in some form upon this principle, and these states include, among others, New York, Pennsylvania, Massachusetts, Iowa, and Ohio. The principle was submitted to a popular election in Ohio in 1903, and was overwhelmingly adopted by 731,000 votes for it and only 26,479 votes against the principle. This amendment is sponsored by the California Farm Bureau Federation, the State Grange, the Farmers Union, and the Agricultural Legislative Committee. But it is also supported by chambers of commerce, women's clubs, and civic organizations generally throughout the state. It will

amendment. This legislation was submitted to the people as required by state law, and was approved by them in the 1928 election.[5] The amendment provided that the

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create a well-balanced legislature in which neither the cities nor the countryside may predominate. It is a just and wholesome provision. It will give the state a better legislature than is possible under present law, and will be a fair determination of a controversy disturbing to the best interests of California.

"Vote YES on this amendment.

"DAVID P. BARROWS.

"Argument Against Legislative Reapportionment Initiative Measure.

"The proposed amendment is unfair and impractical so far as it relates to senatorial districts.

"The provision that no county or city and county shall contain more than one senatorial district would limit Alameda, Los Angeles and San Francisco to one senator each. These three combined have 200,000 more than half of the population of the state, so the result would be that the majority would have only three senators, and the minority would be represented by thirty-seven senators. There is no good reason for the discrimination.

"The agricultural and commercial interests are so closely allied and interwoven that neither one as such should have the greater power in legislation. The only fair way is to base the representation on population, in accordance with the fundamental principles of our government that the majority shall rule.

"The amendment prescribes no method of determining how the senatorial districts shall be formed. It merely provides that counties of small population shall be grouped in districts of not more than three counties in one district. It is left to the legislature or reapportionment commission to determine arbitrarily and without restriction how it shall be done. Many of the counties of small population are contiguous, so it will follow that sparsely settled districts must be formed, and even the agricultural sections will not have equal representation in the senate as among themselves.

"The populous counties pay the greater share of taxes, and should have the controlling voice in the expenditure of the state's funds.

"If the citizens of these centers should vote for this amendment they would help to disfranchise themselves.

"Vote NO and preserve American principles.

"DANA R. WELLER."

Record 54.

[5] Record 37. The vote was 692, 347 in favor, and 570,120 opposed.

Senate would be composed of 40 members, to be elected from senatorial districts; the districts would be based on population, but no county could contain more than one district, and no district could consist of more than three counties.[6]

Since the adoption of these changes, various initiative measures have been submitted to the voters on more than one occasion in an attempt to change this apportionment system for the Senate. In 1948 such a proposition was defeated by a vote of 2,250,937 to 1,069,899.[7] In 1960 such a proposition was defeated by a vote of 3,408,090 to 1,876,185.[8] And in 1962 another such proposition was defeated by a vote of 2,495,440 to 2,181,758.[9]

The Court today summarily affirms the decree of the District Court holding this senatorial apportionment, consistently approved by a majority of the people of California voting in general elections, to be invalid under the decisions of this Court in *Reynolds* v. *Sims,* 377 U. S. 533, and companion cases. Were I able to detect in any of those cases the slightest basis for optimism that the Court might consider last Term's reapportionment pronouncements to leave room for the people of a State to choose for themselves the kind of legislative structure they wish to have—at least when the democratic processes employed are as straightforward and flexible as those of California—I would vote to "Note" and hear this case. Finding, however, that the judgment of the District Court is

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[6] Calif. Const., Art. IV, § 6. The present effect of this apportionment is that Los Angeles County, with a population of over 6,000,000, has one Senator, and the three smallest counties, which together have a population of 14,294, also have one Senator. There is no claim made, however, that the Assembly is not apportioned solely on the basis of population.

[7] Proposition 13 on the 1948 ballot. Record 37–38.

[8] Proposition 15 on the 1960 ballot. Record 38.

[9] Proposition 23 on the 1962 ballot. Record 78.

squarely required by *Lucas* v. *Forty-fourth General Assembly*, 377 U. S. 713,[10] I reluctantly acquiesce in the Court's summary affirmance.[11]

HEARNE ET AL. *v.* SMYLIE, GOVERNOR OF IDAHO, ET AL.

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

No. 617. Decided June 1, 1965.

Appeal dismissed.

Herman J. McDevitt for appellants.

Allan G. Shepard, Attorney General of Idaho, and *M. Allyn Dingel, Jr.*, Assistant Attorney General, for Williams et al., appellees.

PER CURIAM.

The appeal in this case concerns an order of the United States District Court for the District of Idaho staying this reapportionment suit until 30 days after the adjournment of the 1965 Session of the Idaho Legislature. The Idaho Legislature, after adopting a new reapportionment plan, adjourned on March 25, 1965. The stay order now having expired by its own terms and the District Court and the parties now being in a position to proceed promptly with this litigation, the motions to dismiss are granted and the appeal is dismissed.

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[10] The gleam of a distinction between that case and this, which is suggested by what the Court said at p. 731 of its *Lucas* opinion, is wholly dissipated by what appears shortly thereafter at pp. 736–737.

[11] This affirmance does not of course touch the propriety of any relief that the District Court may later grant, or the extent to which provisions of the California Constitution are still binding on the State Legislature in drafting apportionment legislation, see *Forty-fourth General Assembly* v. *Lucas*, 379 U. S. 693.

DREWS ET AL. *v.* MARYLAND.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND.

No. 1010. Decided June 1, 1965.

Appeal dismissed and certiorari denied.
Reported below: 236 Md. 349, 204 A. 2d 64.

Francis D. Murnaghan, Jr., for appellants.

Thomas B. Finan, Attorney General of Maryland, and *Robert C. Murphy*, Deputy Attorney General, for appellee.

PER CURIAM.

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

MR. CHIEF JUSTICE WARREN, with whom MR. JUSTICE DOUGLAS joins, dissenting from the denial of certiorari.[1]

On Sunday, September 6, 1959, Juretha Joyner and James L. Lacey, who are Negroes, and Helen W. Brown, Dale H. Drews and Joseph C. Sheeham, who are white, went to Gwynn Oak Park, an amusement park in Baltimore County, Maryland. Ironically, the park was celebrating "All Nations Day." Shortly after 3 p. m. they

[1] I agree with appellee that this is not a proper appeal. However, in 28 U. S. C. § 2103 (1958 ed., Supp. V), Congress has provided, in pertinent part:

"If an appeal to the Supreme Court is improvidently taken from the decision of the highest court of a State, or of a United States court of appeals, in a case where the proper mode of a review is by petition for certiorari, this alone shall not be ground for dismissal; but the papers whereon the appeal was taken shall be regarded and acted on as a petition for writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken."

were standing in a group by themselves and had, a park guard testified, attracted no attention from other patrons. The guard approached the group and told them that "we are very sorry but the park was closed to colored, and that the colored people would have to leave the premises . . . ." Mr. Lacey answered that he was enjoying himself and would like to look around some more, and neither he nor Miss Joyner complied with the request to leave. The guard then asked all five to leave, but they refused. He testified, however, that they "were all very polite." During this interchange between the guard and petitioners, other patrons of the park began to gather around.

Upon the refusal of petitioners to leave, the guard summoned the Baltimore County police, who, after asking petitioners to leave, placed them under arrest. Meanwhile, the crowd surrounding the petitioners grew larger and more hostile, even going so far as to kick, spit, and yell "Lynch them!" Neither the park officials nor the county police made any attempt to exclude from the park or arrest any of those who engaged in such conduct. Upon being informed of their arrest, the five joined arms briefly, and the three men then dropped to the ground and assumed a prostrate position. Petitioners Joyner and Brown remained on their feet. The police placed handcuffs on Miss Joyner, and escorted her and Miss Brown from the park. Though the police encountered some difficulty in pulling the women through the crowd, they left under their own power. The men, on the other hand, had to be carried out, but offered no active resistance. The only remark by any of the petitioners was made by one of the men, who, responding to mistreatment by someone in the crowd, said ". . . forgive him, he doesn't know what he is doing . . . ."

On April 5, 1960, petitioners Brown, Joyner, Drews and Sheeham were charged with "acting in a disorderly manner, to the disturbance of the public peace, at, in

or on Gwynn Oak Amusement Park, Inc., a body corporate, a place of public resort and amusement in Baltimore County" in violation of Md. Code Ann. Art. 27, § 123 (1957 ed.).[2] Mr. Lacey was not prosecuted. Petitioners waived jury trial, were found guilty by the court, and each was fined $25 plus costs.[3] On January 18, 1961, the Maryland Court of Appeals, defining disorderly conduct as "the doing or saying, or both, of that which offends, disturbs, incites, or tends to incite, a number of people gathered in the same area," [4] affirmed the convictions. 224 Md. 186, 192, 167 A. 2d 341, 343–344. On June 22, 1964, this Court vacated the judgments and remanded the case to the Court of Appeals for consideration in light of *Griffin* v. *Maryland,* 378 U. S. 130, and *Bell* v. *Maryland,* 378 U. S. 226. 378 U. S. 547. On remand, the Court of Appeals, purporting to distinguish *Griffin* and *Bell,* reinstated and reaffirmed the prior judgments of conviction, Judge Oppenheimer dissenting. 236 Md. 349, 204 A. 2d 64.

I cannot concur in the Court's refusal to review this case. (1) There is in my mind serious question as to whether the conduct of petitioners can constitutionally be punished under a disorderly conduct statute. (2) It

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[2] Section 123 provides, in pertinent part:

"Drunkenness and disorderly conduct generally; habitual offenders.

"Every person who shall be found drunk, or acting in a disorderly manner to the disturbance of the public peace, [in any of a number of specified locations, including places of public resort or amusement] shall be deemed guilty of a misdemeanor; and, upon conviction thereof, shall be subject to a fine of not more than fifty dollars, or be confined in jail for a period of not more than sixty days or be both fined and imprisoned in the discretion of the court. . . ."

[3] This Court has never (and I hope it never does) let the fact that the criminal penalty is relatively small stand in the way of reviewing a case presenting important constitutional questions. *E. g., Thompson* v. *Louisville,* 362 U. S. 199, 203-204 ($10 fine); *Yick Wo* v. *Hopkins,* 118 U. S. 356 ($10 fine).

[4] Compare *Cox* v. *Louisiana,* 379 U. S. 536, 551–552.

seems to me apparent from the record that petitioners' conduct is protected under the Civil Rights Act of 1964, 78 Stat. 241, and that, under our decision in *Hamm* v. *City of Rock Hill* and *Lupper* v. *Arkansas,* 379 U. S. 306, the passage of the Act must be deemed to have abated the convictions.

I.

In *Thompson* v. *Louisville,* 362 U. S. 199, the only evidence supporting the petitioner's disorderly conduct conviction was to the effect that, after being arrested on another charge, he was "very argumentative" with the arresting officers. We set aside the conviction on the ground that it was "so totally devoid of evidentiary support as to render his conviction unconstitutional under the Due Process Clause of the Fourteenth Amendment." *Ibid. Thompson* was followed in *Garner* v. *Louisiana,* 368 U. S. 157, where the evidence showed that the petitioners, who were Negroes, had taken seats at a lunch counter where only white people were served, and had refused to leave upon request. For this they were convicted of disturbing the peace. For purposes of our decision, we gave the statute under which the petitioners were convicted its broadest possible readings, and assumed that it outlawed even peaceful and orderly conduct which foreseeably might cause a public commotion, *id.,* at 169. Nonetheless, we found the petitioners' conduct constitutionally insufficient to support the conviction.[5] And in *Barr* v. *City of Columbia,* 378 U. S. 146, we reversed a breach of the peace conviction based on conduct

[5] In *Garner* the Court noted that the record did not support the allegation that the trial judge had taken judicial notice of the fact that the petitioners' presence in a segregated establishment was likely to cause a disturbance. 368 U. S., at 173. Neither the trial transcript in the instant case nor the trial judge's memorandum opinion indicates that he took that sort of notice here.

similar to that involved in *Garner*. In doing so, we observed that

> "because of the frequent occasions on which we have reversed under the Fourteenth Amendment convictions of peaceful individuals who were convicted of breach of the peace because of the acts of hostile onlookers, we are reluctant to assume that the breach-of-peace statute covers petitioners' conduct here. . . . Since there was no evidence to support the breach-of-peace convictions, they should not stand." *Id.*, at 150–151.

I do not find this case meaningfully distinguishable from *Garner* and *Barr*. Clearly, nothing petitioners did prior to being placed under arrest could be called disorderly conduct: their only "sins" up to that point were being Negro or being in the company of Negroes, and politely refusing to leave the park. Nonetheless, they were arrested. *Then* all five members of the group briefly linked arms, and, in a further show of passive resistance, the three men dropped to the ground. They did not, the police officers testified, offer anything in the way of active resistance to either arrest or ejection. As Judge Oppenheimer observed: "In resisting the command of the officers to leave the park, the defendants used no force against the officers or anyone else; they held back or fell to the ground." 236 Md., at 355, 204 A. 2d, at 68. Nor did they argue with the police, cf. *Thompson* v. *Louisville, supra,* or use profanity, cf. *Sharpe* v. *State,* 231 Md. 401, 190 A. 2d 628, cert. denied, 375 U. S. 946; indeed, the only words spoken were in the nature of a plea for forgiveness of one of the mob. All they did was refuse to assist in their own ejection from a segregated amusement park.

The two women did not even lie down. The only bit of testimony from which the trial judge could possibly have inferred disorderly behavior is the following:

> "Q. Now, Officer, do you always place handcuffs on persons whom you have arrested?

"A. When I have a little trouble getting them through the Park or any—when I have a little trouble with them, yes.

"Q. What trouble did you have with Juretha Joyner?

"A. By refusing to leave.

"Q. Did you place handcuffs on any of the other Defendants?

"A. No, I don't recall.

"Q. Did you or did you not?

"A. No, sir.

"Q. Now, did the two female Defendants leave the Park, did they leave under their own power?

"A. I had to pull them through the crowd.

"Q. They walked out?

"A. They walked out, but I had to pull them through.

"THE COURT: Why did you have to pull them through?

"A. Because they didn't want to leave voluntarily.

"Q. They came when you pulled?

"A. They did, yes, sir."

There is undoubtedly some truth to the officer's surmise; I am sure neither woman liked being ejected from the park solely because of her race or the race of her friend. I suspect that their reluctance also resulted in no small measure from a fear of being pulled through a shouting, spitting, kicking mob.

Even if it be assumed that the arrest of petitioners was lawful,[6] I have great difficulty distinguishing the conduct

[6] It is far from clear that the arrest was lawful. In view of the fact that § 24–13 of the Baltimore County Code (1958) authorizes the appointment of special police officers "for the proper protection of persons and property in the county," it may well be that the guard who asked petitioners to leave the park enjoyed the same status as the officer involved in *Griffin* v. *Maryland*, 378 U. S. 130. When this case was here the first time, we remanded it for consideration in light of

of the women, and, to a lesser extent, that of the men, from the refusals to leave segregated establishments which were before us in *Garner* and *Barr*. I cannot see how a statute outlawing "drunkenness and disorderly conduct" [7] can be said to have given petitioners fair warning, cf. *Bouie* v. *City of Columbia*, 378 U. S. 347, that the conduct (or, in the case of the women, lack of conduct) in which they engaged was criminally punishable.[8] I cannot, at

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Griffin. However, only Judge Oppenheimer, dissenting, drew from our remand the meaning that, until today, I too had thought it was supposed to carry, and voted to remand the case to the trial court for an investigation of the relation between the guard and the county:

"If Wood, the 'special officer' in this case, had virtually the same authority from Baltimore County that Collins [the guard involved in *Griffin*] had from Montgomery County . . . then under *Griffin* v. *Maryland, supra*, the State was a joint participant in the discriminatory action.

. . . . . .

"The Baltimore County Code authorizes the county to appoint special police officers to serve for private persons or corporations. Baltimore County Code, Sections 24–13 and 35–3 (1958). I would remand this case to the Circuit Court for Baltimore County for the taking of additional testimony to determine whether or not Wood was appointed by Baltimore County under these sections of its Code. If he was, the convictions should be reversed." 236 Md., at 355; 204 A. 2d, at 68 (Oppenheimer, J., dissenting).

Thus we still do not know whether the guard's action constituted state action, thereby rendering his command to leave the park unconstitutional. Yet it is axiomatic that "one cannot be punished for failing to obey the command of an officer if that command is itself violative of the Constitution." *Wright* v. *Georgia*, 373 U. S. 284, 291–292. Moreover, a strong argument can be made that, under Maryland law, resisting an unlawful arrest does not constitute disorderly conduct. See *Sharpe* v. *State*, 231 Md. 401, 403, 404, 190 A. 2d 628, 630, cert. denied, 375 U. S. 946.

[7] With the conduct of petitioners herein, compare that of the defendants in *Sharpe* v. *State, supra*, note 6, and *In re Cromwell*, 232 Md. 409, 194 A. 2d 88. Also, compare *Niemotko* v. *State*, 194 Md. 247, 250, 71 A. 2d 9, 10, with *Niemotko* v. *Maryland*, 340 U. S. 268, 271.

[8] Whether or not petitioners' conduct would support a conviction for something other than disturbing the peace I do not know. Nor

least not without argument and full consideration by the Court, join in letting stand a decision which holds that police can arrest persons who are doing nothing remotely disorderly, secure in the knowledge that if the persons refuse wholeheartedly to cooperate in their own arrest and removal to a waiting squad car, their conviction for disorderly conduct will be forthcoming.[9]

II.

In *Hamm* v. *City of Rock Hill* and *Lupper* v. *Arkansas*, 379 U. S. 306, 308, we held:

> "The Civil Rights Act of 1964 forbids discrimination in places of public accommodation and removes peaceful attempts to be served on an equal basis from the category of punishable activities. Although the conduct in the present cases occurred prior to enactment of the Act, the still-pending convictions are abated by its passage."

The convictions in this case did not become final until today. That the amusement park is an establishment covered by § 201 of the Civil Rights Act, 78 Stat. 241, 243, seems clear.[10] I take it, therefore, that the Court

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do I inquire, for "[c]onviction upon a charge not made would be sheer denial of due process." *De Jonge* v. *Oregon*, 299 U. S. 353, 362. See also *Garner* v. *Louisiana*, 368 U. S. 157, 164; *Thompson* v. *Louisville*, 362 U. S. 199, 206; *Cole* v. *Arkansas*, 333 U. S. 196, 201.

[9] It seems to me that the persons who were in fact guilty of disorderly conduct were the members of the crowd; however, none of them was prosecuted.

[10] There is a restaurant at Gwynn Oak Park; indeed, petitioners were standing next to it when they were arrested. If a substantial portion of the food served in that restaurant has moved in interstate commerce, the entire amusement park is a place of public accommodation under the Act. §§ 201 (b)(2), 201 (b)(4), 201 (c). See also § 201 (b)(3). If the Court were unwilling to assume that the restaurant serves a substantial portion of such food, the proper course would be to remand the case for a hearing on the issue. Since the Court denies certiorari, I assume that it is for some other reason that it

does not regard petitioners' conduct as a "peaceful attempt to be served on an equal basis." I cannot agree. Surely the attempt to be served was completely orderly, and, as I indicated above, I think petitioners' post-arrest conduct amounted to no more than a natural and fully understandable reaction to their arbitrary exclusion from the park.

In two recent decisions, we have, rightly in my opinion, recognized that people denied service because of their race are likely to react with less than wholehearted cooperation. Today, I fear, the Court forgets that elemental principle of human conduct, and demands, on pain of criminal penalty, the patience of Job. In *Blow* v. *North Carolina,* 379 U. S. 684, the evidence adduced at trial showed that the petitioners, two Negroes, were refused service in a restaurant, whereupon one proceeded to sit down on the floor mat outside the door, and the other stood near the door. They were convicted under a statute making it a crime to enter upon the lands of another without a license after being forbidden to do so. We held that the Civil Rights Act abated their convictions. In *McKinnie* v. *Tennessee,* 380 U. S. 449, the petitioners, eight Negroes, entered the vestibule of a restaurant, were refused entrance into the restaurant proper, whereupon they remained in the vestibule, which measured 6′ x 6′ 4″, for approximately 20 minutes. There was testimony that the petitioners had engaged in some pushing and shoving, but the evidence was unclear as to whether the pushing was initiated by the Negroes or was attributable to white people who, during the 20 minutes, entered the restaurant through the vestibule. Again, we held that the convictions (for conspiracy to injure trade or commerce) had been abated by the passage of the Civil Rights Act. In

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regards petitioners' conduct as not protected by the Act. I further assume that the fact that three of the petitioners are white is not the decisive factor, cf. *Walker* v. *Georgia, ante,* p. 355, since certiorari is denied as to the Negro petitioner too.

each case we concluded that the conduct of the petitioners constituted no more than a peaceful refusal to acquiesce in a denial of their federal rights. I think we should draw the same conclusion here.

In dissenting, I of course do not suggest that a civil rights demonstrator, or anybody else, has a right to block traffic, or bar access to a man's home or place of business. I fully concur in the Court's observation in *Cox* v. *Louisiana,* 379 U. S. 536, 554–555:

> "The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy. The control of travel on the streets is a clear example of governmental responsibility to insure this necessary order. A restriction in that relation, designed to promote the public convenience in the interest of all, and not susceptible to abuses of discriminatory application, cannot be disregarded by the attempted exercise of some civil right which, in other circumstances, would be entitled to protection. One would not be justified in ignoring the familiar red light because this was thought to be a means of social protest. Nor could one, contrary to traffic regulations, insist upon a street meeting in the middle of Times Square at the rush hour as a form of freedom of speech or assembly. Governmental authorities have the duty and responsibility to keep their streets open and available for movement. A group of demonstrators could not insist upon the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations."

But such examples are a far cry from what happened here. Juretha Joyner, a Negro, went with some friends to celebrate "All Nations Day" at Gwynn Oak Park. Despite the facts that she behaved with complete order and dig-

nity, and that her right to be at the park is protected by federal law, she was asked to leave, solely because of her race. She refused and, upon being handcuffed, displayed some reluctance (though no active resistance) to being pulled through an actively hostile mob. For this she was convicted of "acting in a disorderly manner, to the disturbance of the public peace." Today the Court declines to review her conviction, and the convictions of her three companions. I cannot join.

TRAVIA ET AL. *v.* LOMENZO, SECRETARY OF STATE OF NEW YORK, ET AL.

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

No. 1218. Decided June 1, 1965.

Motion to accelerate appeal and application for a stay denied.

Simon H. Rifkind and *Edward N. Costikyan* for appellants.

Louis J. Lefkowitz, Attorney General of New York, *Daniel M. Cohen* and *George D. Zuckerman,* Assistant Attorneys General, *Donald Zimmerman,* Special Assistant Attorney General, and *Orrin G. Judd* for Lomenzo et al.; and *Leonard B. Sand* and *Max Gross* for WMCA, Inc., et al., appellees.

PER CURIAM.

The motion to accelerate the appeal is denied. The application for a stay, addressed to MR. JUSTICE HARLAN as Circuit Justice and referred by him to the Court for consideration under Rule 50 (6), is denied.

MR. JUSTICE HARLAN, dissenting.

An application has been made to me, as Circuit Justice, for a stay pending appeal from an order of a three-judge

District Court, dated May 24, 1965, ordering New York to hold a special legislative election on November 2, 1965, under the electoral scheme embodied in reapportionment "Plan A" [1] passed by the New York Legislature, signed by the Governor, and held unconstitutional under the State Constitution by the New York Court of Appeals. The stay application was accompanied by a motion, addressed to the Court, asking for an acceleration and immediate hearing of the appeal, to which the relief sought from me is incident. Because the stay and acceleration questions were in my opinion inextricably related and involved issues of far-reaching importance, I referred the stay application to the full Court for determination (see Sup. Ct. Rule 50 (6)) in conjunction with the motion to accelerate the appeal. The Court now denies both the stay and motion to accelerate, and I respectfully dissent.

"Plan A" was one of four alternative reapportionment plans passed by the New York Legislature under the impact of an order of the District Court, dated July 27, 1964, entered pursuant to this Court's decision in *WMCA, Inc.* v. *Lomenzo,* 377 U. S. 633, which held New York's then-existing method of legislative apportionment violative of the Fourteenth Amendment. The District Court order provided by way of interim relief that (1) the November 1964 legislative elections could proceed under the invalidated apportionment system, but the legislators would be permitted to serve for only a one-year period, instead of the two-year term provided in the State Constitution; (2) a special November 1965 election must be held under a constitutionally valid apportionment plan to be enacted by the New York Legislature and submitted to the Dis-

[1] New York Laws 1964, c. 976. At the same time the Legislature passed three successive amendments to c. 976: New York Laws 1964, cc. 977–978 (Plan "B"), c. 979 (Plan "C"), and c. 981 (Plan "D"). These four acts have been referred to throughout the proceedings as Plans A, B, C, and D.

trict Court for approval not later than April 1, 1965 (later extended to May 5, 1965), the legislators so elected again to serve for only one year; and (3) the regularly scheduled November 1966 election, for a normal two-year term, would be held under the same or some other court-approved reapportionment plan. This Court summarily affirmed the District Court's order. *Hughes* v. *WMCA, Inc.*, 379 U. S. 694. Two dissenting Justices would have set the case for plenary consideration, and two concurring Justices expressly noted that the Court's action did not foreclose the District Court from modifying its interim order in light of subsequent developments.

In December 1964 the 1964 Legislature, meeting in special session, passed and the Governor signed four alternative reapportionment plans, one of which, "Plan A," is involved in the matter now before us. On January 26, 1965, the three-judge District Court found that "Plan A" satisfied federal constitutional requirements, but that each of the other plans did not. 238 F. Supp. 916. On April 14, 1965, the New York Court of Appeals held all four plans invalid under the State Constitution, in that each provided for an Assembly of more than 150 members, thus exceeding the membership limit prescribed by the New York Constitution, Art. 3, § 2. *In re Orans*, 15 N. Y. 2d 339, 206 N. E. 2d 854.

Ignoring the New York Court of Appeals' holding that Plan A violated the State Constitution, a majority of the District Court, on May 18, 1965, ordered the November 1965 state legislative election to proceed under that plan. One judge dissented, considering that a more appropriate, though admittedly not wholly satisfactory, "interim" solution would be to permit the November 1965 election to go forward under the old reapportionment formula, with the legislators thus elected being accorded "weighted votes" in the legislature based on population.

On May 24, 1965, the State Legislature passed three bills, the substantial effects of which were (1) to adopt the dissenting district judge's weighted voting formula for the 1966 legislative session, without holding an election this fall; [2] (2) to create a bi-partisan commission to devise a new reapportionment formula for the 1966 election, meeting both federal and state constitutional requirements; [3] and (3) to issue a call for a constitutional convention to promulgate a permanent reapportionment plan to govern the 1968 and subsequent elections.[4] The Speaker of the Assembly and the President *pro tem* of the State Senate (the intervenors-appellants here) thereupon sought leave to intervene in the district court proceedings and to persuade the court to modify the interim relief in accordance with these legislative proposals. Their application for leave to intervene was granted, but the District Court refused to modify its earlier order. These applications for a stay and accelerated appeal followed immediately.

These matters bristle with difficult and important questions that touch the nerve centers of the sound operation of our federal and state judicial and political systems. They involve, among other things, the right of a federal court to order that one house of a state legislature shall temporarily be of greater size than is permitted by the State Constitution. Surely such questions are deserving of plenary consideration and reasoned explication. By denying a stay and refusing to accelerate this appeal, the Court, instead, has in effect decided them not only summarily but also *sub silentio*. For while the denial of a stay does not technically moot the appeal, it is manifest that such is the practical effect of the Court's action, since

[2] New York Assembly Intro. 6051, Print. 7067, vetoed by the Governor on May 27, 1965.

[3] New York Assembly Intro. 6050, Print. 7066, vetoed by the Governor on May 27, 1965.

[4] New York Assembly Intro. 5695, Print. 5988.

in normal course the appeal will not even be heard until after the presently ordered November election has taken place.

Without prejudging the question, the propriety of a federal court's ordering a state election to proceed under a plan which the highest court of the State has found to violate the State Constitution in respects not claimed to be violative of the Federal Constitution, when a number of alternatives are available, raises what I consider to be very serious federal questions which this Court should at least hear. All parties have shown themselves willing to argue the case promptly. I would set the case for immediate argument, and would have the Court render its decision on the stay promptly thereafter, with opinions on the merits of the controversy to follow in due course. Compare *Cooper* v. *Aaron,* 358 U. S. 1.[5]

I am wholly at a loss to understand the Court's casual way of disposing of this matter and I can find no considerations of any kind which justify it. The Court should be willing to face up articulately to these difficult problems which have followed as a not unnatural aftermath of its reapportionment decisions of last Term.

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[5] The necessity for a prompt disposition is evidenced by the fact that the State's primary machinery must be set in motion today if an election next November is to take place.

MOTOR CONVOY, INC., ET AL. *v.* UNITED STATES ET AL.

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

No. 987. Decided June 1, 1965.

235 F. Supp. 250, affirmed.

Paul M. Daniell, Robert E. Born and *Martin Sack* for appellants.

Solicitor General Cox, Assistant Attorney General Orrick, Robert B. Hummel, Robert W. Ginnane and *Betty Jo Christian* for the United States et al.; *George S. Dixon* for National Automobile Transporters Association; and *Nelson M. Harris, Jr.,* for Dixie Transport Co., appellees.

PER CURIAM.

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

FOX *v.* UNITED STATES.

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

No. 1032. Decided June 1, 1965.

Affirmed.

Sidney W. Provensal, Jr., for appellant.

Solicitor General Cox for the United States.

PER CURIAM.

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

UNITED STATES *v.* BROWN.

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

No. 399. Argued March 29, 1965.—Decided June 7, 1965.

Respondent was convicted under § 504 of the Labor-Management Reporting and Disclosure Act of 1959, which makes it a crime for one who belongs to the Communist Party or who has been a member thereof during the preceding five years wilfully to serve as a member of the executive board of a labor organization. The Court of Appeals reversed, holding § 504 violative of the First and Fifth Amendments. *Held:* Section 504 constitutes a bill of attainder and is therefore unconstitutional. Pp. 441–462.

(a) The Bill of Attainder Clause, Art. I, § 9, cl. 3, was intended to implement the separation of powers among the three branches of the Government by guarding against the legislative exercise of judicial power. Pp. 441–446.

(b) The Bill of Attainder Clause is to be liberally construed in the light of its purpose to prevent legislative punishment of designated persons or groups. *Cummings* v. *Missouri,* 4 Wall. 277; *Ex parte Garland,* 4 Wall. 333; *United States* v. *Lovett,* 328 U. S. 303. Pp. 447–449.

(c) In designating Communist Party members as those persons who cannot hold union office, Congress has exceeded its Commerce Clause power to enact generally applicable legislation disqualifying from positions affecting interstate commerce persons who may use such positions to cause political strikes. Pp. 449–452.

(d) Section 504 is distinguishable from such conflict-of-interest statutes as § 32 of the Banking Act, where Congress was legislating with respect to general characteristics rather than with respect to the members of a specific group. Pp. 453–455.

(e) The designation of Communist Party membership cannot be justified as an alternative, "shorthand" expression for the characteristics which render men likely to incite political strikes. Pp. 455–456.

(f) A statute which inflicts its deprivation upon named or described persons or groups constitutes a bill of attainder whether its aim is retributive, punishing past acts, or preventive, discouraging future conduct. In *American Communications Assn.* v. *Douds,* 339 U. S. 382, where the Court upheld § 9 (h) of the National

Labor Relations Act, the predecessor of § 504, the Court erroneously assumed that only a law visiting retribution for past acts could constitute a bill of attainder, and misread the statute involved in *United States* v. *Lovett*, 328 U. S. 303, which it sought to distinguish from § 9 (h), as being in that category. Pp. 456–460.

(g) The legislative specification of those to whom the enacted sanction is to apply invalidates a provision as a bill of attainder whether the individuals are designated by name as in *Lovett* or by description as here. Pp. 461–462.

334 F. 2d 488, affirmed.

Solicitor General Cox argued the cause for the United States. With him on the brief were *Assistant Attorney General Yeagley, Nathan Lewin, Kevin T. Maroney* and *George B. Searls.*

Richard Gladstein argued the cause for respondent. With him on the brief was *Norman Leonard.*

Briefs of *amici curiae,* urging affirmance, were filed by *Melvin L. Wulf* for the American Civil Liberties Union of Northern California et al., and by *Victor Rabinowitz* and *Leonard B. Boudin* for the Emergency Civil Liberties Committee.

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

In this case we review for the first time a conviction under § 504 of the Labor-Management Reporting and Disclosure Act of 1959, which makes it a crime for a member of the Communist Party to serve as an officer or (except in clerical or custodial positions) as an employee of a labor union.[1] Section 504, the purpose of which is to protect

[1] 73 Stat. 536, 29 U. S. C. § 504 (1958 ed., Supp. IV). The section, which took effect on September 14, 1959, provides, in pertinent part:

"(a) No person who is or has been a member of the Communist Party . . . shall serve—

"(1) as an officer, director, trustee, member of any executive board or similar governing body, business agent, manager, organizer, or other

the national economy by minimizing the danger of political strikes,[2] was enacted to replace § 9 (h) of the National Labor Relations Act, as amended by the Taft-Hartley Act, which conditioned a union's access to the National Labor Relations Board upon the filing of affidavits by all of the union's officers attesting that they were not members of or affiliated with the Communist Party.[3]

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employee (other than as an employee performing exclusively clerical or custodial duties) of any labor organization . . . .

. . . . . .

"during or for five years after the termination of his membership in the Communist Party . . . .

"(b) Any person who willfully violates this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both."

[2] In *American Communications Assn.* v. *Douds*, 339 U. S. 382, 388, this Court found that "the purpose of § 9 (h) of the [National Labor Relations] Act [was] to remove . . . the so-called 'political strike'." Section 504 was designed to accomplish the same purpose as § 9 (h), but in a more direct and effective way. H. R. Rep. No. 741, 86th Cong., 1st Sess., p. 33; H. R. Rep. No. 1147, 86th Cong., 1st Sess., p. 36.

[3] 61 Stat. 146, amending the National Labor Relations Act of 1935, 49 Stat. 449. Section 9 (h) provided:

"No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits."

Section 9 (h) was repealed by § 201 (d) of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 525.

Respondent has been a working longshoreman on the San Francisco docks, and an open and avowed Communist, for more than a quarter of a century. He was elected to the Executive Board of Local 10 of the International Longshoremen's and Warehousemen's Union for consecutive one-year terms in 1959, 1960, and 1961. On May 24, 1961, respondent was charged in a one-count indictment returned in the Northern District of California with "knowingly and wilfully serv[ing] as a member of an executive board of a labor organization . . . while a member of the Communist Party, in wilful violation of Title 29, United States Code, Section 504." It was neither charged nor proven that respondent at any time advocated or suggested illegal activity by the union, or proposed a political strike.[4] The jury found respondent guilty, and he was sentenced to six months' imprisonment. The Court of Appeals for the Ninth Circuit, sitting *en banc*, reversed and remanded with instructions to set aside the conviction and dismiss the indictment, holding that § 504 violates the First and Fifth Amendments to the Constitution. 334 F. 2d 488. We granted certiorari, 379 U. S. 899.

Respondent urges—in addition to the grounds relied on by the court below—that the statute under which he was convicted is a bill of attainder, and therefore violates Art. I, § 9, of the Constitution.[5] We agree that § 504 is void as a bill of attainder and affirm the decision of the Court of Appeals on that basis. We therefore find it unnecessary to consider the First and Fifth Amendment arguments.

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[4] Evidence that the executive board had never called a strike was, upon the motion of the Government, stricken from the record, and a defense offer to prove that the union had not been involved in a strike since 1948 was rejected by the court.

[5] Respondent first raised the bill of attainder argument in his motion to dismiss the indictment.

I.

The provisions outlawing bills of attainder were adopted by the Constitutional Convention unanimously, and without debate.[6]

> "No Bill of Attainder or ex post facto Law shall be passed [by the Congress]." Art. I, § 9, cl. 3.
> "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . ." Art. I, § 10.

A logical starting place for an inquiry into the meaning of the prohibition is its historical background. The bill of attainder, a parliamentary act sentencing to death one or more specific persons, was a device often resorted to in sixteenth, seventeenth and eighteenth century England for dealing with persons who had attempted, or threatened to attempt, to overthrow the government.[7] In addition to the death sentence, attainder generally carried with it a "corruption of blood," which meant that the attainted party's heirs could not inherit his property.[8] The "bill of pains and penalties" was identical to the bill of attainder, except that it prescribed a penalty short of death,[9] *e. g.*, banishment,[10] deprivation of the right to

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[6] Madison, Debates in the Federal Convention of 1787, p. 449 (Hunt and Scott ed. 1920).

[7] *E. g.*, 3 Jac. 1, c. 2; 10 & 11 Will. 3, c. 13; 13 Will. 3, c. 3; 9 Geo. 1, c. 15.

[8] 3 Coke, First Institute (on Littleton), p. 565 (Thomas ed. 1818); Chafee, Three Human Rights in the Constitution of 1787, p. 96 (1956). Cf. U. S. Const., Art. III, § 3, cl. 2.

[9] II Wooddeson, A Systematical View of the Laws of England, p. 638 (1792); II Story, Commentaries on the Constitution of the United States, p. 210 (4th ed. 1873); see, *e. g.*, 13 Car. 2, Stat. I, c. 15; 9 Geo. 1, c. 15.

[10] II Wooddeson, A Systematical View of the Laws of England, p. 638 (1792); see, *e. g.*, 19 Car. 2, c. 10; Proceedings Against Hugh and Hugh Le Despencer, 1 State Trials 23 (1320).

vote,[11] or exclusion of the designated party's sons from Parliament.[12] Most bills of attainder and bills of pains and penalties named the parties to whom they were to apply; a few, however, simply described them.[13] While some left the designated parties a way of escaping the penalty, others did not.[14] The use of bills of attainder and bills of pains and penalties was not limited to England. During the American Revolution, the legislatures of all thirteen States passed statutes directed against the Tories; among these statutes were a large number of bills of attainder and bills of pains and penalties.[15]

While history thus provides some guidelines, the wide variation in form, purpose and effect of ante-Constitution bills of attainder indicates that the proper scope of the Bill of Attainder Clause, and its relevance to contemporary problems, must ultimately be sought by attempting to discern the reasons for its inclusion in the Constitution, and the evils it was designed to eliminate. The best available evidence, the writings of the architects of our constitutional system, indicates that the Bill of Attainder Clause was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply—trial by legislature.

The Constitution divides the National Government into three branches—Legislative, Executive and Judicial.

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[11] *E. g.*, 11 Geo. 3, c. 55.

[12] 21 Rich. 2, c. 6.

[13] *E. g.*, 26 Hen. 8, c. 25 (priv.), 3 Statutes of the Realm, p. 529; 8 Will. 3, c. 5.

[14] See note 32, *infra.*

[15] Van Tyne, The Loyalists in the American Revolution, apps. B & C (1902); Thompson, Anti-Loyalist Legislation During the American Revolution, 3 Ill. L. Rev. 81, 147; Reppy, The Spectre of Attainder in New York, 23 St. John's L. Rev. 1. See *Respublica* v. *Gordon,* 1 Dall. 233; *Cooper* v. *Telfair,* 4 Dall. 14.

This "separation of powers" was obviously not instituted with the idea that it would promote governmental efficiency. It was, on the contrary, looked to as a bulwark against tyranny. For if governmental power is fractionalized, if a given policy can be implemented only by a combination of legislative enactment, judicial application, and executive implementation, no man or group of men will be able to impose its unchecked will. James Madison wrote:

> "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." [16]

The doctrine of separated powers is implemented by a number of constitutional provisions, some of which entrust certain jobs exclusively to certain branches, while others say that a given task is *not* to be performed by a given branch. For example, Article III's grant of "the judicial Power of the United States" to federal courts has been interpreted both as a grant of exclusive authority over certain areas, *Marbury* v. *Madison,* 1 Cranch 137, and as a limitation upon the judiciary, a declaration that certain tasks are not to be performed by courts, *e. g., Muskrat* v. *United States,* 219 U. S. 346. Compare *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U. S. 579.

The authors of the Federalist Papers took the position that although under some systems of government (most notably the one from which the United States had just broken), the Executive Department is the branch most likely to forget the bounds of its authority, "in a representative republic . . . where the legislative power is exercised by an assembly . . . which is sufficiently numerous to feel all the passions which actuate a multitude; yet

[16] The Federalist, No. 47, pp. 373–374 (Hamilton ed. 1880).

not so numerous as to be incapable of pursuing the objects of its passions . . . ," barriers had to be erected to ensure that the legislature would not overstep the bounds of *its* authority and perform the functions of the other departments.[17] The Bill of Attainder Clause was regarded as such a barrier. Alexander Hamilton wrote:

> "Nothing is more common than for a free people, in times of heat and violence, to gratify momentary passions, by letting into the government principles and precedents which afterwards prove fatal to themselves. Of this kind is the doctrine of disqualification, disfranchisement, and banishment by acts of the legislature. The dangerous consequences of this power are manifest. If the legislature can disfranchise any number of citizens at pleasure by general descriptions, it may soon confine all the votes to a small number of partisans, and establish an aristocracy or an oligarchy; if it may banish at discretion all those whom particular circumstances render obnoxious, without hearing or trial, no man can be safe, nor know when he may be the innocent victim of a prevailing faction. The name of liberty applied to such a government, would be a mockery of common sense." [18]

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[17] The Federalist, No. 48, pp. 383–384 (Hamilton ed. 1880) (Madison); see generally The Federalist, Nos. 47 (Madison), 48 (Madison), 49 (Hamilton), 51 (Hamilton) and 78 (Hamilton).

[18] III (John C.) Hamilton, History of the Republic of the United States, p. 34 (1859), quoting Alexander Hamilton. James Madison expressed similar sentiments:

"Bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the state constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters. Our own experience has taught us, nevertheless, that additional fences against these dangers

Thus the Bill of Attainder Clause not only was intended as one implementation of the general principle of fractionalized power, but also reflected the Framers' belief that the Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons.

> "Every one must concede that a legislative body, from its numbers and organization, and from the very intimate dependence of its members upon the people, which renders them liable to be peculiarly susceptible to popular clamor, is not properly constituted to try with coolness, caution, and impartiality a criminal charge, especially in those cases in which the popular feeling is strongly excited,—the very class of cases most likely to be prosecuted by this mode." [19]

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ought not to be omitted. Very properly, therefore, have the convention added this constitutional bulwark in favour of personal security and private rights . . . . The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and with indignation, that sudden changes, and legislative interferences, in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators; and snares to the more industrious and less informed part of the community." The Federalist, No. 44, p. 351 (Hamilton ed. 1880).

[19] 1 Cooley, Constitutional Limitations, pp. 536–537 (8th ed. 1927). To the same effect, see *Calder* v. *Bull*, 3 Dall. 386, 389; *United States* v. *Lovett*, 328 U. S. 303, 317–318; II Story, Commentaries on the Constitution of the United States, p. 210 (4th ed. 1873); III Hamilton, History of the Republic of the United States, p. 31 (1859); Pound, Justice According to Law II, 14 Col. L. Rev. 1, 7–12. Macaulay's account of the attainder of Sir John Fenwick is particularly vivid:

"Some hundreds of gentlemen, every one of whom had much more than half made up his mind before the case was open, performed the office both of judge and jury. They were not restrained, as a judge is restrained, by the sense of responsibility . . . . They were not selected,

By banning bills of attainder, the Framers of the Constitution sought to guard against such dangers by limiting legislatures to the task of rule-making. "It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments." *Fletcher* v. *Peck,* 6 Cranch 87, 136.[20]

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as a jury is selected, in a manner which enables a culprit to exclude his personal and political enemies. The arbiters of the prisoner's fate came in and went out as they chose. They heard a fragment here and there of what was said against him, and a fragment here and there of what was said in his favor. During the progress of the bill they were exposed to every species of influence. One member might be threatened by the electors of his borough with the loss of his seat . . . . In the debates arts were practised and passions excited which are unknown to well-constituted tribunals, but from which no great popular assembly divided into parties ever was or ever will be free." IX Macaulay, History of England, p. 207 (1900).

[20] The same thought is reflected in the writings of Thomas Jefferson: "173 despots would surely be as oppressive as one. . . . [L]ittle will it avail us that they are chosen by ourselves. . . . [T]he government we fought for [is] one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others. For this reason that convention, which passed the ordinance of government, laid its foundation on this basis, that the legislative, executive and judiciary departments should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time. . . . If . . . the legislature assumes executive and judiciary powers, no opposition is likely to be made; nor, if made, can it be effectual; because in that case they may put their proceedings into the form of an act of assembly, which will render them obligatory on the other branches. *They have accordingly in many instances, decided rights which should have been left to judiciary controversy . . . .*" Jefferson, Notes on the State of Virginia, pp. 157–158 (Ford ed. 1894). (Emphasis supplied.)

II.

It is in this spirit that the Bill of Attainder Clause was consistently interpreted by this Court—until the decision in *American Communications Assn.* v. *Douds,* 339 U. S. 382, which we shall consider hereafter. In 1810, Chief Justice Marshall, speaking for the Court in *Fletcher* v. *Peck,* 6 Cranch 87, 138, stated that "[a] bill of attainder may affect the life of an individual, or may confiscate his property, or may do both." This means, of course, that what were known at common law as bills of pains and penalties are outlawed by the Bill of Attainder Clause. The Court's pronouncement therefore served notice that the Bill of Attainder Clause was not to be given a narrow historical reading (which would exclude bills of pains and penalties), but was instead to be read in light of the evil the Framers had sought to bar: legislative punishment, of any form or severity, of specifically designated persons or groups. See also *Ogden* v. *Saunders,* 12 Wheat. 213, 286.

The approach which Chief Justice Marshall had suggested was followed in the twin post-Civil War cases of *Cummings* v. *Missouri,* 4 Wall. 277, and *Ex parte Garland,* 4 Wall. 333. *Cummings* involved the constitutionality of amendments to the Missouri Constitution of 1865 which provided that no one could engage in a number of specified professions (Cummings was a priest) unless he first swore that he had taken no part in the rebellion against the Union. At issue in *Garland* was a federal statute which required attorneys to take a similar oath before they could practice in federal courts. This Court struck down both provisions as bills of attainder on the ground that they were legislative acts inflicting punishment on a specific group: clergymen and lawyers who had taken part in the rebellion and therefore could not truthfully take the oath. In reaching its result, the Court emphatically rejected the argument that the con-

stitutional prohibition outlawed only a certain class of legislatively imposed penalties:

> "The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact. Disqualification from office may be punishment, as in cases of conviction upon impeachment. Disqualification from the pursuits of a lawful avocation, or from positions of trust, or from the privilege of appearing in the courts, or acting as an executor, administrator, or guardian, may also, and often has been, imposed as punishment." 4 Wall., at 320.

The next extended discussion of the Bill of Attainder Clause [21] came in 1946, in *United States* v. *Lovett,* 328 U. S. 303, where the Court invalidated § 304 of the Urgent Deficiency Appropriation Act, 1943, 57 Stat. 431, 450, which prohibited payment of further salary to three named federal employees,[22] as a bill of attainder.

> "[L]egislative acts, no matter what their form, that apply either to named individuals or to easily ascer-

[21] In 1872, in *Pierce* v. *Carskadon,* 16 Wall. 234, the Court voided as a bill of attainder a West Virginia statute conditioning access to the courts upon the taking of an oath similar to those involved in *Cummings* and *Garland.* In *Dent* v. *West Virginia,* 129 U. S. 114, this Court upheld a West Virginia statute requiring that physicians obtain a license in order to practice. Appellant argued, *inter alia,* that the statute was a bill of attainder because the granting of a license was conditioned upon graduating from medical school, practicing for 10 years, or passing a special examination. The Court rejected the argument on the ground that the statute set forth general qualifications applicable to all persons who wanted to practice medicine, *id.,* at 124, and did not single out a specific person or group for deprivation. See also *Drehman* v. *Stifle,* 8 Wall. 595.

[22] Section 304 provided:

"No part of any appropriation, allocation, or fund (1) which is made available under or pursuant to this Act, or (2) which is now, or which

> tainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution. . . . This permanent proscription from any opportunity to serve the Government is punishment, and of a most severe type. . . . No one would think that Congress could have passed a valid law, stating that after investigation it had found Lovett, Dodd, and Watson 'guilty' of the crime of engaging in 'subversive activities,' defined that term for the first time, and sentenced them to perpetual exclusion from any government employment. Section 304, while it does not use that language, accomplishes that result." *Id.*, at 315–316.[23]

III.

Under the line of cases just outlined, § 504 of the Labor-Management Reporting and Disclosure Act plainly constitutes a bill of attainder. Congress undoubtedly possesses power under the Commerce Clause to enact

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is hereafter made, available under or pursuant to any other Act, to any department, agency, or instrumentality of the United States, shall be used, after November 15, 1943, to pay any part of the salary, or other compensation for the personal services, of Goodwin B. Watson, William E. Dodd, Junior, and Robert Morss Lovett, unless prior to such date such person has been appointed by the President, by and with the advice and consent of the Senate: *Provided,* That this section shall not operate to deprive any such person of payment for leaves of absence or salary, or of any refund or reimbursement, which have accrued prior to November 15, 1943 . . . ."

[23] Although it may be that underinclusiveness is a characteristic of most bills of attainder, we doubt that it is a necessary feature. We think it clear from the *Lovett* opinion that § 304 would have been voided even if it could have been demonstrated that no one other than Lovett, Watson and Dodd possessed the characteristics which Congress was trying to reach. The vice of attainder is that the legislature has decided for itself that certain persons possess certain characteristics and are therefore deserving of sanction, not that it has failed to sanction others similarly situated.

legislation designed to keep from positions affecting interstate commerce persons who may use such positions to bring about political strikes. In § 504, however, Congress has exceeded the authority granted it by the Constitution. The statute does not set forth a generally applicable rule decreeing that any person who commits certain acts or possesses certain characteristics (acts and characteristics which, in Congress' view, make them likely to initiate political strikes) shall not hold union office, and leave to courts and juries the job of deciding what persons have committed the specified acts or possess the specified characteristics. Instead, it designates in no uncertain terms the persons who possess the feared characteristics and therefore cannot hold union office without incurring criminal liability—members of the Communist Party.[24]

Communist Party v. *Subversive Activities Control Board,* 367 U. S. 1, lends support to our conclusion. That case involved an appeal from an order by the Control Board ordering the Communist Party to register as a "Communist-action organization," under the Subversive Activities Control Act of 1950, 64 Stat. 987, 50 U. S. C. § 781 *et seq.* (1958 ed.). The definition of "Communist-action organization" which the Board is to apply is set forth in § 3 of the Act:

> "[A]ny organization in the United States . . . which (i) is substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement referred to in section 2 of this title, and (ii) operates primarily to advance the objectives of such world

[24] We of course take no position on whether or not members of the Communist Party are in fact likely to incite political strikes. The point we make is rather that the Constitution forbids Congress from making such determinations.

> Communist movement . . . ." 64 Stat. 989, 50 U. S. C. § 782 (1958 ed.).

A majority of the Court rejected the argument that the Act was a bill of attainder, reasoning that § 3 does not specify the persons or groups upon which the deprivations set forth in the Act are to be imposed, but instead sets forth a general definition. Although the Board had determined in 1953 that the Communist Party was a "Communist-action organization," the Court found the statutory definition not to be so narrow as to insure that the Party would always come within it:

> "In this proceeding the Board has found, and the Court of Appeals has sustained its conclusion, that the Communist Party, by virtue of the activities in which it now engages, comes within the terms of the Act. If the Party should at any time choose to abandon these activities, after it is once registered pursuant to § 7, the Act provides adequate means of relief." 367 U. S., at 87.

The entire Court did not share the view of the majority that § 3's definition constituted rule-making rather than specification.[25] See also *Garner* v. *Los Angeles Board,* 341 U. S. 716, 723. However, language incorporated in the majority opinion indicates that there was agreement on one point: by focusing upon "the crucial constitutional significance of what Congress did when it rejected the approach of outlawing the Party by name and accepted instead a statutory program regulating not enumerated organizations but designated activities," 367 U. S., at 84–85, the majority clearly implied that if the Act had applied to the Communist Party by name, it would have been a bill of attainder:

> "The Act is not a bill of attainder. It attaches not to specified organizations but to described activities

[25] See 367 U. S., at 146 (BLACK, J., dissenting).

> in which an organization may or may not engage. . . . The Subversive Activities Control Act . . . requires the registration only of organizations which, after the date of the Act, are found to be under the direction, domination, or control of certain foreign powers and to operate primarily to advance certain objectives. This finding must be made after full administrative hearing, subject to judicial review which opens the record for the reviewing court's determination whether the administrative findings as to fact are supported by the preponderance of the evidence." *Id.*, at 86–87.[26]

In this case no disagreement over whether the statute in question designates a particular organization can arise, for § 504 in terms inflicts its disqualification upon members of the Communist Party. The moment § 504 was enacted, respondent was given the choice of declining a leadership position in his union or incurring criminal liability.

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[26] "It need hardly be said that it is upon the particular evidence in a particular record that a particular defendant must be judged, and not upon the evidence in some other record or upon what may be supposed to be the tenets of the Communist Party." *Noto* v. *United States*, 367 U. S. 290, 299.

It is argued that § 504 is not a bill of attainder because prior to its enactment there had been an administrative adjudication (by the Subversive Activities Control Board) of "the nature of the Party." Compare *Hawker* v. *New York*, 170 U. S. 189; *DeVeau* v. *Braisted*, 363 U. S. 144, 160. Even leaving aside the fact that the legislative history of § 504, see note 2, *supra*, indicates that Congress was acting in reliance on the findings it had made in 1947 rather than on those made by the Board in 1953, we think that this argument misses the point of the Court's opinion in the *Communist Party* case, where the Court stressed that the Subversive Activities Control Act did not name the Communist Party but rather set forth a broad definition, which would permit the Party to escape the prescribed deprivations in the event its character changed.

The Solicitor General points out that in *Board of Governors* v. *Agnew*, 329 U. S. 441, this Court applied § 32 of the Banking Act of 1933, which provides:

> "No officer, director, or employee of any corporation or unincorporated association, no partner or employee of any partnership, and no individual, primarily engaged in the issue, flotation, underwriting, public sale, or distribution, at wholesale or retail, or through syndicate participation, of stocks, bonds, or other similar securities, shall serve the same time as an officer, director, or employee of any member bank except in limited classes of cases in which the Board of Governors of the Federal Reserve System may allow such service by general regulations when in the judgment of the said Board it would not unduly influence the investment policies of such member bank or the advice it gives its customers regarding investments." [27]

He suggests that for purposes of the Bill of Attainder Clause, such conflict-of-interest laws [28] are not meaningfully distinguishable from the statute before us. We find this argument without merit. First, we note that § 504, unlike § 32 of the Banking Act, inflicts its deprivation upon the members of a political group thought to present a threat to the national security. As we noted above, such groups were the targets of the overwhelming majority of English and early American bills of attainder. Second, § 32 incorporates no judgment censuring or con-

[27] 48 Stat. 194, as amended, 49 Stat. 709, 12 U. S. C. § 78 (1964 ed.).

[28] A similar example is furnished by provisions forbidding state officers or employees from concurrently holding certain other types of positions, such as positions with the Federal Government. See, *e. g.*, Cal. Const., Art. IV, § 20; cf. N. Y. Const., Art. III, § 7; U. S. Const., Art I, § 6, cl. 2.

demning any man or group of men. In enacting it, Congress relied upon its general knowledge of human psychology, and concluded that the concurrent holding of the two designated positions would present a temptation to *any* man—not just certain men or members of a certain political party. Thus insofar as § 32 incorporates a condemnation, it condemns all men. Third, we cannot accept the suggestion that § 32 constitutes an exercise in specification rather than rule-making. It seems to us clear that § 32 establishes an objective standard of conduct. Congress determined that a person who both (a) held a position in a bank which could be used to influence the investment policies of the bank or its customers, and (b) was in a position to benefit financially from investment in the securities handled by a particular underwriting house, might well be tempted to "use his influence in the bank to involve it or its customers in securities which his underwriting house has in its portfolio or has committed itself to take." 329 U. S., at 447. In designating bank officers, directors and employees as those persons in position (a), and officers, directors, partners and employees of underwriting houses as those persons in position (b), Congress merely expressed the characteristics it was trying to reach in an alternative, shorthand way.[29] That Congress was legislating with

[29] The command of the Bill of Attainder Clause—that a legislature can provide that persons possessing certain characteristics must abstain from certain activities, but must leave to other tribunals the task of deciding who possesses those characteristics—does not mean that a legislature cannot use a shorthand phrase to summarize the characteristics with which it is concerned. For example, a legislature might determine that persons afflicted with a certain disease which has as one of its symptoms a susceptibility to uncontrollable seizures should not be licensed to operate dangerous machinery. In enacting a statute to achieve this goal, the legislature could name the disease instead of listing the symptoms, for in doing so it would merely be substituting a shorthand phrase which conveys the same meaning.

respect to general characteristics rather than with respect to a specific group of men is well demonstrated by the fact that § 32 provides that the prescribed disqualification should not obtain whenever the Board of Governors determined that "it would not unduly influence the investment policies of such member bank or the advice it gives its customers regarding investments." We do not suggest that such an escape clause is essential to the constitutionality of § 32, but point to it only further to underscore the infirmity of the suggestion that § 32, like § 504, incorporates an empirical judgment of, and inflicts its deprivation upon, a particular group of men.

It is argued, however, that in § 504 Congress did no more than it did in enacting § 32: it promulgated a general rule to the effect that persons possessing characteristics which make them likely to incite political strikes should not hold union office, and simply inserted in place of a list of those characteristics an alternative, shorthand criterion—membership in the Communist Party. Again, we cannot agree. The designation of Communists as those persons likely to cause political strikes is not the substitution of a semantically equivalent phrase; on the contrary, it rests, as the Court in *Douds* explicitly recognized, 339 U. S., at 389, upon an empirical investigation by Congress of the acts, characteristics and propensities of Communist Party members. In a number of decisions, this Court has pointed out the fallacy of the suggestion that membership in the Communist Party, or any other political organization, can be regarded as an alternative, but equivalent, expression for a list of undesirable characteristics. For, as the Court noted in *Schneiderman* v. *United States,* 320 U. S. 118, 136, "under our traditions beliefs are personal and not a matter of mere association, and . . . men in adhering to a political party or other organization notoriously do not subscribe un-

qualifiedly to all of its platforms or asserted principles." [30] Just last Term, in *Aptheker* v. *Secretary of State,* 378 U. S. 500, we held § 6 of the Subversive Activities Control Act to violate the Constitution because it "too broadly and indiscriminately" restricted constitutionally protected freedoms. One of the factors which compelled us to reach this conclusion was that § 6 inflicted its deprivation upon all members of Communist organizations without regard to whether there existed any demonstrable relationship between the characteristics of the person involved and the evil Congress sought to eliminate. *Id.,* at 509–511. These cases are relevant to the question before us. Even assuming that Congress had reason to conclude that some Communists would use union positions to bring about political strikes, "it cannot automatically be inferred that all members shar[e] their evil purposes or partici-pat[e] in their illegal conduct." *Schware* v. *Board of Bar Examiners,* 353 U. S. 232, 246. In utilizing the term "members of the Communist Party" to designate those persons who are likely to incite political strikes, it plainly is not the case that Congress has merely substituted a convenient shorthand term for a list of the characteristics it was trying to reach.[31]

IV.

The Solicitor General argues that § 504 is not a bill of attainder because the prohibition it imposes does not constitute "punishment." In support of this conclusion, he urges that the statute was enacted for preventive rather

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[30] To the same effect, see *Noto* v. *United States,* 367 U. S. 290, 299–300; *Wieman* v. *Updegraff,* 344 U. S. 183, 190.

[31] We rely on the "overbroadness" cases only to buttress our conclusion that § 504 cannot be rationalized on the ground that membership in the Communist Party is merely an equivalent, shorthand way of expressing those characteristics which render likely the incitement of political strikes. We of course do not hold that overbroadness is a necessary characteristic of a bill of attainder.

than retributive reasons—that its aim is not to punish Communists for what they have done in the past, but rather to keep them from positions where they will in the future be able to bring about undesirable events. He relies on *American Communications Assn.* v. *Douds,* 339 U. S. 382, which upheld § 9 (h) of the National Labor Relations Act, the predecessor of the statute presently before us. In *Douds* the Court distinguished *Cummings, Garland* and *Lovett* on the ground that in those cases

> "the individuals involved were in fact being punished for *past* actions; whereas in this case they are subject to possible loss of position only because there is substantial ground for the congressional judgment that their beliefs and loyalties will be transformed into *future* conduct." *Id.,* at 413.

This case is not necessarily controlled by *Douds.* For to prove its assertion that § 9 (h) was preventive rather than retributive in purpose,[32] the Court in *Douds* focused

[32] The Court's opinion in *Communist Party* v. *Subversive Activities Control Board,* 367 U. S. 1, 88, also referred to the fact that the members of the class affected by the statute could extricate themselves from the class at will. However, whereas the factor of escapability was considered in *Douds* to be probative of whether or not the statute was punitive, in the *Communist Party* case it was considered only as one factor tending to show that the Act in question was not directed at a specific group of persons but rather set forth a generally applicable definition. See note 26, *supra.* We do not read either opinion to have set up inescapability as an absolute prerequisite to a finding of attainder. Such an absolute rule would have flown in the face of explicit precedent, *Cummings* v. *Missouri,* 4 Wall. 277, 324, as well as the historical background of the constitutional prohibition. A number of ante-Constitution bills of attainder inflicted their deprivations upon named or described persons or groups, but offered them the option of avoiding the deprivations, *e. g.,* by swearing allegiance to the existing government. See, *e. g.,* Del. Laws 1778, c. 29b; Mass. Acts of September 1778, c. 13; III Hamilton, History of the Republic of the United States, p. 25 (1859); see generally Note, 72 Yale L. J. 330, 339–340.

on the fact that members of the Communist Party could escape from the class of persons specified by Congress simply by resigning from the Party:

> "Here the intention is to forestall future dangerous acts; there is no one who may not, by a voluntary alteration of the loyalties which impel him to action, become eligible to sign the affidavit. We cannot conclude that this section is a bill of attainder." *Id.*, at 414.

Section 504, unlike § 9 (h), disqualifies from the holding of union office not only present members of the Communist Party, but also anyone who has within the past five years been a member of the Party. However, even if we make the assumption that the five-year provision was inserted not out of desire to visit retribution but purely out of a belief that failure to include it would lead to *pro forma* resignations from the Party which would not decrease the threat of political strikes, it still clearly appears that § 504 inflicts "punishment" within the meaning of the Bill of Attainder Clause. It would be archaic to limit the definition of "punishment" to "retribution." Punishment serves several purposes: retributive, rehabilitative, deterrent—and preventive. One of the reasons society imprisons those convicted of crimes is to keep them from inflicting future harm, but that does not make imprisonment any the less punishment.

Historical considerations by no means compel restriction of the bill of attainder ban to instances of retribution. A number of English bills of attainder were enacted for preventive purposes—that is, the legislature made a judgment, undoubtedly based largely on past acts and associations (as § 504 is)[33] that a given person or group was likely to cause trouble (usually, overthrow the

[33] *American Communications Assn.* v. *Douds*, 339 U. S. 382, 389; see note 2, *supra*.

government) and therefore inflicted deprivations upon that person or group in order to keep it from bringing about the feared event.[34] It is also clear that many of the early American bills attainting the Tories were passed in order to impede their effectively resisting the Revolution.

> "In the progress of the conflict, and particularly in its earliest periods, attainder and confiscation had been resorted to generally, throughout the continent, as a means of war. But it is a fact important to the history of the revolting colonies, that the acts prescribing penalties, usually offered to the persons against whom they were directed the option of avoiding them, by acknowledging their allegiance to the existing governments.
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> "It was a preventive, not a vindictive policy. In the same humane spirit, as the contest approached its close, and the necessity of these severities diminished, many of the states passed laws offering pardons

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[34] See *Ex parte Law*, 15 Fed. Cas. 3, 9–10 (No. 8126) (D. C. S. D. Ga. 1866). Professor Chafee has pointed out that even the death penalty was often inflicted largely for preventive purposes:

"There was no good middle ground between beheading and doing nothing. If the ousted adviser were left at liberty, he could readily turn his resentment into coercion or rebellion and make a magnificent comeback to the utter ruin of those who had driven him from his high place. Therefore, the usual object of Parliamentary proceedings against an important minister was to put him to death." Chafee, Three Human Rights in the Constitution of 1787, pp. 103–104 (1956).

The preventive purpose of the "Act for the Attainder of the pretended Prince of Wales of High Treason" of 1700, 13 Will. 3, c. 3, is demonstrated by the parliamentary declaration that anyone corresponding with the Prince or his followers would be subject to prosecution for treason. See also Chafee, *supra*, pp. 109–113 (impeachment and attainder of the Earl of Strafford), 115–118 (bill against the Earl of Clarendon).

> to those who had been disfranchised, and restoring them to the enjoyment of their property . . . ." [35]

Thus Justice Iredell was on solid historical ground when he observed, in *Calder* v. *Bull,* 3 Dall. 386, 399–400, that "attainders, *on the principle of retaliation and proscription,* have marked all the vicissitudes of party triumph." (Emphasis supplied.)

We think that the Court in *Douds* misread *United States* v. *Lovett* when it suggested, 339 U. S., at 413, that that case could be distinguished on the ground that the sanction there imposed was levied for purely retributive reasons. In *Lovett* the Court, after reviewing the legislative history of § 304 of the Urgent Deficiency Appropriation Act, 328 U. S., at 308–313, concluded that the statute was the product of a congressional drive to oust from government persons whose (congressionally determined) "subversive" tendencies made their continued employment dangerous to the national welfare: "the purpose of all who sponsored § 304 . . . clearly was to 'purge' the then existing and all future lists of government employees of those whom Congress deemed guilty of 'subversive activities' and therefore 'unfit' to hold a federal job." *Id.,* at 314. Similarly, the purpose of the statute before us is to purge the governing boards of labor unions of those whom Congress regards as guilty of subversive acts and associations and therefore unfit to fill positions which might affect interstate commerce.[36]

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[35] III Hamilton, History of the Republic of the United States, p. 25 (1859); see, *e. g.,* Mass. Acts of September 1778, c. 13 ("An Act to Prevent the Return of Tories"); cf. Md. Laws February 1777, c. 20 ("An Act to punish certain crimes and misdemeanors, and to prevent the growth of toryism"); see also II Story, Commentaries on the Constitution of the United States, p. 211, n. 1 (4th ed. 1873); authorities cited note 15, *supra.*

[36] Nor do the deprivations imposed by the two statutes differ in any meaningful way. Section 304 cut off the salary of the specified individuals, thereby effectively barring them from government serv-

The Solicitor General urges us to distinguish *Lovett* on the ground that the statute struck down there "singled out three identified individuals." It is of course true that § 504 does not contain the words "Archie Brown," and that it inflicts its deprivation upon more than three people. However, the decisions of this Court, as well as the historical background of the Bill of Attainder Clause, make it crystal clear that these are distinctions without a difference. It was not uncommon for English acts of attainder to inflict their deprivations upon relatively large groups of people,[37] sometimes by description rather than name.[38] Moreover, the statutes voided in *Cummings* and *Garland* were of this nature.[39] We cannot agree that the fact that § 504 inflicts its deprivation upon the membership of the Communist Party rather than upon a list of named individuals takes it out of the category of bills of attainder.

We do not hold today that Congress cannot weed dangerous persons out of the labor movement, any more than the Court held in *Lovett* that subversives must be permitted to hold sensitive government positions. Rather, we make again the point made in *Lovett:* that Congress must accomplish such results by rules of general applicability. It cannot specify the people upon whom the sanction it prescribes is to be levied. Under our Constitution, Congress possesses full legislative authority, but the task of adjudication must be left to other tribunals.

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ice, 328 U. S., at 316; § 504 provides that specified persons cannot serve as officers of, or engage in most kinds of employment with, labor unions. Compare Del. Laws 1778, c. 29b; *Cummings* v. *Missouri,* 4 Wall. 277, 317, 320; *Ex parte Garland,* 4 Wall. 333, 374.

[37] *E. g.,* 12 Car. 2, c. 30; 19 Geo. 2, c. 26; 11 Geo. 3, c. 55.

[38] Note 13, *supra.*

[39] See also *Ex parte Law,* 15 Fed. Cas. 3, 8 (No. 8126) (D. C. S. D. Ga. 1866); *United States* v. *Lovett,* 328 U. S. 303, 327 (Frankfurter, J., concurring).

This Court is always reluctant to declare that an Act of Congress violates the Constitution, but in this case we have no alternative. As Alexander Hamilton observed:

> "By a limited constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing." [40]

The judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE WHITE, with whom MR. JUSTICE CLARK, MR. JUSTICE HARLAN, and MR. JUSTICE STEWART join, dissenting.

"A bill of attainder is a legislative act which inflicts punishment without a judicial trial." *Cummings* v. *Missouri,* 4 Wall. 277, 323. When an enactment is challenged as an attainder, the central inquiry must be whether the disability imposed by the act is "punishment" (*i. e.,* is directed at an individual or a group of individuals) or is "regulation" (*i. e.,* is directed at controlling future conduct). *Flemming* v. *Nestor,* 363 U. S. 603, at 613–614; accord, *Trop* v. *Dulles,* 356 U. S. 86, 95–96 (WARREN, C. J., announcing judgment). Whether a punitive purpose would be inferred has depended in past cases on a number of circumstances, including the nature of the disability, whether it was traditionally regarded as punishment, whether it is rationally connected to a permissible legislative objective, as well as the specificity of the legisla-

[40] The Federalist, No. 78, pp. 576–577 (Hamilton ed. 1880).

ture's designation of the persons to be affected. See generally *Kennedy* v. *Mendoza-Martinez,* 372 U. S. 144, 168–169.

In this case, however, the Court discards this meticulous multifold analysis that has been deemed necessary in the past. Instead the Court places the burden of separating attainders from permissible regulation on an examination of the legislative findings implied by the nature of the class designated. The Bill of Attainder Clause, the Court says, was intended to implement the separation of powers by confining the legislature to rule-making and preventing legislative invasion of a function left exclusively to the courts—fact-finding connected with applications of a general rule to individuals or groups. Section 504 of the Labor-Management Reporting and Disclosure Act is therefore a bill of attainder because in pursuit of its purpose of preventing political strikes, it has specified the persons—Communist Party members—who are to be disqualified from holding union office, rather than excluding all persons who might engage in the undesirable conduct. The vice in § 504 is that it does not set forth a rule generally applicable to "any person who commits certain acts or possesses certain characteristics (acts and characteristics which, in Congress' view, make them likely to initiate political strikes)" but has instead designated "the persons who possess the feared characteristics," members of the Communist Party. *Ante,* at 450.

At this point the Court implies that legislation is sufficiently general if it specifies a characteristic that makes it *likely* that individuals falling within the group designated will engage in conduct Congress may prohibit. But the Court then goes on to reject the argument that Communist Party membership is in itself a characteristic raising such a likelihood. The Court declares that "[e]ven assuming that Congress had reason to conclude that *some* Communists would use union positions to bring about

political strikes, '. . . it cannot automatically be inferred that *all* members shar[e] their evil purposes or particip[e] in their illegal conduct.'" *Ante,* at 456. (Emphasis added.) This sudden shift in analysis—from likelihood to certainty—must mean that the Bill of Attainder Clause proscribes legislative action with respect to any group smaller than the total class possessing the characteristic upon which legislative power is premised whenever the legislation is based only on a finding about the average characteristics of the subgroup. The legislature may focus on a particular group or class only when the group designation is a "shorthand phrase" for the feared characteristic—*i. e.,* when it is common knowledge that all, not just some, members of the group possess the feared characteristic and thus such legislative designation would require no legislative fact-finding about individuals.[1]

In the Court's view, therefore, § 504 is too narrow in specifying the particular class; but it is also too broad in treating all members of the class alike. On both counts—underinclusiveness and overinclusiveness—§ 504 is invalid as a bill of attainder because Congress has engaged in forbidden fact-finding about individuals and groups and has thus strayed into the area reserved to the judiciary by the Constitution.

I.

It is not difficult to find some of the cases and statutes which the necessary implications of the Court's approach will overrule or invalidate.

American Communications Assn. v. *Douds,* 339 U. S. 382, which upheld the predecessor statute to § 504 is ob-

[1] An overbroadness challenge could also be made under the First Amendment on the ground that in § 504 Congress has too broadly and indiscriminately visited disabilities on a class defined in terms of associational ties. See *Aptheker* v. *Secretary of State,* 378 U. S. 500. But the Court expressly disavows decision of First Amendment claims, and I likewise put such questions aside.

viously overruled. In that case the Court accepted the congressional findings about the Communist Party and about the propensity of Party members "to subordinate legitimate trade union objectives to obstructive strikes when dictated by Party leaders, often in support of the policies of a foreign government." 339 U. S., at 388. Moreover, Congress was permitted to infer from a person's "political affiliations and beliefs" that such a person would be likely to instigate political strikes. 339 U. S., at 391–392. Like § 504, the statute there under consideration did not cover all persons who might be likely to call political strikes. Nevertheless, legislative findings that *some* Communists would engage in illegal activities were sufficient to sustain the exercise of legislative power. The Bill of Attainder Clause now forbids Congress to do precisely what was validated in *Douds*.

Similarly invalidated are statutes denying positions of public importance to groups of persons identified by their business affiliations, commonly known as conflict-of-interest statutes. In the *Douds* case the Court found in such statutes support for its conclusion that Congress could rationally draw inferences about probable conduct on the basis of political affiliations and beliefs, which it considered comparable to business affiliations. The majority in the case now before us likewise recognizes the pertinency of such statutes and, in its discussion of *Board of Governors* v. *Agnew*, 329 U. S. 441, strenuously—and unsuccessfully—attempts to distinguish them.

The statute involved in *Agnew*, § 32 of the Banking Act of 1933, 48 Stat. 194, as amended, 12 U. S. C. § 78 (1964 ed.), forbade any partner or employee of a firm primarily engaged in underwriting securities from being a director of a national bank. The Court expressly recognized that the statute was directed to the "*probability or likelihood*" that a bank director who was also a partner or employee of an underwriting firm "*may* use his influence in the bank

to involve it or its customers in securities which his underwriting house has in its portfolio or has committed itself to take." 329 U. S., at 447. (Emphasis added.) And, as we noted in *Douds*, 339 U. S., at 392, "[t]here was no showing, nor was one required, that all employees of underwriting firms would engage in such conduct." See also *Agnew*, 329 U. S., at 449.

In terms of the Court's analysis of the Bill of Attainder Clause, no meaningful distinction may be drawn between § 32 of the Banking Act and § 504. Both sections disqualify a specifically described group, officers and employees of underwriting firms in the one case and members of the Communist Party in the other. Both sections may be said to be underinclusive: others besides underwriters may have business interests conflicting with the duties of a bank director and others than Communists may call political strikes. Equally, both sections may be deemed overinclusive: neither section finds that all members of the group affected would violate their obligations to the office from which they are disqualified; some members would and perhaps others would not. Both sections are based on a probability or likelihood that this would occur. Both sections leave to the courts the task of determining whether particular persons are members of the designated groups and occupy the specified positions.

In attempting to distinguish the two sections, the Court states that in enacting § 32 of the Banking Act Congress made no judgment or condemnation of any specific group of persons. Instead, the Court reasons, "Congress relied upon its general knowledge of human psychology, and concluded that the concurrent holding of the two designated positions would present a temptation to *any* man—not just certain men or members of a certain political party." *Ante*, at 454. But § 32 disqualifies only partners and employees of underwriting firms, not other

businessmen with conflicting interests. And § 504 applies to *any* man who occupies the two positions of labor union leader and member of the Communist Party. If based upon "its general knowledge of human psychology" Congress may make findings about a group including members and employees of underwriting firms which disqualify such persons from a certain office, why may not Congress on a similar basis make such a finding about members of the Communist Party? "Because of their business connections, carrying as they do certain loyalties, interests and disciplines," § 32 disqualifies members and employees of underwriting firms as posing "a continuing threat of participation in the harmful activities . . . ." *Douds,* 339 U. S., at 392. The same might be said about § 504, as was said about its predecessor: "Political affiliations of the kind here involved, no less than business affiliations, provide rational ground for the legislative judgment that those persons proscribed by § 9 (h) would be subject to 'tempting opportunities' to commit acts deemed harmful to the national economy. In this respect, § 9 (h) is not unlike a host of other statutes which prohibit specified groups of persons from holding positions of power and public interest because, in the legislative judgment, they threaten to abuse the trust that is a necessary concomitant of the power of office." *Id.,* at 392.

Conflict-of-interest statutes are an accepted type of legislation.[2] Indeed, our Constitution contains a con-

[2] See, *e. g.,* § 10 of the Clayton Act, 38 Stat. 734, 15 U. S. C. § 20 (1964 ed.) (requiring competitive bidding for certain transactions between a common carrier and other corporations when there are common directors), *United States* v. *Boston & M. R. Co.,* 380 U. S. 157; § 16 (b) of the Securities Exchange Act of 1934, 48 Stat. 896, 15 U. S. C. § 78p (b) (1964 ed.) (providing that profits made by directors, officers, and principal shareholders through short-swing transactions in corporation stock shall inure to benefit of corpora-

flict-of-interest provision in Art. I, § 6, cl. 2, which prohibits any Congressman from simultaneously holding office under the United States. If the Court would save the conflict-of-interest statutes, which apparently it would, it is difficult to understand why § 504 is stricken down as a bill of attainder.

Other legislative enactments relevant here are those statutes disqualifying felons from occupying certain positions. The leading case is *Hawker* v. *New York,* 170 U. S. 189, which upheld a provision prohibiting convicted felons from practicing medicine against a claim that, as applied to one convicted before its enactment, it was an *ex post facto* law. The Court noted that a legislature may establish qualifications for the practice of medicine, and character may be such a qualification. Conviction of a felony, the Court reasoned, may be evidence of character:

> "It is not open to doubt that the commission of crime . . . has some relation to the question of character. It is not, as a rule, the good people who commit crime. When the legislature declares that whoever has violated the criminal laws of the State shall be deemed lacking in good moral character it is not laying down an arbitrary or fanciful rule—one having no relation to the subject-matter, but is only appealing to a well recognized fact of human experience . . . .
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> . . . . . .
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> "It is no answer to say that this test of character is not in all cases absolutely certain, and that sometimes it works harshly. Doubtless, one who has violated the criminal law may thereafter reform and become in fact possessed of a good moral character. But the legislature has power in cases of this kind

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tion), *Blau* v. *Lehman,* 368 U. S. 403, 411–413; § 310 (b) of the Trust Indenture Act of 1939, 53 Stat. 1157 (making certain conflicting interests grounds for disqualification of indenture trustees).

> to make a rule of universal application, and no inquiry is permissible back of the rule to ascertain whether the fact of which the rule is made the absolute test does or does not exist." 170 U. S., at 196–197.

Accord, *De Veau* v. *Braisted,* 363 U. S. 144, 159–160 (Frankfurter, J., announcing judgment) (bill of attainder and *ex post facto* challenges).

Like § 504, the legislation challenged in *Hawker* was both overinclusive and underinclusive. Felons were not the only persons who might possess character defects making them unsuitable practitioners of medicine; and, as the Court expressly noted, not all felons would lack good moral character. Nevertheless, the legislature was permitted to disqualify all members of the class, rather than being required to delegate to the courts the responsibility of determining the character of each individual based on all relevant facts, including the prior conviction. The legislative findings that sustained the legislation attacked in *Hawker* were simply that a substantial number of felons would be likely to abuse the practice of medicine because of their bad character. It is just such findings respecting the average propensities of a given class of persons to engage in particular conduct that the Court will not now permit under the Bill of Attainder Clause. Though the Court makes no attempt to distinguish the *Hawker*-type laws it apparently would save them, see *Trop* v. *Dulles,* 356 U. S. 86, 96–97 (WARREN, C. J., announcing judgment), and with them the provision of the statute now before the Court which disqualifies felons from holding union office.[3]

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[3] For a partial listing of similar statutes, see *De Veau* v. *Braisted,* 363 U. S. 144, 159 (Frankfurter, J., announcing judgment). *De Veau* v. *Braisted* itself sustained against a bill of attainder challenge, without dissent on this issue, a state statute disqualifying felons from holding office in waterfront labor unions.

The Court apparently agrees that the Subversive Activities Control Act was not a bill of attainder with regard to the Communist Party because, as the Court pointed out in *Communist Party* v. *Subversive Activities Control Board,* 367 U. S. 1, the finding that the Party was a Communist-action organization was not made by the legislature but was made administratively, after a trial-type hearing and subject to judicial review. But this apparently does not settle whether the statute is a bill of attainder with respect to Party members; for under today's approach, a finding about the Party and about some of its members does not cure the vice of overinclusiveness. The Subversive Activities Control Act attaches certain disqualifications to each Party member following the administrative-judicial finding that the Party is a Communist-action organization. Among other things, each Party member is disqualified from holding union office, almost the same disqualification as is involved here. Subversive Activities Control Act of 1950, § 5 (a)(1)(E), added by the Act of Aug. 24, 1954, § 6, 68 Stat. 777, 50 U. S. C. § 784 (a)(1)(E) (1958 ed.). I do not see how this and the other consequences attached to Party membership in that Act could survive examination under the principles announced today.

On the other hand, if the statutes involved in *Hawker* and *Agnew* are not bills of attainder, how can the Subversive Activities Control Act be an attainder with respect to members of the Communist Party? In the *Communist Party* case, the Board found that the "[Party's] principal leaders and a substantial number of its members are subject to and recognize the disciplinary power of the Soviet Union and its representatives. This evidences domination and control over [the Party] by the Soviet Union, and a purpose to advance the objectives of the world Communist movement." Modified Report of the Board, December 18, 1956, in Record in that case,

p. 2538. That finding was expressly sustained by this Court. 367 U. S. 1, 57. Certainly, if *Hawker* and *Agnew* are to be followed at all, these nonlegislative findings establish a sufficient probability or likelihood with regard to Party members—a sufficient temptation to Party members who are also union officers—to permit the legislature to disqualify Party members from union office as it did in the Subversive Activities Control Act.

And if the disqualification of Party members in the Subversive Activities Control Act is not a bill of attainder, neither is § 504. If it is § 504's specific designation of the Communist Party and its members which concerns the Court—if the Court would have the same concern if the statute in *Agnew* had disqualified the members of a particular underwriting firm—it seems to me that at this point this vice is no vice at all; for the Congress has provided in another statute, the Subversive Activities Control Act, for an adjudication about Communist-action organizations, the nature of the Party has now been adjudicated and an adequate probability about the future conduct of its members established to justify the disqualification which Congress has imposed. Compare *Schware* v. *Board of Bar Examiners,* 353 U. S. 232, 244 (absent findings respecting nature of Communist Party at time of bar applicant's membership, membership in Party 15 years prior to application provides no rational ground for disqualification).

This, of course, is not the path the Court follows. Section 504 is said to impose punishment on specific individuals because it has disqualified all Communist Party members without providing for a judicial determination as to each member that he will call a political strike. A likelihood of doing so based on membership is not enough. By the same token, a statute disqualifying Communists (or authorizing the Executive Branch to do so) from holding sensitive positions in the Government would be auto-

matically infirm, as would a requirement that employees of the Central Intelligence Agency or the National Security Agency disclaim membership in the Communist Party, unless in each case it is proved by evidence other than membership in the Communist Party, the nature of which has already been adjudicated, that the individual would commit acts of disloyalty or subordinate his official undertakings to the interests of the Party.

But how does one prove that a person would be disloyal? The Communist Party's illegal purpose and its domination by a foreign power have already been adjudicated, both administratively and judicially. If this does not in itself provide a sufficient probability with respect to the individual who persists in remaining a member of the Party, or if a probability is in any event insufficient, what evidence with regard to the individual will be sufficient to disqualify him? If he must be apprehended in the act of calling one political strike or in one act of disloyalty before steps can be taken to exclude him from office, there is little or nothing left of the preventive or prophylactic function of § 504 or of the statutes such as the Court had before it in *Hawker* and *Agnew*.

Examples of statutes that will now be suspect because of the Court's opinion but were, until today, unanimously accepted as legitimate exercises of legislative power could easily be multiplied. Such a catalogue in itself would lead one to inquire whether the Court's reasoning does not contain some flaw that explains such perverse results.

II.

One might well begin by challenging the Court's premise that the Bill of Attainder Clause was intended to provide a general dividing line between legislative and judicial functions and thereby to operate as the chief means of implementing the separation of powers. While it must be conceded that our system of government is

based on the separation of powers and that the prohibition on bills of attainder is a judicially enforceable restraint on legislative power and therefore constitutes one among the many mechanisms implementing the separation of powers, that conclusion is the most that can be gleaned from the authorities cited by the Court. Some, like the statement quoted from Chief Justice Marshall, *Fletcher* v. *Peck*, 6 Cranch 87, 136, reflect views concerning "whether the nature of society and of government does not prescribe some limits to the legislative power," *id.*, at 135, rather than an analysis of the bill-of-attainder provision. None assigns a pre-eminent position to that provision as compared with other restraints on the legislature.

On the other hand, there are substantial reasons for concluding that the Bill of Attainder Clause may not be regarded as enshrining any general rule distinguishing between the legislative and judicial functions. Congress may pass legislation affecting specific persons in the form of private bills. It may also punish persons who commit contempt before it. So too, one may note that if Art. I, § 9, cl. 3, immortalizes some notion of the separation of powers at the federal level, then Art. I, § 10, necessarily does the same for the States. But it has long been recognized by this Court that "[w]hether the legislative, executive and judicial powers of a State shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the State." *Dreyer* v. *Illinois*, 187 U. S. 71, 84; accord, *e. g.*, *Reetz* v. *Michigan*, 188 U. S. 505, 507; *Carfer* v. *Caldwell*, 200 U. S. 293, 297; *Sweezy* v. *New Hampshire*, 354 U. S. 234, 255 (WARREN, C. J., announcing judgment), 256–257 (Frankfurter, J., concurring), 268 (CLARK, J., dissenting).

III.

The basic flaw in the Court's reasoning, however, is its too narrow view of the legislative process. The Court is concerned to separate the legislative and judicial functions by ensuring that the legislature does not infringe the judicial function of applying general rules to specific circumstances. Congress is held to have violated the Bill of Attainder Clause here because, on the one hand, § 504 does not encompass the whole class of persons having characteristics that would make them likely to call political strikes and, on the other hand, § 504 does single out a particular group, members of the Communist Party, not all of whom possess such characteristics. Because of this combination of underinclusiveness and overinclusiveness the Court concludes that Communist Party members were singled out for punishment, thus rejecting the Government's contention that § 504 has solely a regulatory aim.

The Court's conclusion that a statute which is both underinclusive and overinclusive must be deemed to have been adopted with a punitive purpose assumes that legislatures normally deal with broad categories and attack all of an evil at a time. Or if partial measures are undertaken, a legislature singles out a particular group for regulation only because the group label is a "shorthand phrase" for traits that are characteristic of the broader evil. But this Court has long recognized in equal protection cases that a legislature may prefer to deal with only part of an evil. See, *e. g., Railway Express Agency, Inc.* v. *New York,* 336 U. S. 106; *Semler* v. *Oregon State Board of Dental Examiners,* 294 U. S. 608; *Bryant* v. *Zimmerman,* 278 U. S. 63; *Patsone* v. *Pennsylvania,* 232 U. S. 138. And it is equally true that a group may be singled out for regulation without any punitive purpose even when not all members of the group would be likely to engage in the feared conduct. "[I]f the class discrimi-

nated against is or reasonably might be considered to define those from whom the evil *mainly is to be feared,* it properly may be picked out." *Patsone* v. *Pennsylvania,* 232 U. S., at 144. (Emphasis added.) That is, the focus of legislative attention may be the substantially greater likelihood that some members of the group would engage in the feared conduct compared to the likelihood that members of other groups would do so. This is true because legislators seldom deal with abstractions but with concrete situations and the regulation of specific abuses. Thus many regulatory measures are enacted after investigation into particular incidents or the practices of particular groups and after findings by the legislature that the practices disclosed are inimical to the public interest and should be prevented in the future. Not surprisingly, the resulting legislation may reflect in its specificity the specificity of the preceding legislative inquiry. See *United States* v. *Boston & M. R. Co.,* 380 U. S. 157, 161–162. But the fact that it does should not be taken, in itself, to be conclusive that the legislature's purpose is punitive. Admittedly the degree of specificity is a relevant factor—as when individuals are singled out by name—but because in many instances specificity of the degree here held impermissible may be wholly consistent with a regulatory, rather than a punitive purpose, the Court's *per se* approach cuts too broadly and invalidates legitimate legislative activity.

IV.

Putting aside the Court's *per se* approach based on the nature of the classification specified by the legislation, we must still test § 504 against the traditional definition of the bill of attainder as legislative punishment of particular individuals. In my view, § 504 does not impose punishment and is not a bill of attainder.

We have said that "only the clearest proof could suffice" to establish that Congress' purpose was punitive rather than regulatory. *Flemming* v. *Nestor,* 363 U. S. 603, 617. A punitive purpose has been found when it could be said that a statute passed amid the fierce passions aroused by the Civil War bore no rational connection to any permissible legislative purpose. *Cummings* v. *Missouri,* 4 Wall. 277, 319, 322; see *Dent* v. *West Virginia,* 129 U. S. 114, 128; *Hawker* v. *New York,* 170 U. S. 189, 198. The imposition of a particularly harsh deprivation without any discernible legitimate legislative purpose has similarly been characterized as penal. *Trop* v. *Dulles,* 356 U. S. 86 (WARREN, C. J., announcing judgment). Similarly a punitive purpose has been found when such a purpose clearly appeared in the legislative history. *Kennedy* v. *Mendoza-Martinez,* 372 U. S. 144, 169; *United States* v. *Lovett,* 328 U. S. 303, 308–314. In other cases the analysis is more difficult. We summarized the relevant considerations in *Kennedy* v. *Mendoza-Martinez, supra:*

> "Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter,* whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions." 372 U. S., at 168–169.

An application of these criteria to § 504 compels the conclusion that it is regulatory rather than punitive.

Congress' concern with the possibility of political strikes is not simply a fictional concern advanced to mask a puni-

tive purpose. Congress has sought to forestall political strikes since 1947, when it adopted § 9 (h) of the National Labor Relations Act, which was sustained as a reasonable regulation in *American Communications Assn.* v. *Douds,* 339 U. S. 382. Section 504 was adopted as a fairer and more effective method of dealing with the same evil. H. R. Rep. No. 741, 86th Cong., 1st Sess. (1959), p. 33; 1 Leg. Hist. LMRDA 791. Section 9 (h) had proved ineffective because many Communists would take the prescribed oath, which meant the only sanction available was a perjury prosecution that presented serious difficulties of proof. See Hearings before the House Committee on Un-American Activities, Communist Infiltration of Vital Industries and Current Communist Techniques in the Chicago, Illinois, Area, 86th Cong., 1st Sess. (1959), pp. 519, 576; Hearings before a Subcommittee of the Senate Committee on Labor and Public Welfare, Communist Domination of Unions and National Security, 82d Cong., 2d Sess. (1952), p. 54. Moreover, the oath requirement created inequities both because the disqualification imposed was visited on the whole union membership and because the taking of an oath was exacted of all union leaders, many of whom resented the requirement. See *American Communications Assn.* v. *Douds,* 339 U. S., at 434–435 (Jackson, J., concurring and dissenting); S. Rep. No. 187, 86th Cong., 1st Sess. (1959), pp. 7, 9; 1 Leg. Hist. LMRDA 403, 405. It was obviously reasonable for Congress to substitute § 504 for § 9 (h), and no punitive purpose may be inferred from such congressional action.

Nor can it be denied that § 504 is reasonably related to a permissible legislative objective. In *American Communications Assn.* v. *Douds,* we held that "Congress could rationally find that the Communist Party is not like other political parties in its utilization of positions of union leadership as means by which to bring about strikes . . . ," 339 U. S., at 391, and therefore Congress could rationally

infer that members of the Communist Party were likely to call political strikes. See also *Communist Party* v. *Subversive Activities Control Board,* 367 U. S. 1, 93–94, 112. In 1956 the Subversive Activities Control Board found, after a trial-type hearing, that the Party's principal leaders and a substantial number of its members recognize the disciplinary power of the Soviet Union. Without question the findings previously made by Congress and the Subversive Activities Control Board afforded a rational basis in 1959 for Congress to conclude that Communists were likely to call political strikes, and sufficiently more likely than others to do so that special measures could appropriately be enacted to deal with the particular threat posed.

In view of Congress' demonstrated concern in preventing future conduct—political strikes—and the reasonableness of the means adopted to that end, I cannot conclude that § 504 had a punitive purpose or that it constitutes a bill of attainder. I intimate no opinion on the issues that the Court does not reach.

GRISWOLD ET AL. *v.* CONNECTICUT.

APPEAL FROM THE SUPREME COURT OF ERRORS OF CONNECTICUT.

No. 496. Argued March 29–30, 1965.—Decided June 7, 1965.

Appellants, the Executive Director of the Planned Parenthood League of Connecticut, and its medical director, a licensed physician, were convicted as accessories for giving married persons information and medical advice on how to prevent conception and, following examination, prescribing a contraceptive device or material for the wife's use. A Connecticut statute makes it a crime for any person to use any drug or article to prevent conception. Appellants claimed that the accessory statute as applied violated the Fourteenth Amendment. An intermediate appellate court and the State's highest court affirmed the judgment. *Held:*

1. Appellants have standing to assert the constitutional rights of the married people. *Tileston* v. *Ullman,* 318 U. S. 44, distinguished. P. 481.

2. The Connecticut statute forbidding use of contraceptives violates the right of marital privacy which is within the penumbra of specific guarantees of the Bill of Rights. Pp. 481–486.

151 Conn. 544, 200 A. 2d 479, reversed.

Thomas I. Emerson argued the cause for appellants. With him on the briefs was *Catherine G. Roraback.*

Joseph B. Clark argued the cause for appellee. With him on the brief was *Julius Maretz.*

Briefs of *amici curiae,* urging reversal, were filed by *Whitney North Seymour* and *Eleanor M. Fox* for Dr. John M. Adams et al.; by *Morris L. Ernst, Harriet F. Pilpel* and *Nancy F. Wechsler* for the Planned Parenthood Federation of America, Inc.; by *Alfred L. Scanlon* for the Catholic Council on Civil Liberties, and by *Rhoda H. Karpatkin, Melvin L. Wulf* and *Jerome E. Caplan* for the American Civil Liberties Union et al.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Appellant Griswold is Executive Director of the Planned Parenthood League of Connecticut. Appellant Buxton is a licensed physician and a professor at the Yale Medical School who served as Medical Director for the League at its Center in New Haven—a center open and operating from November 1 to November 10, 1961, when appellants were arrested.

They gave information, instruction, and medical advice to *married persons* as to the means of preventing conception. They examined the wife and prescribed the best contraceptive device or material for her use. Fees were usually charged, although some couples were serviced free.

The statutes whose constitutionality is involved in this appeal are §§ 53–32 and 54–196 of the General Statutes of Connecticut (1958 rev.). The former provides:

> "Any person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined not less than fifty dollars or imprisoned not less than sixty days nor more than one year or be both fined and imprisoned."

Section 54–196 provides:

> "Any person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender."

The appellants were found guilty as accessories and fined $100 each, against the claim that the accessory statute as so applied violated the Fourteenth Amendment. The Appellate Division of the Circuit Court affirmed. The Supreme Court of Errors affirmed that judgment. 151 Conn. 544, 200 A. 2d 479. We noted probable jurisdiction. 379 U. S. 926.

We think that appellants have standing to raise the constitutional rights of the married people with whom they had a professional relationship. *Tileston* v. *Ullman,* 318 U. S. 44, is different, for there the plaintiff seeking to represent others asked for a declaratory judgment. In that situation we thought that the requirements of standing should be strict, lest the standards of "case or controversy" in Article III of the Constitution become blurred. Here those doubts are removed by reason of a criminal conviction for serving married couples in violation of an aiding-and-abetting statute. Certainly the accessory should have standing to assert that the offense which he is charged with assisting is not, or cannot constitutionally be, a crime.

This case is more akin to *Truax* v. *Raich,* 239 U. S. 33, where an employee was permitted to assert the rights of his employer; to *Pierce* v. *Society of Sisters,* 268 U. S. 510, where the owners of private schools were entitled to assert the rights of potential pupils and their parents; and to *Barrows* v. *Jackson,* 346 U. S. 249, where a white defendant, party to a racially restrictive covenant, who was being sued for damages by the covenantors because she had conveyed her property to Negroes, was allowed to raise the issue that enforcement of the covenant violated the rights of prospective Negro purchasers to equal protection, although no Negro was a party to the suit. And see *Meyer* v. *Nebraska,* 262 U. S. 390; *Adler* v. *Board of Education,* 342 U. S. 485; *NAACP* v. *Alabama,* 357 U. S. 449; *NAACP* v. *Button,* 371 U. S. 415. The rights of husband and wife, pressed here, are likely to be diluted or adversely affected unless those rights are considered in a suit involving those who have this kind of confidential relation to them.

Coming to the merits, we are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments

suggest that *Lochner* v. *New York,* 198 U. S. 45, should be our guide. But we decline that invitation as we did in *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379; *Olsen* v. *Nebraska,* 313 U. S. 236; *Lincoln Union* v. *Northwestern Co.,* 335 U. S. 525; *Williamson* v. *Lee Optical Co.,* 348 U. S. 483; *Giboney* v. *Empire Storage Co.,* 336 U. S. 490. We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation.

The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice—whether public or private or parochial—is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights.

By *Pierce* v. *Society of Sisters, supra,* the right to educate one's children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments. By *Meyer* v. *Nebraska, supra,* the same dignity is given the right to study the German language in a private school. In other words, the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read (*Martin* v. *Struthers,* 319 U. S. 141, 143) and freedom of inquiry, freedom of thought, and freedom to teach (see *Wieman* v. *Updegraff,* 344 U. S. 183, 195)—indeed the freedom of the entire university community. *Sweezy* v. *New Hampshire,* 354 U. S. 234, 249–250, 261–263; *Barenblatt* v. *United States,* 360 U. S. 109, 112; *Baggett* v. *Bullitt,* 377 U. S. 360, 369. Without

those peripheral rights the specific rights would be less secure. And so we reaffirm the principle of the *Pierce* and the *Meyer* cases.

In *NAACP* v. *Alabama,* 357 U. S. 449, 462, we protected the "freedom to associate and privacy in one's associations," noting that freedom of association was a peripheral First Amendment right. Disclosure of membership lists of a constitutionally valid association, we held, was invalid "as entailing the likelihood of a substantial restraint upon the exercise by petitioner's members of their right to freedom of association." *Ibid.* In other words, the First Amendment has a penumbra where privacy is protected from governmental intrusion. In like context, we have protected forms of "association" that are not political in the customary sense but pertain to the social, legal, and economic benefit of the members. *NAACP* v. *Button,* 371 U. S. 415, 430–431. In *Schware* v. *Board of Bar Examiners,* 353 U. S. 232, we held it not permissible to bar a lawyer from practice, because he had once been a member of the Communist Party. The man's "association with that Party" was not shown to be "anything more than a political faith in a political party" (*id.,* at 244) and was not action of a kind proving bad moral character. *Id.,* at 245–246.

Those cases involved more than the "right of assembly"—a right that extends to all irrespective of their race or ideology. *De Jonge* v. *Oregon,* 299 U. S. 353. The right of "association," like the right of belief (*Board of Education* v. *Barnette,* 319 U. S. 624), is more than the right to attend a meeting; it includes the right to express one's attitudes or philosophies by membership in a group or by affiliation with it or by other lawful means. Association in that context is a form of expression of opinion; and while it is not expressly included in the First Amendment its existence is necessary in making the express guarantees fully meaningful.

The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. See *Poe* v. *Ullman,* 367 U. S. 497, 516–522 (dissenting opinion). Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers "in any house" in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The Fourth and Fifth Amendments were described in *Boyd* v. *United States,* 116 U. S. 616, 630, as protection against all governmental invasions "of the sanctity of a man's home and the privacies of life."* We recently re-

*The Court said in full about this right of privacy:

"The principles laid down in this opinion [by Lord Camden in *Entick* v. *Carrington,* 19 How. St. Tr. 1029] affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employes of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence,—it is the invasion of this sacred right which underlies and constitutes the essence of

ferred in *Mapp* v. *Ohio,* 367 U. S. 643, 656, to the Fourth Amendment as creating a "right to privacy, no less important than any other right carefully and particularly reserved to the people." See Beaney, The Constitutional Right to Privacy, 1962 Sup. Ct. Rev. 212; Griswold, The Right to be Let Alone, 55 Nw. U. L. Rev. 216 (1960).

We have had many controversies over these penumbral rights of "privacy and repose." See, *e. g., Breard* v. *Alexandria,* 341 U. S. 622, 626, 644; *Public Utilities Comm'n* v. *Pollak,* 343 U. S. 451; *Monroe* v. *Pape,* 365 U. S. 167; *Lanza* v. *New York,* 370 U. S. 139; *Frank* v. *Maryland,* 359 U. S. 360; *Skinner* v. *Oklahoma,* 316 U. S. 535, 541. These cases bear witness that the right of privacy which presses for recognition here is a legitimate one.

The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the *use* of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." *NAACP* v. *Alabama,* 377 U. S. 288, 307. Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The

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Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other." 116 U. S., at 630.

very idea is repulsive to the notions of privacy surrounding the marriage relationship.

We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Reversed.

MR. JUSTICE GOLDBERG, whom THE CHIEF JUSTICE and MR. JUSTICE BRENNAN join, concurring.

I agree with the Court that Connecticut's birth-control law unconstitutionally intrudes upon the right of marital privacy, and I join in its opinion and judgment. Although I have not accepted the view that "due process" as used in the Fourteenth Amendment incorporates all of the first eight Amendments (see my concurring opinion in *Pointer* v. *Texas,* 380 U. S. 400, 410, and the dissenting opinion of MR. JUSTICE BRENNAN in *Cohen* v. *Hurley,* 366 U. S. 117, 154), I do agree that the concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights. My conclusion that the concept of liberty is not so restricted and that it embraces the right of marital privacy though that right is not mentioned explicitly in the Constitution [1] is supported both by numer-

[1] My Brother STEWART dissents on the ground that he "can find no . . . general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court." *Post,* at 530. He would require a more explicit guarantee than the one which the Court derives from several constitutional amendments. This Court, however, has never held that the Bill of Rights or the

ous decisions of this Court, referred to in the Court's opinion, and by the language and history of the Ninth Amendment. In reaching the conclusion that the right of marital privacy is protected, as being within the protected penumbra of specific guarantees of the Bill of Rights, the Court refers to the Ninth Amendment, *ante,* at 484. I add these words to emphasize the relevance of that Amendment to the Court's holding.

The Court stated many years ago that the Due Process Clause protects those liberties that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder* v. *Massachusetts,* 291 U. S. 97, 105. In *Gitlow* v. *New York,* 268 U. S. 652, 666, the Court said:

> "For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the *fundamental* personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." (Emphasis added.)

Fourteenth Amendment protects only those rights that the Constitution specifically mentions by name. See, *e. g., Bolling* v. *Sharpe,* 347 U. S. 497; *Aptheker* v. *Secretary of State,* 378 U. S. 500; *Kent* v. *Dulles,* 357 U. S. 116; *Carrington* v. *Rash,* 380 U. S. 89, 96; *Schware* v. *Board of Bar Examiners,* 353 U. S. 232; *NAACP* v. *Alabama,* 360 U. S. 240; *Pierce* v. *Society of Sisters,* 268 U. S. 510; *Meyer* v. *Nebraska,* 262 U. S. 390. To the contrary, this Court, for example, in *Bolling* v. *Sharpe, supra,* while recognizing that the Fifth Amendment does not contain the "explicit safeguard" of an equal protection clause, *id.,* at 499, nevertheless derived an equal protection principle from that Amendment's Due Process Clause. And in *Schware* v. *Board of Bar Examiners, supra,* the Court held that the Fourteenth Amendment protects from arbitrary state action the right to pursue an occupation, such as the practice of law.

And, in *Meyer* v. *Nebraska*, 262 U. S. 390, 399, the Court, referring to the Fourteenth Amendment, stated:

> "While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also [for example,] the right . . . to marry, establish a home and bring up children . . . ."

This Court, in a series of decisions, has held that the Fourteenth Amendment absorbs and applies to the States those specifics of the first eight amendments which express fundamental personal rights.[2] The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments.

The Ninth Amendment reads, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." The Amendment is almost entirely the work of James Madison. It was introduced in Congress by him and passed the House and Senate with little or no debate and virtually no change in language. It was proffered to quiet expressed fears that a bill of specifically enumerated rights[3] could not be sufficiently broad to cover all es-

[2] See, *e. g.*, *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226; *Gitlow* v. *New York*, *supra*; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Wolf* v. *Colorado*, 338 U. S. 25; *Robinson* v. *California*, 370 U. S. 660; *Gideon* v. *Wainwright*, 372 U. S. 335; *Malloy* v. *Hogan*, 378 U. S. 1; *Pointer* v. *Texas*, *supra*; *Griffin* v. *California*, 380 U. S. 609.

[3] Madison himself had previously pointed out the dangers of inaccuracy resulting from the fact that "no language is so copious as to supply words and phrases for every complex idea." The Federalist, No. 37 (Cooke ed. 1961), at 236.

sential rights and that the specific mention of certain rights would be interpreted as a denial that others were protected.[4]

In presenting the proposed Amendment, Madison said:

> "It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against. I have attempted it, as gentlemen may see by turning to the

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[4] Alexander Hamilton was opposed to a bill of rights on the ground that it was unnecessary because the Federal Government was a government of delegated powers and it was not granted the power to intrude upon fundamental personal rights. The Federalist, No. 84 (Cooke ed. 1961), at 578–579. He also argued,

"I go further, and affirm that bills of rights, in the sense and in the extent in which they are contended for, are not only unnecessary in the proposed constitution, but would even be dangerous. They would contain various exceptions to powers which are not granted; and on this very account, would afford a colourable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretence for claiming that power." *Id.*, at 579.

The Ninth Amendment and the Tenth Amendment, which provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," were apparently also designed in part to meet the above-quoted argument of Hamilton.

last clause of the fourth resolution [the Ninth Amendment]." I Annals of Congress 439 (Gales and Seaton ed. 1834).

Mr. Justice Story wrote of this argument against a bill of rights and the meaning of the Ninth Amendment:

> "In regard to . . . [a] suggestion, that the affirmance of certain rights might disparage others, or might lead to argumentative implications in favor of other powers, it might be sufficient to say that such a course of reasoning could never be sustained upon any solid basis . . . . But a conclusive answer is, that such an attempt may be interdicted (as it has been) by a positive declaration in such a bill of rights that the enumeration of certain rights shall not be construed to deny or disparage others retained by the people." II Story, Commentaries on the Constitution of the United States 626–627 (5th ed. 1891).

He further stated, referring to the Ninth Amendment:

> "This clause was manifestly introduced to prevent any perverse or ingenious misapplication of the well-known maxim, that an affirmation in particular cases implies a negation in all others; and, *e converso*, that a negation in particular cases implies an affirmation in all others." *Id.*, at 651.

These statements of Madison and Story make clear that the Framers did not intend that the first eight amendments be construed to exhaust the basic and fundamental rights which the Constitution guaranteed to the people.[5]

While this Court has had little occasion to interpret the Ninth Amendment,[6] "[i]t cannot be presumed that any

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[5] The Tenth Amendment similarly made clear that the States and the people retained all those powers not expressly delegated to the Federal Government.

[6] This Amendment has been referred to as "The Forgotten Ninth Amendment," in a book with that title by Bennett B. Patterson (1955). Other commentary on the Ninth Amendment includes Redlich, Are

clause in the constitution is intended to be without effect." *Marbury* v. *Madison,* 1 Cranch 137, 174. In interpreting the Constitution, "real effect should be given to all the words it uses." *Myers* v. *United States,* 272 U. S. 52, 151. The Ninth Amendment to the Constitution may be regarded by some as a recent discovery and may be forgotten by others, but since 1791 it has been a basic part of the Constitution which we are sworn to uphold. To hold that a right so basic and fundamental and so deep-rooted in our society as the right of privacy in marriage may be infringed because that right is not guaranteed in so many words by the first eight amendments to the Constitution is to ignore the Ninth Amendment and to give it no effect whatsoever. Moreover, a judicial construction that this fundamental right is not protected by the Constitution because it is not mentioned in explicit terms by one of the first eight amendments or elsewhere in the Constitution would violate the Ninth Amendment, which specifically states that

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There "Certain Rights . . . Retained by the People"? 37 N. Y. U. L. Rev. 787 (1962), and Kelsey, The Ninth Amendment of the Federal Constitution, 11 Ind. L. J. 309 (1936). As far as I am aware, until today this Court has referred to the Ninth Amendment only in *United Public Workers* v. *Mitchell,* 330 U. S. 75, 94–95; *Tennessee Electric Power Co.* v. *TVA,* 306 U. S. 118, 143–144; and *Ashwander* v. *TVA,* 297 U. S. 288, 330–331. See also *Calder* v. *Bull,* 3 Dall. 386, 388; *Loan Assn.* v. *Topeka,* 20 Wall. 655, 662–663.

In *United Public Workers* v. *Mitchell, supra,* at 94–95, the Court stated: "We accept appellants' contention that the nature of political rights reserved to the people by the Ninth and Tenth Amendments [is] involved. The right claimed as inviolate may be stated as the right of a citizen to act as a party official or worker to further his own political views. Thus we have a measure of interference by the Hatch Act and the Rules with what otherwise would be the freedom of the civil servant under the First, Ninth and Tenth Amendments. And, if we look upon due process as a guarantee of freedom in those fields, there is a corresponding impairment of that right under the Fifth Amendment."

"[t]he enumeration in the Constitution, of certain rights, shall not be *construed* to deny or disparage others retained by the people." (Emphasis added.)

A dissenting opinion suggests that my interpretation of the Ninth Amendment somehow "broaden[s] the powers of this Court." *Post,* at 520. With all due respect, I believe that it misses the import of what I am saying. I do not take the position of my Brother BLACK in his dissent in *Adamson* v. *California,* 332 U. S. 46, 68, that the entire Bill of Rights is incorporated in the Fourteenth Amendment, and I do not mean to imply that the Ninth Amendment is applied against the States by the Fourteenth. Nor do I mean to state that the Ninth Amendment constitutes an independent source of rights protected from infringement by either the States or the Federal Government. Rather, the Ninth Amendment shows a belief of the Constitution's authors that fundamental rights exist that are not expressly enumerated in the first eight amendments and an intent that the list of rights included there not be deemed exhaustive. As any student of this Court's opinions knows, this Court has held, often unanimously, that the Fifth and Fourteenth Amendments protect certain fundamental personal liberties from abridgment by the Federal Government or the States. See, *e. g., Bolling* v. *Sharpe,* 347 U. S. 497; *Aptheker* v. *Secretary of State,* 378 U. S. 500; *Kent* v. *Dulles,* 357 U. S. 116; *Cantwell* v. *Connecticut,* 310 U. S. 296; *NAACP* v. *Alabama,* 357 U. S. 449; *Gideon* v. *Wainwright,* 372 U. S. 335; *New York Times Co.* v. *Sullivan,* 376 U. S. 254. The Ninth Amendment simply shows the intent of the Constitution's authors that other fundamental personal rights should not be denied such protection or disparaged in any other way simply because they are not specifically listed in the first eight constitutional amendments. I do not see how this broadens the author-

ity of the Court; rather it serves to support what this Court has been doing in protecting fundamental rights.

Nor am I turning somersaults with history in arguing that the Ninth Amendment is relevant in a case dealing with a *State's* infringement of a fundamental right. While the Ninth Amendment—and indeed the entire Bill of Rights—originally concerned restrictions upon *federal* power, the subsequently enacted Fourteenth Amendment prohibits the States as well from abridging fundamental personal liberties. And, the Ninth Amendment, in indicating that not all such liberties are specifically mentioned in the first eight amendments, is surely relevant in showing the existence of other fundamental personal rights, now protected from state, as well as federal, infringement. In sum, the Ninth Amendment simply lends strong support to the view that the "liberty" protected by the Fifth and Fourteenth Amendments from infringement by the Federal Government or the States is not restricted to rights specifically mentioned in the first eight amendments. Cf. *United Public Workers* v. *Mitchell,* 330 U. S. 75, 94–95.

In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look to the "traditions and [collective] conscience of our people" to determine whether a principle is "so rooted [there] . . . as to be ranked as fundamental." *Snyder* v. *Massachusetts,* 291 U. S. 97, 105. The inquiry is whether a right involved "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' . . . ." *Powell* v. *Alabama,* 287 U. S. 45, 67. "Liberty" also "gains content from the emanations of . . . specific [constitutional] guarantees" and "from experience with the requirements of a free society." *Poe*

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v. *Ullman*, 367 U. S. 497, 517 (dissenting opinion of MR. JUSTICE DOUGLAS).[7]

I agree fully with the Court that, applying these tests, the right of privacy is a fundamental personal right, emanating "from the totality of the constitutional scheme under which we live." *Id.*, at 521. Mr. Justice Brandeis, dissenting in *Olmstead* v. *United States*, 277 U. S. 438, 478, comprehensively summarized the principles underlying the Constitution's guarantees of privacy:

> "The protection guaranteed by the [Fourth and Fifth] Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."

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[7] In light of the tests enunciated in these cases it cannot be said that a judge's responsibility to determine whether a right is basic and fundamental in this sense vests him with unrestricted personal discretion. In fact, a hesitancy to allow too broad a discretion was a substantial reason leading me to conclude in *Pointer* v. *Texas*, *supra*, at 413–414, that those rights absorbed by the Fourteenth Amendment and applied to the States because they are fundamental apply with equal force and to the same extent against both federal and state governments. In *Pointer* I said that the contrary view would require "this Court to make the extremely subjective and excessively discretionary determination as to whether a practice, forbidden the Federal Government by a fundamental constitutional guarantee, is, as viewed in the factual circumstances surrounding each individual case, sufficiently repugnant to the notion of due process as to be forbidden the States." *Id.*, at 413.

The Connecticut statutes here involved deal with a particularly important and sensitive area of privacy—that of the marital relation and the marital home. This Court recognized in *Meyer* v. *Nebraska, supra,* that the right "to marry, establish a home and bring up children" was an essential part of the liberty guaranteed by the Fourteenth Amendment. 262 U. S., at 399. In *Pierce* v. *Society of Sisters,* 268 U. S. 510, the Court held unconstitutional an Oregon Act which forbade parents from sending their children to private schools because such an act "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." 268 U. S., at 534–535. As this Court said in *Prince* v. *Massachusetts,* 321 U. S. 158, at 166, the *Meyer* and *Pierce* decisions "have respected the private realm of family life which the state cannot enter."

I agree with MR. JUSTICE HARLAN'S statement in his dissenting opinion in *Poe* v. *Ullman,* 367 U. S. 497, 551–552: "Certainly the safeguarding of the home does not follow merely from the sanctity of property rights. The home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right. . . . Of this whole 'private realm of family life' it is difficult to imagine what is more private or more intimate than a husband and wife's marital relations."

The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected.

Although the Constitution does not speak in so many words of the right of privacy in marriage, I cannot believe that it offers these fundamental rights no protection. The fact that no particular provision of the Con-

stitution explicitly forbids the State from disrupting the traditional relation of the family—a relation as old and as fundamental as our entire civilization—surely does not show that the Government was meant to have the power to do so. Rather, as the Ninth Amendment expressly recognizes, there are fundamental personal rights such as this one, which are protected from abridgment by the Government though not specifically mentioned in the Constitution.

My Brother STEWART, while characterizing the Connecticut birth control law as "an uncommonly silly law," *post,* at 527, would nevertheless let it stand on the ground that it is not for the courts to " 'substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws.' " *Post,* at 528. Elsewhere, I have stated that "[w]hile I quite agree with Mr. Justice Brandeis that . . . 'a . . . State may . . . serve as a laboratory; and try novel social and economic experiments,' *New State Ice Co.* v. *Liebmann,* 285 U. S. 262, 280, 311 (dissenting opinion), I do not believe that this includes the power to experiment with the fundamental liberties of citizens . . . ." [8] The vice of the dissenters' views is that it would permit such experimentation by the States in the area of the fundamental personal rights of its citizens. I cannot agree that the Constitution grants such power either to the States or to the Federal Government.

The logic of the dissents would sanction federal or state legislation that seems to me even more plainly unconstitutional than the statute before us. Surely the Government, absent a showing of a compelling subordinating state interest, could not decree that all husbands and wives must be sterilized after two children have been born

[8] *Pointer* v. *Texas, supra,* at 413. See also the discussion of my Brother DOUGLAS, *Poe* v. *Ullman, supra,* at 517–518 (dissenting opinion).

to them. Yet by their reasoning such an invasion of marital privacy would not be subject to constitutional challenge because, while it might be "silly," no provision of the Constitution specifically prevents the Government from curtailing the marital right to bear children and raise a family. While it may shock some of my Brethren that the Court today holds that the Constitution protects the right of marital privacy, in my view it is far more shocking to believe that the personal liberty guaranteed by the Constitution does not include protection against such totalitarian limitation of family size, which is at complete variance with our constitutional concepts. Yet, if upon a showing of a slender basis of rationality, a law outlawing voluntary birth control by married persons is valid, then, by the same reasoning, a law requiring compulsory birth control also would seem to be valid. In my view, however, both types of law would unjustifiably intrude upon rights of marital privacy which are constitutionally protected.

In a long series of cases this Court has held that where fundamental personal liberties are involved, they may not be abridged by the States simply on a showing that a regulatory statute has some rational relationship to the effectuation of a proper state purpose. "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling," *Bates* v. *Little Rock,* 361 U. S. 516, 524. The law must be shown "necessary, and not merely rationally related, to the accomplishment of a permissible state policy." *McLaughlin* v. *Florida,* 379 U. S. 184, 196. See *Schneider* v. *Irvington,* 308 U. S. 147, 161.

Although the Connecticut birth-control law obviously encroaches upon a fundamental personal liberty, the State does not show that the law serves any "subordinating [state] interest which is compelling" or that it is "neces-

sary . . . to the accomplishment of a permissible state policy." The State, at most, argues that there is some rational relation between this statute and what is admittedly a legitimate subject of state concern—the discouraging of extra-marital relations. It says that preventing the use of birth-control devices by married persons helps prevent the indulgence by some in such extra-marital relations. The rationality of this justification is dubious, particularly in light of the admitted widespread availability to all persons in the State of Connecticut, unmarried as well as married, of birth-control devices for the prevention of disease, as distinguished from the prevention of conception, see *Tileston* v. *Ullman,* 129 Conn. 84, 26 A. 2d 582. But, in any event, it is clear that the state interest in safeguarding marital fidelity can be served by a more discriminately tailored statute, which does not, like the present one, sweep unnecessarily broadly, reaching far beyond the evil sought to be dealt with and intruding upon the privacy of all married couples. See *Aptheker* v. *Secretary of State,* 378 U. S. 500, 514; *NAACP* v. *Alabama,* 377 U. S. 288, 307–308; *McLaughlin* v. *Florida, supra,* at 196. Here, as elsewhere, "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *NAACP* v. *Button,* 371 U. S. 415, 438. The State of Connecticut does have statutes, the constitutionality of which is beyond doubt, which prohibit adultery and fornication. See Conn. Gen. Stat. §§ 53–218, 53–219 *et seq.* These statutes demonstrate that means for achieving the same basic purpose of protecting marital fidelity are available to Connecticut without the need to "invade the area of protected freedoms." *NAACP* v. *Alabama, supra,* at 307. See *McLaughlin* v. *Florida, supra,* at 196.

Finally, it should be said of the Court's holding today that it in no way interferes with a State's proper regula-

tion of sexual promiscuity or misconduct. As my Brother HARLAN so well stated in his dissenting opinion in *Poe* v. *Ullman, supra,* at 553.

> "Adultery, homosexuality and the like are sexual intimacies which the State forbids . . . but the intimacy of husband and wife is necessarily an essential and accepted feature of the institution of marriage, an institution which the State not only must allow, but which always and in every age it has fostered and protected. It is one thing when the State exerts its power either to forbid extra-marital sexuality . . . or to say who may marry, but it is quite another when, having acknowledged a marriage and the intimacies inherent in it, it undertakes to regulate by means of the criminal law the details of that intimacy."

In sum, I believe that the right of privacy in the marital relation is fundamental and basic—a personal right "retained by the people" within the meaning of the Ninth Amendment. Connecticut cannot constitutionally abridge this fundamental right, which is protected by the Fourteenth Amendment from infringement by the States. I agree with the Court that petitioners' convictions must therefore be reversed.

MR. JUSTICE HARLAN, concurring in the judgment.

I fully agree with the judgment of reversal, but find myself unable to join the Court's opinion. The reason is that it seems to me to evince an approach to this case very much like that taken by my Brothers BLACK and STEWART in dissent, namely: the Due Process Clause of the Fourteenth Amendment does not touch this Connecticut statute unless the enactment is found to violate some right assured by the letter or penumbra of the Bill of Rights.

In other words, what I find implicit in the Court's opinion is that the "incorporation" doctrine may be used to *restrict* the reach of Fourteenth Amendment Due Process. For me this is just as unacceptable constitutional doctrine as is the use of the "incorporation" approach to *impose* upon the States all the requirements of the Bill of Rights as found in the provisions of the first eight amendments and in the decisions of this Court interpreting them. See, *e. g.*, my concurring opinions in *Pointer* v. *Texas,* 380 U. S. 400, 408, and *Griffin* v. *California,* 380 U. S. 609, 615, and my dissenting opinion in *Poe* v. *Ullman,* 367 U. S. 497, 522, at pp. 539–545.

In my view, the proper constitutional inquiry in this case is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values "implicit in the concept of ordered liberty," *Palko* v. *Connecticut,* 302 U. S. 319, 325. For reasons stated at length in my dissenting opinion in *Poe* v. *Ullman, supra,* I believe that it does. While the relevant inquiry may be aided by resort to one or more of the provisions of the Bill of Rights, it is not dependent on them or any of their radiations. The Due Process Clause of the Fourteenth Amendment stands, in my opinion, on its own bottom.

A further observation seems in order respecting the justification of my Brothers BLACK and STEWART for their "incorporation" approach to this case. Their approach does not rest on historical reasons, which are of course wholly lacking (see Fairman, Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding, 2 Stan. L. Rev. 5 (1949)), but on the thesis that by limiting the content of the Due Process Clause of the Fourteenth Amendment to the protection of rights which can be found elsewhere in the Constitution, in this instance in the Bill of Rights, judges will thus be confined to "interpretation" of specific constitutional

provisions, and will thereby be restrained from introducing their own notions of constitutional right and wrong into the "vague contours of the Due Process Clause." *Rochin* v. *California,* 342 U. S. 165, 170.

While I could not more heartily agree that judicial "self restraint" is an indispensable ingredient of sound constitutional adjudication, I do submit that the formula suggested for achieving it is more hollow than real. "Specific" provisions of the Constitution, no less than "due process," lend themselves as readily to "personal" interpretations by judges whose constitutional outlook is simply to keep the Constitution in supposed "tune with the times" (*post,* p. 522). Need one go further than to recall last Term's reapportionment cases, *Wesberry* v. *Sanders,* 376 U. S. 1, and *Reynolds* v. *Sims,* 377 U. S. 533, where a majority of the Court "interpreted" "by the People" (Art. I, § 2) and "equal protection" (Amdt. 14) to command "one person, one vote," an interpretation that was made in the face of irrefutable and still unanswered history to the contrary? See my dissenting opinions in those cases, 376 U. S., at 20; 377 U. S., at 589.

Judicial self-restraint will not, I suggest, be brought about in the "due process" area by the historically unfounded incorporation formula long advanced by my Brother BLACK, and now in part espoused by my Brother STEWART. It will be achieved in this area, as in other constitutional areas, only by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms. See *Adamson* v. *California,* 332 U. S. 46, 59 (Mr. Justice Frankfurter, concurring). Adherence to these principles will not, of course, obviate all constitutional differences of opinion among judges, nor should it. Their continued recogni-

tion will, however, go farther toward keeping most judges from roaming at large in the constitutional field than will the interpolation into the Constitution of an artificial and largely illusory restriction on the content of the Due Process Clause.*

MR. JUSTICE WHITE, concurring in the judgment.

In my view this Connecticut law as applied to married couples deprives them of "liberty" without due process of law, as that concept is used in the Fourteenth Amendment. I therefore concur in the judgment of the Court reversing these convictions under Connecticut's aiding and abetting statute.

It would be unduly repetitious, and belaboring the obvious, to expound on the impact of this statute on the liberty guaranteed by the Fourteenth Amendment against arbitrary or capricious denials or on the nature of this liberty. Suffice it to say that this is not the first time this Court has had occasion to articulate that the liberty entitled to protection under the Fourteenth Amendment includes the right "to marry, establish a home and bring up children," *Meyer* v. *Nebraska,* 262 U. S. 390, 399, and "the liberty . . . to direct the upbringing and education of children," *Pierce* v. *Society of Sisters,* 268 U. S. 510, 534–535, and that these are among "the basic civil rights of man." *Skinner* v. *Oklahoma,* 316 U. S. 535, 541. These decisions affirm that there is a "realm of family life which the state cannot enter" without substantial justification. *Prince* v. *Massachusetts,* 321 U. S. 158, 166. Surely the right invoked in this case, to be free of regulation of the intimacies of

*Indeed, my Brother BLACK, in arguing his thesis, is forced to lay aside a host of cases in which the Court has recognized fundamental rights in the Fourteenth Amendment without specific reliance upon the Bill of Rights. *Post,* p. 512, n. 4.

the marriage relationship, "come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." *Kovacs* v. *Cooper,* 336 U. S. 77, 95 (opinion of Frankfurter, J.).

The Connecticut anti-contraceptive statute deals rather substantially with this relationship. For it forbids all married persons the right to use birth-control devices, regardless of whether their use is dictated by considerations of family planning, *Trubek* v. *Ullman,* 147 Conn. 633, 165 A. 2d 158, health, or indeed even of life itself. *Buxton* v. *Ullman,* 147 Conn. 48, 156 A. 2d 508. The anti-use statute, together with the general aiding and abetting statute, prohibits doctors from affording advice to married persons on proper and effective methods of birth control. *Tileston* v. *Ullman,* 129 Conn. 84, 26 A. 2d 582. And the clear effect of these statutes, as enforced, is to deny disadvantaged citizens of Connecticut, those without either adequate knowledge or resources to obtain private counseling, access to medical assistance and up-to-date information in respect to proper methods of birth control. *State* v. *Nelson,* 126 Conn. 412, 11 A. 2d 856; *State* v. *Griswold,* 151 Conn. 544, 200 A. 2d 479. In my view, a statute with these effects bears a substantial burden of justification when attacked under the Fourteenth Amendment. *Yick Wo* v. *Hopkins,* 118 U. S. 356; *Skinner* v. *Oklahoma,* 316 U. S. 535; *Schware* v. *Board of Bar Examiners,* 353 U. S. 232; *McLaughlin* v. *Florida,* 379 U. S. 184, 192.

An examination of the justification offered, however, cannot be avoided by saying that the Connecticut anti-use statute invades a protected area of privacy and association or that it demeans the marriage relationship. The nature of the right invaded is pertinent, to be sure, for statutes regulating sensitive areas of liberty do, under

the cases of this Court, require "strict scrutiny," *Skinner* v. *Oklahoma,* 316 U. S. 535, 541, and "must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton* v. *Tucker,* 364 U. S. 479, 488. "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." *Bates* v. *Little Rock,* 361 U. S. 516, 524. See also *McLaughlin* v. *Florida,* 379 U. S. 184. But such statutes, if reasonably necessary for the effectuation of a legitimate and substantial state interest, and not arbitrary or capricious in application, are not invalid under the Due Process Clause. *Zemel* v. *Rusk,* 381 U. S. 1.*

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* Dissenting opinions assert that the liberty guaranteed by the Due Process Clause is limited to a guarantee against unduly vague statutes and against procedural unfairness at trial. Under this view the Court is without authority to ascertain whether a challenged statute, or its application, has a permissible purpose and whether the manner of regulation bears a rational or justifying relationship to this purpose. A long line of cases makes very clear that this has not been the view of this Court. *Dent* v. *West Virginia,* 129 U. S. 114; *Jacobson* v. *Massachusetts,* 197 U. S. 11; *Douglas* v. *Noble,* 261 U. S. 165; *Meyer* v. *Nebraska,* 262 U. S. 390; *Pierce* v. *Society of Sisters,* 268 U. S. 510; *Schware* v. *Board of Bar Examiners,* 353 U. S. 232; *Aptheker* v. *Secretary of State,* 378 U. S. 500; *Zemel* v. *Rusk,* 381 U. S. 1.

The traditional due process test was well articulated, and applied, in *Schware* v. *Board of Bar Examiners, supra,* a case which placed no reliance on the specific guarantees of the Bill of Rights.

"A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection Clause of the Fourteenth Amendment. *Dent* v. *West Virginia,* 129 U. S. 114. Cf. *Slochower* v. *Board of Education,* 350 U. S. 551; *Wieman* v. *Updegraff,* 344 U. S. 183. And see *Ex parte Secombe,* 19 How. 9, 13. A State can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law. *Douglas* v. *Noble,* 261 U. S. 165; *Cum-*

As I read the opinions of the Connecticut courts and the argument of Connecticut in this Court, the State claims but one justification for its anti-use statute. Cf. *Allied Stores of Ohio* v. *Bowers,* 358 U. S. 522, 530; *Martin* v. *Walton,* 368 U. S. 25, 28 (DOUGLAS, J., dissenting). There is no serious contention that Connecticut thinks the use of artificial or external methods of contraception immoral or unwise in itself, or that the anti-use statute is founded upon any policy of promoting population expansion. Rather, the statute is said to serve the State's policy against all forms of promiscuous or illicit sexual relationships, be they premarital or extramarital, concededly a permissible and legitimate legislative goal.

Without taking issue with the premise that the fear of conception operates as a deterrent to such relationships in addition to the criminal proscriptions Connecticut has against such conduct, I wholly fail to see how the ban on the use of contraceptives by married couples in any way reinforces the State's ban on illicit sexual relationships. See *Schware* v. *Board of Bar Examiners,* 353 U. S. 232, 239. Connecticut does not bar the importation or possession of contraceptive devices; they are not considered contraband material under state law, *State* v. *Certain Contraceptive Materials,* 126 Conn. 428, 11 A. 2d 863, and their availability in that State is not seriously disputed. The only way Connecticut seeks to limit or control the availability of such devices is through its general aiding and abetting statute whose operation in this context has

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mings v. *Missouri,* 4 Wall. 277, 319–320. Cf. *Nebbia* v. *New York,* 291 U. S. 502. Obviously an applicant could not be excluded merely because he was a Republican or a Negro or a member of a particular church. Even in applying permissible standards, officers of a State cannot exclude an applicant when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory." 353 U. S., at 238–239. Cf. *Martin* v. *Walton,* 368 U. S. 25, 26 (DOUGLAS, J., dissenting).

been quite obviously ineffective and whose most serious use has been against birth-control clinics rendering advice to married, rather than unmarried, persons. Cf. *Yick Wo* v. *Hopkins,* 118 U. S. 356. Indeed, after over 80 years of the State's proscription of use, the legality of the sale of such devices to prevent disease has never been expressly passed upon, although it appears that sales have long occurred and have only infrequently been challenged. This "undeviating policy . . . throughout all the long years . . . bespeaks more than prosecutorial paralysis." *Poe* v. *Ullman,* 367 U. S. 497, 502. Moreover, it would appear that the sale of contraceptives to prevent disease is plainly legal under Connecticut law.

In these circumstances one is rather hard pressed to explain how the ban on use by married persons in any way prevents use of such devices by persons engaging in illicit sexual relations and thereby contributes to the State's policy against such relationships. Neither the state courts nor the State before the bar of this Court has tendered such an explanation. It is purely fanciful to believe that the broad proscription on use facilitates discovery of use by persons engaging in a prohibited relationship or for some other reason makes such use more unlikely and thus can be supported by any sort of administrative consideration. Perhaps the theory is that the flat ban on use prevents married people from possessing contraceptives and without the ready availability of such devices for use in the marital relationship, there will be no or less temptation to use them in extramarital ones. This reasoning rests on the premise that married people will comply with the ban in regard to their marital relationship, notwithstanding total nonenforcement in this context and apparent nonenforcibility, but will not comply with criminal statutes prohibiting extramarital affairs and the anti-use statute in respect to illicit sexual relationships, a premise whose validity has not been

demonstrated and whose intrinsic validity is not very evident. At most the broad ban is of marginal utility to the declared objective. A statute limiting its prohibition on use to persons engaging in the prohibited relationship would serve the end posited by Connecticut in the same way, and with the same effectiveness, or ineffectiveness, as the broad anti-use statute under attack in this case. I find nothing in this record justifying the sweeping scope of this statute, with its telling effect on the freedoms of married persons, and therefore conclude that it deprives such persons of liberty without due process of law.

MR. JUSTICE BLACK, with whom MR. JUSTICE STEWART joins, dissenting.

I agree with my Brother STEWART'S dissenting opinion. And like him I do not to any extent whatever base my view that this Connecticut law is constitutional on a belief that the law is wise or that its policy is a good one. In order that there may be no room at all to doubt why I vote as I do, I feel constrained to add that the law is every bit as offensive to me as it is to my Brethren of the majority and my Brothers HARLAN, WHITE and GOLDBERG who, reciting reasons why it is offensive to them, hold it unconstitutional. There is no single one of the graphic and eloquent strictures and criticisms fired at the policy of this Connecticut law either by the Court's opinion or by those of my concurring Brethren to which I cannot subscribe—except their conclusion that the evil qualities they see in the law make it unconstitutional.

Had the doctor defendant here, or even the nondoctor defendant, been convicted for doing nothing more than expressing opinions to persons coming to the clinic that certain contraceptive devices, medicines or practices would do them good and would be desirable, or for telling people how devices could be used, I can think of no reasons at this time why their expressions of views would not be

protected by the First and Fourteenth Amendments, which guarantee freedom of speech. Cf. *Brotherhood of Railroad Trainmen* v. *Virginia ex rel. Virginia State Bar,* 377 U. S. 1; *NAACP* v. *Button,* 371 U. S. 415. But speech is one thing; conduct and physical activities are quite another. See, *e. g., Cox* v. *Louisiana,* 379 U. S. 536, 554–555; *Cox* v. *Louisiana,* 379 U. S. 559, 563–564; *id.,* 575–584 (concurring opinion); *Giboney* v. *Empire Storage & Ice Co.,* 336 U. S. 490; cf. *Reynolds* v. *United States,* 98 U. S. 145, 163–164. The two defendants here were active participants in an organization which gave physical examinations to women, advised them what kind of contraceptive devices or medicines would most likely be satisfactory for them, and then supplied the devices themselves, all for a graduated scale of fees, based on the family income. Thus these defendants admittedly engaged with others in a planned course of conduct to help people violate the Connecticut law. Merely because some speech was used in carrying on that conduct—just as in ordinary life some speech accompanies most kinds of conduct—we are not in my view justified in holding that the First Amendment forbids the State to punish their conduct. Strongly as I desire to protect all First Amendment freedoms, I am unable to stretch the Amendment so as to afford protection to the conduct of these defendants in violating the Connecticut law. What would be the constitutional fate of the law if hereafter applied to punish nothing but speech is, as I have said, quite another matter.

The Court talks about a constitutional "right of privacy" as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the "privacy" of individuals. But there is not. There are, of course, guarantees in certain specific constitutional provisions which are designed in part to protect privacy at certain times and places with respect to certain activities. Such, for example, is the Fourth

Amendment's guarantee against "unreasonable searches and seizures." But I think it belittles that Amendment to talk about it as though it protects nothing but "privacy." To treat it that way is to give it a niggardly interpretation, not the kind of liberal reading I think any Bill of Rights provision should be given. The average man would very likely not have his feelings soothed any more by having his property seized openly than by having it seized privately and by stealth. He simply wants his property left alone. And a person can be just as much, if not more, irritated, annoyed and injured by an unceremonious public arrest by a policeman as he is by a seizure in the privacy of his office or home.

One of the most effective ways of diluting or expanding a constitutionally guaranteed right is to substitute for the crucial word or words of a constitutional guarantee another word or words, more or less flexible and more or less restricted in meaning. This fact is well illustrated by the use of the term "right of privacy" as a comprehensive substitute for the Fourth Amendment's guarantee against "unreasonable searches and seizures." "Privacy" is a broad, abstract and ambiguous concept which can easily be shrunken in meaning but which can also, on the other hand, easily be interpreted as a constitutional ban against many things other than searches and seizures. I have expressed the view many times that First Amendment freedoms, for example, have suffered from a failure of the courts to stick to the simple language of the First Amendment in construing it, instead of invoking multitudes of words substituted for those the Framers used. See, *e. g.*, *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 293 (concurring opinion); cases collected in *City of El Paso* v. *Simmons,* 379 U. S. 497, 517, n. 1 (dissenting opinion); Black, The Bill of Rights, 35 N. Y. U. L. Rev. 865. For these reasons I get nowhere in this case by talk about a constitutional "right of privacy" as an emanation from

one or more constitutional provisions.[1] I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision. For these reasons I cannot agree with the Court's judgment and the reasons it gives for holding this Connecticut law unconstitutional.

This brings me to the arguments made by my Brothers HARLAN, WHITE and GOLDBERG for invalidating the Connecticut law. Brothers HARLAN [2] and WHITE would invalidate it by reliance on the Due Process Clause of the Fourteenth Amendment, but Brother GOLDBERG, while agreeing with Brother HARLAN, relies also on the Ninth Amendment. I have no doubt that the Connecticut law could be applied in such a way as to abridge freedom of

[1] The phrase "right to privacy" appears first to have gained currency from an article written by Messrs. Warren and (later Mr. Justice) Brandeis in 1890 which urged that States should give some form of tort relief to persons whose private affairs were exploited by others. The Right to Privacy, 4 Harv. L. Rev. 193. Largely as a result of this article, some States have passed statutes creating such a cause of action, and in others state courts have done the same thing by exercising their powers as courts of common law. See generally 41 Am. Jur. 926–927. Thus the Supreme Court of Georgia, in granting a cause of action for damages to a man whose picture had been used in a newspaper advertisement without his consent, said that "A right of privacy in matters purely private is . . . derived from natural law" and that "The conclusion reached by us seems to be . . . thoroughly in accord with natural justice, with the principles of the law of every civilized nation, and especially with the elastic principles of the common law . . . ." *Pavesich* v. *New England Life Ins. Co.*, 122 Ga. 190, 194, 218, 50 S. E. 68, 70, 80. Observing that "the right of privacy . . . presses for recognition here," today this Court, which I did not understand to have power to sit as a court of common law, now appears to be exalting a phrase which Warren and Brandeis used in discussing grounds for tort relief, to the level of a constitutional rule which prevents state legislatures from passing any law deemed by this Court to interfere with "privacy."

[2] Brother HARLAN's views are spelled out at greater length in his dissenting opinion in *Poe* v. *Ullman*, 367 U. S. 497, 539–555.

speech and press and therefore violate the First and Fourteenth Amendments. My disagreement with the Court's opinion holding that there is such a violation here is a narrow one, relating to the application of the First Amendment to the facts and circumstances of this particular case. But my disagreement with Brothers HARLAN, WHITE and GOLDBERG is more basic. I think that if properly construed neither the Due Process Clause nor the Ninth Amendment, nor both together, could under any circumstances be a proper basis for invalidating the Connecticut law. I discuss the due process and Ninth Amendment arguments together because on analysis they turn out to be the same thing—merely using different words to claim for this Court and the federal judiciary power to invalidate any legislative act which the judges find irrational, unreasonable or offensive.

The due process argument which my Brothers HARLAN and WHITE adopt here is based, as their opinions indicate, on the premise that this Court is vested with power to invalidate all state laws that it considers to be arbitrary, capricious, unreasonable, or oppressive, or on this Court's belief that a particular state law under scrutiny has no "rational or justifying" purpose, or is offensive to a "sense of fairness and justice." [3] If these formulas based on "natural justice," or others which mean the same thing,[4] are to prevail, they require judges to determine

[3] Indeed, Brother WHITE appears to have gone beyond past pronouncements of the natural law due process theory, which at least said that the Court should exercise this unlimited power to declare state acts unconstitutional with "restraint." He now says that, instead of being presumed constitutional (see *Munn* v. *Illinois*, 94 U. S. 113, 123; compare *Adkins* v. *Children's Hospital*, 261 U. S. 525, 544), the statute here "bears a substantial burden of justification when attacked under the Fourteenth Amendment."

[4] A collection of the catchwords and catch phrases invoked by judges who would strike down under the Fourteenth Amendment laws which offend their notions of natural justice would fill many pages. Thus it has been said that this Court can forbid state action

what is or is not constitutional on the basis of their own appraisal of what laws are unwise or unnecessary. The power to make such decisions is of course that of a legislative body. Surely it has to be admitted that no provision of the Constitution specifically gives such blanket power to courts to exercise such a supervisory veto over the wisdom and value of legislative policies and to hold unconstitutional those laws which they believe unwise or dangerous. I readily admit that no legislative body, state or national, should pass laws that can justly be given any

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which "shocks the conscience," *Rochin* v. *California*, 342 U. S. 165, 172, sufficiently to "shock itself into the protective arms of the Constitution," *Irvine* v. *California*, 347 U. S. 128, 138 (concurring opinion). It has been urged that States may not run counter to the "decencies of civilized conduct," *Rochin, supra*, at 173, or "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder* v. *Massachusetts*, 291 U. S. 97, 105, or to "those canons of decency and fairness which express the notions of justice of English-speaking peoples," *Malinski* v. *New York*, 324 U. S. 401, 417 (concurring opinion), or to "the community's sense of fair play and decency," *Rochin, supra*, at 173. It has been said that we must decide whether a state law is "fair, reasonable and appropriate," or is rather "an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty or to enter into . . . contracts," *Lochner* v. *New York*, 198 U. S. 45, 56. States, under this philosophy, cannot act in conflict with "deeply rooted feelings of the community," *Haley* v. *Ohio*, 332 U. S. 596, 604 (separate opinion), or with "fundamental notions of fairness and justice," *id.*, 607. See also, *e. g.*, *Wolf* v. *Colorado*, 338 U. S. 25, 27 ("rights . . . basic to our free society"); *Hebert* v. *Louisiana*, 272 U. S. 312, 316 ("fundamental principles of liberty and justice"); *Adkins* v. *Children's Hospital*, 261 U. S. 525, 561 ("arbitrary restraint of . . . liberties"); *Betts* v. *Brady*, 316 U. S. 455, 462 ("denial of fundamental fairness, shocking to the universal sense of justice"); *Poe* v. *Ullman*, 367 U. S. 497, 539 (dissenting opinion) ("intolerable and unjustifiable"). Perhaps the clearest, frankest and briefest explanation of how this due process approach works is the statement in another case handed down today that this Court is to invoke the Due Process Clause to strike down state procedures or laws which it can "not tolerate." *Linkletter* v. *Walker, post*, p. 618, at 631.

of the invidious labels invoked as constitutional excuses to strike down state laws. But perhaps it is not too much to say that no legislative body ever does pass laws without believing that they will accomplish a sane, rational, wise and justifiable purpose. While I completely subscribe to the holding of *Marbury* v. *Madison,* 1 Cranch 137, and subsequent cases, that our Court has constitutional power to strike down statutes, state or federal, that violate commands of the Federal Constitution, I do not believe that we are granted power by the Due Process Clause or any other constitutional provision or provisions to measure constitutionality by our belief that legislation is arbitrary, capricious or unreasonable, or accomplishes no justifiable purpose, or is offensive to our own notions of "civilized standards of conduct." [5] Such an appraisal of the wisdom of legislation is an attribute of the power to make laws, not of the power to interpret them. The use by federal courts of such a formula or doctrine or whatnot to veto federal or state laws simply takes away from Congress and States the power to make laws based on their own judgment of fairness and wisdom and transfers that power to this Court for ultimate determination—a power which was specifically denied to federal courts by the convention that framed the Constitution.[6]

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[5] See Hand, The Bill of Rights (1958) 70:

"[J]udges are seldom content merely to annul the particular solution before them; they do not, indeed they may not, say that taking all things into consideration, the legislators' solution is too strong for the judicial stomach. On the contrary they wrap up their veto in a protective veil of adjectives such as 'arbitrary,' 'artificial,' 'normal,' 'reasonable,' 'inherent,' 'fundamental,' or 'essential,' whose office usually, though quite innocently, is to disguise what they are doing and impute to it a derivation far more impressive than their personal preferences, which are all that in fact lie behind the decision." See also *Rochin* v. *California,* 342 U. S. 165, 174 (concurring opinion). But see *Linkletter* v. *Walker, supra,* n. 4, at 631.

[6] This Court held in *Marbury* v. *Madison,* 1 Cranch 137, that this Court has power to invalidate laws on the ground that they exceed

Of the cases on which my Brothers WHITE and GOLDBERG rely so heavily, undoubtedly the reasoning of two of them supports their result here—as would that of a number of others which they do not bother to name, *e. g.*,

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the constitutional power of Congress or violate some specific prohibition of the Constitution. See also *Fletcher* v. *Peck*, 6 Cranch 87. But the Constitutional Convention did on at least two occasions reject proposals which would have given the federal judiciary a part in recommending laws or in vetoing as bad or unwise the legislation passed by the Congress. Edmund Randolph of Virginia proposed that the President

". . . and a convenient number of the National Judiciary, ought to compose a council of revision with authority to examine every act of the National Legislature before it shall operate, & every act of a particular Legislature before a Negative thereon shall be final; and that the dissent of the said Council shall amount to a rejection, unless the Act of the National Legislature be again passed, or that of a particular Legislature be again negatived by [original wording illegible] of the members of each branch." 1 The Records of the Federal Convention of 1787 (Farrand ed. 1911) 21.

In support of a plan of this kind James Wilson of Pennsylvania argued that:

". . . It had been said that the Judges, as expositors of the Laws would have an opportunity of defending their constitutional rights. There was weight in this observation; but this power of the Judges did not go far enough. Laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet not be so unconstitutional as to justify the Judges in refusing to give them effect. Let them have a share in the Revisionary power, and they will have an opportunity of taking notice of these characters of a law, and of counteracting, by the weight of their opinions the improper views of the Legislature." 2 *id.*, at 73.

Nathaniel Gorham of Massachusetts "did not see the advantage of employing the Judges in this way. As Judges they are not to be presumed to possess any peculiar knowledge of the mere policy of public measures." *Ibid.*

Elbridge Gerry of Massachusetts likewise opposed the proposal for a council of revision:

". . . He relied for his part on the Representatives of the people as the guardians of their Rights & interests. It [the proposal] was

Lochner v. *New York*, 198 U. S. 45, *Coppage* v. *Kansas*, 236 U. S. 1, *Jay Burns Baking Co.* v. *Bryan*, 264 U. S. 504, and *Adkins* v. *Children's Hospital*, 261 U. S. 525. The two they do cite and quote from, *Meyer* v. *Nebraska*, 262 U. S. 390, and *Pierce* v. *Society of Sisters*, 268 U. S. 510, were both decided in opinions by Mr. Justice McReynolds which elaborated the same natural law due process philosophy found in *Lochner* v. *New York*, *supra*, one of the cases on which he relied in *Meyer*, along with such other long-discredited decisions as, *e. g.*, *Adams* v. *Tanner*, 244 U. S. 590, and *Adkins* v. *Children's Hospital*, *supra*. *Meyer* held unconstitutional, as an "arbitrary" and unreasonable interference with the right of a teacher to carry on his occupation and of parents to hire him, a

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making the Expositors of the Laws, the Legislators which ought never to be done." *Id.*, at 75.

And at another point:

"Mr. Gerry doubts whether the Judiciary ought to form a part of it [the proposed council of revision], as they will have a sufficient check agst. encroachments on their own department by their exposition of the laws, which involved a power of deciding on their Constitutionality. . . . It was quite foreign from the nature of ye. office to make them judges of the policy of public measures." 1 *Id.*, at 97–98.

Madison supported the proposal on the ground that "a Check [on the legislature] is necessary." *Id.*, at 108. John Dickinson of Delaware opposed it on the ground that "the Judges must interpret the Laws they ought not to be legislators." *Ibid.* The proposal for a council of revision was defeated.

The following proposal was also advanced:

"To assist the President in conducting the Public affairs there shall be a Council of State composed of the following officers—1. The Chief Justice of the Supreme Court, who shall from time to time recommend such alterations of and additions to the laws of the U. S. as may in his opinion be necessary to the due administration of Justice, and such as may promote useful learning and inculcate sound morality throughout the Union . . . ." 2 *id.*, at 342. This proposal too was rejected.

state law forbidding the teaching of modern foreign languages to young children in the schools.[7] And in *Pierce*, relying principally on *Meyer*, Mr. Justice McReynolds said that a state law requiring that all children attend public schools interfered unconstitutionally with the property rights of private school corporations because it was an "arbitrary, unreasonable and unlawful interference" which threatened "destruction of their business and property." 268 U. S., at 536. Without expressing an opinion as to whether either of those cases reached a correct result in light of our later decisions applying the First Amendment to the States through the Fourteenth,[8] I merely point out that the reasoning stated in *Meyer* and *Pierce* was the same natural law due process philosophy which many later opinions repudiated, and which I cannot accept. Brothers WHITE and GOLDBERG also cite other cases, such as *NAACP* v. *Button*, 371 U. S. 415, *Shelton* v. *Tucker*, 364 U. S. 479, and *Schneider* v. *State*, 308 U. S. 147, which held that States in regulating conduct could not, consistently with the First Amendment as applied to them by the Fourteenth, pass unnecessarily broad laws which might indirectly infringe on First Amendment freedoms.[9] See *Brotherhood of Railroad Trainmen* v. *Virginia ex rel.*

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[7] In *Meyer*, in the very same sentence quoted in part by my Brethren in which he asserted that the Due Process Clause gave an abstract and inviolable right "to marry, establish a home and bring up children," Mr. Justice McReynolds also asserted the heretofore discredited doctrine that the Due Process Clause prevented States from interfering with "the right of the individual to contract." 262 U. S., at 399.

[8] Compare *Poe* v. *Ullman*, 367 U. S., at 543–544 (HARLAN, J., dissenting).

[9] The Court has also said that in view of the Fourteenth Amendment's major purpose of eliminating state-enforced racial discrimination, this Court will scrutinize carefully any law embodying a racial classification to make sure that it does not deny equal protection of the laws. See *McLaughlin* v. *Florida*, 379 U. S. 184.

Virginia State Bar, 377 U. S. 1, 7–8.[10] Brothers WHITE and GOLDBERG now apparently would start from this requirement that laws be narrowly drafted so as not to curtail free speech and assembly, and extend it limitlessly to require States to justify any law restricting "liberty" as my Brethren define "liberty." This would mean at the

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[10] None of the other cases decided in the past 25 years which Brothers WHITE and GOLDBERG cite can justly be read as holding that judges have power to use a natural law due process formula to strike down all state laws which they think are unwise, dangerous, or irrational. *Prince* v. *Massachusetts*, 321 U. S. 158, *upheld* a state law forbidding minors from selling publications on the streets. *Kent* v. *Dulles*, 357 U. S. 116, recognized the power of Congress to restrict travel outside the country so long as it accorded persons the procedural safeguards of due process and did not violate any other specific constitutional provision. *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, held simply that a State could not, consistently with due process, refuse a lawyer a license to practice law on the basis of a finding that he was morally unfit when there was no evidence in the record, 353 U. S., at 246–247, to support such a finding. Compare *Thompson* v. *City of Louisville*, 362 U. S. 199, in which the Court relied in part on *Schware*. See also *Konigsberg* v. *State Bar*, 353 U. S. 252. And *Bolling* v. *Sharpe*, 347 U. S. 497, merely recognized what had been the understanding from the beginning of the country, an understanding shared by many of the draftsmen of the Fourteenth Amendment, that the whole Bill of Rights, including the Due Process Clause of the Fifth Amendment, was a guarantee that all persons would receive equal treatment under the law. Compare *Chambers* v. *Florida*, 309 U. S. 227, 240–241. With one exception, the other modern cases relied on by my Brethren were decided either solely under the Equal Protection Clause of the Fourteenth Amendment or under the First Amendment, made applicable to the States by the Fourteenth, some of the latter group involving the right of association which this Court has held to be a part of the rights of speech, press and assembly guaranteed by the First Amendment. As for *Aptheker* v. *Secretary of State*, 378 U. S. 500, I am compelled to say that if that decision was written or intended to bring about the abrupt and drastic reversal in the course of constitutional adjudication which is now attributed to it, the change was certainly made in a very quiet and unprovocative manner, without any attempt to justify it.

very least, I suppose, that every state criminal statute—since it must inevitably curtail "liberty" to some extent—would be suspect, and would have to be justified to this Court.[11]

My Brother GOLDBERG has adopted the recent discovery[12] that the Ninth Amendment as well as the Due Process Clause can be used by this Court as authority to strike down all state legislation which this Court thinks

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[11] Compare *Adkins* v. *Children's Hospital*, 261 U. S. 525, 568 (Holmes, J., dissenting):

"The earlier decisions upon the same words [the Due Process Clause] in the Fourteenth Amendment began within our memory and went no farther than an unpretentious assertion of the liberty to follow the ordinary callings. Later that innocuous generality was expanded into the dogma, Liberty of Contract. Contract is not specially mentioned in the text that we have to construe. It is merely an example of doing what you want to do, embodied in the word liberty. But pretty much all law consists in forbidding men to do some things that they want to do, and contract is no more exempt from law than other acts."

[12] See Patterson, The Forgotten Ninth Amendment (1955). Mr. Patterson urges that the Ninth Amendment be used to protect unspecified "natural and inalienable rights." P. 4. The Introduction by Roscoe Pound states that "there is a marked revival of natural law ideas throughout the world. Interest in the Ninth Amendment is a symptom of that revival." P. iii.

In Redlich, Are There "Certain Rights . . . Retained by the People"?, 37 N. Y. U. L. Rev. 787, Professor Redlich, in advocating reliance on the Ninth and Tenth Amendments to invalidate the Connecticut law before us, frankly states:

"But for one who feels that the marriage relationship should be beyond the reach of a state law forbidding the use of contraceptives, the birth control case poses a troublesome and challenging problem of constitutional interpretation. He may find himself saying, 'The law is unconstitutional—but why?' There are two possible paths to travel in finding the answer. One is to revert to a frankly flexible due process concept even on matters that do not involve specific constitutional prohibitions. The other is to attempt to evolve a new constitutional framework within which to meet this and similar problems which are likely to arise." *Id.*, at 798.

violates "fundamental principles of liberty and justice," or is contrary to the "traditions and [collective] conscience of our people." He also states, without proof satisfactory to me, that in making decisions on this basis judges will not consider "their personal and private notions." One may ask how they can avoid considering them. Our Court certainly has no machinery with which to take a Gallup Poll.[13] And the scientific miracles of this age have not yet produced a gadget which the Court can use to determine what traditions are rooted in the "[collective] conscience of our people." Moreover, one would certainly have to look far beyond the language of the Ninth Amendment [14] to find that the Framers vested in this Court any such awesome veto powers over lawmaking, either by the States or by the Congress. Nor does anything in the history of the Amendment offer any support for such a shocking doctrine. The whole history of the adoption of the Constitution and Bill of Rights points the other way, and the very material quoted by my Brother GOLDBERG shows that the Ninth Amendment was intended to protect against the idea that "by enumerating particular exceptions to the grant of power" to the Federal Government, "those rights which were not singled out, were intended to be assigned into the hands of the General Government [the United States], and were con-

[13] Of course one cannot be oblivious to the fact that Mr. Gallup has already published the results of a poll which he says show that 46% of the people in this country believe schools should teach about birth control. Washington Post, May 21, 1965, p. 2, col. 1. I can hardly believe, however, that Brother GOLDBERG would view 46% of the persons polled as so overwhelming a proportion that this Court may now rely on it to declare that the Connecticut law infringes "fundamental" rights, and overrule the long-standing view of the people of Connecticut expressed through their elected representatives.

[14] U. S. Const., Amend. IX, provides:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

sequently insecure." [15] That Amendment was passed, not to broaden the powers of this Court or any other department of "the General Government," but, as every student of history knows, to assure the people that the Constitution in all its provisions was intended to limit the Federal Government to the powers granted expressly or by necessary implication. If any broad, unlimited power to hold laws unconstitutional because they offend what this Court conceives to be the "[collective] conscience of our people" is vested in this Court by the Ninth Amendment, the Fourteenth Amendment, or any other provision of the Constitution, it was not given by the Framers, but rather has been bestowed on the Court by the Court. This fact is perhaps responsible for the peculiar phenomenon that for a period of a century and a half no serious suggestion was ever made that the Ninth Amendment, enacted to protect state powers against federal invasion, could be used as a weapon of federal power to prevent state legislatures from passing laws they consider appropriate to govern local affairs. Use of any such broad, unbounded judicial authority would make of this Court's members a day-to-day constitutional convention.

I repeat so as not to be misunderstood that this Court does have power, which it should exercise, to hold laws unconstitutional where they are forbidden by the Federal Constitution. My point is that there is no provision

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[15] 1 Annals of Congress 439. See also II Story, Commentaries on the Constitution of the United States (5th ed. 1891): "This clause was manifestly introduced to prevent any perverse or ingenious misapplication of the well-known maxim, that an affirmation in particular cases implies a negation in all others; and, *e converso*, that a negation in particular cases implies an affirmation in all others. The maxim, rightly understood, is perfectly sound and safe; but it has often been strangely forced from its natural meaning into the support of the most dangerous political heresies." *Id.*, at 651 (footnote omitted).

of the Constitution which either expressly or impliedly vests power in this Court to sit as a supervisory agency over acts of duly constituted legislative bodies and set aside their laws because of the Court's belief that the legislative policies adopted are unreasonable, unwise, arbitrary, capricious or irrational. The adoption of such a loose, flexible, uncontrolled standard for holding laws unconstitutional, if ever it is finally achieved, will amount to a great unconstitutional shift of power to the courts which I believe and am constrained to say will be bad for the courts and worse for the country. Subjecting federal and state laws to such an unrestrained and unrestrainable judicial control as to the wisdom of legislative enactments would, I fear, jeopardize the separation of governmental powers that the Framers set up and at the same time threaten to take away much of the power of States to govern themselves which the Constitution plainly intended them to have.[16]

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[16] Justice Holmes in one of his last dissents, written in reply to Mr. Justice McReynolds' opinion for the Court in *Baldwin* v. *Missouri*, 281 U. S. 586, solemnly warned against a due process formula apparently approved by my concurring Brethren today. He said:

"I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable. I cannot believe that the Amendment was intended to give us *carte blanche* to embody our economic or moral beliefs in its prohibitions. Yet I can think of no narrower reason that seems to me to justify the present and the earlier decisions to which I have referred. Of course the words 'due process of law,' if taken in their literal meaning, have no application to this case; and while it is too late to deny that they have been given a much more extended and artificial signification, still we ought to remember the great caution shown by the Consti-

I realize that many good and able men have eloquently spoken and written, sometimes in rhapsodical strains, about the duty of this Court to keep the Constitution in tune with the times. The idea is that the Constitution must be changed from time to time and that this Court is charged with a duty to make those changes. For myself, I must with all deference reject that philosophy. The Constitution makers knew the need for change and provided for it. Amendments suggested by the people's elected representatives can be submitted to the people or their selected agents for ratification. That method of change was good for our Fathers, and being somewhat old-fashioned I must add it is good enough for me. And so, I cannot rely on the Due Process Clause or the Ninth Amendment or any mysterious and uncertain natural law concept as a reason for striking down this state law. The Due Process Clause with an "arbitrary and capricious" or "shocking to the conscience" formula was liberally used by this Court to strike down economic legislation in the early decades of this century, threatening, many people thought, the tranquility and stability of the Nation. See, *e. g., Lochner* v. *New York,* 198 U. S. 45. That formula, based on subjective considerations of "natural justice," is no less dangerous when used to enforce this Court's views about personal rights than those about economic rights. I had thought that we had laid that formula, as a means for striking down state legislation, to rest once and for all in cases like *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379; *Olsen* v. *Nebraska ex rel. Western Reference & Bond Assn.,* 313 U. S. 236, and many other

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tution in limiting the power of the States, and should be slow to construe the clause in the Fourteenth Amendment as committing to the Court, with no guide but the Court's own discretion, the validity of whatever laws the States may pass." 281 U. S., at 595. See 2 Holmes-Pollock Letters (Howe ed. 1941) 267–268.

opinions.[17] See also *Lochner* v. *New York,* 198 U. S. 45, 74 (Holmes, J., dissenting).

In *Ferguson* v. *Skrupa,* 372 U. S. 726, 730, this Court two years ago said in an opinion joined by all the Justices but one [18] that

> "The doctrine that prevailed in *Lochner, Coppage, Adkins, Burns,* and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws."

And only six weeks ago, without even bothering to hear argument, this Court overruled *Tyson & Brother* v. *Banton,* 273 U. S. 418, which had held state laws regulating ticket brokers to be a denial of due process of law.[19] *Gold*

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[17] *E. g.,* in *Day-Brite Lighting, Inc.* v. *Missouri,* 342 U. S. 421, 423, this Court held that "Our recent decisions make plain that we do not sit as a superlegislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare." Compare *Gardner* v. *Massachusetts,* 305 U. S. 559, which the Court today apparently overrules, which held that a challenge under the Federal Constitution to a state law forbidding the sale or furnishing of contraceptives did not raise a substantial federal question.

[18] Brother HARLAN, who has consistently stated his belief in the power of courts to strike down laws which they consider arbitrary or unreasonable, see, *e. g., Poe* v. *Ullman,* 367 U. S. 497, 539–555 (dissenting opinion), did not join the Court's opinion in *Ferguson* v. *Skrupa.*

[19] Justice Holmes, dissenting in *Tyson,* said:

"I think the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain." 273 U. S., at 446.

v. *DiCarlo*, 380 U. S. 520. I find April's holding hard to square with what my concurring Brethren urge today. They would reinstate the *Lochner, Coppage, Adkins, Burns* line of cases, cases from which this Court recoiled after the 1930's, and which had been I thought totally discredited until now. Apparently my Brethren have less quarrel with state economic regulations than former Justices of their persuasion had. But any limitation upon their using the natural law due process philosophy to strike down any state law, dealing with any activity whatever, will obviously be only self-imposed.[20]

In 1798, when this Court was asked to hold another Connecticut law unconstitutional, Justice Iredell said:

> "[I]t has been the policy of all the *American* states, which have, individually, framed their state constitutions since the revolution, and of the people of the *United States*, when they framed the Federal Constitution, to define with precision the objects of the legislative power, and to restrain its exercise within marked and settled boundaries. If any act of Congress, or of the Legislature of a state, violates those constitutional provisions, it is unquestionably void; though, I admit, that as the authority to declare it void is of a delicate and awful nature, the Court will never resort to that authority, but in a clear and urgent case. If, on the other hand, the Legislature of the Union, or the Legislature of any member of the Union, shall pass a law, within the

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[20] Compare *Nicchia* v. *New York*, 254 U. S. 228, 231, upholding a New York dog-licensing statute on the ground that it did not "deprive dog owners of liberty without due process of law." And as I said concurring in *Rochin* v. *California*, 342 U. S. 165, 175, "I believe that faithful adherence to the specific guarantees in the Bill of Rights insures a more permanent protection of individual liberty than that which can be afforded by the nebulous standards" urged by my concurring Brethren today.

> general scope of their constitutional power, the Court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject; and all that the Court could properly say, in such an event, would be, that the Legislature (possessed of an equal right of opinion) had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice." *Calder* v. *Bull,* 3 Dall. 386, 399 (emphasis in original).

I would adhere to that constitutional philosophy in passing on this Connecticut law today. I am not persuaded to deviate from the view which I stated in 1947 in *Adamson* v. *California,* 332 U. S. 46, 90–92 (dissenting opinion):

> "Since *Marbury* v. *Madison,* 1 Cranch 137, was decided, the practice has been firmly established, for better or worse, that courts can strike down legislative enactments which violate the Constitution. This process, of course, involves interpretation, and since words can have many meanings, interpretation obviously may result in contraction or extension of the original purpose of a constitutional provision, thereby affecting policy. But to pass upon the constitutionality of statutes by looking to the particular standards enumerated in the Bill of Rights and other parts of the Constitution is one thing; to invalidate statutes because of application of 'natural law' deemed to be above and undefined by the Constitution is another. 'In the one instance, courts proceeding within clearly marked constitutional boundaries seek to execute policies written into the Constitution; in the other, they roam at will in the limit-

> less area of their own beliefs as to reasonableness and actually select policies, a responsibility which the Constitution entrusts to the legislative representatives of the people.' *Federal Power Commission* v. *Pipeline Co.*, 315 U. S. 575, 599, 601, n. 4." [21] (Footnotes omitted.)

The late Judge Learned Hand, after emphasizing his view that judges should not use the due process formula suggested in the concurring opinions today or any other formula like it to invalidate legislation offensive to their "personal preferences," [22] made the statement, with which I fully agree, that:

> "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I

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[21] *Gideon* v. *Wainwright*, 372 U. S. 335, and similar cases applying specific Bill of Rights provisions to the States do not in my view stand for the proposition that this Court can rely on its own concept of "ordered liberty" or "shocking the conscience" or natural law to decide what laws it will permit state legislatures to enact. *Gideon* in applying to state prosecutions the Sixth Amendment's guarantee of right to counsel followed *Palko* v. *Connecticut*, 302 U. S. 319, which had held that specific provisions of the Bill of Rights, rather than the Bill of Rights as a whole, would be selectively applied to the States. While expressing my own belief (not shared by MR. JUSTICE STEWART) that all the provisions of the Bill of Rights were made applicable to the States by the Fourteenth Amendment, in my dissent in *Adamson* v. *California*, 332 U. S. 46, 89, I also said:

"If the choice must be between the selective process of the *Palko* decision applying some of the Bill of Rights to the States, or the *Twining* rule applying none of them, I would choose the *Palko* selective process."

Gideon and similar cases merely followed the *Palko* rule, which in *Adamson* I agreed to follow if necessary to make Bill of Rights safeguards applicable to the States. See also *Pointer* v. *Texas*, 380 U. S. 400; *Malloy* v. *Hogan*, 378 U. S. 1.

[22] Hand, The Bill of Rights (1958) 70. See note 5, *supra*. See generally *id.*, at 35–45.

> knew how to choose them, which I assuredly do not." [23]

So far as I am concerned, Connecticut's law as applied here is not forbidden by any provision of the Federal Constitution as that Constitution was written, and I would therefore affirm.

MR. JUSTICE STEWART, whom MR. JUSTICE BLACK joins, dissenting.

Since 1879 Connecticut has had on its books a law which forbids the use of contraceptives by anyone. I think this is an uncommonly silly law. As a practical matter, the law is obviously unenforceable, except in the oblique context of the present case. As a philosophical matter, I believe the use of contraceptives in the relationship of marriage should be left to personal and private choice, based upon each individual's moral, ethical, and religious beliefs. As a matter of social policy, I think professional counsel about methods of birth control should be available to all, so that each individual's choice can be meaningfully made. But we are not asked in this case to say whether we think this law is unwise, or even asinine. We are asked to hold that it violates the United States Constitution. And that I cannot do.

In the course of its opinion the Court refers to no less than six Amendments to the Constitution: the First, the Third, the Fourth, the Fifth, the Ninth, and the Four-

[23] *Id.*, at 73. While Judge Hand condemned as unjustified the invalidation of state laws under the natural law due process formula, see *id.*, at 35–45, he also expressed the view that this Court in a number of cases had gone too far in holding legislation to be in violation of specific guarantees of the Bill of Rights. Although I agree with his criticism of use of the due process formula, I do not agree with all the views he expressed about construing the specific guarantees of the Bill of Rights.

teenth. But the Court does not say which of these Amendments, if any, it thinks is infringed by this Connecticut law.

We *are* told that the Due Process Clause of the Fourteenth Amendment is not, as such, the "guide" in this case. With that much I agree. There is no claim that this law, duly enacted by the Connecticut Legislature, is unconstitutionally vague. There is no claim that the appellants were denied any of the elements of procedural due process at their trial, so as to make their convictions constitutionally invalid. And, as the Court says, the day has long passed since the Due Process Clause was regarded as a proper instrument for determining "the wisdom, need, and propriety" of state laws. Compare *Lochner* v. *New York,* 198 U. S. 45, with *Ferguson* v. *Skrupa,* 372 U. S. 726. My Brothers HARLAN and WHITE to the contrary, "[w]e have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Ferguson* v. *Skrupa, supra,* at 730.

As to the First, Third, Fourth, and Fifth Amendments, I can find nothing in any of them to invalidate this Connecticut law, even assuming that all those Amendments are fully applicable against the States.[1] It has

[1] The Amendments in question were, as everyone knows, originally adopted as limitations upon the power of the newly created Federal Government, not as limitations upon the powers of the individual States. But the Court has held that many of the provisions of the first eight amendments are fully embraced by the Fourteenth Amendment as limitations upon state action, and some members of the Court have held the view that the adoption of the Fourteenth Amendment made every provision of the first eight amendments fully applicable against the States. See *Adamson* v. *California,* 332 U. S. 46, 68 (dissenting opinion of MR. JUSTICE BLACK).

not even been argued that this is a law "respecting an establishment of religion, or prohibiting the free exercise thereof." [2] And surely, unless the solemn process of constitutional adjudication is to descend to the level of a play on words, there is not involved here any abridgment of "the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." [3] No soldier has been quartered in any house.[4] There has been no search, and no seizure.[5] Nobody has been compelled to be a witness against himself.[6]

The Court also quotes the Ninth Amendment, and my Brother GOLDBERG'S concurring opinion relies heavily upon it. But to say that the Ninth Amendment has anything to do with this case is to turn somersaults with history. The Ninth Amendment, like its companion the Tenth, which this Court held "states but a truism that all is retained which has not been surrendered," *United States* v. *Darby*, 312 U. S. 100, 124, was framed by James Madison and adopted by the States simply to make clear that the adoption of the Bill of Rights did not alter the plan that

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[2] U. S. Constitution, Amendment I. To be sure, the injunction contained in the Connecticut statute coincides with the doctrine of certain religious faiths. But if that were enough to invalidate a law under the provisions of the First Amendment relating to religion, then most criminal laws would be invalidated. See, *e. g.*, the Ten Commandments. The Bible, Exodus 20:2–17 (King James).

[3] U. S. Constitution, Amendment I. If all the appellants had done was to advise people that they thought the use of contraceptives was desirable, or even to counsel their use, the appellants would, of course, have a substantial First Amendment claim. But their activities went far beyond mere advocacy. They prescribed specific contraceptive devices and furnished patients with the prescribed contraceptive materials.

[4] U. S. Constitution, Amendment III.

[5] U. S. Constitution, Amendment IV.

[6] U. S. Constitution, Amendment V.

the *Federal* Government was to be a government of express and limited powers, and that all rights and powers not delegated to it were retained by the people and the individual States. Until today no member of this Court has ever suggested that the Ninth Amendment meant anything else, and the idea that a federal court could ever use the Ninth Amendment to annul a law passed by the elected representatives of the people of the State of Connecticut would have caused James Madison no little wonder.

What provision of the Constitution, then, does make this state law invalid? The Court says it is the right of privacy "created by several fundamental constitutional guarantees." With all deference, I can find no such general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court.[7]

At the oral argument in this case we were told that the Connecticut law does not "conform to current community standards." But it is not the function of this Court to decide cases on the basis of community standards. We are here to decide cases "agreeably to the Constitution and laws of the United States." It is the essence of judicial

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[7] Cases like *Shelton* v. *Tucker*, 364 U. S. 479 and *Bates* v. *Little Rock*, 361 U. S. 516, relied upon in the concurring opinions today, dealt with true First Amendment rights of association and are wholly inapposite here. See also, *e. g.*, *NAACP* v. *Alabama*, 357 U. S. 449; *Edwards* v. *South Carolina*, 372 U. S. 229. Our decision in *McLaughlin* v. *Florida*, 379 U. S. 184, is equally far afield. That case held invalid under the Equal Protection Clause, a state criminal law which discriminated against Negroes.

The Court does not say how far the new constitutional right of privacy announced today extends. See, *e. g.*, Mueller, Legal Regulation of Sexual Conduct, at 127; Ploscowe, Sex and the Law, at 189. I suppose, however, that even after today a State can constitutionally still punish at least some offenses which are not committed in public.

duty to subordinate our own personal views, our own ideas of what legislation is wise and what is not. If, as I should surely hope, the law before us does not reflect the standards of the people of Connecticut, the people of Connecticut can freely exercise their true Ninth and Tenth Amendment rights to persuade their elected representatives to repeal it. That is the constitutional way to take this law off the books.[8]

[8] See *Reynolds* v. *Sims*, 377 U. S. 533, 562. The Connecticut House of Representatives recently passed a bill (House Bill No. 2462) repealing the birth control law. The State Senate has apparently not yet acted on the measure, and today is relieved of that responsibility by the Court. New Haven Journal-Courier, Wed., May 19, 1965, p. 1, col. 4, and p. 13, col. 7.

ESTES *v.* TEXAS.

CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS.

No. 256. Argued April 1, 1965.—Decided June 7, 1965.

Petitioner had been indicted by a Texas county grand jury for swindling. Massive pretrial publicity had given the case national notoriety. On the trial date, following a change of venue, a hearing commenced on petitioner's motion to prevent telecasting, radio broadcasting, and news photography. The hearing, conducted in the presence of some trial witnesses and veniremen later released, was carried live on television and radio, and news photography was permitted. The original jury panel, petitioner, counsel, and the trial judge were highly publicized during the two days the pretrial hearing lasted, emphasizing throughout the community the notorious character that the trial would take. Four of the jurors selected later at the trial had seen or heard all or part of the broadcasts. The profusion of cameramen with their equipment in various parts of the crowded courtroom caused considerable disruption. The trial court denied petitioner's motion but granted a continuance of almost a month. During the interim a booth was erected in the rear of the courtroom to which television cameramen and equipment were restricted. Live telecasting was prohibited during most of the actual trial. The State's opening and closing arguments were carried live with sound (though because of mechanical difficulty there was no picture of the former), as were the return of the jury's verdict and its receipt by the judge. The court's order allowed videotapes without sound of the whole proceeding and the cameras operated intermittently during the three-day trial, which ended with petitioner's conviction. Film clips of the trial were shown largely on regularly scheduled news programs. Both the trial court and the appellate court rejected petitioner's claim of denial of due process in violation of the Fourteenth Amendment by the televising and broadcasting of the trial. *Held:* The televising over petitioner's objections of the courtroom proceedings of petitioner's criminal trial, in which there was widespread public interest, was inherently invalid as infringing the fundamental right to a fair trial guaranteed by the Due Process Clause of the Fourteenth Amendment. Pp. 536–552.

(a) The high degree of publicity given to the two-day hearing, which could only have impressed those present and the community

at large with the notorious character of the petitioner and the proceeding, made what occurred at the pretrial relevant to determining whether petitioner was accorded due process at his trial. Pp. 536–537.

(b) The constitutional guarantee of a public trial is to ensure that the accused is fairly dealt with and not unjustly condemned. Pp. 538–539.

(c) The freedom granted to the press under the First Amendment must be subject to the maintenance of absolute fairness in the judicial process; and in the present state of television techniques such freedom does not confer the right to use equipment in the courtroom which might jeopardize a fair trial, the atmosphere for which must be preserved at all costs. Pp. 539–540.

(d) The public's right to be informed about court proceedings is satisfied if reporters are free to attend and to report on the proceedings through their respective media. Pp. 541–542.

(e) Where, as here, the procedure employed by the State involves the probability that prejudice to the accused will result, that procedure, in line with the principle established in such cases as *Rideau* v. *Louisiana,* 373 U. S. 723, will be deemed lacking in due process whether or not isolatable prejudice can be demonstrated. Pp. 542–544.

(f) There are numerous respects in which televising court proceedings may alone, and in combination almost certainly will, cause unfairness, such as: (1) improperly influencing jurors by emphasizing the notoriety of the trial and affecting their impartial judgment, distracting their attention, facilitating (in States which do not sequester jurors) their viewing of selected parts of the proceedings, and improperly influencing potential jurors and thus jeopardizing the fairness of new trials; (2) impairing the testimony of witnesses, as by causing some to be frightened and others to overstate their testimony, and generally influencing the testimony of witnesses, thus frustrating invocation of the "rule" against witnesses; (3) distracting judges generally and exercising an adverse psychological effect particularly upon those who are elected; and (4) imposing pressures upon the defendant and intruding into the confidential attorney-client relationship. Pp. 544–550.

(g) The foregoing factors are not merely "hypothetical," as is evidenced by the bar on television in federal criminal trials imposed by the Federal Rules of Criminal Procedure and by such a bar in all but two States. P. 550.

(h) Application of the rule of the *Rideau* case, *supra,* is clearly warranted by the facts of this case. Pp. 550–552.

Reversed.

John D. Cofer and *Hume Cofer* argued the cause and filed a brief for petitioner.

Waggoner Carr, Attorney General of Texas, and *Leon Jaworski,* Special Assistant Attorney General, argued the cause for respondent. With them on the brief were *Hawthorne Phillips, Stanton Stone, Howard M. Fender* and *Gilbert J. Pena,* Assistant Attorneys General, and *Alton F. Curry,* Special Assistant Attorney General.

Briefs of *amici curiae,* urging reversal, were filed by *Whitney North Seymour, Richmond C. Coburn* and *John H. Yauch* for the American Bar Association, and by *Norman Dorsen* and *Melvin L. Wulf* for the American Civil Liberties Union et al.

Briefs of *amici curiae,* urging affirmance, were filed by *Davis Grant* for the State Bar of Texas, joined by *Duke W. Dunbar,* Attorney General of Colorado; and by *Douglas A. Anello, W. Theodore Pierson* and *Harold David Cohen* for the National Association of Broadcasters et al.

MR. JUSTICE CLARK delivered the opinion of the Court.*

The question presented here is whether the petitioner, who stands convicted in the District Court for the Seventh Judicial District of Texas at Tyler for swindling,[1] was

*MR. JUSTICE HARLAN concurs in this opinion subject to the reservations and to the extent indicated in his concurring opinion, *post,* p. 587.

[1] The evidence indicated that petitioner, through false pretenses and fraudulent representations, induced certain farmers to purchase fertilizer tanks and accompanying equipment, which in fact did not exist, and to sign and deliver to him chattel mortgages on the fictitious property.

deprived of his right under the Fourteenth Amendment to due process by the televising and broadcasting of his trial. Both the trial court and the Texas Court of Criminal Appeals found against the petitioner. We hold to the contrary and reverse his conviction.

I.

While petitioner recites his claim in the framework of Canon 35 of the Judicial Canons of the American Bar Association he does not contend that we should enshrine Canon 35 in the Fourteenth Amendment, but only that the time-honored principles of a fair trial were not followed in his case and that he was thus convicted without due process of law. Canon 35, of course, has of itself no binding effect on the courts but merely expresses the view of the Association in opposition to the broadcasting, televising and photographing of court proceedings. Likewise, Judicial Canon 28 of the Integrated State Bar of Texas, 27 Tex. B. J. 102 (1964), which leaves to the trial judge's sound discretion the telecasting and photographing of court proceedings, is of itself not law. In short, the question here is not the validity of either Canon 35 of the American Bar Association or Canon 28 of the State Bar of Texas, but only whether petitioner was tried in a manner which comports with the due process requirement of the Fourteenth Amendment.

Petitioner's case was originally called for trial on September 24, 1962, in Smith County after a change of venue from Reeves County, some 500 miles west. Massive pretrial publicity totaling 11 volumes of press clippings, which are on file with the Clerk, had given it national notoriety. All available seats in the courtroom were taken and some 30 persons stood in the aisles. However, at that time a defense motion to prevent telecasting, broadcasting by radio and news photography and a defense motion for continuance were presented, and after a two-day hearing the former was denied and the latter granted.

These initial hearings were carried live by both radio and television, and news photography was permitted throughout. The videotapes of these hearings clearly illustrate that the picture presented was not one of that judicial serenity and calm to which petitioner was entitled. Cf. *Wood* v. *Georgia,* 370 U. S. 375, 383 (1962); *Turner* v. *Louisiana,* 379 U. S. 466, 472 (1965); *Cox* v. *Louisiana,* 379 U. S. 559, 562 (1965). Indeed, at least 12 cameramen were engaged in the courtroom throughout the hearing taking motion and still pictures and televising the proceedings. Cables and wires were snaked across the courtroom floor, three microphones were on the judge's bench and others were beamed at the jury box and the counsel table. It is conceded that the activities of the television crews and news photographers led to considerable disruption of the hearings. Moreover, veniremen had been summoned and were present in the courtroom during the entire hearing but were later released after petitioner's motion for continuance had been granted. The court also had the names of the witnesses called; some answered but the absence of others led to a continuance of the case until October 22, 1962. It is contended that this two-day pretrial hearing cannot be considered in determining the question before us. We cannot agree. Pretrial can create a major problem for the defendant in a criminal case. Indeed, it may be more harmful than publicity during the trial for it may well set the community opinion as to guilt or innocence. Though the September hearings dealt with motions to prohibit television coverage and to postpone the trial, they are unquestionably relevant to the issue before us. All of this two-day affair was highly publicized and could only have impressed those present, and also the community at large, with the notorious character of the petitioner as well as the proceeding. The trial witnesses present at the hearing, as well as the original jury panel, were un-

doubtedly made aware of the peculiar public importance of the case by the press and television coverage being provided, and by the fact that they themselves were televised live and their pictures rebroadcast on the evening show.

When the case was called for trial on October 22 the scene had been altered. A booth had been constructed at the back of the courtroom which was painted to blend with the permanent structure of the room. It had an aperture to allow the lens of the cameras an unrestricted view of the courtroom. All television cameras and newsreel photographers were restricted to the area of the booth when shooting film or telecasting.

Because of continual objection, the rules governing live telecasting, as well as radio and still photos, were changed as the exigencies of the situation seemed to require. As a result, live telecasting was prohibited during a great portion of the actual trial. Only the opening [2] and closing arguments of the State, the return of the jury's verdict and its receipt by the trial judge were carried live with sound. Although the order allowed videotapes of the entire proceeding without sound, the cameras operated only intermittently, recording various portions of the trial for broadcast on regularly scheduled newscasts later in the day and evening. At the request of the petitioner, the trial judge prohibited coverage of any kind, still or television, of the defense counsel during their summations to the jury.

Because of the varying restrictions placed on sound and live telecasting the telecasts of the trial were confined largely to film clips shown on the stations' regularly scheduled news programs. The news commentators would use the film of a particular part of the day's trial activities as a backdrop for their reports. Their commen-

[2] Due to mechanical difficulty there was no picture during the opening argument.

tary included excerpts from testimony and the usual reportorial remarks. On one occasion the videotapes of the September hearings were rebroadcast in place of the "late movie."

II.

In *Rideau* v. *Louisiana*, 373 U. S. 723 (1963), this Court constructed a rule that the televising of a defendant in the act of confessing to a crime was inherently invalid under the Due Process Clause of the Fourteenth Amendment even without a showing of prejudice or a demonstration of the nexus between the televised confession and the trial. See *id.*, at 729 (dissenting opinion of CLARK, J.). Here, although there was nothing so dramatic as a home-viewed confession, there had been a bombardment of the community with the sights and sounds of a two-day hearing during which the original jury panel, the petitioner, the lawyers and the judge were highly publicized. The petitioner was subjected to characterization and minute electronic scrutiny to such an extent that at one point the photographers were found attempting to picture the page of the paper from which he was reading while sitting at the counsel table. The two-day hearing and the order permitting television at the actual trial were widely known throughout the community. This emphasized the notorious character that the trial would take and, therefore, set it apart in the public mind as an extraordinary case or, as Shaw would say, something "not conventionally unconventional." When the new jury was empaneled at the trial four of the jurors selected had seen and heard all or part of the broadcasts of the earlier proceedings.

III.

We start with the proposition that it is a "public trial" that the Sixth Amendment guarantees to the "accused." The purpose of the requirement of a public trial was to guarantee that the accused would be fairly dealt with and

not unjustly condemned. History had proven that secret tribunals were effective instruments of oppression. As our Brother BLACK so well said in *In re Oliver*, 333 U. S. 257 (1948):

> "The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the *lettre de cachet*. . . . Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution." At 268–270. (Footnotes omitted.)

It is said, however, that the freedoms granted in the First Amendment extend a right to the news media to televise from the courtroom, and that to refuse to honor this privilege is to discriminate between the newspapers and television. This is a misconception of the rights of the press.

The free press has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences, including court proceedings. While maximum freedom must be allowed the press in carrying on this important function in a democratic society its exercise must necessarily be subject to the maintenance of absolute fairness in the judicial process. While the state and federal courts have differed over what spectators may be excluded from a criminal trial, 6 Wigmore, Evidence § 1834 (3d ed. 1940), the *amici curiae* brief of the National Association of Broadcasters and the Radio Television News Directors Association, says, as indeed it must, that "neither of these two amendments [First and Sixth] speaks of an unlim-

ited right of access to the courtroom on the part of the broadcasting media . . . ." At 7. Moreover, they recognize that the "primary concern of all must be the proper administration of justice"; that "the life or liberty of any individual in this land should not be put in jeopardy because of actions of any news media"; and that "the due process requirements in both the Fifth and Fourteenth Amendments and the provisions of the Sixth Amendment require a procedure that will assure a fair trial . . . ." At 3–4.

Nor can the courts be said to discriminate where they permit the newspaper reporter access to the courtroom. The television and radio reporter has the same privilege. All are entitled to the same rights as the general public. The news reporter is not permitted to bring his typewriter or printing press. When the advances in these arts permit reporting by printing press or by television without their present hazards to a fair trial we will have another case.

IV.

Court proceedings are held for the solemn purpose of endeavoring to ascertain the truth which is the *sine qua non* of a fair trial. Over the centuries Anglo-American courts have devised careful safeguards by rule and otherwise to protect and facilitate the performance of this high function. As a result, at this time those safeguards do not permit the televising and photographing of a criminal trial, save in two States and there only under restrictions. The federal courts prohibit it by specific rule. This is weighty evidence that our concepts of a fair trial do not tolerate such an indulgence. We have always held that the atmosphere essential to the preservation of a fair trial—the most fundamental of all freedoms—must be maintained at all costs. Our approach has been through rules, contempt proceedings and reversal of convictions obtained under unfair conditions. Here the remedy is

clear and certain of application and it is our duty to continue to enforce the principles that from time immemorial have proven efficacious and necessary to a fair trial.

V.

The State contends that the televising of portions of a criminal trial does not constitute a denial of due process. Its position is that because no prejudice has been shown by the petitioner as resulting from the televising, it is permissible; that claims of "distractions" during the trial due to the physical presence of television are wholly unfounded; and that psychological considerations are for psychologists, not courts, because they are purely hypothetical. It argues further that the public has a right to know what goes on in the courts; that the court has no power to "suppress, edit, or censor events which transpire in proceedings before it," citing *Craig* v. *Harney*, 331 U. S. 367, 374 (1947); and that the televising of criminal trials would be enlightening to the public and would promote greater respect for the courts.

At the outset the notion should be dispelled that telecasting is dangerous because it is new. It is true that our empirical knowledge of its full effect on the public, the jury or the participants in a trial, including the judge, witnesses and lawyers, is limited. However, the nub of the question is not its newness but, as MR. JUSTICE DOUGLAS says, "the insidious influences which it puts to work in the administration of justice." Douglas, The Public Trial and the Free Press, 33 Rocky Mt. L. Rev. 1 (1960). These influences will be detailed below, but before turning to them the State's argument that the public has a right to know what goes on in the courtroom should be dealt with.

It is true that the public has the right to be informed as to what occurs in its courts, but reporters of all media, including television, are always present if they wish to be

and are plainly free to report whatever occurs in open court through their respective media. This was settled in *Bridges* v. *California,* 314 U. S. 252 (1941), and *Pennekamp* v. *Florida,* 328 U. S. 331 (1946), which we reaffirm. These reportorial privileges of the press were stated years ago:

> "The law, however, favors publicity in legal proceedings, so far as that object can be attained without injustice to the persons immediately concerned. The public are permitted to attend nearly all judicial inquiries, and there appears to be no sufficient reason why they should not also be allowed to see in print the reports of trials, if they can thus have them presented as fully as they are exhibited in court, or at least all the material portion of the proceedings impartially stated, so that one shall not, by means of them, derive erroneous impressions, which he would not have been likely to receive from hearing the trial itself." 2 Cooley's Constitutional Limitations 931–932 (Carrington ed. 1927).

The State, however, says that the use of television in the instant case was "without injustice to the person immediately concerned," basing its position on the fact that the petitioner has established no isolatable prejudice and that this must be shown in order to invalidate a conviction in these circumstances. The State paints too broadly in this contention, for this Court itself has found instances in which a showing of actual prejudice is not a prerequisite to reversal. This is such a case. It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due

process. Such a case was *In re Murchison,* 349 U. S. 133 (1955), where MR. JUSTICE BLACK for the Court pointed up with his usual clarity and force:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the *probability* of unfairness. . . . [T]o perform its high function in the best way 'justice must satisfy the appearance of justice.' *Offutt* v. *United States,* 348 U. S. 11, 14." At 136. (Emphasis supplied.)

And, as Chief Justice Taft said in *Tumey* v. *Ohio,* 273 U. S. 510, almost 30 years before:

> "the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a *possible* temptation to the average man . . . to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." At 532. (Emphasis supplied.)

This rule was followed in *Rideau, supra,* and in *Turner* v. *Louisiana,* 379 U. S. 466 (1965). In each of these cases the Court departed from the approach it charted in *Stroble* v. *California,* 343 U. S. 181 (1952), and in *Irvin* v. *Dowd,* 366 U. S. 717 (1961), where we made a careful examination of the facts in order to determine whether prejudice resulted. In *Rideau* and *Turner* the Court did not stop to consider the actual effect of the practice but struck down the conviction on the ground that prejudice was inherent in it. Likewise in *Gideon* v. *Wainwright,*

372 U. S. 335 (1963), and *White* v. *Maryland,* 373 U. S. 59 (1963), we applied the same rule, although in different contexts.

In this case it is even clearer that such a rule must be applied. In *Rideau, Irvin* and *Stroble,* the pretrial publicity occurred outside the courtroom and could not be effectively curtailed. The only recourse other than reversal was by contempt proceedings. In *Turner* the probability of prejudice was present through the use of deputy sheriffs, who were also witnesses in the case, as shepherds for the jury. No prejudice was shown but the circumstances were held to be inherently suspect, and, therefore, such a showing was not held to be a requisite to reversal. Likewise in this case the application of this principle is especially appropriate. Television in its present state and by its very nature, reaches into a variety of areas in which it may cause prejudice to an accused. Still one cannot put his finger on its specific mischief and prove with particularity wherein he was prejudiced. This was found true in *Murchison, Tumey, Rideau* and *Turner.* Such untoward circumstances as were found in those cases are inherently bad and prejudice to the accused was presumed. Forty-eight of our States and the Federal Rules have deemed the use of television improper in the courtroom. This fact is most telling in buttressing our conclusion that any change in procedure which would permit its use would be inconsistent with our concepts of due process in this field.

VI.

As has been said, the chief function of our judicial machinery is to ascertain the truth. The use of television, however, cannot be said to contribute materially to this objective. Rather its use amounts to the injection of an irrelevant factor into court proceedings. In addition experience teaches that there are numerous situations

in which it might cause actual unfairness—some so subtle as to defy detection by the accused or control by the judge. We enumerate some in summary:

1. The potential impact of television on the jurors is perhaps of the greatest significance. They are the nerve center of the fact-finding process. It is true that in States like Texas where they are required to be sequestered in trials of this nature the jurors will probably not see any of the proceedings as televised from the courtroom. But the inquiry cannot end there. From the moment the trial judge announces that a case will be televised it becomes a *cause célèbre*. The whole community, including prospective jurors, becomes interested in all the morbid details surrounding it. The approaching trial immediately assumes an important status in the public press and the accused is highly publicized along with the offense with which he is charged. Every juror carries with him into the jury box these solemn facts and thus increases the chance of prejudice that is present in every criminal case. And we must remember that realistically it is only the notorious trial which will be broadcast, because of the necessity for paid sponsorship. The conscious or unconscious effect that this may have on the juror's judgment cannot be evaluated, but experience indicates that it is not only possible but highly probable that it will have a direct bearing on his vote as to guilt or innocence. Where pretrial publicity of all kinds has created intense public feeling which is aggravated by the telecasting or picturing of the trial the televised jurors cannot help but feel the pressures of knowing that friends and neighbors have their eyes upon them. If the community be hostile to an accused a televised juror, realizing that he must return to neighbors who saw the trial themselves, may well be led "not to hold the balance nice, clear and true between the State and the accused . . . ."

Moreover, while it is practically impossible to assess the effect of television on jury attentiveness, those of us who know juries realize the problem of jury "distraction." The State argues this is *de minimis* since the physical disturbances have been eliminated. But we know that distractions are not caused solely by the physical presence of the camera and its telltale red lights. It is the awareness of the fact of telecasting that is felt by the juror throughout the trial. We are all self-conscious and uneasy when being televised. Human nature being what it is, not only will a juror's eyes be fixed on the camera, but also his mind will be preoccupied with the telecasting rather than with the testimony.

Furthermore, in many States the jurors serving in the trial may see the broadcasts of the trial proceedings. Admittedly, the Texas sequestration rule would prevent this occurring there.[3] In other States following no such practice jurors would return home and turn on the TV if only to see how they appeared upon it. They would also be subjected to re-enactment and emphasis of the selected parts of the proceedings which the requirements of the broadcasters determined would be telecast and would be subconsciously influenced the more by that testimony. Moreover, they would be subjected to the broadest commentary and criticism and perhaps the well-meant advice of friends, relatives and inquiring strangers who recognized them on the streets.

Finally, new trials plainly would be jeopardized in that potential jurors will often have seen and heard the original trial when it was telecast. Yet viewers may later

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[3] Only six States, in addition to Texas, require sequestration of the jury prior to its deliberations in a non-capital felony trial. The great majority of jurisdictions leave the matter to the trial judge's discretion, while in at least one State the jury will be kept together in such circumstances only upon a showing of cause by the defendant.

be called upon to sit in the jury box during the new trial. These very dangers are illustrated in this case where the court, due to the defendant's objections, permitted only the State's opening and closing arguments to be broadcast with sound to the public.

2. The quality of the testimony in criminal trials will often be impaired. The impact upon a witness of the knowledge that he is being viewed by a vast audience is simply incalculable. Some may be demoralized and frightened, some cocky and given to overstatement; memories may falter, as with anyone speaking publicly, and accuracy of statement may be severely undermined. Embarrassment may impede the search for the truth, as may a natural tendency toward overdramatization. Furthermore, inquisitive strangers and "cranks" might approach witnesses on the street with jibes, advice or demands for explanation of testimony. There is little wonder that the defendant cannot "prove" the existence of such factors. Yet we all know from experience that they exist.

In addition the invocation of the rule against witnesses is frustrated. In most instances witnesses would be able to go to their homes and view broadcasts of the day's trial proceedings, notwithstanding the fact that they had been admonished not to do so. They could view and hear the testimony of preceding witnesses, and so shape their own testimony as to make its impact crucial. And even in the absence of sound, the influences of such viewing on the attitude of the witness toward testifying, his frame of mind upon taking the stand or his apprehension of withering cross-examination defy objective assessment. Indeed, the mere fact that the trial is to be televised might render witnesses reluctant to appear and thereby impede the trial as well as the discovery of the truth.

While some of the dangers mentioned above are present as well in newspaper coverage of any important trial, the circumstances and extraneous influences intruding upon the solemn decorum of court procedure in the televised trial are far more serious than in cases involving only newspaper coverage.

3. A major aspect of the problem is the additional responsibilities the presence of television places on the trial judge. His job is to make certain that the accused receives a fair trial. This most difficult task requires his undivided attention. Still when television comes into the courtroom he must also supervise it. In this trial, for example, the judge on several different occasions—aside from the two days of pretrial—was obliged to have a hearing or enter an order made necessary solely because of the presence of television. Thus, where telecasting is restricted as it was here, and as even the State concedes it must be, his task is made much more difficult and exacting. And, as happened here, such rulings may unfortunately militate against the fairness of the trial. In addition, laying physical interruptions aside, there is the ever-present distraction that the mere awareness of television's presence prompts. Judges are human beings also and are subject to the same psychological reactions as laymen. Telecasting is particularly bad where the judge is elected, as is the case in all save a half dozen of our States. The telecasting of a trial becomes a political weapon, which, along with other distractions inherent in broadcasting, diverts his attention from the task at hand—the fair trial of the accused.

But this is not all. There is the initial decision that must be made as to whether the use of television will be permitted. This is perhaps an even more crucial consideration. Our judges are high-minded men and women. But it is difficult to remain oblivious to the pressures that the news media can bring to bear on them both directly

and through the shaping of public opinion. Moreover, where one judge in a district or even in a State permits telecasting, the requirement that the others do the same is almost mandatory. Especially is this true where the judge is selected at the ballot box.

4. Finally, we cannot ignore the impact of courtroom television on the defendant. Its presence is a form of mental—if not physical—harassment, resembling a police line-up or the third degree. The inevitable close-ups of his gestures and expressions during the ordeal of his trial might well transgress his personal sensibilities, his dignity, and his ability to concentrate on the proceedings before him—sometimes the difference between life and death—dispassionately, freely and without the distraction of wide public surveillance. A defendant on trial for a specific crime is entitled to his day in court, not in a stadium, or a city or nationwide arena. The heightened public clamor resulting from radio and television coverage will inevitably result in prejudice. Trial by television is, therefore, foreign to our system. Furthermore, telecasting may also deprive an accused of effective counsel. The distractions, intrusions into confidential attorney-client relationships and the temptation offered by television to play to the public audience might often have a direct effect not only upon the lawyers, but the judge, the jury and the witnesses. See Pye, The Lessons of Dallas—Threats to Fair Trial and Free Press, National Civil Liberties Clearing House, 16th Annual Conference.

The television camera is a powerful weapon. Intentionally or inadvertently it can destroy an accused and his case in the eyes of the public. While our telecasters are honorable men, they too are human. The necessity for sponsorship weighs heavily in favor of the televising of only notorious cases, such as this one, and invariably focuses the lens upon the unpopular or infamous

accused. Such a selection is necessary in order to obtain a sponsor willing to pay a sufficient fee to cover the costs and return a profit. We have already examined the ways in which public sentiment can affect the trial participants. To the extent that television shapes that sentiment, it can strip the accused of a fair trial.

The State would dispose of all these observations with the simple statement that they are for psychologists because they are purely hypothetical. But we cannot afford the luxury of saying that, because these factors are difficult of ascertainment in particular cases, they must be ignored. Nor are they "purely hypothetical." They are no more hypothetical than were the considerations deemed controlling in *Tumey, Murchison, Rideau* and *Turner*. They are real enough to have convinced the Judicial Conference of the United States, this Court and the Congress that television should be barred in federal trials by the Federal Rules of Criminal Procedure; in addition they have persuaded all but two of our States to prohibit television in the courtroom. They are effects that may, and in some combination almost certainly will, exist in any case in which television is injected into the trial process.

VII.

The facts in this case demonstrate clearly the necessity for the application of the rule announced in *Rideau*. The sole issue before the court for two days of pretrial hearing was the question now before us. The hearing was televised live and repeated on tape in the same evening, reaching approximately 100,000 viewers. In addition, the courtroom was a mass of wires, television cameras, microphones and photographers. The petitioner, the panel of prospective jurors, who were sworn the second day, the witnesses and the lawyers were all exposed to this untoward situation. The judge decided that the trial

proceedings would be telecast. He announced no restrictions at the time. This emphasized the notorious nature of the coming trial, increased the intensity of the publicity on the petitioner and together with the subsequent televising of the trial beginning 30 days later inherently prevented a sober search for the truth. This is underscored by the fact that the selection of the jury took an entire week. As might be expected, a substantial amount of that time was devoted to ascertaining the impact of the pretrial televising on the prospective jurors. As we have noted, four of the jurors selected had seen all or part of those broadcasts. The trial, on the other hand, lasted only three days.

Moreover, the trial judge was himself harassed. After the initial decision to permit telecasting he apparently decided that a booth should be built at the broadcasters' expense to confine its operations; he then decided to limit the parts of the trial that might be televised live; then he decided to film the testimony of the witnesses without sound in an attempt to protect those under the rule; and finally he ordered that defense counsel and their argument not be televised, in the light of their objection. Plagued by his original error—recurring each day of the trial—his day-to-day orders made the trial more confusing to the jury, the participants and to the viewers. Indeed, it resulted in a public presentation of only the State's side of the case.

As Mr. Justice Holmes said in *Patterson* v. *Colorado,* 205 U. S. 454, 462 (1907):

> "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."

It is said that the ever-advancing techniques of public communication and the adjustment of the public to its

presence may bring about a change in the effect of telecasting upon the fairness of criminal trials. But we are not dealing here with future developments in the field of electronics. Our judgment cannot be rested on the hypothesis of tomorrow but must take the facts as they are presented today.

The judgment is therefore

Reversed.

MR. CHIEF JUSTICE WARREN, whom MR. JUSTICE DOUGLAS and MR. JUSTICE GOLDBERG join, concurring.

While I join the Court's opinion and agree that the televising of criminal trials is inherently a denial of due process, I desire to express additional views on why this is so. In doing this, I wish to emphasize that our condemnation of televised criminal trials is not based on generalities or abstract fears. The record in this case presents a vivid illustration of the inherent prejudice of televised criminal trials and supports our conclusion that this is the appropriate time to make a definitive appraisal of television in the courtroom.

I.

Petitioner, a much-publicized financier, was indicted by a Reeves County, Texas, grand jury for obtaining property through false pretenses. The case was transferred to the City of Tyler, in Smith County, Texas, and was set for trial on September 24, 1962. Prior to that date petitioner's counsel informed the trial judge that he would make a motion on September 24 to exclude all cameras from the courtroom during the trial.

On September 24, a hearing was held to consider petitioner's motion to prohibit television, motion pictures, and still photography at the trial. The courtroom was filled with newspaper reporters and cameramen, television cameramen, and spectators. At least 12 cameramen with

their equipment were seen by one observer, and there were 30 or more people standing in the aisles. An article appearing in the New York Times the next day stated:

> "A television motor van, big as an intercontinental bus, was parked outside the courthouse and the second-floor courtroom was a forest of equipment. Two television cameras had been set up inside the bar and four more marked cameras were aligned just outside the gates. . . . [C]ables and wires snaked over the floor." [1]

With photographers roaming at will through the courtroom, petitioner's counsel made his motion that all cameras be excluded. As he spoke, a cameraman wandered behind the judge's bench and snapped his picture. Counsel argued that the presence of cameras would make it difficult for him to consult with his client, make his client ill at ease, and make it impossible to obtain a fair trial since the cameras would distract the jury, witnesses and lawyers. He also expressed the view that televising selected cases tends to give the jury an impression that the particular trial is different from ordinary criminal trials. The court, however, ruled that the taking of pictures and televising would be allowed so long as the cameramen stood outside the railing that separates the trial participants from the spectators. The court also ruled that if a complaint was made that any camera was too noisy, the cameramen would have to stop taking pictures; that no pictures could be taken in the corridors outside the courtroom; and that those with microphones were not to pick up conversations between petitioner and his lawyers. Subsequent to the court's ruling petitioner arrived in the courtroom,[2] and the defense introduced tes-

[1] N. Y. Times, Sept. 25, 1962, p. 46, col. 4. See Appendix, Photographs 1, 2, 3.

[2] Counsel explained to the trial court that he desired to protect petitioner from the cameras until the court had made its ruling.

timony concerning the atmosphere in the court on that day. At the conclusion of the day's hearing the judge reasserted his earlier ruling. He then ordered a roll call of the prosecution witnesses, at least some of whom had been in the courtroom during the proceedings.

The entire hearing on September 24 was televised live by station KLTV of Tyler, Texas, and station WFAA–TV of Dallas, Texas. Commercials were inserted when there was a pause in the proceedings. On the evening of Monday, September 24, both stations ran an edited tape of the day's proceedings and interrupted the tape to play the commercials ordinarily seen in the particular time slot. In addition to the live television coverage there was also a live radio pickup of the proceedings by at least one station.

The proceedings continued on September 25. There was again a significant number of cameramen taking motion pictures, still pictures and television pictures. The judge once more ordered cameramen to stay on the other side of the railing and stated that this order was to be observed even during court recesses. The panel from which the petit jury was to be selected was then sworn in the presence of the cameramen. The panel was excused to permit counsel to renew his motion to prohibit photography in the courtroom. The court denied the motion, but granted a continuance of trial until October 22 and dismissed the jury panel. At the suggestion of petitioner's counsel the trial judge warned the prosecution witnesses who were present not to discuss the case during the continuance. The proceedings were televised live and portions of the television tape were shown on the regularly scheduled evening news programs. Live radio transmission apparently occurred as on the day before.

On October 1, 1962, the trial judge issued an order explaining what coverage he would permit during the trial. The judge delivered the order in his chambers for the

benefit of television cameramen so that they could film him. The judge ruled that although he would permit television cameras to be present during the trial, they would not be permitted to present live coverage of the interrogation of prospective jurors or the testimony of witnesses. He ruled that each of the three major television networks, NBC, CBS, ABC, and the local television station KLTV could install one camera not equipped to pick up sound and the film would be available to other television stations on a pooled basis. In addition, he ruled that with respect to news photographers only cameramen for the local press, Associated Press, and United Press would be permitted in the courtroom. Photographs taken were also to be made available to others on a pooled basis. The judge did not explain how he decided which television cameramen and which still photographers were to be permitted in the courtroom and which were to be excluded.

For the proceedings beginning on October 22, station KLTV, at its own expense, and with the permission of the court, had constructed a booth in the rear of the courtroom painted the same or near the same color as the courtroom. An opening running lengthwise across the booth permitted the four television cameras to photograph the proceedings. The courtroom was small and the cameras were clearly visible to all in the courtroom.[3] The cameras were equipped with "electronic sound on camera" which permitted them to take both film and sound. Upon entering the courtroom the judge told all those with television cameras to go back to the booth; asked the press photographers not to move around any more than necessary; ordered that no flashbulbs or floodlights be used; and again told cameramen that they could not go inside the railing. Defense counsel renewed his motion

[3] See Appendix, Photograph 6.

to ban all "sound equipment . . . still cameras, movie cameras and television; and all radio facilities" from the courtroom. Witnesses were again called on this issue, but at the conclusion of the hearing the trial judge reaffirmed his prior ruling to permit cameramen in the courtroom. In response to petitioner's argument that his rights under the Constitution of the United States were being violated, the judge remarked that the "case [was] not being tried under the Federal Constitution."

None of the proceedings on October 22 was televised live. Television cameras, however, recorded the day's entire proceedings with sound for later showings. Apparently none of the October 22 proceedings was carried live on radio, although the proceedings were recorded on tape. The still photographers admitted by the court were free to take photographs from outside the railing.

On October 23 the selection of the jury began. Overnight an additional strip had been placed across the television booth so that the opening for the television cameras was reduced, but the cameras and their operators were still quite visible.[4] A panel of 86 prospective jurors was ready for the *voir dire*. The judge excused the jurors from the courtroom and made still another ruling on news coverage at the trial. He ordered the television recording to proceed from that point on without an audio pickup, and, in addition, forbade radio tapes of any further proceedings until all the evidence had been introduced. During the course of the trial the television cameras recorded without sound whatever matters appeared interesting to them for use on later newscasts; radio broadcasts in the form of spot reports were made from a room next to the courtroom. There was no live television or radio coverage until November 7 when the trial judge permitted live coverage of the prosecution's

[4] See Appendix, Photograph 7.

arguments to the jury, the return of the jury's verdict and its acceptance by the court. Since the defense objected to being photographed during the summation, the judge prohibited television cameramen or still photographers from taking any pictures of the defense during its argument. But the show went on, and while the defense was speaking the cameras were directed at the judge and the arguments were monitored by audio equipment and relayed to the television audience by an announcer. On November 7 the judge, for the first time, directed news photographers desiring to take pictures to take them only from the back of the room. Up until this time the trial judge's orders merely limited news photographers to the spectator section.

II.

The decision below affirming petitioner's conviction runs counter to the evolution of Anglo-American criminal procedure over a period of centuries. During that time the criminal trial has developed from a ritual practically devoid of rational justification [5] to a fact-finding process, the acknowledged purpose of which is to provide a fair and reliable determination of guilt.[6]

An element of rationality was introduced into the guilt-determining process in England over 600 years ago when a rudimentary trial by jury became "the principal institution for criminal cases." [7] Initially members of the jury were expected to make their own examinations of the cases they were to try and come to court already familiar

[5] Jenks, A Short History of English Law 46–47 (6th ed. 1949); I Stephen, A History of the Criminal Law of England 51–74 (1883).

[6] See, *e. g.*, *Craig* v. *Harney*, 331 U. S. 367, 378; *Irvin* v. *Dowd*, 366 U. S. 717, 728; *Brady* v. *Maryland*, 373 U. S. 83, 87; *Jackson* v. *Denno*, 378 U. S. 368, 391.

[7] See *Singer* v. *United States*, 380 U. S. 24, 27.

with the facts,[8] which made it impossible to limit the jury's determination to legally relevant evidence. Gradually, however, the jury was transformed from a panel of witnesses to a panel of triers passing on evidence given by others in the courtroom.[9] The next step was to insure the independence of the jury, and this was accomplished by the decision in the case of *Edward Bushell,* 6 How. St. Tr. 999 (1670), which put an end to the practice of fining or otherwise punishing jury members who failed to reach the decision directed by the court. As the purpose of trial as a vehicle for discovering the truth became clearer, it was recognized that the defendant should have the right to call witnesses and to place them under oath,[10] to be informed of the charges against him before the trial,[11] and to have counsel assist him with his defense.[12] All these protections, and others which could be cited, were part of a development by which "the administration of criminal justice was set upon a firm and dignified basis." [13]

When the colonists undertook the responsibility of governing themselves, one of their prime concerns was the establishment of trial procedures which would be consistent with the purpose of trial. The Continental Congress passed measures designed to safeguard the right to a fair trial,[14] and the various States adopted constitutional pro-

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[8] II Pollock and Maitland, The History of English Law 621–622 (2d ed. 1909).

[9] I Stephen, *supra,* note 5, at 260.

[10] See 7 Will. 3, c. 3 (1695).

[11] *Ibid.*

[12] *Ibid.;* 6 & 7 Will. 4, c. 114 (1836).

[13] I Stephen, *supra,* note 5, at 427.

[14] I Journals of the Continental Congress 1774–1789, 69 (Ford ed. 1904).

visions directed to the same end.[15] Eventually the Sixth Amendment incorporated into the Constitution certain provisions dealing with the conduct of trials:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Significantly, in the Sixth Amendment the words "speedy and public" qualify the term *trial* and the rest of the Amendment defines specific protections the accused is to have at his *trial.* Thus, the Sixth Amendment, by its own terms, not only requires that the accused have certain specific rights but also that he enjoy them at a *trial*—a word with a meaning of its own, see *Bridges* v. *California,* 314 U. S. 252, 271.

The Fourteenth Amendment which places limitations on the States' administration of their criminal laws also gives content to the term *trial.* Whether the Sixth Amendment as a whole applies to the States through the Fourteenth,[16] or the Fourteenth Amendment embraces only those portions of the Sixth Amendment that are "fundamental," [17] or the Fourteenth Amendment incorporates a standard of "ordered liberty" apart from the

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[15] Radin, The Right to a Public Trial, 6 Temple L. Q. 381, 383, n. 5a (1932).

[16] *Adamson* v. *California,* 332 U. S. 46, 71–72 (dissenting opinion of MR. JUSTICE BLACK).

[17] *Gideon* v. *Wainwright,* 372 U. S. 335, 342.

specific guarantees of the Bill of Rights,[18] it has been recognized that state prosecutions must, at the least, comport with "the fundamental conception" of a fair *trial.*[19]

It has been held on one or another of these theories that the fundamental conception of a fair trial includes many of the specific provisions of the Sixth Amendment, such as the right to have the proceedings open to the public, *In re Oliver,* 333 U. S. 257; the right to notice of specific charges, *Cole* v. *Arkansas,* 333 U. S. 196; the right to confrontation, *Pointer* v. *Texas,* 380 U. S. 400; *Douglas* v. *Alabama,* 380 U. S. 415; and the right to counsel, *Gideon* v. *Wainwright,* 372 U. S. 335. But it also has been agreed that neither the Sixth nor the Fourteenth Amendment is to be read formalistically, for the clear intent of the amendments is that these specific rights be enjoyed at a constitutional trial. In the words of Justice Holmes, even though "every form [be] preserved," the forms may amount to no "more than an empty shell" when considered in the context or setting in which they were actually applied.[20]

In cases arising from state prosecutions this Court has acted to prevent the right to a constitutional trial from being reduced to a formality by the intrusion of factors into the trial process that tend to subvert its purpose. The Court recognized in *Pennekamp* v. *Florida,* 328 U. S.

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[18] *Pointer* v. *Texas,* 380 U. S. 400, 408 (opinion of MR. JUSTICE HARLAN, concurring in the result).

[19] *Cox* v. *Louisiana,* 379 U. S. 559, 562; *Frank* v. *Mangum,* 237 U. S. 309, 347 (dissenting opinion of Justice Holmes). See *Adamson* v. *California,* 332 U. S. 46, 53; *In re Murchison,* 349 U. S. 133, 136; *Irvin* v. *Dowd,* 366 U. S. 717, 722; *Jackson* v. *Denno,* 378 U. S. 368, 377 (Court opinion), 424 (dissenting opinion of MR. JUSTICE CLARK), 428 (dissenting opinion of MR. JUSTICE HARLAN).

[20] *Frank* v. *Mangum,* 237 U. S. 309, 346 (dissenting opinion).

331, 334, that the "orderly operation of courts" is "the primary and dominant requirement in the administration of justice." And, in *Moore* v. *Dempsey,* 261 U. S. 86, 90–91, it was held that the atmosphere in and around the courtroom might be so hostile as to interfere with the trial process, even though an examination of the record disclosed that all the forms of trial conformed to the requirements of law: the defendant had counsel, the jury members stated they were impartial, the jury was correctly charged, and the evidence was legally sufficient to convict. Moreover, in *Irvin* v. *Dowd,* 366 U. S. 717, a conviction was reversed where extensive pretrial publicity rendered a fair trial unlikely despite the observance of the formal requisites of a legal trial. We commented in that case:

> "No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father." *Id.,* at 728.

To recognize that disorder can convert a trial into a ritual without meaning is not to pay homage to order as an end in itself. Rather, it recognizes that the courtroom in Anglo-American jurisprudence is more than a location with seats for a judge, jury, witnesses, defendant, prosecutor, defense counsel and public observers; the setting that the courtroom provides is itself an important element in the constitutional conception of trial, contributing a dignity essential to "the integrity of the trial" process. *Craig* v. *Harney,* 331 U. S. 367, 377. As MR. JUSTICE BLACK said, in another context: "The very purpose of a court system is to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the courtroom according to legal procedures." [21] In light of this fundamental conception of what the term *trial*

[21] *Cox* v. *Louisiana,* 379 U. S. 559, 583 (dissenting opinion).

means, this Court has recognized that often, despite widespread, hostile publicity about a case, it is possible to conduct a trial meeting constitutional standards. Significantly, in each of these cases, the basic premise behind the Court's conclusion has been the notion that judicial proceedings can be conducted with dignity and integrity so as to shield the trial process itself from these irrelevant, external factors, rather than to aggravate them as here. Thus, in reversing contempt convictions for out-of-court statements, this Court referred to "the power of courts to protect themselves from disturbances and disorder *in the court room*," *Bridges* v. *California,* 314 U. S. 252, 266 (emphasis added); "the necessity for fair adjudication, free from interruption of its processes," *Pennekamp* v. *Florida,* 328 U. S. 331, 336; "the integrity of the trial," *Craig* v. *Harney,* 331 U. S. 367, 377. And, in upholding a conviction against a claim of unfavorable publicity, this Court commented "that petitioner's trial was conducted in a calm judicial manner," *Darcy* v. *Handy,* 351 U. S. 454, 463.

Similarly, when state procedures have been found to thwart the purpose of trial this Court has declared those procedures to be unconstitutional. In *Tumey* v. *Ohio,* 273 U. S. 510, the Court considered a state procedure under which judges were paid for presiding over a case only if the defendant was found guilty and costs assessed against him. An argument was made that the practice should not be condemned broadly, since some judges undoubtedly would not let their judgment be affected by such an arrangement. However, the Court found the procedure so inconsistent with the conception of what a trial should be and so likely to produce prejudice that it declared the practice unconstitutional even though no specific prejudice was shown.

In *Lyons* v. *Oklahoma,* 322 U. S. 596, this Court stated that if an involuntary confession is introduced into evi-

dence at a state trial the conviction must be reversed, even though there is other evidence in the record to justify a verdict of guilty. We explained the rationale behind this judgment in *Payne* v. *Arkansas,* 356 U. S. 560, 568:

> "[W]here . . . a coerced confession constitutes a part of the evidence before the jury and a general verdict is returned, no one can say what credit and weight the jury gave to the confession."

Similar reasoning led to the decision last Term in *Jackson* v. *Denno,* 378 U. S. 368. We held there that when the voluntariness of a confession is at issue there must be a procedure adopted which provides "a reliable and clear-cut determination of . . . voluntariness." *Id.,* at 391. We found insufficient a procedure whereby the jury heard the confession but was instructed to disregard it if the jury found the confession involuntary:

> "[T]he New York procedure poses substantial threats to a defendant's constitutional rights to have an involuntary confession entirely disregarded and to have the coercion issue fairly and reliably determined. These hazards we cannot ignore." *Id.,* at 389.

Earlier this Term, in *Turner* v. *Louisiana,* 379 U. S. 466, we considered a case in which deputy sheriffs, who were the prosecution's principal witnesses, were in charge of a sequestered jury during the trial. The Supreme Court of Louisiana criticized the practice but said that in the absence of a showing of prejudice there was no ground for reversal. We reversed because the "extreme prejudice inherent" in the practice required its condemnation on constitutional grounds.

Finally, the Court has on numerous other occasions reversed convictions, where the formalities of trial were

observed, because of practices that negate the fundamental conception of trial.[22]

This line of cases does not indicate a disregard for the position of the States in our federal system. Rather, it stands for the proposition that the criminal trial under our Constitution has a clearly defined purpose, to provide a fair and reliable determination of guilt, and no procedure or occurrence which seriously threatens to divert it from that purpose can be tolerated.

III.

For the Constitution to have vitality, this Court must be able to apply its principles to situations that may not have been foreseen at the time those principles were adopted. As was said in *Weems* v. *United States,* 217 U. S. 349, 373, and reaffirmed in *Brown* v. *Board of Education,* 347 U. S. 483, 492–493:

> "Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. . . . In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by prece-

[22] See *Mooney* v. *Holohan,* 294 U. S. 103; *Alcorta* v. *Texas,* 355 U. S. 28; *Napue* v. *Illinois,* 360 U. S. 264; and *Brady* v. *Maryland,* 373 U. S. 83.

> dent into impotent and lifeless formulas. Rights declared in words might be lost in reality."

I believe that it violates the Sixth Amendment for federal courts and the Fourteenth Amendment for state courts to allow criminal trials to be televised to the public at large. I base this conclusion on three grounds: (1) that the televising of trials diverts the trial from its proper purpose in that it has an inevitable impact on all the trial participants; (2) that it gives the public the wrong impression about the purpose of trials, thereby detracting from the dignity of court proceedings and lessening the reliability of trials; and (3) that it singles out certain defendants and subjects them to trials under prejudicial conditions not experienced by others.

I have attempted to show that our common-law heritage, our Constitution, and our experience in applying that Constitution have committed us irrevocably to the position that the criminal trial has one well-defined purpose—to provide a fair and reliable determination of guilt. In *Tumey* v. *Ohio, supra*, at 532, this Court condemned the procedure there employed for compensating judges because it offered a "possible temptation" to judges "not to hold the balance nice, clear and true between the State and the accused." How much more harmful is a procedure which not only offers the temptation to judges to use the bench as a vehicle for their own ends, but offers the same temptation to every participant in the trial, be he defense counsel, prosecutor, witness or juror! It is not necessary to speak in the abstract on this point. In the present case, on October 1, the trial judge invited the television cameras into his chambers so they could take films of him reading one of his pretrial orders. On this occasion, at least, the trial judge clearly took the initiative in placing himself before the television audience and in giving his order, and himself, the maximum possible publicity. Moreover, on October 22, when trial counsel re-

newed his motion to exclude television from the courtroom on the ground that it violated petitioner's rights under the Federal Constitution, the trial judge made the following speech:

> "This case is not being tried under the Federal Constitution. This Defendant has been brought into this Court under the state laws, under the State Constitution.
>
> . . . . .
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> "I took an oath to uphold this Constitution; not the Federal Constitution but the State Constitution; and I am going to do my best to do that as long as I preside on this Court, and if it is distasteful in following my oath and upholding the constitution, it will just have to be distasteful."

One is entitled to wonder if such a statement would be made in a court of justice by any state trial judge except as an appeal calculated to gain the favor of his viewing audience. I find it difficult to believe that this trial judge, with over 20 years' experience on the bench, was unfamiliar with the fundamental duty imposed on him by Article VI of the Constitution of the United States:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

This is not to say that all participants in the trial would distort it by deliberately playing to the television audience, but some undoubtedly would. The even more serious danger is that neither the judge, prosecutor, defense counsel, jurors or witnesses would be able to go

through trial without considering the effect of their conduct on the viewing public. It is admitted in dissent that "if the scene at the September hearing had been repeated in the courtroom during this jury trial, it is difficult to conceive how a fair trial in the constitutional sense could have been afforded the defendant." *Post,* p. 612. But it is contended that what went on at the September hearing is irrelevant to the issue before us. With this I cannot agree. We granted certiorari to consider whether petitioner was denied due process when he was required to submit to a televised trial. In this, as in other cases involving rights under the Due Process Clause, we have an obligation to make an independent examination of the record, *e. g., Watts* v. *Indiana,* 338 U. S. 49, 51; *Norris* v. *Alabama,* 294 U. S. 587, 590; and the limited grant of certiorari does not prohibit us from considering all the facts in this record relevant to the question before us. The parties to this case, and those who filed briefs as *amici curiae,* recognize this, since they treat the televising of the September proceedings as a factor relevant to our consideration. Our decisions in *White* v. *Maryland,* 373 U. S. 59, and *Hamilton* v. *Alabama,* 368 U. S. 52, clearly hold that an accused is entitled to procedural protections at pretrial hearings as well as at actual trial and his conviction will be reversed if he is not accorded these protections. In addition, in *Pointer* v. *Texas,* 380 U. S. 400, we held that a pretrial hearing can have a profound effect on the trial itself and effectively prevent an accused from having a fair trial. Petitioner clearly did not have a fair determination of his motion to exclude cameras from the courtroom. The very presence of the cameras at the September hearing tended to impress upon the trial judge the power of the communications media and the criticism to which he would have been subjected if he had ruled that the presence of the cameras was inconsistent with petitioner's right to a fair trial. The prejudice to peti-

tioner did not end here. Most of the trial participants were present at the September hearing—the judge, defense counsel, prosecutor, prosecution witnesses and defendant himself—and they saw for themselves the desecration of the courtroom. After undergoing this experience it is unrealistic to suppose that they would come to the October trial unaware that court procedures were being sacrificed in this case for the convenience of television. The manner in which the October proceedings were conducted only intensified this awareness. It was impossible for any of the trial participants ever to be unaware of the presence of television cameras in court for the actual trial.[23] The snouts of the four television cameras protruded through the opening in the booth, and the cameras and their operators were not only readily visible but were impossible to ignore by all who were surveying the activities in this small courtroom. No one could forget that he was constantly in the focus of the "all-seeing eye." Although the law of Texas purportedly permits witnesses to object to being televised, it is ludicrous to place this burden on them. They would naturally accept the conditions of the courtroom as the judge establishes them, and feel that it would be as presumptuous for them to object to the court's permitting television as to object to the court reporter's recording their testimony. Yet, it is argued that no witnesses objected to being televised. This is indeed a slender reed to rely on, particularly in view of the trial judge's failure, in the course of his self-exculpating statements justifying his decision to allow television, to advise the witnesses or the jurors that they had the right to object to being televised. Defense counsel, however, stated forcefully that he could not concentrate on the case because of the distraction caused by the cameras. And the trial judge's atten-

[23] See Appendix, Photograph 7.

tion was distracted from the trial since he was compelled to make seven extensive rulings concerning television coverage during the October proceedings alone, when he should, instead, have been concentrating on the trial itself.

It is common knowledge that "television . . . can . . . work profound changes in the behavior of the people it focuses on." [24] The present record provides ample support for scholars who have claimed that awareness that a trial is being televised to a vast, but unseen audience, is bound to increase nervousness and tension,[25] cause an in-

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[24] Keating, "Not 'Bonanza,' Not 'Peyton Place,' But the U. S. Senate," N. Y. Times Magazine, April 25, 1965, 67, 72. See, *e. g.*, N. Y. Times, April 22, 1965, p. 43, col. 2 (in describing a televised stockholders' meeting the Times reported, "Some stockholders seemed very much aware they were on camera"); Tinkham, Should Canon 35 Be Amended? A Question of Proper Judicial Administration, 42 A. B. A. J. 843, 845 (1956) (in giving examples of how people react when they know they are on television, the author describes the reactions of a television audience when the camera was turned on it as "contorted, grimacing"); Gould, N. Y. Times, March 11, 1956, § 2, p. X 11, col. 2 ("The most experienced performers in show business know the horrors of stage fright before they go on TV. This psychological and emotional burden must not be placed on a layman whose testimony may have a bearing on whether, in a murder trial, another human being is to live or die.").

[25] See, *e. g.*, Douglas, The Public Trial and the Free Press, 46 A. B. A. J. 840, 842 (1960). In *United States* v. *Kleinman,* 107 F. Supp. 407 (D. C. D. C. 1952), the court refused to hold in contempt witnesses in a congressional hearing who refused to answer questions while television cameras were focused on them. The court stated:

"The only reason for having a witness on the stand, either before a committee of Congress or before a court, is to get a thoughtful, calm, considered and, it is to be hoped, truthful disclosure of facts. That is not always accomplished, even under the best of circumstances. But at least the atmosphere of the forum should lend itself to that end.

"In the cases now to be decided, the stipulation of facts discloses that there were, in close proximity to the witness, television cameras, newsreel cameras, news photographers with their concomitant flashbulbs, radio microphones, a large and crowded hearing room with

creased concern about appearances,[26] and bring to the surface latent opportunism that the traditional dignity of the courtroom would discourage. Whether they do so consciously or subconsciously, all trial participants act differently in the presence of television cameras. And, even if all participants make a conscientious and studied effort to be unaffected by the presence of television, this effort in itself prevents them from giving their full attention to their proper functions at trial. Thus, the evil of televised trials, as demonstrated by this case, lies not in the noise and appearance of the cameras, but in the trial participants' awareness that they are being televised. To the extent that television has such an inevitable impact it undercuts the reliability of the trial process.

In the early days of this country's development, the entertainment a trial might provide often tended to obfuscate its proper role.

> "The people thought holding court one of the greatest performances in the range of their experience. . . . The country folks would crowd in for ten miles to hear these 'great lawyers' plead; and it was a secondary matter with the client whether he won or lost his case, so the 'pleading' was loud and long." [27]

> "In early frontier America, when no motion pictures, no television, and no radio provided entertain-

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spectators standing along the walls, etc. The obdurate stand taken by these two defendants must be viewed in the context of all these conditions. The concentration of all of these elements seems to me necessarily so to disturb and distract any witness to the point that he might say today something that next week he will realize was erroneous. And the mistake could get him in trouble all over again." *Id.*, at 408.

[26] See, *e. g.*, Douglas, *supra*, note 25, at 842; Yesawich, Televising and Broadcasting Trials, 37 Cornell L. Q. 701, 717 (1952).

[27] Wigmore, A Kaleidoscope of Justice 487 (1941).

> ment, trial day in the county was like fair day, and from near and far citizens young and old converged on the county seat. The criminal trial was the theater and *spectaculum* of old rural America. Applause and cat calls were not infrequent. All too easily lawyers and judges became part-time actors at the bar . . . ." [28]

I had thought that these days of frontier justice were long behind us, but the courts below would return the theater to the courtroom.

The televising of trials would cause the public to equate the trial process with the forms of entertainment regularly seen on television and with the commercial objectives of the television industry. In the present case, tapes of the September 24 hearing were run in place of the "Tonight Show" by one station and in place of the late night movie by another. Commercials for soft drinks, soups, eyedrops and seatcovers were inserted when there was a pause in the proceedings. In addition, if trials were televised there would be a natural tendency on the part of broadcasters to develop the personalities of the trial participants, so as to give the proceedings more of an element of drama. This tendency was noticeable in the present case. Television commentators gave the viewing audience a homey, flattering sketch about the trial judge, obviously to add an extra element of viewer appeal to the trial:

> "Tomorrow morning at 9:55 the WFAA T. V. cameras will be in Tyler to telecast live [the trial judge's] decision whether or not he will permit live coverage of the Billie Sol Estes trial. If so, this will be the first such famous national criminal proceeding to be televised in its entirety live. [The trial judge]

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[28] Mueller, Problems Posed by Publicity to Crime and Criminal Proceedings, 110 U. Pa. L. Rev. 1, 6 (1961).

> was appointed to the bench here in Tyler in 1942 by [the Governor]. The judge has served every two years since then. This *very* beautiful Smith County Courthouse was built and dedicated in 1954, but before that [the trial judge] had made a reputation for himself that reached not only throughout Texas, but throughout the United States as well. It is said that [the trial judge], who is now 53 years old, has tried more cases than any other judge during his time in office."

The television industry might also decide that the bare-boned trial itself does not contain sufficient drama to sustain an audience. It might provide expert commentary on the proceedings and hire persons with legal backgrounds to anticipate possible trial strategy, as the football expert anticipates plays for his audience. The trial judge himself stated at the September hearing that if he wanted to see a ball game he would turn on his television set, so why not the same for a trial.

Moreover, should television become an accepted part of the courtroom, greater sacrifices would be made for the benefit of broadcasters. In the present case construction of a television booth in the courtroom made it necessary to alter the physical layout of the courtroom and to move from their accustomed position two benches reserved for spectators.[29] If this can be done in order better to accommodate the television industry, I see no reason why another court might not move a trial to a theater, if such a move would provide improved television coverage. Our memories are short indeed if we have already forgotten the wave of horror that swept over this country when Premier Fidel Castro conducted his prosecutions before 18,000 people in Havana Stadium.[30] But in the decision

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[29] Compare Appendix, Photograph 5, with Appendix, Photograph 6.

[30] N. Y. Times, Jan. 23, 1959, p. 1, col. 1.

below, which completely ignores the importance of the courtroom in the trial process, we have the beginnings of a similar approach toward criminal "justice." This is not an abstract fear I am expressing because this very situation confronted the Nebraska Supreme Court in *Roberts* v. *State,* 100 Neb. 199, 203, 158 N. W. 930, 931–932 (1916):

> "The court removed the trial from the court-room to the theater, and stated as a reason therefor: 'By reason of the insufficiency of the court-room to seat and accommodate the people applying for admission . . . it is by the court ordered that the further trial of this cause be had at the Keith Theater, and thereupon the court was adjourned to Keith Theater, where trial proceeded.' The stage was occupied by court, counsel, jury, witnesses, and officers connected with the trial. The theater proper was crowded with curious spectators. Before the trial was completed it was returned to the court-room and concluded there. At the adjournment of court on one occasion the bailiff announced from the stage: 'The regular show will be tomorrow; matinee in the afternoon and another performance at 8:30. Court is now adjourned until 7:30.'"

There would be a real threat to the integrity of the trial process if the television industry and trial judges were allowed to become partners in the staging of criminal proceedings. The trial judge in the case before us had several "conferences [with] representatives of the news media." *Post,* p. 606. He then entered into a joint enterprise with a television station for the construction of a booth in his courtroom. The next logical step in this partnership might be to schedule the trial for a time that would permit the maximum number of viewers to watch and to schedule recesses to coincide with the need for station breaks. Should the television industry become an

integral part of our system of criminal justice, it would not be unnatural for the public to attribute the shortcomings of the industry to the trial process itself. The public is aware of the television industry's consuming interest in ratings, and it is also aware of the steps that have been taken in the past to maintain viewer interest in television programs. Memories still recall vividly the scandal caused by the disclosure that quiz programs had been corrupted in order to heighten their dramatic appeal. Can we be sure that similar efforts would not be made to heighten the dramatic appeal of televised trials? Can we be sure that the public would not inherently distrust our system of justice because of its intimate association with a commercial enterprise?

Broadcasting in the courtroom would give the television industry an awesome power to condition the public mind either for or against an accused. By showing only those parts of its films or tapes which depict the defendant or his witnesses in an awkward or unattractive position, television directors could give the community, state or country a false and unfavorable impression of the man on trial. Moreover, if the case should end in a mistrial, the showing of selected portions of the trial, or even of the whole trial, would make it almost impossible to select an impartial jury for a second trial. Cf. *Rideau* v. *Louisiana,* 373 U. S. 723. To permit this powerful medium to use the trial process itself to influence the opinions of vast numbers of people, before a verdict of guilt or innocence has been rendered, would be entirely foreign to our system of justice.

The sense of fairness, dignity and integrity that all associate with the courtroom would become lost with its commercialization. Thus, the televising of trials would not only have an effect on those participating in the trials that are being televised, but also on those who observe the trials and later become trial participants.

It is argued that television not only entertains but also educates the public. But the function of a trial is not to provide an educational experience; and there is a serious danger that any attempt to use a trial as an educational tool will both divert it from its proper purpose and lead to suspicions concerning the integrity of the trial process. The Soviet Union's trial of Francis Gary Powers provides an example in point. The integrity of the trial was suspect because it was concerned not only with determining the guilt of the individual on trial but also with providing an object lesson to the public. This divided effort undercut confidence in the guilt-determining aspect of the procedure and by so doing rendered the educational aspect self-defeating.

> "Was it prejudicial to [Powers] that the trial took place in a special hall with over 2,000 spectators, that it was televised, that prominent representatives of many organizations in various countries were invited to attend, that simultaneous oral translations of the proceedings . . . were provided, and that detailed . . . reports of the case in various languages were distributed to the press before, during and after the trial?"
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> ". . . [T]he Soviet legal system . . . consciously and explicitly uses the trial, and indeed the very safeguards of justice themselves, as instruments of the social and political objectives of the state. . . .
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> ". . . A Soviet trial is supposed to be correct, impartial, just, reasonable, and at the same time it is supposed to serve as an object-lesson to society, a means of teaching the participants, the spectators and the public generally to be loyal, obedient, disciplined fighters for Communist ideals. . . .
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> ". . . [T]he tension between the demands of justice and the demands of politics can never be entirely

eliminated. The fate of the accused is bound to be influenced in one way or another when the trial is lifted above its individual facts and deliberately made an object-lesson to the public."

". . . [T]he deliberate use of a trial as a means of political education threatens the integrity of the judicial process." [31]

Finally, if the televising of criminal proceedings were approved, trials would be selected for television coverage for reasons having nothing to do with the purpose of trial. A trial might be televised because a particular judge has gained the fancy of the public by his unorthodox approach; or because the district attorney has decided to run for another office and it is believed his appearance would attract a large audience; or simply because a particular courtroom has a layout that best accommodates television coverage.[32] For the most part, however, the most important factor that would draw television to the courtroom would be the nature of the case. The alleged perpetrator of the sensational murder, the fallen idol, or some other person who, like petitioner, has attracted the public interest would find his trial turned into

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[31] Berman, Introduction to the Trial of the U 2 xiii, xii–xiii, xxix (1960).

[32] A revealing dialogue took place in the present case between defense counsel and one of the television executives present in the courtroom during the September 24 hearing.

"Q. The camera on the other side of the room has to look over a corner of the jury box and past the jurors to be aimed at the witness box, does it not?

"A. I think that is pretty clear, sir. I don't think the jurors would be in the way there.

"Q. You don't think the jurors would get in the way of your operations?

"A. I don't mean that exactly, sir."

a vehicle for television. Yet, these are the very persons who encounter the greatest difficulty in securing an impartial trial, even without the presence of television. This Court would no longer be able to point to the dignity and calmness of the courtroom as a protection from outside influences. For the television camera penetrates this protection and brings into the courtroom tangible evidence of the widespread interest in a case—an interest which has often been fanned by exhaustive reports in the newspapers, television and radio for weeks before trial. The present case presents a clear example of this danger. In the words of petitioner's counsel:

> "The Saturday Evening Post, The Readers Digest, Time, Life all had feature stories upon [petitioner's] story giving in detail his life history and the details of . . . alleged fraudulent transactions . . . .
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> "The metropolitan papers throughout the country featured the story daily. Each day for weeks the broadcasts carried some features of the story." [33]

After living in the glare of this publicity for weeks, petitioner came to court for a legal adjudication of the charges against him. As he approached the courthouse he was confronted by an army of photographers, reporters and television commentators shoving microphones in his face.[34] When he finally made his way into the courthouse it was reasonable for him to expect that he could have a respite from this merciless badgering and have his case adjudicated in a calm atmosphere. Instead, the carnival atmosphere of the September hearing served only to increase the publicity surrounding petitioner and to condition further the public's mind against him. Then, upon his entrance into the courtroom for his actual trial he was

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[33] Petition for writ of certiorari, 35a.

[34] See Appendix, Photograph 4.

confronted with the sight of the television camera zeroed in on him and the ever-present still photographers snapping pictures of interest. As he opened a newspaper waiting for the proceedings to begin, the close-up lens of a television camera zoomed over his shoulder in an effort to find out what he was reading. In no sense did the dignity and integrity of the trial process shield this petitioner from the prejudicial publicity to which he had been exposed, because that publicity marched right through the courtroom door and made itself at home in heretofore unfamiliar surroundings. We stated in *Gideon* v. *Wainwright,* 372 U. S. 335, 344, "From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law." This principle was not applied by the courts below.

I believe petitioner in this case has shown that he was actually prejudiced by the conduct of these proceedings, but I cannot agree with those who say that a televised trial deprives a defendant of a fair trial only if "actual prejudice" can be shown. The prejudice of television may be so subtle that it escapes the ordinary methods of proof,[35] but it would gradually erode our fundamental conception of trial.[36] A defendant may be unable to prove that he was actually prejudiced by a televised trial, just as he may be unable to prove that the introduction of a coerced confession at his trial influenced the jury to convict him when there was substantial evidence to support his conviction aside from the confession, *Payne* v. *Arkansas, supra;* that the jury refrained from making a

[35] See, *e. g.,* Douglas, *supra,* note 25, at 844.

[36] Cf. *Fay* v. *New York,* 332 U. S. 261, 300 (dissenting opinion of Mr. Justice Murphy).

clear-cut determination on the voluntariness question, *Jackson* v. *Denno, supra;* that a particular judge was swayed by a direct financial interest in his conviction, *Tumey* v. *Ohio, supra;* or that the jury gave additional weight to the testimony of certain prosecution witnesses because of the jury's repeated contacts with those witnesses during the trial, *Turner* v. *Louisiana, supra.* How is the defendant to prove that the prosecutor acted differently than he ordinarily would have, that defense counsel was more concerned with impressing prospective clients than with the interests of the defendant, that a juror was so concerned with how he appeared on television that his mind continually wandered from the proceedings, that an important defense witness made a bad impression on the jury because he was "playing" to the television audience, or that the judge was a little more lenient or a little more strict than he usually might be? And then, how is petitioner to show that this combination of changed attitudes diverted the trial sufficiently from its purpose to deprive him of a fair trial? It is no answer to say that an appellate court can review for itself tapes or films of the proceedings. In the first place, it is not clear that the court would be able to obtain unedited tapes or films to review. Even with the cooperation of counsel on both sides, this Court was unable to obtain films of this trial which were in any sense complete. In addition, time limitations might restrict the television companies to taking pictures only of those portions of the trial that are most newsworthy and most likely to attract the attention of the viewing audience. More importantly, the tapes or films, even if unedited, could give a wrong impression of the proceedings. The camera which takes pictures cannot take a picture of itself. In addition, the camera cannot possibly cover the actions of all trial participants during the trial. While the camera is focused on the

judge who is apparently acting properly, a juror may be glancing up to see where the camera is pointing and counsel may be looking around to see whether he can confer with his client without the close-up lens of the camera focusing on them. Needless to say, the camera cannot penetrate the minds of the trial participants and show their awareness that they may at that moment be the subject of the camera's focus. The most the camera can show is that a formally correct trial took place, but our Constitution requires more than form.

I recognize that the television industry has shown in the past that it can be an enlightening and informing institution, but like other institutions it must respect the rights of others and cannot demand that we alter fundamental constitutional conceptions for its benefit. We must take notice of the inherent unfairness of television in the courtroom and rule that its presence is inconsistent with the "fundamental conception" of what a trial should be. My conviction that this is the proper holding in this case is buttressed by the almost unanimous condemnation of televised court proceedings by the judiciary in this country and by the strong opposition to the practice by the organized bar in this country. Canon 35 of the American Bar Association's Canons of Judicial Ethics prohibits the televising of court trials.[37] With only two, or possibly three exceptions,[38] the highest court of each

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[37] The Canon provides in pertinent part:

"Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings detract from the essential dignity of the proceedings, distract participants and witnesses in giving testimony, and create misconceptions with respect thereto in the mind of the public and should not be permitted."

[38] Colorado, *In re Hearings Concerning Canon 35 of the Canons of Judicial Ethics*, 296 P. 2d 465 (Colo. Sup. Ct. 1956), and Texas

State which has considered the question has declared that televised criminal trials are inconsistent with the Anglo-American conception of "trial." [39] Similarly, Rule 53 of the Federal Rules of Criminal Procedure prohibits

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permit televising of trials in the discretion of the trial judge. The current situation in Oklahoma is unclear. In *Lyles* v. *State*, 330 P. 2d 734 (1958), the Criminal Court of Appeals of Oklahoma stated that the televising of proceedings was in the discretion of the trial judge. In 1959, however, the Supreme Court adopted a rule prohibiting television during actual proceedings. Okla. Stat. Ann., Tit. 5, at 65–66 (1963 Supp.). Nevertheless, in 1961 the court again stated that the televising of trials is a matter for the trial judge's discretion. *Cody* v. *State*, 361 P. 2d 307 (Ct. Crim. App. Okla. 1961).

[39] With the exceptions stated in note 38, *supra*, no State affirmatively permits televised trials. It has been stated that Canon 35 is in effect in 30 States. 48 J. Am. Jud. Soc. 80 (1964); Brief for Petitioner, p. 39. It is difficult to verify this figure because of the lack of uniformity among the States in reporting their court rules. However, the following States have clearly adopted Canon 35, or its equivalent: Alaska, Alaska Rules Crim. Proc. 48; Arizona, Ariz. Sup. Ct. Rule 45, 17 Ariz. Rev. Stat. Ann., at 40; Connecticut, Conn. Practice Book 27 (1963); Delaware, Del. Sup. Ct. Rule 33, 13 Del. Code Ann., at 23 (1964 Supp.) (adopted Canon 35 in its pre-1952 form, which does not explicitly prohibit television, but does prohibit "the taking of photographs" and "broadcasting of court proceedings"); Florida, Code of Ethics, Rule A35, 31 Fla. Stat. Ann., at 285 (1964 Supp.), see *Brumfield* v. *State*, 108 So. 2d 33 (Fla. Sup. Ct. 1958); Hawaii, Hawaii Sup. Ct. Rule 16, 43 Haw. 450; Illinois, 1964 Ann. Rep. of the Ill. Judicial Conference 168–169, see *People* v. *Ulrich*, 376 Ill. 461, 34 N. E. 2d 393 (1941), *People* v. *Munday*, 280 Ill. 32, 117 N. E. 286 (1917); Iowa, Iowa Sup. Ct. Rule 119, 40 Iowa Code Ann., c. 610 (1964 Supp.); Kansas, Kansas Sup. Ct. Rule 117, 191 Kan. xxiv (1963) (does not refer specifically to television); Kentucky, Ky. Ct. App. Rule 3.170, Russell's Kentucky Practice and Service 21 (1964); Louisiana, Canon of Judicial Ethics XXIII, 242 La. LI (1960); Michigan, Canon of Judicial Ethics 35, Callaghan's Michigan Pleading and Practice, Rules at 422–423 (2d ed. 1962); New Jersey, Canon of Judicial Ethics 35, 1 Waltzinger, New Jersey Practice 299 (Rev. ed. 1954); New Mexico, N. M. Sup. Ct. Rule 27, 4 N. M. Stat. Ann., at 95 (1963 Supp.); New York, N. Y. Rules of

the "broadcasting" of trials,[40] and the Judicial Conference of the United States has unanimously condemned televised trials.[41] This condemnation rests on more than notions of policy; it arises from an understanding of the

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the Administrative Board of the Judicial Conference, Rule 5, N. Y. Judiciary Law, at 320 (1964 Supp.); Ohio, 176 Ohio St. lxiv (1964), see *State* v. *Clifford*, 162 Ohio St. 370, 123 N. E. 2d 8 (1954), cert. denied, 349 U. S. 929; Tennessee, Tenn. Sup. Ct. Rule 38, 209 Tenn. 818 (1961); Virginia, 201 Va. cvii (1960) (prohibits taking of photographs and broadcasting, although it does not refer specifically to television); Washington, 61 Wash. 2d xxviii (1963); West Virginia, 141 W. Va. viii (1955).

In addition, Brand, Bar Associations, Attorneys and Judges (1956 and 1959 Supp.) reports that the Idaho Supreme Court adopted Canon 35 in its present form and the Supreme Courts of Oregon, South Dakota and Utah adopted the Canon when it merely prohibited "photographing" and "broadcasting" without specifically mentioning television. It has also been reported that the Supreme Court of Arkansas adopted Canon 35. 44 J. Am. Jud. Soc. 120 (1960).

Moreover, the Supreme Court of California assumed it was "improper" to televise criminal proceedings in *People* v. *Stroble*, 36 Cal. 2d 615, 226 P. 2d 330 (1951), affirmed 343 U. S. 181, rehearing denied 343 U. S. 952; see the rule adopted by the Conference of California Judges, 24 Cal. State Bar J. 299 (1949); the Court of Appeals of Maryland in *Ex parte Sturm*, 152 Md. 114, 122, 136 A. 312, 315 (1927), used language indicating that Maryland would probably bar television from the courtroom if faced with the problem; and the Supreme Court of Pennsylvania cited with approval Canon 35 in *Mack Appeal*, 386 Pa. 251, 257, n.5, 126 A. 2d 679, 681–682, n.4 (1956), cert. denied, 352 U. S. 1002, see 48 J. Am. Jud. Soc. 200 (1965).

[40] Rule 53 provides:

"The taking of photographs in the court room during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the court room shall not be permitted by the court."

[41] "Resolved, That the Judicial Conference of the United States condemns the taking of photographs in the courtroom or its environs in connection with any judicial proceedings, and the broadcasting of judicial proceedings by radio, television, or other means, and considers such practices to be inconsistent with fair judicial procedure

constitutional conception of the term "trial." Such a general consensus is certainly relevant to this Court's determination of the question. See *Mapp* v. *Ohio,* 367 U. S. 643, 651.

IV.

Nothing in this opinion is inconsistent with the constitutional guarantees of a public trial and the freedoms of speech and the press.

This Court explained in *In re Oliver,* 333 U. S. 257, 266, 270, that the public trial provision of the Sixth Amendment is a "guarantee to an accused" designed to "safeguard against any attempt to employ our courts as instruments of persecution." Clearly the openness of the proceedings provides other benefits as well: it arguably improves the quality of testimony, it may induce unknown witnesses to come forward with relevant testimony, it may move all trial participants to perform their duties conscientiously, and it gives the public the opportunity to observe the courts in the performance of their duties and to determine whether they are performing adequately.[42] But the guarantee of a public trial confers no special benefit on the press, the radio industry or the television industry. A public trial is a necessary component of an accused's right to a fair trial and the concept of public trial cannot be used to defend conditions which prevent the trial process from providing a fair and reliable determination of guilt.

To satisfy the constitutional requirement that trials be public it is not necessary to provide facilities large enough

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and that they ought not to be permitted in any federal court." Annual Report of the Proceedings of the Judicial Conference of the United States, March 8–9, 1962, p. 10.

[42] See, *e. g.,* 3 Blackstone, Commentaries on the Laws of England 372–373 (15th ed. 1809); 6 Wigmore, Evidence 332–335 (3d ed. 1940).

for all who might like to attend a particular trial, since to do so would interfere with the integrity of the trial process and make the publicity of trial proceedings an end in itself. Nor does the requirement that trials be public mean that observers are free to act as they please in the courtroom, for persons who attend trials cannot act in such a way as to interfere with the trial process, see *Moore* v. *Dempsey, supra.* When representatives of the communications media attend trials they have no greater rights than other members of the public. Just as an ordinary citizen might be prohibited from using field glasses or a motion picture camera in the courthouse because by so doing he would interfere with the conduct of the trial, representatives of the press and broadcasting industries are subject to similar limitations when they attend court. Since the televising of criminal trials diverts the trial process from its proper end, it must be prohibited. This prohibition does not conflict with the constitutional guarantee of a public trial, because a trial is public, in the constitutional sense, when a courtroom has facilities for a reasonable number of the public to observe the proceedings, which facilities are not so small as to render the openness negligible and not so large as to distract the trial participants from their proper function, when the public is free to use those facilities, and when all those who attend the trial are free to report what they observed at the proceedings.

Nor does the exclusion of television cameras from the courtroom in any way impinge upon the freedoms of speech and the press. Court proceedings, as well as other public matters, are proper subjects for press coverage.

> "A trial is a public event. What transpires in the court room is public property. If a transcript of the court proceedings had been published, we suppose

> none would claim that the judge could punish the publisher for contempt. And we can see no difference though the conduct of the attorneys, of the jury, or even of the judge himself, may have reflected on the court. Those who see and hear what transpired can report it with impunity. There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it." [43]

So long as the television industry, like the other communications media, is free to send representatives to trials and to report on those trials to its viewers, there is no abridgment of the freedom of press. The right of the communications media to comment on court proceedings does not bring with it the right to inject themselves into the fabric of the trial process to alter the purpose of that process.

In summary, television is one of the great inventions of all time and can perform a large and useful role in society. But the television camera, like other technological innovations, is not entitled to pervade the lives of everyone in disregard of constitutionally protected rights.[44] The television industry, like other institutions, has a proper area of activities and limitations beyond which it cannot go with its cameras. That area does not extend into an American courtroom. On entering that

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[43] *Craig* v. *Harney,* 331 U. S. 367, 374. See *Bridges* v. *California,* 314 U. S. 252; *Pennekamp* v. *Florida,* 328 U. S. 331.

[44] Compare *Olmstead* v. *United States,* 277 U. S. 438, 471 (dissenting opinion of Mr. Justice Brandeis); *On Lee* v. *United States,* 343 U. S. 747, 762 (dissenting opinion of MR. JUSTICE DOUGLAS); *Silverman* v. *United States,* 365 U. S. 505; *Lopez* v. *United States,* 373 U. S. 427, 445–446 (opinion concurring in the result), 465 (dissenting opinion of MR. JUSTICE BRENNAN).

hallowed sanctuary, where the lives, liberty and property of people are in jeopardy, television representatives have only the rights of the general public, namely, to be present, to observe the proceedings, and thereafter, if they choose, to report them.

[For opinion of HARLAN, J., concurring, see *post,* p. 587.]

PHOTOGRAPH 1. This photograph shows the activities of still and motion picture photographers at the September hearing on petitioner's motion to exclude cameras from the courtroom.

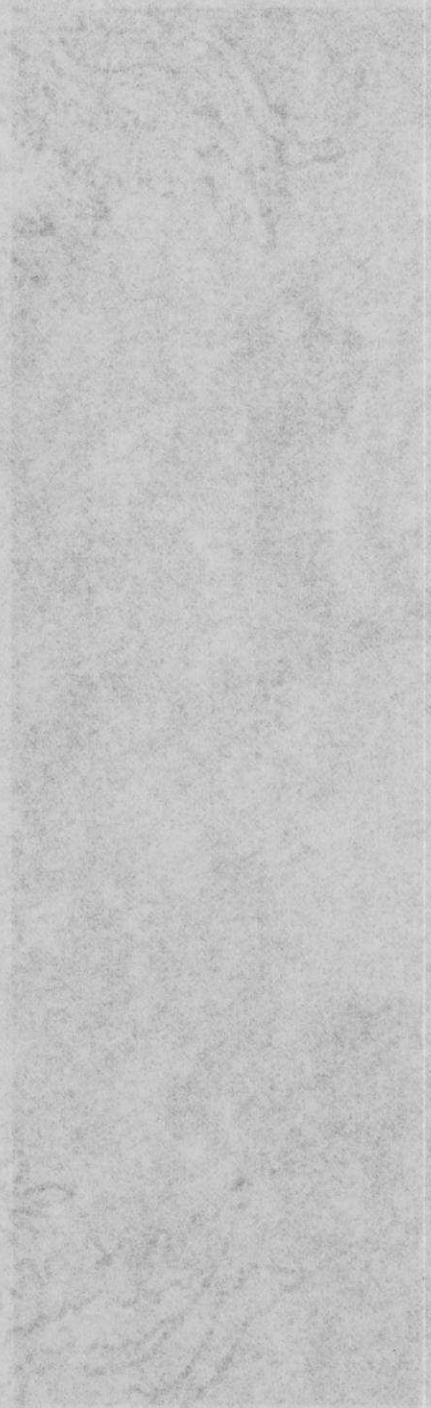
773-305 O - 65 (Face p. 586) No. 1

PHOTOGRAPH 2. This photograph shows the concentration of television, still and motion picture cameras at the September hearing.

773-305 O - 65 (Face p. 586) No. 2

PHOTOGRAPH 3. This photograph shows the television motor van stationed outside the courtroom during the September hearing.

773-305 O - 65 (Face p. 586) No. 3

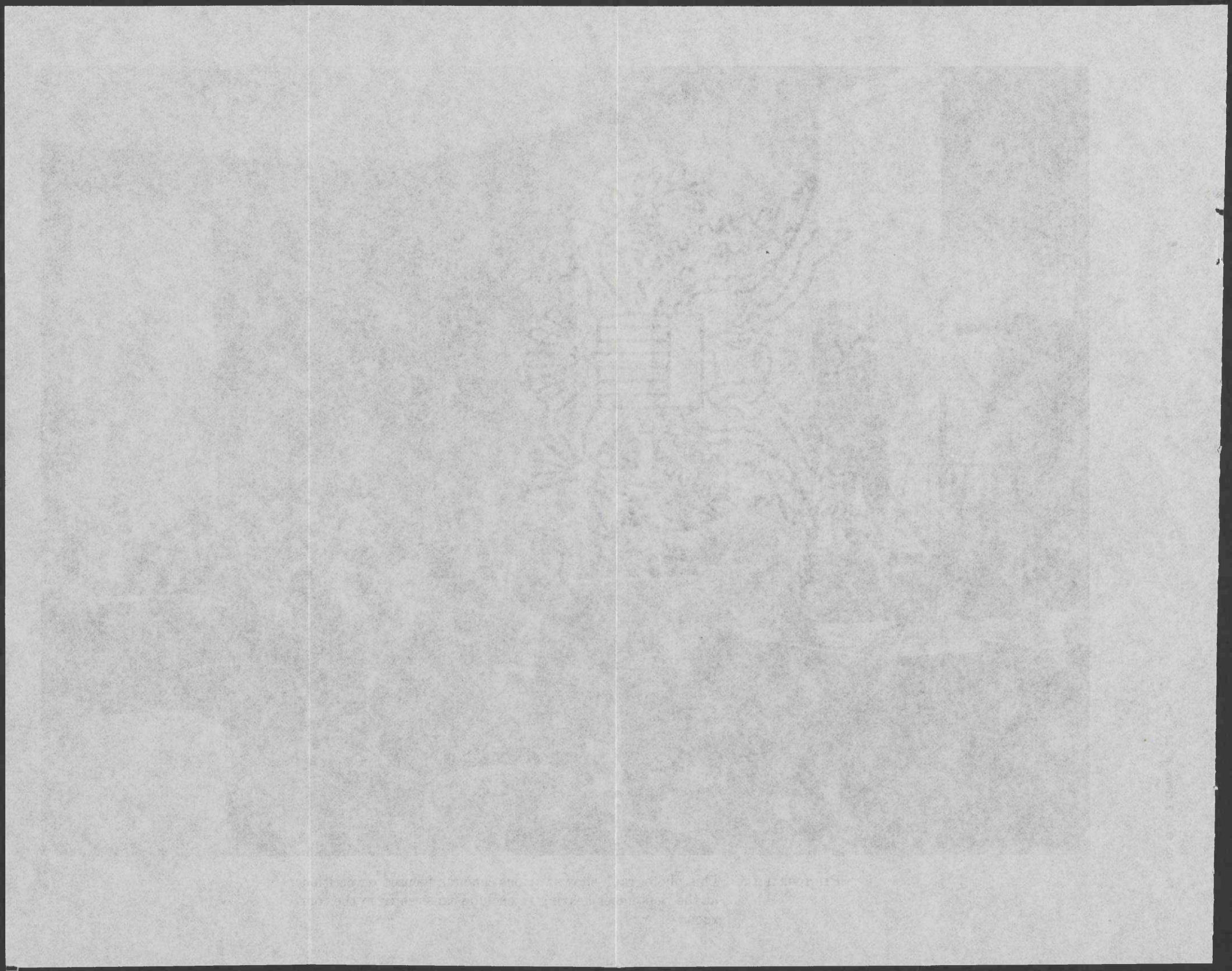


PHOTOGRAPH 4. This photograph shows petitioner trying to make his way into the courtroom for the September hearing.

773-305 O - 65 (Face p. 586) No. 4

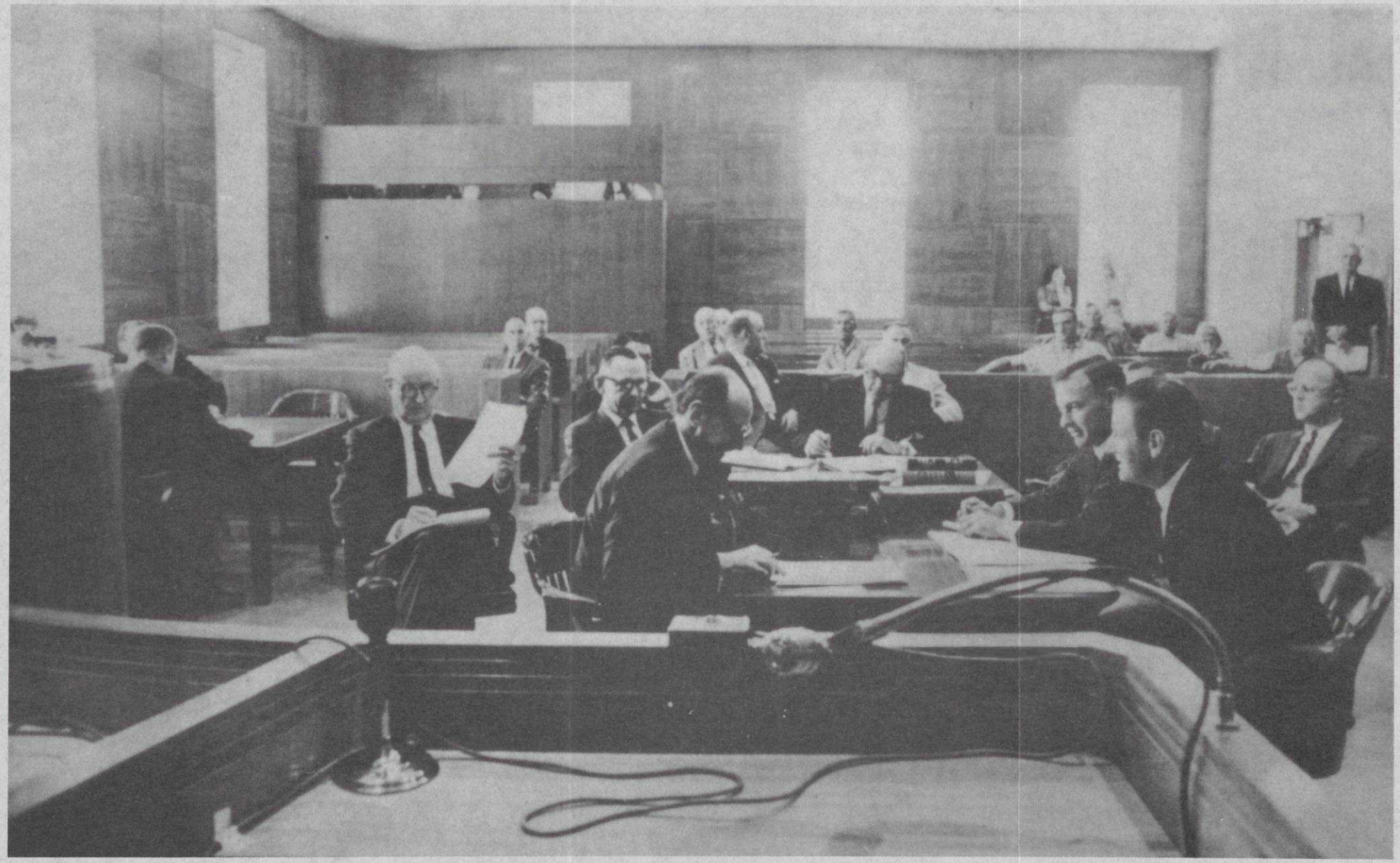
PHOTOGRAPH 5. This photograph shows various cameras focused on petitioner at the September hearing to exclude cameras from the courtroom.

773-305 O - 65 (Face p. 586) No. 5



PHOTOGRAPH 6. This photograph shows the television booth as it appeared on October 22.

773-305 O - 65 (Face p. 586) No. 6



PHOTOGRAPH 7. This photograph shows the television booth as it appeared on October 23 and for the rest of the trial.

773-305 O - 65 (Face p. 586) No. 7

MR. JUSTICE HARLAN, concurring.

I concur in the opinion of the Court, subject, however, to the reservations and only to the extent indicated in this opinion.

The constitutional issue presented by this case is far-reaching in its implications for the administration of justice in this country. The precise question is whether the Fourteenth Amendment prohibits a State, over the objection of a defendant, from employing television in the courtroom to televise contemporaneously, or subsequently by means of videotape, the courtroom proceedings of a criminal trial of widespread public interest. The issue is no narrower than this because petitioner has not asserted any isolatable prejudice resulting from the presence of television apparatus within the courtroom or from the contemporaneous or subsequent broadcasting of the trial proceedings. On the other hand, the issue is no broader, for we are concerned here only with a criminal trial of great notoriety, and not with criminal proceedings of a more or less routine nature.

The question is fraught with unusual difficulties. Permitting television in the courtroom undeniably has mischievous potentialities for intruding upon the detached atmosphere which should always surround the judicial process. Forbidding this innovation, however, would doubtless impinge upon one of the valued attributes of our federalism by preventing the States from pursuing a novel course of procedural experimentation. My conclusion is that there is no constitutional requirement that television be allowed in the courtroom, and, at least as to a notorious criminal trial such as this one, the considerations against allowing television in the courtroom so far outweigh the countervailing factors advanced in its support as to require a holding that what was done in this case infringed the fundamental right to a fair trial assured by the Due Process Clause of the Fourteenth Amendment.

Some preliminary observations are in order: All would agree, I am sure, that at its worst, television is capable of distorting the trial process so as to deprive it of fundamental fairness. Cables, kleig lights, interviews with the principal participants, commentary on their performances, "commercials" at frequent intervals, special wearing apparel and makeup for the trial participants—certainly such things would not conduce to the sound administration of justice by any acceptable standard. But that is not the case before us. We must judge television as we find it in this trial—relatively unobtrusive, with the cameras contained in a booth at the back of the courtroom.

I.

No constitutional provision guarantees a right to televise trials. The "public trial" guarantee of the Sixth Amendment, which reflects a concept fundamental to the administration of justice in this Country, *In re Oliver,* 333 U. S. 257, certainly does not require that television be admitted to the courtroom. See *United Press Assns.* v. *Valente,* 308 N. Y. 71, 123 N. E. 2d 777. Essentially, the public-trial guarantee embodies a view of human nature, true as a general rule, that judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings. *In re Oliver, supra,* at 266–273. A fair trial is the objective, and "public trial" is an institutional safeguard for attaining it.

Thus the right of "public trial" is not one belonging to the public, but one belonging to the accused, and inhering in the institutional process by which justice is administered. Obviously, the public-trial guarantee is not violated if an individual member of the public cannot gain admittance to a courtroom because there are no available seats. The guarantee will already have been met, for the "public" will be present in the form of those per-

sons who did gain admission. Even the actual presence of the public is not guaranteed. A public trial implies only that the court must be open to those who wish to come, sit in the available seats, conduct themselves with decorum, and observe the trial process. It does not give anyone a concomitant right to photograph, record, broadcast, or otherwise transmit the trial proceedings to those members of the public not present, although to be sure, the guarantee of public trial does not of itself prohibit such activity.

The free speech and press guarantees of the First and Fourteenth Amendments are also asserted as embodying a positive right to televise trials, but the argument is greatly overdrawn. Unquestionably, television has become a very effective medium for transmitting news. Many trials are newsworthy, and televising them might well provide the most accurate and comprehensive means of conveying their content to the public. Furthermore, television is capable of performing an educational function by acquainting the public with the judicial process in action. Albeit these are credible policy arguments in favor of television, they are not arguments of constitutional proportions. The rights to print and speak, over television as elsewhere, do not embody an independent right to bring the mechanical facilities of the broadcasting and printing industries into the courtroom. Once beyond the confines of the courthouse, a news-gathering agency may publicize, within wide limits, what its representatives have heard and seen in the courtroom. But the line is drawn at the courthouse door; and within, a reporter's constitutional rights are no greater than those of any other member of the public. Within the courthouse the only relevant constitutional consideration is that the accused be accorded a fair trial. If the presence of television substantially detracts from that goal, due process requires that its use be forbidden.

773-305 O-65-42

I see no force in the argument that to exclude television apparatus from the courtroom, while at the same time permitting newspaper reporters to bring in their pencils and notebooks, would discriminate in favor of the press as against the broadcasting services. The distinctions to be drawn between the accouterments of the press and the television media turn not on differences of size and shape but of function and effect. The presence of the press at trials may have a distorting effect, but it is not caused by their pencils and notebooks. If it were, I would not hesitate to say that such physical paraphernalia should be barred.

II.

The probable impact of courtroom television on the fairness of a trial may vary according to the particular kind of case involved. The impact of television on a trial exciting wide popular interest may be one thing; the impact on a run-of-the-mill case may be quite another. Furthermore, the propriety of closed circuit television for the purpose of making a court recording or for limited use in educational institutions obviously presents markedly different considerations. The Estes trial was a heavily publicized and highly sensational affair. I therefore put aside all other types of cases; in so doing, however, I wish to make it perfectly clear that I am by no means prepared to say that the constitutional issue should ultimately turn upon the nature of the particular case involved. When the issue of television in a non-notorious trial is presented it may appear that no workable distinction can be drawn based on the type of case involved, or that the possibilities for prejudice, though less severe, are nonetheless of constitutional proportions. Compare *Powell* v. *Alabama,* 287 U. S. 45; *Betts* v. *Brady,* 316 U. S. 455; *Gideon* v. *Wainwright,* 372 U. S. 335. The resolution of those further questions should await an appropriate case; the

Court should proceed only step by step in this unplowed field. The opinion of the Court necessarily goes no farther, for only the four members of the majority who unreservedly join the Court's opinion would resolve those questions now.

I do not deem the constitutional inquiry in this case ended by the finding, in effect conceded by petitioner's counsel, that no isolatable prejudice was occasioned by the manner in which television was employed in this case.[1] Courtroom television introduces into the conduct of a criminal trial the element of professional "showmanship," an extraneous influence whose subtle capacities for serious mischief in a case of this sort will not be underestimated by any lawyer experienced in the elusive imponderables of the trial arena. In the context of a trial of intense public interest, there is certainly a strong possibility that the timid or reluctant witness, for whom a court appearance even at its traditional best is a harrowing affair, will become more timid or reluctant when he finds that he will also be appearing before a "hidden audience" of unknown but large dimensions. There is certainly a strong possibility that the "cocky" witness having a thirst for the limelight will become more "cocky" under the influence of television. And who can say that the juror who is gratified by having been chosen for a front-line case, an ambitious prosecutor, a publicity-minded defense counsel, and even a conscientious judge will not stray, albeit unconsciously, from doing what "comes naturally" into pluming themselves for a satisfactory television "performance"?

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[1] The trial judge ordered that there was to be no audio transmission of the witnesses' testimony. The witnesses, however, were present at the September hearing when everything was broadcast, and the record does not show affirmatively that they were aware that the microphone which confronted them during the actual trial was not being used for the same purpose.

Surely possibilities of this kind carry grave potentialities for distorting the integrity of the judicial process bearing on the determination of the guilt or innocence of the accused, and, more particularly, for casting doubt on the reliability of the fact-finding process carried on under such conditions. See Douglas, The Public Trial and the Free Press, 46 A. B. A. J. 840 (1960). To be sure, such distortions may produce no telltale signs, but in a highly publicized trial the danger of their presence is substantial, and their effects may be far more pervasive and deleterious than the physical disruptions which all concede would vitiate a conviction. A lively public interest could increase the size of the viewing audience immensely, and the masses of spectators to whom the trial is telecast would have become emotionally involved with the case through the dissemination of pretrial publicity, the usual concomitant of such a case. The presence of television would certainly emphasize to the trial participants that the case is something "special." Particularly treacherous situations are presented in cases where pretrial publicity has been massive [2] even when jurors positively state they will not be influenced by it; see *Rideau* v. *Louisiana,* 373 U. S. 723; *Irvin* v. *Dowd,* 366 U. S. 717. To increase the possibility of influence and the danger of a "popular verdict" by subjecting the jurors to the view of a mass audience whose approach to the case has been conditioned by pretrial publicity can only make a bad situation worse. The entire thrust of rules of evidence and the other protections attendant upon the modern trial is to keep extraneous influences out of the courtroom. *Turner* v. *Louisiana,* 379 U. S. 466, 472–473. As we recently observed in *Turner,* "Mr. Justice Holmes stated no more than a truism when he observed that 'Any judge who has sat with juries knows that in spite of forms they

[2] Petitioner in this case amassed 11 volumes of pretrial press clippings.

are extremely likely to be impregnated by the environing atmosphere.' *Frank* v. *Mangum*, 237 U. S. 309, at 349 (dissenting opinion)." *Id.*, at 472.[3] The knowledge on the part of the jury and other trial participants that they are being televised to an emotionally involved audience can only aggravate the atmosphere created by pretrial publicity.

The State argues that specific prejudice must be shown for the Due Process Clause to apply. I do not believe that the Fourteenth Amendment is so impotent when the trial practices in question are instinct with dangers to constitutional guarantees. I am at a loss to understand how the Fourteenth Amendment can be thought not to encompass protection of a state criminal trial from the dangers created by the intrusion of collateral and wholly irrelevant influences into the courtroom. The Court has not hesitated in the past to condemn such practices, even without any positive showing of isolatable prejudice. In *Turner* v. *Louisiana, supra,* decided just this Term, we held that the "potentialities" for distortion of the trial created by a key witness serving as bailiff to a sequestered jury were sufficient to violate the Due Process Clause of the Fourteenth Amendment. In *Jackson* v. *Denno,* 378 U. S. 368, the Court made the judgment that a trial judge's determination of a coerced-confession issue is more likely to avoid prejudice than a jury determination, a judgment which indeed overrode a long-standing contrary state practice. And in *Irvin* v. *Dowd,* 366 U. S. 717, we held that flamboyant pretrial publicity cast sufficient doubt on the impartiality of the jury to vitiate a conviction, even in the face of statements by all the jurors that they were not subject to its influence. See 366 U. S., at 729 (Frankfurter, J., concurring). Other examples of

[3] The Court had occasion to recognize in *Cox* v. *Louisiana,* 379 U. S. 559, 565, that even "judges are human" and not immune from outside environmental influences.

instances in which the Court has exercised its judgment as to the effects of one thing or another on human behavior are plentiful. See, *e. g., Griffin* v. *California,* 380 U. S. 609; *Tancil* v. *Woolls,* 379 U. S. 19; *Mapp* v. *Ohio,* 367 U. S. 643 (compare *People* v. *Defore,* 242 N. Y. 13, 150 N. E. 585); *Avery* v. *Georgia,* 345 U. S. 559; *Brown* v. *Board of Education,* 347 U. S. 483; *Tumey* v. *Ohio,* 273 U. S. 510.

The judgment that the presence of television in the courtroom represents a serious danger to the trial process is supported by a vast segment of the Bar of this country, as evidenced by Canon 35 of the Canons of Judicial Ethics of the American Bar Association, counseling against such practices,[4] the views of the Judicial Conference of the United States (*infra,* p. 601), Rule 53 of the Federal Rules of Criminal Procedure, and even the "personal views" (*post,* pp. 601–602) of the Justices on the dissenting side of the present case.

The arguments advanced against the constitutional banning of televised trials seem to me peculiarly unpersuasive. It is said that the pictorial broadcasting of trials will serve to educate the public as to the nature of the judicial process. Whatever force such arguments might have in run-of-the-mill cases, they carry little weight in cases of the sort before us, where the public's interest in viewing the trial is likely to be engendered more by curiosity about the personality of the well-known figure who is the defendant (as here), or about famous witnesses or lawyers who will appear on the television screen, or about the details of the particular crime involved, than by innate curiosity to learn about the workings of the judicial process itself. Indeed it would be naive not to suppose that it would be largely such factors that would qualify a trial for commercial television

[4] The consistent position of the American Bar Association is set out in the Appendix.

"billing," and it is precisely that kind of case where the risks of permitting television coverage of the proceedings are at their greatest.

It is also asserted that televised trials will cause witnesses to be more truthful, and jurors, judges, and lawyers more diligent. To say the least this argument is sophistic, for it is impossible to believe that the reliability of a trial as a method of finding facts and determining guilt or innocence increases in relation to the size of the crowd which is watching it. Attendance by interested spectators in the courtroom will fully satisfy the safeguards of "public trial." Once openness is thus assured, the addition of masses of spectators would, I venture to say, detract rather than add to the reliability of the process. See *Cox* v. *Louisiana,* 379 U. S. 559, 562. A trial in Yankee Stadium, even if the crowd sat in stony silence, would be a substantially different affair from a trial in a traditional courtroom under traditional conditions, and the difference would not, I think, be that the witnesses, lawyers, judges, and jurors in the stadium would be more truthful, diligent, and capable of reliably finding facts and determining guilt or innocence.[5] There will be no disagreement, I am sure, among those competent to judge that precisely the opposite would likely be the case.

Finally, we should not be deterred from making the constitutional judgment which this case demands by the prospect that the day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process. If and when that day arrives the constitutional

[5] There may, of course, be a difference in impact upon the atmosphere and trial participants between the physical presence of masses of people and the presence of a camera lens which permits masses of people to observe the process remotely. However, the critical element is the knowledge of the trial participants that they are subject to such visual observation, an element which is, of course, present in this case.

judgment called for now would of course be subject to re-examination in accordance with the traditional workings of the Due Process Clause. At the present juncture I can only conclude that televised trials, at least in cases like this one, possess such capabilities for interfering with the even course of the judicial process that they are constitutionally banned. On these premises I concur in the opinion of the Court.

APPENDIX TO OPINION OF MR. JUSTICE HARLAN, CONCURRING.

The development of Canon 35 is set out at length in the *amicus curiae* brief of the American Bar Association, pp. 3–8, as follows:

"It [Canon 35] was originally adopted on September 30, 1937 by the House of Delegates [1] in the following form:

> " 'Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting of court proceedings are calculated to detract from the essential dignity of the proceedings, degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted.' 62 A. B. A. REP. 1134–35 (1937).

"A Special Committee on Cooperation Between Press, Radio and Bar, as to Publicity Interfering with Fair Trial of Judicial and Quasi-Judicial Proceedings had reported to the Association its grave concern with the dangers attendant upon the use of radio in connection with trials, par-

[1] "The House of Delegates is not only the governing body of the American Bar Association; because of the presence of representatives of all State Bar Associations, the largest and most important local bar associations, and of other important national professional groups, it is in fact a broadly representative policy forum for the profession as a whole."

ticularly in light of the spectacular publicity and broadcast of the trial of Bruno Hauptmann.[2] The Committee specifically referred to the evil of 'trial in the air'.[3] 62 A. B. A. REP. 860 (1937).

"After the adoption of Judicial Canon 35, the direct radio broadcasting of court proceedings was disapproved by the Association's Committee on Professional Ethics and Grievances in its Opinion No. 212, March 15, 1941, as being specifically condemned. The Committee quoted with approval the following statement of the Michigan and Detroit Bar Associations:

> " 'Such broadcasts are unfair to the defendant and to the witnesses. The natural embarrassment and confusion of a citizen on trial should not be increased by a realization that his voice and his difficulties are being used as entertainment for a vast radio audience. The fear expressed by most persons when facing an audience or microphone is a matter of common knowledge, and but few defendants or witnesses can properly concentrate on facts and testify fully and fairly when so handicapped. . . . Such broadcasts are unfair to the Judge, who should be permitted to devote his undivided attention to the case, unmindful of the effect which his comments or decision may

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[2] "See *State* v. *Hauptmann*, 115 N.J.L. 412, 180 Atl. 809 (Ct. Err. & App.), *cert. denied*, 296 U. S. 649 (1935)."

[3] "Prior to the adoption of Judicial Canon 35, the impropriety of permitting radio broadcasts of court proceedings was recognized by the Committee on Professional Ethics and Grievances of the Association in its Opinion No. 67, March 21, 1932. The Committee had recourse to Judicial Canon 34 which provides that a judge should not administer his office 'for the purpose of advancing his personal ambitions or increasing his popularity.' The Committee found that radio broadcasting of a trial changes 'what should be the most serious of human institutions either into an enterprise for the entertainment of the public or of one for promoting publicity for the judge.' AMERICAN BAR ASSOCIATION, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES 163 (1957)."

> have upon the radio audience.' AMERICAN BAR ASSOCIATION, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES 426 (1957).

"In 1952, the growing prominence of television as a medium of mass communication was dealt with in a report of the Special Committee on Televising and Broadcasting Legislative and Judicial Proceedings [headed by the late John W. Davis]. 77 A. B. A. REP. 607 (1952). In condemning the practice of televising judicial proceedings, the Committee called attention to the fact that:

> " 'The attention of the court, the jury, lawyers and witnesses should be concentrated upon the trial itself and ought not to be divided with the television or broadcast audience who for the most part have merely the interest of curiosity in the proceedings. It is not difficult to conceive that all participants may become over-concerned with the impression their actions, rulings or testimony will make on the absent multitude.' *Id.* at 610.

"As a result of this report, and the recommendation of the Committee on Professional Ethics and Grievances, Judicial Canon 35 was amended by inserting a ban on the 'televising' of court proceedings and inserting the descriptive phrase 'distract the witness in giving his testimony' before the phrase 'degrade the court.' In addition, a second paragraph was added providing for the televising and broadcasting of certain ceremonial proceedings. *Id.* at 110–11.

"In October, 1954, the Board of Governors authorized the appointment of a Special Bar-Media Conference Committee on Fair Trial-Free Press to meet with representatives of the press, radio, and television. The views of both sides were thoroughly explored and were presented in detail in the September, 1956 issue of the American Bar Association Journal.[4] After extensive joint debate,

[4] "42 A.B.A.J. 834, 838, 843 (1956)."

no solutions or agreements were reached. 83 A. B. A. REP. 790–91 (1958). The Committee did report that it was convinced that

> " 'courtroom photographing or broadcasting or both would impose undue police duties upon the trial judge[,] . . . that the broadcasting and the photographing in the courtroom might have an adverse psychological effect upon trial participants, judges, lawyers, witnesses and juries[,] . . . [and] that partial broadcasts of trials, particularly on television, might influence public opinion which in turn might influence trial results. . . .' *Id.* at 645.

"Following the presentation of the Bar-Media Conference Committee report and in connection with the consideration of a report and recommendation of a Special Committee of the American Bar Foundation created in July, 1955 (83 A. B. A. REP. 643–45 (1958)), the House of Delegates conducted a hearing as a 'Committee of the Whole' during its February, 1958 session at which proponents and opponents of Judicial Canon 35 were fully heard. 83 A. B. A. REP. 648–69 (1958). Thereafter, at the August, 1958 meeting of the House of Delegates, it was decided to have a Special Committee study Canon 35 and

> " 'conduct further studies of the problem, including the obtaining of a body of reliable factual data on the experience of judges and lawyers in those courts where either photography, televising or broadcasting, or all of them, are permitted. . . . The fundamental objective of the Committee and of all others interested must be to consider and make recommendations which will preserve the right of fair trial.' 83 A. B. A. REP. 284 (1958).

"The Special Committee filed an Interim Report and Recommendations with the House of Delegates in August,

1962 setting forth the 'Area and Perspective' of its survey and studies. The report included portions of testimony by media representatives taken at a hearing held in Chicago on February 18, 1962, as well as a summary of the Committee's informal conference with certain representatives from Colorado and Texas. In addition, the report included written comments by officers of State Bar Associations responding to a Committee survey, and certain general correspondence received by the Committee regarding Judicial Canon 35. The report also listed significant publications favoring either revision or retention of the Canon. . . . [Hereinafter cited *Int. Rep.*]

"The Special Committee thereafter submitted its final report and recommendations, concluding that the substantive provisions of Judicial Canon 35 remain valid and 'should be retained as essential safeguards of the individual's inviolate and personal right of fair trial.' . . . The Committee did recommend certain minor deletions . . . and changes . . . which were adopted by the House of Delegates, after full debate, on February 5, 1963:

> " 'The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings [are calculated to] detract from the essential dignity of the proceedings, distract [the] *participants and* witnesses in giving [his] testimony, [degrade the court] and create misconceptions with respect thereto in the mind of the public and should not be permitted.' [5]

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[5] "The full text of Judicial Canon 35, as amended, is as follows:

" 'IMPROPER PUBLICIZING OF COURT PROCEEDINGS

" 'Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings detract from the essential dignity of the proceedings, distract participants and witnesses in giving

"A vast majority of the states have voluntarily adopted Judicial Canon 35 in one form or another, and it has been embodied in principle in Rule 53 of the Federal Rules of Criminal Procedure. In a recent Resolution of the Judicial Conference of the United States, the philosophy of Canon 35 was unanimously reaffirmed:

> " 'Resolved, That the Judicial Conference of the United States condemns the taking of photographs in the courtroom or its environs in connection with any judicial proceeding, and the broadcasting of judicial proceedings by radio, television, or other means, and considers such practices to be inconsistent with fair judicial procedure and that they ought not to be permitted in any federal court.' *Int. Rep.* p. 97."

(Footnotes numbered and partially omitted.)

MR. JUSTICE STEWART, whom MR. JUSTICE BLACK, MR. JUSTICE BRENNAN, and MR. JUSTICE WHITE join, dissenting.

I cannot agree with the Court's decision that the circumstances of this trial led to a denial of the petitioner's Fourteenth Amendment rights. I think that the introduction of television into a courtroom is, at least in the present state of the art, an extremely unwise policy. It invites many constitutional risks, and it detracts from the inherent dignity of a courtroom. But I am unable to escalate this personal view into a *per se* constitutional

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testimony, and create misconceptions with respect thereto in the mind of the public and should not be permitted.

" 'Provided that this restriction shall not apply to the broadcasting or televising, under the supervision of the court, of such portions of naturalization proceedings (other than the interrogation of applicants) as are designed and carried out exclusively as a ceremony for the purpose of publicly demonstrating in an impressive manner the essential dignity and the serious nature of naturalization.' "

rule. And I am unable to find, on the specific record of this case, that the circumstances attending the limited televising of the petitioner's trial resulted in the denial of any right guaranteed to him by the United States Constitution.

On October 22, 1962, the petitioner went to trial in the Seventh Judicial District Court of Smith County, Texas, upon an indictment charging him with the offenses of (1) swindling, (2) theft by false pretenses, and (3) theft by a bailee. After a week spent in selecting a jury, the trial itself lasted some three and a half days. At its conclusion the jury found the petitioner guilty of the offense of swindling under the first count of the indictment. The trial judge permitted portions of the trial proceedings to be televised, under the limitations described below. He also gave news photographers permission to take still pictures in the courtroom under specified conditions.

The Texas Court of Criminal Appeals affirmed the petitioner's conviction, and we granted certiorari, limited to a single question. The question, as phrased by the petitioner, is this:

> "Whether the action of the trial court, over petitioner's continued objection, denied him due process of law and equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States, in requiring petitioner to submit to live television of his trial, and in refusing to adopt in this all out publicity case, as a rule of trial procedure, Canon 35 of the Canons of Judicial Ethics of the American Bar Association, and instead adopting and following, over defendant's objection, Canon 28 of the Canons of Judicial Ethics, since approved by the Judicial Section of the integrated (State agency) State Bar of Texas."

The two Canons of Judicial Ethics referred to in the petitioner's statement of the question presented are set

out in the margin.[1] But, as the Court rightly says, the problem before us is not one of choosing between the conflicting guidelines reflected in these Canons of Judicial Ethics. It is a problem rooted in the Due Process Clause of the Fourteenth Amendment. We deal here with matters subject to continuous and unforeseeable change—the

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[1] Canons of Judicial Ethics. American Bar Association: Judicial Canon 35. Improper publicizing of Court proceedings.

"Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings detract from the essential dignity of the proceedings, distract participants and witnesses in giving testimony, and create misconceptions with respect thereto in the mind of the public and should not be permitted.

"Provided that this restriction shall not apply to the broadcasting or televising, under the supervision of the court, of such portions of naturalization proceedings (other than the interrogation of applicants) as are designed and carried out exclusively as a ceremony for the purpose of publicly demonstrating in an impressive manner the essential dignity and the serious nature of naturalization."

Canons of Judicial Ethics, Integrated State Bar of Texas: Judicial Canon 28. Improper Publicizing of Court Proceedings.

"Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings unless properly supervised and controlled, may detract from the essential dignity of the proceedings, distract participants and witnesses in giving testimony, and create misconceptions with respect thereto in the mind of the public. The supervision and control of such trial coverage shall be left to the trial judge who has the inherent power to exclude or control coverage in the proper case in the interest of justice.

"In connection with the control of such coverage the following declaration of principles is adopted:

"(1) There should be no use of flash bulbs or other artificial lighting.

"(2) No witness, over his expressed objection, should be photographed, his voice broadcast or be televised.

"(3) The representatives of news media must obtain permission of the trial judge to cover by photograph, broadcasting or televising,

techniques of public communication. In an area where all the variables may be modified tomorrow, I cannot at this time rest my determination on hypothetical possibilities not present in the record of this case. There is no claim here based upon any right guaranteed by the First Amendment. But it is important to remember that we move in an area touching the realm of free communication, and for that reason, if for no other, I would be wary of imposing any *per se* rule which, in the light of future technology, might serve to stifle or abridge true First Amendment rights.

I.

The indictment was originally returned by a grand jury in Reeves County, Texas, and it engendered widespread publicity. After some preliminary proceedings there, the case was transferred for trial to Smith County, more than 500 miles away. The trial was set for September 24, 1962, but it did not commence on that date. Instead, that day and the next were spent in hearings on two motions filed by defense counsel: a motion to bar television and news cameras from the trial, and a motion to continue the trial to a later date. Those proceedings were themselves telecast "live," and news photographers were permitted to take pictures in the courtroom. The activities of the television crews and news photographers led to considerable disruption of the hearings.[2] At the con-

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and shall comply with the rules prescribed by the judge for the exercise of the privilege.

"(4) Any violation of the Court's Rules shall be punished as a contempt.

"(5) Where a judge has refused to allow coverage or has regulated it, any attempt, other than argument by representatives of the news media directly with the Court, to bring pressure of any kind on the judge, pending final disposition of the cause in trial, shall be punished as a contempt."

[2] A contemporary newspaper account described the scene as follows:

"A television motor van, big as an intercontinental bus, was parked outside the courthouse and the second-floor courtroom was a forest

clusion of the hearings the motion for a continuance was granted, and the case reset for trial on October 22. The motion to bar television and news photographers from the trial was denied.[3]

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of equipment. Two television cameras had been set up inside the bar and four more marked cameras were aligned just outside the gates.

"A microphone stuck its 12-inch snout inside the jury box, now occupied by an overflow of reporters from the press table, and three microphones confronted Judge Dunagan on his bench. [C]ables and wires snaked over the floor." The New York Times, September 25, 1962, p. 46, col. 4.

[3] In ruling on the motion, the trial judge stated:

"In the past, it has been the policy of this Court to permit televising in the court room under the rules and supervision of the Court. Heretofore, I have not encountered any difficulty with it. I was unable to observe any detraction from the witnesses or the attorneys in those cases. We have watched television, of course, grow up from its infancy and now into its maturity; and it is a news media. So I really do not see any justified reason why it should not be permitted to take its proper seat in the family circle. However, it will be under the strict supervision of the Court. I know there has been pro and con about televising in the court room. I have heard some say that it makes a circus out of the Court. I had the privilege yesterday morning of sitting in my home and viewing a sermon by the First Baptist Church over in Dallas and certainly it wasn't any circus in that church; and I feel that if it is a proper instrument in the house of the Lord, it is not out of place in the court room, if properly supervised.

"Now, television is going to be televising whatever the scene is here. If you want to watch a ball game and that is what they televise, you are going to see a ball game. If you want to see a preacher and hear a sermon, you tune in on that and that is what you are going to get. If the Court permits a circus in this court room, it will be televised, that is true, but they will not be creating a circus.

"Now, the most important point is whether or not it would interfere with a fair and impartial trial of this Defendant. That is the most important point, and that is the purpose, or will be the primary purpose of the Court, to insure that he gets that fair trial.

. . . . .

"There is not anything the Court can do about the interest in this case, but I can control your activities and your conduct here; and

On October 1, the trial judge issued an order delineating what coverage he would permit during the trial.[4] As a result of that order and ensuing conferences between the judge and representatives of the news media, the environment for the trial, which began on October 22, was in sharp contrast to that of the September hearings. The actual extent of television and news photography in the

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I can assure you now that this Court is not going to be turned into a circus with TV or without it. Whatever action is necessary for the Court to take to insure that, the Court will take it.

. . . . .

"There has been one consideration that the Court has given and it is that this is a small court room and there will be hundreds of people trying to get into this court room to witness this trial. I believe we would have less confusion if they would stay at home and stay out of the court room and look in on the trial. With all of those people trying to crowd in and push into this court room, that is another consideration I have given to it."

[4] "In my statement of September 24, 1962, admitting television and other cameras in the court room during the trial of Billie Sol Estes, I said cameras would be allowed under the control and direction of the Court so long as they did not violate the legal rights of the Defendant or the State of Texas.

. . . . .

"In line with my statement of September 24, 1962, I am at this time informing both television and radio that live broadcasting or telecasting by either news media cannot and will not be permitted during the interrogation of jurors in testing their qualifications, or of the testimony given by the witnesses, as to do so would be in violation of Art. 644 of the Code of Criminal Procedure of Texas, which provides as follows: 'At the request of either party, the witnesses on both sides may be sworn and placed in the custody of an officer and removed out of the court room to some place where they can not hear the testimony as delivered by any other witness in the case. This is termed placing witnesses under rule.'

". . . [E]ach television network and the local television station will be allowed one film camera without sound in the court room and the film will be made available to other television stations on a pool basis. Marshall Pengra, manager of Television Station KLTV, Tyler, will be in charge of the independent pool and independent stations may

courtroom was described by the judge, after the trial had ended, in certifying the petitioner's bill of exceptions. This description is confirmed by my understanding of the entire record and was agreed to and accepted by defense counsel:

> "Prior to the trial of October 22, 1962, there was a booth constructed and placed in the rear of the courtroom painted the same or near the same color as the courtroom with a small opening across the top for the use of cameras . . . .
>
> "Live telecasting and radio broadcasting were not permitted and the only telecasting was on film without sound, and there was not any broadcasting of the trial by radio permitted. Each network, ABC, NBC, CBS and KRLD [KLTV] Television in Tyler was allowed a camera in the courtroom . . . . The telecasting on film of this case was not a continuous camera operation and only pictures being taken at intervals during the day to be used on their regular news casts later in the day. There were some days during the trial that the cameras of only one or two stations were in operation, the others not being in attendance upon the Court each and every day. The Court did not permit any cameras other than those that were noiseless nor were flood lights and flash bulbs allowed to be used in the courtroom. The Court permitted one news photographer with

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contact him. The same will be true of cameras for the press, which will be limited to the local press, Associated Press and United Press.

. . . . . .

"I am making this statement at this time in order that the two news media affected may have sufficient notice before the case is called on October 22nd.

"The rules I have set forth above concerning the use of cameras are subject to change if I find that they are too restrictive or not workable, for any reason."

Associated Press, United Press International and Tyler Morning Telegraph and Courier Times. However, they were not permitted inside the Bar; and the Court did not permit any telecasting or photographing in the hallways leading into the courtroom or on the second floor of the courthouse where the courtroom is situated, in order that the Defendant and his attorneys would not be hindered, molested or harassed in approaching or leaving the courtroom. The Court did permit live telecasting of the arguments of State's counsel and the returning of the verdict by the Jury and its acceptance by the Court. The opening argument of the District Attorney of Smith County was carried by sound and because of transmission difficulty, there was not any picture. The closing argument for the State by the District Attorney of Reeves County was carried live by both picture and sound. The arguments of attorneys for Defendant, John D. Cofer and Hume Cofer, were not telecast or broadcast as the Court granted their Motion that same not be permitted.

"There was not any televising at any time during the trial except from the booth in the rear of the courtroom, and during the argument of counsel to the jury, news photography was required to operate from the booth so that they would not interfere or detract from the attention of either the jurors or the attorneys.

"During the trial that began October 22nd, there was never at any time any radio broadcasting equipment in the courtroom. There was some equipment in a room off of the courtroom where there were periodic news reports given; and throughout the trial that began October 22nd, not any witness requested not to be televised or photographed while they were testifying. Neither did any juror, while being inter-

rogated on voir dire or at any other time, make any request of the Court not to be televised."

Thus, except for the closing arguments for the prosecution and the return of the jury's verdict, there was no "live" telecasting of the trial. And, even for purposes of delayed telecasting on later news programs, no words or other sounds were permitted to be recorded while the members of the jury were being selected or while any witness was testifying. No witnesses and no jurors were televised or photographed over their objection.[5]

Finally, the members of the jury saw no telecasts and no pictures of anything that went on during the trial. In accord with Texas law, the jurors were sequestered, day and night, from the beginning of the trial until it ended.[6] The jurors were lodged each night in quarters provided for that purpose in the courthouse itself. On the evening of November 6, by agreement of counsel and special permission of the court, the members of the jury were permitted to watch the election returns on television for a short period. For this purpose a portable television was brought into the jury's quarters by a court officer, and operated by him. Otherwise the jurors were not permitted to watch television at any time during the trial. The only newspapers permitted the jury were ones from which all coverage of the trial had been physically removed.

II.

It is important to bear in mind the precise limits of the question before us in this case. The petition for a writ of certiorari asked us to review four separate constitutional claims. We declined to review three of them, among which was the claim that the members of the jury "had received through the news media damaging and prej-

[5] There were nine witnesses for the prosecution and no witnesses for the defense.

[6] Arts. 668, 745, and 725, Tex. Code Crim. Proc.

udicial evidence . . . ." [7] We thus left undisturbed the determination of the Texas Court of Criminal Appeals that the members of the jury were *not* prejudiced by the widespread publicity which preceded the petitioner's trial. One ingredient of this pretrial publicity was the telecast of the September hearings. Despite the confusion in the courtroom during those hearings, all that a potential juror could have possibly learned from watching them on television was that the petitioner's case had been called for trial, and that motions had been made and acted upon for a continuance, and to exclude cameras and television. At those hearings, there was no discussion whatever of anything bearing on the petitioner's guilt or innocence. This was conceded by the petitioner's counsel at the trial.[8]

Because of our refusal to review the petitioner's claim that pretrial publicity had a prejudicial effect upon the jurors in this case, and because, insofar as the September hearings were an element of that publicity, the claim is patently without merit, that issue is simply not here. Our decision in *Rideau* v. *Louisiana*, 373 U. S. 723, therefore, has no bearing at all in this case. There the record showed that the inhabitants of the small Louisiana parish where the trial was held had repeatedly been exposed to a television film showing "Rideau, in jail, flanked by the sheriff and two state troopers, admitting in detail the commission of the robbery, kidnapping, and murder, in response to leading questions by the sheriff." 373 U. S.,

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[7] Petition for Writ of Certiorari, Question 3, p. 3.

[8] "A. [Mr. Hume Cofer, counsel for petitioner] . . . . The publicity that was given this trial on the last occasion and the number of cameras here, I think was sufficient to spread the news of this case throughout the county, to every available juror; and it is my opinion that on that occasion, there were so many cameras and so much paraphernalia here that it gave an opportunity for every prospective juror in Smith County to know about this case.

"Q. Not about the facts of the case?

"A. No, sir; not about the facts, nor any of the evidence."

at 725. We found that "[a]ny subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality." *Id.*, at 726. See also *Irvin* v. *Dowd,* 366 U. S. 717.

The *Rideau* case was no more than a contemporary application of enduring principles of procedural due process, principles reflected in such earlier cases as *Moore* v. *Dempsey,* 261 U. S. 86; *Brown* v. *Mississippi,* 297 U. S. 278; and *Chambers* v. *Florida,* 309 U. S. 227, 235–241. "Under our Constitution's guarantee of due process," we said, "a person accused of committing a crime is vouchsafed basic minimal rights. Among these are the right to counsel, the right to plead not guilty, and the right to be tried in a courtroom presided over by a judge." 373 U. S., at 726–727. We had occasion to apply the same basic concepts of procedural due process earlier this Term in *Turner* v. *Louisiana,* 379 U. S. 466. "In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." 379 U. S., at 472–473.

But we do not deal here with mob domination of a courtroom, with a kangaroo trial, with a prejudiced judge or a jury inflamed with bias. Under the limited grant of certiorari in this case, the sole question before us is an entirely different one. It concerns only the regulated presence of television and still photography at the trial itself, which began on October 22, 1962. Any discussion of pretrial events can do no more than obscure the important question which is actually before us.

III.

It is obvious that the introduction of television and news cameras into a criminal trial invites many serious constitutional hazards. The very presence of photog-

raphers and television cameramen plying their trade in a courtroom might be so completely and thoroughly disruptive and distracting as to make a fair trial impossible. Thus, if the scene at the September hearing had been repeated in the courtroom during this jury trial, it is difficult to conceive how a fair trial in the constitutional sense could have been afforded the defendant.[9] And even if, as was true here, the television cameras are so controlled and concealed as to be hardly perceptible in the courtroom itself, there are risks of constitutional dimensions that lurk in the very process of televising court proceedings at all.

Some of those risks are catalogued in the *amicus curiae* brief filed in this case by the American Bar Association: "[P]otential or actual jurors, in the absence of enforceable and effective safeguards, may arrive at certain misconceptions regarding the defendant and his trial by viewing televised pre-trial hearings and motions from which the jury is ordinarily excluded. Evidence otherwise inadmissible may leave an indelible mark. . . . Once the trial begins, exposure to nightly rebroadcasts of selected portions of the day's proceedings will be difficult to guard against, as jurors spend frequent evenings before the television set. The obvious impact of witnessing repeated trial episodes and hearing accompanying commentary, episodes admittedly chosen for their news value and not for evidentiary purposes, can serve only to distort the jurors' perspective. . . . Despite the court's injunction not to discuss the case, it seems undeniable that jurors will be subject to the pressure of television-watching family, friends and, indeed, strangers. . . . It is not too much to imagine a juror being confronted with his wife's television-oriented viewpoint. . . . Additionally, the jurors' daily television appearances may make them recognizable celebrities, likely to be stopped by passing

[9] See note 2.

strangers, or perhaps harried by intruding telephone calls. . . ." Constitutional problems of another kind might arise if a witness or juror were subjected to being televised over his objection.

The plain fact of the matter, however, is that none of these things happened or could have happened in this case. The jurors themselves were prevented from seeing any telecasts of the trial, and completely insulated from association with any members of the public who did see such telecasts. This case, therefore, does not remotely resemble *Turner* v. *Louisiana,* 379 U. S. 466, where, during the trial, the jurors were subjected outside the courtroom to unmeasured and unmeasurable influences by key witnesses for the prosecution.

In the courtroom itself, there is nothing to show that the trial proceeded in any way other than it would have proceeded if cameras and television had not been present. In appearance, the courtroom was practically unaltered. There was no obtrusiveness and no distraction, no noise and no special lighting. There is no indication anywhere in the record of any disturbance whatever of the judicial proceedings. There is no claim that the conduct of the judge, or that any deed or word of counsel, or of any witness, or of any juror, was influenced in any way by the presence of photographers or by television.

Furthermore, from a reading of the record it is crystal clear that this was not a trial where the judge was harassed or confused or lacking in command of the proceedings before the jury. Not once, after the first witness was called, was there any interruption at all of the trial proper to secure a ruling concerning the presence of cameramen in the courtroom. There was no occasion, during the entire trial—until after the jury adjourned to reach its verdict—for any cautionary word to members of the press in the courtroom. The only time a motion was made, the jury was not in the courtroom. The trial itself was a

most mundane affair, totally lacking in the lurid and completely emotionless. The evidence related solely to the circumstances in which various documents had been signed and negotiated. It was highly technical, if not downright dull. The petitioner called no witnesses, and counsel for petitioner made only a brief closing argument to the jury. There is nothing to indicate that the issues involved were of the kind where emotion could hold sway. The transcript of the trial belies any notion that frequent interruptions and inconsistent rulings communicated to the jury any sense that the judge was unable to concentrate on protecting the defendant and conducting the trial in a fair manner, in accordance with the State and Federal Constitutions.

IV.

What ultimately emerges from this record, therefore, is one bald question—whether the Fourteenth Amendment of the United States Constitution prohibits all television cameras from a state courtroom whenever a criminal trial is in progress. In the light of this record and what we now know about the impact of television on a criminal trial, I can find no such prohibition in the Fourteenth Amendment or in any other provision of the Constitution. If what occurred did not deprive the petitioner of his constitutional right to a fair trial, then the fact that the public could view the proceeding on television has no constitutional significance. The Constitution does not make us arbiters of the image that a televised state criminal trial projects to the public.

While no First Amendment claim is made in this case, there are intimations in the opinions filed by my Brethren in the majority which strike me as disturbingly alien to the First and Fourteenth Amendments' guarantees against federal or state interference with the free communication of information and ideas. The suggestion that there are limits upon the public's right to know what goes on in

the courts causes me deep concern. The idea of imposing upon any medium of communications the burden of justifying its presence is contrary to where I had always thought the presumption must lie in the area of First Amendment freedoms. See *Speiser* v. *Randall,* 357 U. S. 513, 525. And the proposition that nonparticipants in a trial might get the "wrong impression" from unfettered reporting and commentary contains an invitation to censorship which I cannot accept. Where there is no disruption of the "essential requirement of the fair and orderly administration of justice," "[f]reedom of discussion should be given the widest range." *Pennekamp* v. *Florida,* 328 U. S. 331, 347; *Bridges* v. *California,* 314 U. S. 252. Cf. *Cox* v. *Louisiana,* 379 U. S. 559, 563.

I do not think that the Constitution denies to the State or to individual trial judges all discretion to conduct criminal trials with television cameras present, no matter how unobtrusive the cameras may be. I cannot say at this time that it is impossible to have a constitutional trial whenever any part of the proceedings is televised or recorded on television film. I cannot now hold that the Constitution absolutely bars television cameras from every criminal courtroom, even if they have no impact upon the jury, no effect upon any witness, and no influence upon the conduct of the judge.

For these reasons I would affirm the judgment.

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN joins, dissenting.

I agree with MR. JUSTICE STEWART that a finding of constitutional prejudice on this record entails erecting a flat ban on the use of cameras in the courtroom and believe that it is premature to promulgate such a broad constitutional principle at the present time. This is the first case in this Court dealing with the subject of television

coverage of criminal trials; our cases dealing with analogous subjects are not really controlling, cf. *Rideau* v. *Louisiana,* 373 U. S. 723; and there is, on the whole, a very limited amount of experience in this country with television coverage of trials. In my view, the currently available materials assessing the effect of cameras in the courtroom are too sparse and fragmentary to constitute the basis for a constitutional judgment permanently barring any and all forms of television coverage. As was said in another context, "we know too little of the actual impact . . . to reach a conclusion on the bare bones of the . . . evidence before us." *White Motor Co.* v. *United States,* 372 U. S. 253, 261. It may well be, however, that as further experience and informed judgment do become available, the use of cameras in the courtroom, as in this trial, will prove to pose such a serious hazard to a defendant's rights that a violation of the Fourteenth Amendment will be found without a showing on the record of specific demonstrable prejudice to the defendant. Compare *Wolf* v. *Colorado,* 338 U. S. 25, with *Mapp* v. *Ohio,* 367 U. S. 643; *Betts* v. *Brady,* 316 U. S. 455, with *Gideon* v. *Wainwright,* 372 U. S. 335; *Stein* v. *New York,* 346 U. S. 156, with *Jackson* v. *Denno,* 378 U. S. 368, 389–390.

The opinion of the Court in effect precludes further opportunity for intelligent assessment of the probable hazards imposed by the use of cameras at criminal trials. Serious threats to constitutional rights in some instances justify a prophylactic rule dispensing with the necessity of showing specific prejudice in a particular case. *Rideau* v. *Louisiana,* 373 U. S. 723, 727; *Jackson* v. *Denno,* 378 U. S. 368, 389. But these are instances in which there has been ample experience on which to base an informed judgment. Here, although our experience is inadequate and our judgment correspondingly infirm, the Court discourages further meaningful study of the use of television at criminal trials. Accordingly, I dissent.

MR. JUSTICE BRENNAN.

I write merely to emphasize that only four of the five Justices voting to reverse rest on the proposition that televised criminal trials are constitutionally infirm, whatever the circumstances. Although the opinion announced by my Brother CLARK purports to be an "opinion of the Court," my Brother HARLAN subscribes to a significantly less sweeping proposition. He states:

> "The Estes trial was a heavily publicized and highly sensational affair. I therefore put aside all other types of cases . . . . The resolution of those further questions should await an appropriate case; the Court should proceed only step by step in this unplowed field. *The opinion of the Court necessarily goes no farther, for only the four members of the majority who unreservedly join the Court's opinion would resolve those questions now.*" *Ante*, pp. 590–591. (Emphasis supplied.)

Thus today's decision is *not* a blanket constitutional prohibition against the televising of state criminal trials.

While I join the dissents of my Brothers STEWART and WHITE, I do so on the understanding that their use of the expressions "the Court's opinion" or "the opinion of the Court" refers only to those views of our four Brethren which my Brother HARLAN explicitly states he shares.

LINKLETTER *v.* WALKER, WARDEN.

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

No. 95. Argued March 11, 1965.—Decided June 7, 1965.

Petitioner was convicted of burglary by a Louisiana court and his conviction was affirmed by the highest state court. Thereafter, in *Mapp* v. *Ohio*, 367 U. S. 643, this Court held that evidence illegally seized is inadmissible in a state criminal trial, and petitioner applied for a writ of habeas corpus. The writ was denied by the federal District Court and by the Court of Appeals, which found the searches of petitioner's person and property illegal but held that the *Mapp* exclusionary rule was not retrospective. *Held:* The exclusionary rule announced in *Mapp* does not apply to state court convictions which had become final before its rendition. Pp. 622–640.

(a) The effect of a subsequent ruling of invalidity on prior final judgments when collaterally attacked is not automatic retroactive invalidity but depends upon a consideration of particular relations and conduct, or rights claimed to have become vested, of status, of prior determinations deemed to have finality, and of public policy in the light of the nature of the statute and its previous application. *Chicot Drainage Dist.* v. *Baxter State Bank*, 308 U. S. 371. P. 627.

(b) No distinction is drawn between civil and criminal litigation. P. 627.

(c) The Constitution neither prohibits nor requires retroactive effect and in each case the Court determines whether retroactive or prospective application is appropriate. This approach is particularly correct with reference to the unreasonable search and seizure proscription of the Fourth Amendment. P. 629.

(d) The primary purpose of *Mapp* v. *Ohio* was the enforcement of the Fourth Amendment through the inclusion of the exclusionary rule within its rights, and this purpose would not be advanced by making the rule retroactive. Pp. 636–637.

(e) Other areas in which rules have been applied retrospectively concerned the fairness of the trial, which is not under attack here. P. 639.

(f) The date of the seizure in *Mapp* (which preceded that here) is of no legal significance; the crucial date is the date of the *Mapp* judgment which changed the rule. P. 639.

323 F. 2d 11, affirmed.

Euel A. Screws, Jr., argued the cause for petitioner. With him on the brief was *Truman Hobbs.*

Teddy W. Airhart, Jr., Assistant Attorney General of Louisiana, argued the cause for respondent. With him on the brief was *Jack P. F. Gremillion,* Attorney General.

H. Richard Uviller argued the cause for the National District Attorneys' Association, as *amicus curiae,* urging affirmance. With him on the brief was *Michael Juviler. Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, *Barry Mahoney* and *Thomas F. O'Hare, Jr.,* Assistant Attorneys General, *H. Richard Uviller* and *Michael Juviler* filed a supplementary memorandum on behalf of the National District Attorneys' Association, as *amicus curiae.*

MR. JUSTICE CLARK delivered the opinion of the Court.

In *Mapp* v. *Ohio,* 367 U. S. 643 (1961), we held that the exclusion of evidence seized in violation of the search and seizure provisions of the Fourth Amendment was required of the States by the Due Process Clause of the Fourteenth Amendment. In so doing we overruled *Wolf* v. *Colorado,* 338 U. S. 25 (1949), to the extent that it failed to apply the exclusionary rule to the States.[1] This case presents the question of whether this requirement operates retrospectively upon cases finally decided in the

[1] Although *Mapp* may not be considered to be an overruling decision in the sense that it did not disturb the earlier holding of *Wolf* that the search and seizure provisions of the Fourth Amendment are applicable to the States, its effect certainly was to change existing law with regard to enforcement of the right.

period prior to *Mapp*. The Court of Appeals for the Fifth Circuit held that it did not, 323 F. 2d 11, and we granted certiorari in order to settle what has become a most troublesome question in the administration of justice.[2] 377 U. S. 930. We agree with the Court of Appeals.

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[2] A split of authority has developed in the various courts of appeals concerning the retrospectivity of *Mapp*. Compare *Hall* v. *Warden*, 313 F. 2d 483 (C. A. 4th Cir. 1963) (retroactive); *Walker* v. *Peppersack*, 316 F. 2d 119 (C. A. 4th Cir. 1963) (retroactive); *California* v. *Hurst*, 325 F. 2d 891 (C. A. 9th Cir. 1963) (retroactive), with *Gaitan* v. *United States*, 317 F. 2d 494 (C. A. 10th Cir. 1963) (prospective); *Linkletter* v. *Walker*, 323 F. 2d 11 (C. A. 5th Cir. 1963) (prospective); *Sisk* v. *Lane*, 331 F. 2d 235 (C. A. 7th Cir. 1964) (prospective); *United States ex rel. Angelet* v. *Fay*, 333 F. 2d 12 (C. A. 2d Cir. 1964) (prospective).

About the only point upon which there was agreement in the cases cited was that our opinion in *Mapp* did not foreclose the question.

The state courts which have considered the question have almost unanimously decided against application to cases finalized prior to *Mapp*. See, *e. g.*, *Beltowski* v. *Tahash*, 266 Minn. 182, 123 N. W. 2d 207, cert. denied, 375 U. S. 947 (1963); *Moore* v. *State*, 274 Ala. 276, 147 So. 2d 835 (1962), cert. denied, 374 U. S. 811 (1963); *People* v. *Muller*, 11 N. Y. 2d 154, 182 N. E. 2d 99, cert. denied, 371 U. S. 850 (1962).

Commentators have also split over the question of absolute retroactivity. See Bender, The Retroactive Effect of an Overruling Constitutional Decision: *Mapp* v. *Ohio*, 110 U. Pa. L. Rev. 650 (1962); Freund, New Vistas in Constitutional Law, 112 U. Pa. L. Rev. 631 (1964); Traynor, Mapp v. Ohio at Large in the Fifty States, 1962 Duke L. J. 319; Weinstein, Local Responsibility for Improvement of Search and Seizure Practices, 34 Rocky Mt. L. Rev. 150 (1962); Note, Collateral Attack of Pre-*Mapp* v. *Ohio* Convictions Based on Illegally Obtained Evidence in State Courts, 16 Rutgers L. Rev. 587 (1962); Note, Prospective Overruling and Retroactive Application in the Federal Courts, 71 Yale L. J. 907 (1962). Contra, Currier, Time and Change in Judge-Made Law: Prospective Overruling, 51 Va. L. Rev. 201 (1965); Meador, Habeas Corpus and the "Retroactivity" Illusion, 50 Va. L. Rev. 1115 (1964); Torcia & King, The Mirage of Retroactivity and Changing Constitutional Concepts, 66 Dick. L. Rev. 269 (1962).

The petitioner was convicted in a Louisiana District Court on May 28, 1959, of "simple burglary." At the time of his arrest he had been under surveillance for two days as a suspect in connection with another burglary. He was taken to the police station, searched, and keys were taken from his person. After he was booked and placed in jail, other officers took his keys, entered and searched his home, and seized certain property and papers. Later his place of business was entered and searched and seizures were effected. These intrusions were made without a warrant. The State District Court held that the arresting officers had reasonable cause for the arrest under Louisiana law and finding probable cause to search as an incident to arrest it held the seizures valid. The Supreme Court of Louisiana affirmed in February 1960.

On June 19, 1961, *Mapp* was announced. Immediately thereafter petitioner filed an application for habeas corpus in the state court on the basis of *Mapp*. The writ being denied in the Louisiana courts, he then filed a like application in the United States District Court. After denial there he appealed and the Court of Appeals affirmed. It found the searches too remote from the arrest and therefore illegal but held that the constitutional requirement of exclusion of the evidence under *Mapp* was not retrospective. Petitioner has two points: (1) that the Court of Appeals erred in holding that *Mapp* was not retrospective; and (2) that even though *Mapp* be held not to operate retrospectively, the search in his case was subsequent to that in *Mapp*, and while his final conviction was long prior to our disposition of it, his case should nevertheless be governed by *Mapp*.

Initially we must consider the term "retrospective" for the purposes of our opinion. A ruling which is purely prospective does not apply even to the parties before the

court.[3] See, *e. g.*, *England* v. *Louisiana State Board of Medical Examiners*, 375 U. S. 411 (1964). See also *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358 (1932). However, we are not here concerned with pure prospectivity since we applied the rule announced in *Mapp* to reverse Miss Mapp's conviction. That decision has also been applied to cases still pending on direct review at the time it was rendered.[4] Therefore, in this case, we are concerned only with whether the exclusionary principle enunciated in *Mapp* applies to state court convictions which had become final[5] before rendition of our opinion.

I.

While to some it may seem "academic" it might be helpful to others for us to briefly outline the history and theory of the problem presented.

At common law there was no authority for the proposition that judicial decisions made law only for the future.[6] Blackstone stated the rule that the duty of the court was not to "pronounce a new law, but to maintain and expound

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[3] It has been suggested that this Court is prevented by Article III from adopting the technique of purely prospective overruling. Note, 71 Yale L. J. 907, 933 (1962). But see 1A Moore, Federal Practice 4082–4084 (2d ed. 1961); Currier, *supra*, n. 2, at 216–220. However, no doubt was expressed of our power under Article III in *England* v. *Louisiana State Board of Medical Examiners*, 375 U. S. 411 (1964). See also *Griffin* v. *Illinois*, 351 U. S. 12, 20 (1956) (concurring opinion of Frankfurter, J.).

[4] *Ker* v. *California*, 374 U. S. 23 (1963); *Fahy* v. *Connecticut*, 375 U. S. 85 (1963); *Stoner* v. *California*, 376 U. S. 483 (1964).

[5] By final we mean where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before our decision in *Mapp* v. *Ohio*.

[6] "I know of no authority in this court to say that in general state decisions shall make law only for the future. Judicial decisions have had retrospective operation for near a thousand years." *Kuhn* v. *Fairmont Coal Co.*, 215 U. S. 349, 372 (1910) (dissenting opinion of Holmes, J.).

the old one." 1 Blackstone, Commentaries 69 (15th ed. 1809).[7] This Court followed that rule in *Norton* v. *Shelby County,* 118 U. S. 425 (1886),[8] holding that unconstitutional action "confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." At 442. The judge rather than being the creator of the law was but its discoverer. Gray, Nature and Sources of the Law 222 (1st ed. 1909). In the case of the overruled decision, *Wolf* v. *Colorado, supra,* here, it was thought to be only a failure at true discovery and was consequently never the law; while the overruling one, *Mapp,* was not "new law but an application of what is, and theretofore had been, the true law." Shulman, Retroactive Legislation, 13 Encyclopaedia of the Social Sciences 355, 356 (1934).

On the other hand, Austin maintained that judges do in fact do something more than discover law; they make

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[7] While Blackstone is always cited as the foremost exponent of the declaratory theory, a very similar view was stated by Sir Matthew Hale in his History of the Common Law which was published 13 years before the birth of Blackstone. Gray, Nature and Sources of the Law 206 (1st ed. 1909).

[8] It is interesting to note, however, that as early as 1801, Chief Justice Marshall in *United States* v. *Schooner Peggy,* 1 Cranch 103, had made clear that

"if subsequent to the judgment [in the trial court] and before the decision of the appellate court, a law intervenes and positively changes the rule which governs . . . the court must decide according to existing laws, and if it be necessary to set aside a judgment . . . which cannot be affirmed but in violation of law, the judgment must be set aside." At 110.

Petitioner maintains that this case establishes a rule of absolute retroactivity and that the principle is the same with regard to constitutional rights. Respondent, on the other hand, maintains that the case stands for the proposition for which he contends, *i. e.,* that a change in the law will be given effect while a case is on direct review, but cannot be necessarily invoked on collateral attack.

it interstitially by filling in with judicial interpretation the vague, indefinite, or generic statutory or common-law terms that alone are but the empty crevices of the law. Implicit in such an approach is the admission when a case is overruled that the earlier decision was wrongly decided. However, rather than being erased by the later overruling decision it is considered as an existing juridical fact until overruled, and intermediate cases finally decided under it are not to be disturbed.

The Blackstonian view ruled English jurisprudence and cast its shadow over our own as evidenced by *Norton* v. *Shelby County, supra.* However, some legal philosophers continued to insist that such a rule was out of tune with actuality largely because judicial repeal ofttime did "work hardship to those who [had] trusted to its existence." Cardozo, Address to the N. Y. Bar Assn., 55 Rep. N. Y. State Bar Assn. 263, 296–297 (1932). The Austinian view gained some acceptance over a hundred years ago when it was decided that although legislative divorces were illegal and void, those previously granted were immunized by a prospective application of the rule of the case. *Bingham* v. *Miller,* 17 Ohio 445 (1848). And as early as 1863 this Court drew on the same concept in *Gelpcke* v. *Dubuque,* 1 Wall. 175 (1863). The Supreme Court of Iowa had repeatedly held that the Iowa Legislature had the power to authorize municipalities to issue bonds to aid in the construction of railroads. After the City of Dubuque had issued such bonds, the Iowa Supreme Court reversed itself and held that the legislature lacked such power. In *Gelpcke,* which arose after the overruling decision, this Court held that the bonds issued under the apparent authority granted by the legislature were collectible. "However we may regard the late [overruling] case in Iowa as affecting the future, it can have no effect upon the past." At 206. The theory was, as Mr. Justice Holmes stated in *Kuhn* v. *Fairmont Coal Co.,* 215 U. S.

349, 371 (1910), "that a change of judicial decision after a contract has been made on the faith of an earlier one the other way is a change of the law." And in 1932 Mr. Justice Cardozo in *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358, applied the Austinian approach in denying a federal constitutional due process attack on the prospective application of a decision of the Montana Supreme Court. He said that a State "may make a choice for itself between the principle of forward operation and that of relation backward." At 364. Mr. Justice Cardozo based the rule on the avoidance of "injustice or hardship" citing a long list of state and federal cases supporting the principle that the courts had the power to say that decisions though later overruled "are law none the less for intermediate transactions." At 364. Eight years later Chief Justice Hughes in *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U. S. 371 (1940), in discussing the problem made it clear that the broad statements of *Norton, supra,* "must be taken with qualifications." He reasoned that the actual existence of the law prior to the determination of unconstitutionality "is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration." He laid down the rule that the "effect of the subsequent ruling as to invalidity may have to be considered in various aspects." At 374.

One form of limited retroaction which differs somewhat from the type discussed above is that which was established in *United States* v. *Schooner Peggy*, 1 Cranch 103 (1801). There, a schooner had been seized under an order of the President which commanded that any armed French vessel found on the high seas be captured. An order of condemnation was entered on September 23, 1800. However, while the case was pending before this Court the United States signed an agreement with France providing that any property captured and not "defini-

tively condemned" should be restored. Chief Justice Marshall said:

> "It is in the general true that the province of an appellate court is only to enquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied . . . [and] where individual rights . . . are sacrificed for national purposes . . . the court must decide according to existing laws, and if it be necessary to set aside a judgment . . . which cannot be affirmed but in violation of law, the judgment must be set aside." At 110.

This same approach was subsequently applied in instances where a statutory change intervened, *Carpenter* v. *Wabash R. Co.*, 309 U. S. 23 (1940); where a constitutional amendment was adopted, *United States* v. *Chambers*, 291 U. S. 217 (1934);[9] and where judicial decision altered or overruled earlier case law, *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U. S. 538 (1941).[10]

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[9] "Because this was a criminal prosecution, it builds not only upon the cases which followed *Schooner Peggy* but also upon the principle, established at common law, that repeal of a penal statute prohibits prosecution of acts committed before the repeal if those acts had not yet been prosecuted to final judgment. The repeal is regarded as an indication that the state no longer wants such acts punished, regardless of when they took place, and no longer views them as criminal." Note, 71 Yale L. J. 907, 914 (1962).

[10] This was a diversity case in which this Court held that the doctrine of *Schooner Peggy*, in effect, was incorporated in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64. "A federal court sitting in a diversity case must therefore apply the most recent state court decision, even if it came after the operative events or the entry of judgment by a lower court." Note, 71 Yale L. J. 907, 915 (1962). See, *e. g.*, *Blaauw* v. *Grand Trunk Western R. Co.*, 380 U. S. 127 (1965).

Under our cases it appears (1) that a change in law will be given effect while a case is on direct review, *Schooner Peggy, supra,*[11] and (2) that the effect of the subsequent ruling of invalidity on prior final judgments when collaterally attacked is subject to no set "principle of absolute retroactive invalidity" but depends upon a consideration of "particular relations . . . and particular conduct . . . of rights claimed to have become vested, of status, of prior determinations deemed to have finality"; and "of public policy in the light of the nature both of the statute and of its previous application." *Chicot County Drainage Dist.* v. *Baxter State Bank, supra,* at 374.

That no distinction was drawn between civil and criminal litigation is shown by the language used not only in *Schooner Peggy, supra,* and *Chicot County, supra,* but also in such cases as *State* v. *Jones,* 44 N. M. 623, 107 P. 2d 324 (1940) and *James* v. *United States,* 366 U. S. 213 (1961). In the latter case, this Court laid down a prospective principle in overruling *Commissioner* v. *Wilcox,* 327 U. S. 404 (1946), "in a manner that will not prejudice those who might have relied on it." [12] At 221.

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[11] Accord, *Carpenter* v. *Wabash R. Co.,* 309 U. S. 23 (1940) (intervening statutory change); *Vandenbark* v. *Owens-Illinois Glass Co.,* 311 U. S. 538 and cases cited at 541–542 (1941); *Dinsmore* v. *Southern Express Co.,* 183 U. S. 115, 120 (1901) (intervening statutory change); *Crozier* v. *Krupp,* 224 U. S. 290, 308 (1912) (intervening statutory change).

[12] There was no mention of prospective overruling in the opinion, however three Justices voted to overrule *Wilcox* but reversed James' conviction because "the element of willfulness could not be proven in a criminal prosecution for failing to include embezzled funds in gross income in the year of misappropriation so long as the statute contained the gloss placed upon it by *Wilcox* at the time the alleged crime was committed." 366 U. S. 213, 221–222. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS concurred in the reversal of the conviction on the basis that *Wilcox* was right and therefore failure to include

Thus, the accepted rule today is that in appropriate cases the Court may in the interest of justice make the rule prospective. And "there is much to be said in favor of such a rule for cases arising in the future." *Mosser* v. *Darrow*, 341 U. S. 267, at 276 (dissenting opinion of BLACK, J.).

While the cases discussed above deal with the invalidity of statutes or the effect of a decision overturning long-established common-law rules, there seems to be no impediment—constitutional or philosophical—to the use of the same rule in the constitutional area where the exigencies of the situation require such an application. It is true that heretofore, without discussion, we have applied new constitutional rules to cases finalized before the promulgation of the rule.[13] Petitioner contends that our

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embezzled funds in taxable income was not a crime. However, MR. JUSTICE BLACK strongly disagreed with the prospective manner in which the overruling was done.

"[O]ne of the great inherent restraints upon this Court's departure from the field of interpretation to enter that of lawmaking has been the fact that its judgments could not be limited to prospective application. This Court and in fact all departments of the Government have always heretofore realized that prospective lawmaking is the function of Congress rather than of the courts. We continue to think that this function should be exercised only by Congress under our constitutional system." 366 U. S., at 225.

Compare the dissenting opinion of MR. JUSTICE BLACK in *Mosser* v. *Darrow*, 341 U. S. 267, 275 (1951), where he stated that a new rule of trustee liability should not be applied retroactively. For discussion of these cases see Currier, *supra*, n. 2; Note, 71 Yale L. J. 907.

[13] *Eskridge* v. *Washington Prison Board*, 357 U. S. 214 (1958), applied the rule of *Griffin* v. *Illinois*, 351 U. S. 12 (1956), requiring the State to furnish transcripts of the trial to indigents on appeal, to a 1935 conviction. The rule in *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), that counsel must be appointed to represent an indigent charged with a felony, was actually applied retrospectively in that case since *Gideon* had collaterally attacked the prior judgment by post-conviction remedies. See also *Doughty* v. *Maxwell*, 376 U. S. 202 (1964). *Jackson* v. *Denno*, 378 U. S. 368 (1964), involving a

method of resolving those prior cases demonstrates that an absolute rule of retroaction prevails in the area of constitutional adjudication. However, we believe that the Constitution neither prohibits nor requires retrospective effect. As Justice Cardozo said, "We think the federal constitution has no voice upon the subject." [14]

Once the premise is accepted that we are neither required to apply, nor prohibited from applying, a decision retrospectively, we must then weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. We believe that this approach is particularly correct with reference to the Fourth Amendment's prohibitions as to unreasonable searches and seizures. Rather than "disparaging" the Amendment we but apply the wisdom of Justice Holmes that "[t]he life of the law has not been logic: it has been experience." Holmes, The Common Law 5 (Howe ed. 1963).[15]

II.

Since *Weeks* v. *United States,* 232 U. S. 383 (1914), this Court has adhered to the rule that evidence seized by federal officers in violation of the Fourth Amend-

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coerced confession, was also applied to the petitioner who was here on a collateral attack. See also *McNerlin* v. *Denno,* 378 U. S. 575 (1964). It is also contended that *Reck* v. *Pate,* 367 U. S. 433 (1961), supports the conclusion of absolute retroactivity in the constitutional area since the petitioner convicted in 1937 was released after a finding that the confession was coerced when judged by standards set forth in our cases decided subsequent to his conviction. See *United States ex rel. Angelet* v. *Fay,* 333 F. 2d 12, 24 (dissenting opinion of Marshall, J.).

[14] *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.,* 287 U. S. 358, 364 (1932) (referring to state court's prospective overruling of prior decision).

[15] See *Mapp* v. *Ohio,* 367 U. S. 643, 661–662 (1961) (concurring opinion of BLACK, J.).

ment is not admissible at trial in a federal court. In 1949 in *Wolf* v. *Colorado, supra,* the Court decided that while the right to privacy—"the core of the Fourth Amendment"—was such a basic right as to be implicit in "the concept of ordered liberty" and thus enforceable against the States through the Fourteenth Amendment, "the ways of enforcing such a basic right raise questions of a different order. How such arbitrary conduct should be checked, what remedies against it should be afforded, the means by which the right should be made effective, are all questions that are not to be so dogmatically answered as to preclude the varying solutions which spring from an allowable range of judgment on issues not susceptible of quantitative solution." At 27–28.

The Court went on to say that the federal exclusionary rule was not "derived from the explicit requirements of the Fourth Amendment . . . . The decision was a matter of judicial implication." At 28. Since "we find that in fact most of the English-speaking world does not regard as vital to such protection the exclusion of evidence thus obtained, we must hesitate to treat this remedy as an essential ingredient of the right." [16] At 29. While granting that "in practice" the exclusion of evidence might be "an effective way of deterring unreasonable searches," the Court concluded that it could not "condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon other methods which, if consistently enforced, would be equally effective." At 31. The continuance of the federal exclusionary rule was excused on the ground that the reasons for it were more

[16] There the Court detailed the lineup of the States on the exclusionary rule before and after *Weeks* pointing out that at the time of the decision 31 States rejected the rule and 16 States were in agreement with it.

"compelling" since public opinion in the community could be exerted against oppressive conduct by local police far more effectively than it could throughout the country.

The "asymmetry which *Wolf* imported into the law," *Mapp* v. *Ohio, supra,* at 670 (concurring opinion of DOUGLAS, J.), was indicated by a decision announced on the same day, *Lustig* v. *United States,* 338 U. S. 74 (1949), holding that evidence given to federal authorities "on a silver platter" by state officers was not excludable in federal trials. At 79. *Wolf*'s holding, in conjunction with the "silver platter" doctrine of *Lustig,* provided wide avenues of abuse in the *Weeks*' exclusionary rule in the federal courts. Evidence seized in violation of the Fourth Amendment by state officers was turned over to federal officers and admitted in evidence in prosecutions in the federal courts. In 1951 *Wolf* was strengthened by *Stefanelli* v. *Minard,* 342 U. S. 117, in which the Court refused to permit a federal court to enjoin the use of evidence in a state criminal proceeding that had been illegally seized by state officers. In 1952, however, the Court could not tolerate the procedure involved in *Rochin* v. *California,* 342 U. S. 165, where morphine capsules pumped from the accused's stomach by state officers were admitted in evidence in a state court. It struck down the conviction on due process grounds under the Fourteenth Amendment because the action was shocking to the conscience. In 1954 came *Irvine* v. *California,* 347 U. S. 128, in which the State admitted evidence procured via a microphone secreted clandestinely by state police in the accused's bedroom. These "incredible" circumstances did not sufficiently shock the conscience of the Court into applying the *Rochin* test. Instead the case went off on the doctrine of *Wolf.* Mr. Justice Jackson in announcing the judgment of the Court overruled those who urged that *Wolf* "applies only to searches and seizures which produce on our minds

a mild shock, while if the shock is more serious, the states must exclude the evidence or we will reverse the conviction." At 133–134. He strongly reaffirmed *Wolf* stating:

> "Now that the *Wolf* doctrine is known to them, state courts may wish further to reconsider their evidentiary rules. But to upset state convictions even before the states have had adequate opportunity to adopt or reject the rule would be an unwarranted use of federal power." At 134.

The opinion in dealing with the operation of the exclusionary rule said that it "must be remembered that petitioner is not invoking the Constitution to prevent or punish a violation of his federal right recognized in *Wolf* . . . . He is invoking it only to set aside his own conviction of crime. . . . Rejection of the evidence does nothing to punish the wrong-doing official, while it may, and likely will, release the wrong-doing defendant. . . . [It] does nothing to protect innocent persons who are the victims of illegal but fruitless searches." At 136. Admitting the futility of other remedies available to the victims of illegal searches, Mr. Justice Jackson and the then Chief Justice suggested that the "Clerk of this Court should be directed to forward a copy of the record in this case, together with a copy of this opinion, for attention of the Attorney General of the United States" with a view to prosecution under the Civil Rights Act, 62 Stat. 696, 18 U. S. C. § 242 (1958 ed.). In concurring in the judgment in *Irvine* the writer of this opinion indicated his displeasure with *Wolf* but observed that since the Court "still refuses today" to overrule it he felt bound by *Wolf* but had hopes that "strict adherence to the tenor of that decision may produce needed converts for its extinction." At 138–139. The Court continued to broaden the rule of exclusion when, in 1956, it held that a federal agent might be enjoined from transferring to state authorities evidence that he

had seized on an illegal federal warrant, or testifying with regard to it in a state prosecution. *Rea* v. *United States,* 350 U. S. 214. In 1960 the Court's dissatisfaction with the "silver platter" doctrine, *Lustig* v. *United States, supra,* led to its rejection in the leading case of *Elkins* v. *United States,* 364 U. S. 206. The factual situation being the converse of *Rea* v. *United States, supra,* the Court tightened the noose of exclusion in order to strangle completely the use in the federal courts of evidence illegally seized by state agents. It was in *Elkins* that the Court emphasized that the exclusionary rule was "calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." [17] At 217.

Mapp was announced in 1961. The Court in considering "the current validity of the factual grounds upon which *Wolf* was based" pointed out that prior to *Wolf* "almost two-thirds of the States were opposed to the use of the exclusionary rule, now, despite the *Wolf* case, more than half of those since passing upon it . . . have wholly or partly adopted or adhered to the *Weeks* rule." At 651. We then cited California as typical of those adopting the rule since *Wolf.* It was " 'compelled to reach that conclusion,' " we said, quoting California's highest court, " 'because other remedies have completely failed to secure compliance with the constitutional provisions . . . .' *People* v. *Cahan,* 44 Cal. 2d 434 . . . ." We went on to find that "[t]he experience of California that such other remedies have been worthless and futile is buttressed by the experience of other States. The obvious futility of relegating the Fourth Amendment to the protection of other remedies has, moreover, been recog-

[17] In an Appendix to the opinion, the lineup of States regarding the exclusion of illegally seized evidence was catalogued, indicating that there was some change since *Wolf*—26 States excluded such evidence while 24 did not. At 224–225.

nized by this Court since *Wolf*. See *Irvine* v. *California* . . . ." At 652–653. In discussing *People* v. *Defore*, 242 N. Y. 13, 150 N. E. 585, upon which *Wolf* heavily relied, we concluded that "Likewise, time has set its face against what *Wolf* called the 'weighty testimony' of *People* v. *Defore* . . . 'that [t]he Federal rule as it stands is either too strict or too lax.' 242 N. Y., at 22." At 653. We concluded that "the force of that reasoning has been largely vitiated by later decisions of this Court," at 653, which had closed all of the courtroom doors "open to evidence secured by official lawlessness . . ." save that of the state courts. At 655. That door was closed by *Mapp*.

In recapitulation, we found in *Mapp* that *Wolf* rested on these grounds. First, that the "contrariety of views of the States" as to the use of the exclusionary rule was "particularly impressive." Second, " 'other means of protection' [of Fourth Amendment rights] ha[d] been afforded" than the exclusionary rule. And, third, the "weighty testimony" of *People* v. *Defore, supra.* As to the first, we found the lineup of the States as to the exclusionary rule had shifted to where a majority favored it; as to the second, that the other means of protection had proven to be "worthless and futile" and had not reduced the incidence of police lawlessness during the 12 years since *Wolf* was announced but that *Wolf* had operated as a license for police illegality; and, as to the third, that our cases subsequent to *Mapp* had completely closed the laxity in the federal exclusionary rule complained of in *People* v. *Defore, supra.* We also affirmatively found that the exclusionary rule was "an essential part of both the Fourth and Fourteenth Amendments" and the only effective remedy for the protection of rights under the Fourth Amendment; that it would stop the needless "shopping around" that was causing conflict between federal and state courts, as was permitted in *Wilson* v. *Schnettler*, 365 U. S. 381 (1961); that it would withdraw the invitation

which *Wolf* extended to federal officers to step across the street to the state's attorney with their illegal evidence, thus eliminating a practice which tended to destroy the entire system of constitutional restraints on which the liberties of the people rest; that it would promote state-federal cooperation in law enforcement by rejecting the double standard of admissibility of illegal evidence which tends to breed suspicion among the officers, encourages disobedience to the Constitution on the part of all the participants and violates "the imperative of judicial integrity." *Mapp* v. *Ohio, supra,* at 657–660. In short, just as other cases had found the exclusionary rule to be a deterrent safeguard necessary to the enforcement of the Amendment, *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385 (1920), *Mapp* bottomed its rule on its necessity as a "sanction upon which [the Fourth Amendment's] protection and enjoyment had always been deemed dependent under the *Boyd, Weeks* and *Silverthorne* cases." At 655. *Mapp*'s rationale was that since *Wolf* we had on an *ad hoc* basis been led to exclude all evidence in both state and federal courts where a federal agent had participated in the illegal search. Only a few States had made any changes in their rule of admissibility since *Wolf* and many of those not following the federal exclusionary rule were, in effect, using *Wolf* as a license to violate the Fourth Amendment's proscription of unreasonable searches and seizures as applied to the States by the *Wolf* case itself. As we noted in *Mapp* "further delay in [applying the exclusionary rule to the States] could have no effect other than to compound the difficulties"; a definitive continuance of *Wolf* might have increased the number of cases involving illegal searches in non-exclusionary States and also enticed those in the exclusionary column to reverse their position, as some States had done prior to *Mapp.*

III.

We believe that the existence of the *Wolf* doctrine prior to *Mapp* is "an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration." *Chicot County Drainage Dist.* v. *Baxter State Bank, supra,* at 374. The thousands of cases that were finally decided on *Wolf* cannot be obliterated. The "particular conduct, private and official," must be considered. Here "prior determinations deemed to have finality and acted upon accordingly" have "become vested." And finally, "public policy in the light of the nature both of the . . . [*Wolf* doctrine] and of its previous application" must be given its proper weight. *Ibid.* In short, we must look to the purpose of the *Mapp* rule; the reliance placed upon the *Wolf* doctrine; and the effect on the administration of justice of a retrospective application of *Mapp.*

It is clear that the *Wolf* Court, once it had found the Fourth Amendment's unreasonable Search and Seizure Clause applicable to the States through the Due Process Clause of the Fourteenth Amendment, turned its attention to whether the exclusionary rule was included within the command of the Fourth Amendment. This was decided in the negative. It is clear that based upon the factual considerations heretofore discussed the *Wolf* Court then concluded that it was not necessary to the enforcement of the Fourth Amendment for the exclusionary rule to be extended to the States as a requirement of due process. *Mapp* had as its prime purpose the enforcement of the Fourth Amendment through the inclusion of the exclusionary rule within its rights. This, it was found, was the only effective deterrent to lawless police action. Indeed, all of the cases since *Wolf* requiring the exclusion of illegal evidence have been based on the necessity for an effective deterrent to illegal police

action. See, *e. g., Rea* v. *United States, supra.* We cannot say that this purpose would be advanced by making the rule retrospective. The misconduct of the police prior to *Mapp* has already occurred and will not be corrected by releasing the prisoners involved. Nor would it add harmony to the delicate state-federal relationship of which we have spoken as part and parcel of the purpose of *Mapp.* Finally, the ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late.

It is true that both the accused and the States relied upon *Wolf.* Indeed, *Wolf* and *Irvine* each pointed the way for the victims of illegal searches to seek reparation for the violation of their privacy. Some pursued the same. See *Monroe* v. *Pape,* 365 U. S. 167 (1961). In addition, in *Irvine,* a flag in a concurring opinion warned that *Wolf* was in stormy weather. On the other hand, the States relied on *Wolf* and followed its command. Final judgments of conviction were entered prior to *Mapp.* Again and again this Court refused to reconsider *Wolf* and gave its implicit approval to hundreds of cases in their application of its rule. In rejecting the *Wolf* doctrine as to the exclusionary rule the purpose was to deter the lawless action of the police and to effectively enforce the Fourth Amendment. That purpose will not at this late date be served by the wholesale release of the guilty victims.

Finally, there are interests in the administration of justice and the integrity of the judicial process to consider. To make the rule of *Mapp* retrospective would tax the administration of justice to the utmost. Hearings would have to be held on the excludability of evidence long since destroyed, misplaced or deteriorated. If it is excluded, the witnesses available at the time of the original trial will not be available or if located their memory will be dimmed. To thus legitimate such an extraordinary

procedural weapon that has no bearing on guilt would seriously disrupt the administration of justice.

It is urged, however, that these same considerations apply in the cases that we have applied retrospectively in other areas,[18] notably that of coerced confessions, and that the *Mapp* exclusionary rule should, therefore, be given the same dignity and effect. Two cases are cited, *Fay* v. *Noia,* 372 U. S. 391 (1963), and *Reck* v. *Pate,* 367 U. S. 433 (1961), but neither is apposite. It is said that we ordered new trials 25 years after conviction in the latter and after the lapse of 21 years in the former. This time table is true but that is all. The principle that a coerced confession is not admissible in a trial predated the arrests as well as the original convictions in each of these cases. See *Brown* v. *Mississippi,* 297 U. S. 278 (1936). There was no question of retrospective operation involved in either case. Moreover, coerced confessions are excluded from evidence because of "a complex of values," *Blackburn* v. *Alabama,* 361 U. S. 199 (1960), including "the likelihood that the confession is untrue"; "the preservation of the individual's freedom of will"; and "'[t]he abhorrence of society to the use of involuntary confessions.'" At 207. Cited with approval in *Jackson* v. *Denno,* 378 U. S. 368, 385–386 (1964). But there is no likelihood of unreliability or coercion present in a search-and-seizure case. Rather than being abhorrent at the time of seizure in this case, the use in state trials of illegally seized evidence had been specifically authorized by this Court in *Wolf.*[19] Furthermore, in *Noia,* the confession was admittedly coerced and the sole issue involved the availability of federal habeas corpus in a state convic-

[18] See cases cited in n. 13, *supra.*

[19] Indeed, MR. JUSTICE BLACK in concurring said "that the federal exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence which Congress might negate." 338 U. S. 25, at 39–40.

tion, where state post-conviction remedies had been exhausted but the accused had failed to appeal from his original conviction. Nothing of that kind is involved here and this holding has no bearing whatever on *Noia* or *Reck,* for that matter. Finally, in each of the three areas in which we have applied our rule retrospectively [20] the principle that we applied went to the fairness of the trial—the very integrity of the fact-finding process. Here, as we have pointed out, the fairness of the trial is not under attack. All that petitioner attacks is the admissibility of evidence, the reliability and relevancy of which is not questioned, and which may well have had no effect on the outcome.

Nor can we accept the contention of petitioner that the *Mapp* rule should date from the day of the seizure there, rather than that of the judgment of this Court. The date of the seizure in *Mapp* has no legal significance. It was the judgment of this Court that changed the rule and the date of that opinion is the crucial date. In the light of the cases of this Court this is the better cutoff time. See *United States* v. *Schooner Peggy, supra.*

All that we decide today is that though the error complained of might be fundamental it is not of the nature

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[20] In *Griffin* v. *Illinois, supra,* the appeal which was denied because of lack of funds was "an integral part of the [State's] trial system for finally adjudicating the guilt or innocence of a defendant." At 18. Precluding an appeal because of inability to pay was analogized to denying the poor a fair trial. In *Gideon* v. *Wainwright, supra,* we recognized a fundamental fact that a layman, no matter how intelligent, could not possibly further his claims of innocence and violation of previously declared rights adequately. Because of this the judgment lacked reliability. In *Jackson* v. *Denno, supra,* the holding went to the basis of fair hearing and trial because the procedural apparatus never assured the defendant a fair determination of voluntariness. In addition, MR. JUSTICE WHITE expressed grave doubts regarding the ability of the jury to disregard a confession found to be involuntary if the question of guilt was uncertain.

requiring us to overturn all final convictions based upon it. After full consideration of all the factors we are not able to say that the *Mapp* rule requires retrospective application.

Affirmed.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, dissenting.

The Court of Appeals held, and this Court now concedes, that the petitioner Linkletter is presently in prison serving a nine-year sentence at hard labor for burglary under a 1959 Louisiana State Court conviction obtained by use of evidence unreasonably seized in violation of the Fourth and Fourteenth Amendments. On June 19, 1961, we decided *Mapp* v. *Ohio,* 367 U. S. 643, in which the Court specifically held that "all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." 367 U. S., at 655. Stating that this Court had previously held in *Wolf* v. *Colorado,* 338 U. S. 25, that the Fourth Amendment was applicable to the States through the Due Process Clause of the Fourteenth Amendment, this Court in *Mapp* went on to add:

> "In short, the admission of the new constitutional right by *Wolf* could not consistently tolerate denial of its most important constitutional privilege, namely, the exclusion of the evidence which an accused had been forced to give by reason of the unlawful seizure. To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment." 367 U. S., at 656.

Despite the Court's resounding promises throughout the *Mapp* opinion that convictions based on such "unconstitutional evidence" would " 'find no sanction in the judg-

ments of the courts,' " Linkletter, convicted in the state court by use of "unconstitutional evidence," is today denied relief by the judgment of this Court because his conviction became "final" before *Mapp* was decided. Linkletter must stay in jail; Miss Mapp, whose offense was committed before Linkletter's, is free. This different treatment of Miss Mapp and Linkletter points up at once the arbitrary and discriminatory nature of the judicial contrivance utilized here to break the promise of *Mapp* by keeping all people in jail who are unfortunate enough to have had their unconstitutional convictions affirmed before June 19, 1961.

Miss Mapp's Ohio offense was committed May 23, 1957; Linkletter's Louisiana offense occurred more than a year later—August 16, 1958. Linkletter was tried in Louisiana, convicted, the State Supreme Court affirmed, and a rehearing was denied March 21, 1960, all within about one year and seven months after his offense was committed. The Ohio Supreme Court affirmed Miss Mapp's conviction March 23, 1960, approximately two years and 10 months after her offense. Thus, had the Ohio courts proceeded with the same expedition as those in Louisiana, or had the Louisiana courts proceeded as slowly as the Ohio courts, Linkletter's conviction would not have been "finally" decided within the Court's definition of "finally" until within about 10 days of the time Miss Mapp's case was decided in this Court—which would have given Linkletter ample time to petition this Court for virtually automatic relief on direct review after the *Mapp* case was decided. The Court offers no defense based on any known principle of justice for discriminating among defendants who were similarly convicted by use of evidence unconstitutionally seized. It certainly cannot do so as between Linkletter and Miss Mapp. The crime with which she was charged took

place more than a year before his, yet the decision today seems to rest on the fanciful concept that the Fourth Amendment protected her 1957 offense against conviction by use of unconstitutional evidence but denied its protection to Linkletter for his 1958 offense. In making this ruling the Court assumes for itself the virtue of acting in harmony with a comment of Justice Holmes that "[t]he life of the law has not been logic: it has been experience." [1] Justice Holmes was not there talking about the Constitution; he was talking about the evolving judge-made law of England and of some of our States whose judges are allowed to follow in the common law tradition. It should be remembered in this connection that no member of this Court has ever more seriously criticized it than did Justice Holmes for reading its own predilections into the "vague contours" of the Due Process Clause.[2] But quite apart from that, there is no experience of the past that justifies a new Court-made rule to perpetrate a grossly invidious and unfair discrimination against Linkletter simply because he happened to be prosecuted in a State that was evidently well up with its criminal court docket. If this discrimination can be excused at all it is not because of experience but because of logic—sterile and formal at that—not, according to Justice Holmes, the most dependable guide in lawmaking.

When we get beyond the way the new rule works as between people situated like Linkletter and Miss Mapp, the new contrivance stands no better. I say "new" because the Court admits, as it must, that "It is true that heretofore, without discussion, we have applied new constitutional rules to cases finalized before the promulgation of the rule." *Ante,* p. 628. And the Court also refers to

[1] Holmes, The Common Law 5 (Howe ed. 1963).

[2] *Adkins* v. *Children's Hospital,* 261 U. S. 525, 568 (dissenting opinion).

a number of cases in which that practice has been followed. For example, in *Griffin* v. *Illinois,* 351 U. S. 12, where we announced that a pauper could not be denied the right to appeal because of his indigency, a suggestion was made in a concurring opinion that the Court should apply its new rule to future cases only. *Id.,* at 25–26. However, in 1958 this Court did apply the *Griffin* rule to a conviction obtained in 1935, over the dissents of two Justices who said that the *Griffin* case decided in 1956 should not determine the constitutionality of the petitioner's 1935 conviction. *Eskridge* v. *Washington,* 357 U. S. 214.

Interesting as the question may be abstractly, this case should not be decided on the basis of arguments about whether judges "make" law or "discover" it when performing their duty of interpreting the Constitution. This Court recognized in *Chicot County Drainage District* v. *Baxter State Bank,* 308 U. S. 371, 374, an opinion in which I joined, that "an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified." And where state courts in certain situations chose to apply their decisions to the future only, this Court also said that, "the federal constitution has no voice" forbidding them to do so. *Great Northern R. Co.* v. *Sunburst Oil & Ref. Co.,* 287 U. S. 358, 364. But cf. *Kuhn* v. *Fairmont Coal Co.,* 215 U. S. 349, 372 (dissenting opinion). In stating this Court's position on the question, the opinion in the *Chicot County* case recognized that rights and interests may have resulted from the existence and operation of a statute which should be respected notwithstanding its later being declared unconstitutional:

> "The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects,—with respect to particular relations, indi-

> vidual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination." 308 U. S., at 374.

Thus in *Mosser* v. *Darrow,* 341 U. S. 267, when this Court created an entirely new rule imposing heavy financial liability on a trustee in bankruptcy for acts which at the time he performed them had been perfectly valid under the law, I dissented, stating my belief that although there was "much to be said in favor of such a rule [of trustee liability] for cases arising in the future," 341 U. S., at 276, it should not be applied against trustees who had in good faith relied on the existence of a different rule in the past. On the other hand, in *James* v. *United States,* 366 U. S. 213, I suggested in an opinion in which MR. JUSTICE DOUGLAS joined, that there were objections having a peculiar force in the field of criminal law to a judicial rule to the effect that courts "should make their decisions as to what the law is apply only prospectively." A major basis for what we said there was stated this way:

> "Our trouble with this aspect of the Court's action is that it seems to us to indicate that the Court has passed beyond the interpretation of the tax statute and proceeded substantially to amend it.
>
> . . . . .
>
> "In our judgment one of the great inherent restraints upon this Court's departure from the field of interpretation to enter that of lawmaking has been the fact that its judgments could not be limited to prospective application." 366 U. S., at 224–225.

I adhere to my views in *James,* expressing opposition to a general rule that would always apply new interpretations

of criminal laws prospectively. Doubtless there might be circumstances in which applying a new interpretation of the law to past events might lead to unjust consequences which, as we said in *Chicot,* "cannot justly be ignored." No such unjust consequences to Linkletter, however, can possibly result here by giving him and others like him the benefit of a changed constitutional interpretation where he is languishing in jail on the basis of evidence concededly used unconstitutionally to convict him. And I simply cannot believe that the State of Louisiana has any "vested interest" that we should recognize in these circumstances in order to keep Linkletter in jail. I therefore would follow this Court's usual practice and apply the *Mapp* rule to unconstitutional convictions which have resulted in persons being presently in prison.

In refusing to give Linkletter the benefit of the *Mapp* rule, the Court expresses the view that its "approach is particularly correct with reference to the Fourth Amendment's prohibitions as to unreasonable searches and seizures," indicating a disparaging view of the Fourth Amendment that leaves me somewhat puzzled after *Mapp* and other recent opinions talking about the indispensable protections of the Amendment. *Ante,* p. 629. Then the Court goes on to follow a recent pattern of balancing away Bill of Rights guarantees and balances away [3] in great part the Fourth Amendment safeguards one could reasonably have expected from the *Mapp* opinion and the opinion in *Fay* v. *Noia,* 372 U. S. 391, which opened up to collateral attack all unconstitutional convictions even though "final." Even using the Court's own balancing process, however, I think those now in prison under convictions resting on the use of unconstitutionally seized evidence should have their convictions set aside and be granted new trials conducted in conformity with the Constitution.

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[3] See *United States ex rel. Angelet* v. *Fay,* 333 F. 2d 12, 27 (dissenting opinion of Judge Marshall).

I.

As the Court concedes, *ante,* p. 628, this is the first instance on record where this Court, having jurisdiction, has ever refused to give a previously convicted defendant the benefit of a new and more expansive Bill of Rights interpretation. I am at a loss to understand why those who suffer from the use of evidence secured by a search and seizure in violation of the Fourth Amendment should be treated differently from those who have been denied other guarantees of the Bill of Rights. Speaking of the right guaranteed by the Fourth and Fifth Amendments not to be convicted on "unconstitutional evidence," the Court said in *Mapp,* only four years ago, that:

> ". . . we can no longer permit that right to remain an empty promise. Because it is *enforceable in the same manner and to like effect* as other basic rights secured by the Due Process Clause, we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment. *Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him . . . .*" 367 U. S., at 660. (Emphasis supplied.)

Linkletter was convicted on "unconstitutional evidence." He brought this federal habeas corpus proceeding seeking relief from his prior conviction, which this Court held in *Fay* v. *Noia,* 372 U. S. 391, was the proper way to challenge a previous conviction unconstitutionally obtained. Evidence used against Noia, however, was not obtained by an unlawful search and seizure but by a coerced confession. Noia's conviction had taken place 21 years before his case reached this Court, and was therefore "final." And in *Reck* v. *Pate,* 367 U. S. 433, decided in 1961, this

Court set aside the conviction of Reck for a 1936 offense on the ground that a coerced confession had been used against him.

There are peculiar reasons why the *Mapp* search and seizure exclusionary rule should be given like dignity and effect as the coerced confession exclusionary rule. Quite apart from the Court's positive statement in *Mapp* that the right guaranteed by the Fourth and Fifth Amendments not to be convicted through use of unconstitutionally seized evidence should be given "like effect as other basic rights secured by the Due Process Clause . . . ," *Mapp,* like most other search and seizure exclusionary rule cases, relied heavily on *Boyd* v. *United States,* 116 U. S. 616. In reaching the conclusion in *Boyd* that evidence obtained by unlawful search and seizure could not be admitted in evidence, the *Boyd* Court relied on the Fifth Amendment's prohibition against compelling a man to be a witness against himself. The *Boyd* Court held that the Fifth Amendment's prohibition against self-incrimination gave constitutional justification to exclusion of evidence obtained by an unlawful search and seizure. The whole Court [4] treated such a search and seizure as compelling the person whose property was thus taken to give evidence against himself. There was certainly nothing in the *Boyd* case to indicate that the Fourth and Fifth Amendments were to be given different dignity and respect in determining what, when and under what circumstances persons are entitled to their full protection. See *One 1958 Plymouth Sedan* v. *Pennsylvania,* 380 U. S. 693, 703 (concurring opinion).

[4] Mr. Justice Miller, joined by Chief Justice Waite, agreed with the Court that the Fifth Amendment barred use at a trial of evidence obtained through a subpoena compelling production of a man's private papers to be used in a criminal prosecution of him; Mr. Justice Miller did not agree that a statute authorizing such a subpoena violated the Fourth Amendment. *Boyd* v. *United States,* 116 U. S. 616, 638.

This Court's opinion in *Mapp* not only by the express language already quoted but in numerous other places treated the two amendments as inseparable from the standpoint of the exclusionary rule. Speaking of the two, the Court said:

> "[T]he very least that together they assure in either sphere is that no man is to be convicted on unconstitutional evidence." 367 U. S., at 657.

Again the Court said in *Mapp* that:

> "'[C]onviction by means of unlawful seizures and enforced confessions . . . should find no sanction in the judgments of the courts . . . .'" *Id.*, at 648.

This statement appearing in *Mapp* had originally been made in *Weeks* v. *United States*, 232 U. S. 383, 392. *Weeks*, which established the federal exclusionary rule for the first time, did so by relying greatly on the *Boyd* case and *Boyd*'s treatment of unlawful seizures and enforced confessions as falling into precisely the same constitutional category. Yet the Court today by a chain of circuitous reasoning degrades the search and seizure exclusionary rule to a position far below that of the rule excluding evidence obtained by coerced confessions. The result is that this departure from the philosophy of *Mapp* denies Linkletter a right to challenge his conviction for an offense committed in August 1958 while it leaves Miss Mapp free because of an offense she committed in 1957.

II.

One reason—perhaps a basic one—put forward by the Court for its refusal to give Linkletter the benefit of the search and seizure exclusionary rule is the repeated statement that the purpose of that rule is to deter sheriffs, policemen, and other law officers from making unlawful

searches and seizures. The inference I gather from these repeated statements is that the rule is not a right or privilege accorded to defendants charged with crime but is a sort of punishment against officers in order to keep them from depriving people of their constitutional rights. In passing I would say that if that is the sole purpose, reason, object and effect of the rule, the Court's action in adopting it sounds more like law-making than construing the Constitution. Compare *Mapp* v. *Ohio,* 367 U. S. 643, 661 (concurring opinion). Both the majority and the concurring members of the *Boyd* Court seemed to believe they were construing the Constitution. Quite aside from that aspect, however, the undoubted implication of today's opinion that the rule is not a safeguard for defendants but is a mere punishing rod to be applied to law enforcement officers is a rather startling departure from many past opinions, and even from *Mapp* itself. *Mapp* quoted from the Court's earlier opinion in *Weeks* v. *United States, supra,* certainly not with disapproval, saying that the Court "in that case clearly stated that use of the seized evidence involved 'a denial of the constitutional rights of the accused.' " 367 U. S., at 648. I have read and reread the *Mapp* opinion but have been unable to find one word in it to indicate that the exclusionary search and seizure rule should be limited on the basis that it was intended to do nothing in the world except to deter officers of the law. Certainly no such limitation is implied by the Court's statement in *Mapp* that without the rule:

> "[T]he assurance against unreasonable . . . searches and seizures would be 'a form of words,' valueless and undeserving of mention in a perpetual charter of inestimable human liberties . . . ." 367 U. S., at 655.

The Court went on to indicate its belief that the rule was " 'implicit in the concept of ordered liberty,' " *id.,* at 655,

and that it is an "essential ingredient" of the constitutional guarantee. *Id.*, at 651. If the exclusionary rule has the high place in our constitutional plan of "ordered liberty," which this Court in *Mapp* and other cases has so frequently said that it does have, what possible valid reason can justify keeping people in jail under convictions obtained by wanton disregard of a constitutional protection which the Court itself in *Mapp* treated as being one of the "constitutional rights of the accused"?

III.

The Court says that the exclusionary rule's purpose of preventing law enforcement officers from making lawless searches and seizures "will not at this late date be served by the wholesale release of the guilty victims." *Ante*, p. 637. It has not been the usual thing to cut down trial protections guaranteed by the Constitution on the basis that some guilty persons might escape. There is probably no one of the rights in the Bill of Rights that does not make it more difficult to convict defendants. But all of them are based on the premise, I suppose, that the Bill of Rights' safeguards should be faithfully enforced by the courts without regard to a particular judge's judgment as to whether more people could be convicted by a refusal of courts to enforce the safeguards. Such has heretofore been accepted as a general maxim. In answer to an argument made in the *Mapp* case, that application of the exclusionary rule to the States might allow guilty criminals to go free, this Court conceded that:

> "In some cases this will undoubtedly be the result. . . . The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." *Mapp* v. *Ohio, supra,* at 659.

IV.

The Court says that:

> "To make the rule of *Mapp* retrospective would tax the administration of justice to the utmost. Hearings would have to be held on the excludability of evidence long since destroyed, misplaced or deteriorated. If it is excluded, the witnesses available at the time of the original trial will not be available or if located their memory will be dimmed. To thus legitimate such an extraordinary procedural weapon that has no bearing on guilt would seriously disrupt the administration of justice." *Ante,* pp. 637–638.

This same argument would certainly apply with much force to many cases we have heard in the past including *Reck* v. *Pate, supra,* and *Fay* v. *Noia, supra.* Reck was directed to be given a new trial 25 years after his offense and Noia 21 years after conviction. Both were given relief under just "such an extraordinary procedural weapon" as the Court seems today to inveigh against. Indeed in Noia's case this Court went to great lengths to explain in an exhaustive and in what I consider to be a very notable and worthwhile opinion that habeas corpus was designed to go behind "final" judgments and release people who were held on convictions obtained by reason of a denial of constitutional rights. A glance at the briefs and this Court's opinions in both *Reck* and *Noia* will reveal that this Court rejected precisely the same kind of arguments and reasoning that I have just quoted from the Court's opinion justifying its judgment in this case. What the Court held in *Noia* did not, as the dissenting Justice charged it would, seriously disrupt the administration of justice.[5] It merely opened up to collateral review cases of men who were in prison due to convictions where

[5] See *Fay* v. *Noia,* 372 U. S. 391, 445 (CLARK, J., dissenting).

their constitutional rights had been disregarded. *Noia* rested on the sound principle that people in jail, without regard to when they were put there, who were convicted by the use of unconstitutional evidence were entitled in a government dedicated to justice and fairness to be allowed to have a new trial with the safeguards the Constitution provides.

Little consolation can be gathered by people who languish in jail under unconstitutional convictions from the Court's statement that "the ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late." *Ante,* p. 637. Linkletter is still in jail. His claim is no more "too late" than was Noia's.[6]

The plain facts here are that the Court's opinion cuts off many defendants who are now in jail from any hope of relief from unconstitutional convictions. The opinion today also beats a timid retreat from the wholesome and refreshing principles announced in *Noia.* No State should be considered to have a vested interest in keeping prisoners in jail who were convicted because of lawless conduct by the State's officials. Careful analysis of the Court's opinion shows that it rests on the premise that a State's assumed interest in sustaining convictions obtained under the old, repudiated rule outweighs the interests both of that State and of the individuals convicted

[6] "Surely no fair-minded person will contend that those who have been deprived of their liberty without due process of law ought nevertheless to languish in prison. Noia, no less than his codefendants Caminito and Bonino, is conceded to have been the victim of unconstitutional state action. Noia's case stands on its own; but surely no just and humane legal system can tolerate a result whereby a Caminito and a Bonino are at liberty because their confessions were found to have been coerced yet a Noia, whose confession was also coerced, remains in jail for life. For such anomalies, such affronts to the conscience of a civilized society, habeas corpus is predestined by its historical role in the struggle for personal liberty to be the ultimate remedy." *Fay* v. *Noia,* 372 U. S. 391, 441.

in having wrongful convictions set aside. It certainly offends my sense of justice to say that a State holding in jail people who were convicted by unconstitutional methods has a vested interest in keeping them there that outweighs the right of persons adjudged guilty of crime to challenge their unconstitutional convictions at any time. No words can obscure the simple fact that the promises of *Mapp* and *Noia* are to a great extent broken by the decision here. I would reverse.

773-305 O-65-46

ANGELET *v.* FAY, WARDEN.

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

No. 578. Argued March 11, 1965.—Decided June 7, 1965.

Petitioner was convicted in a New York State court in 1951 for a narcotics violation based on an illegal search of his apartment conducted by local police joined by federal narcotics agents. After the decision in *Mapp* v. *Ohio*, 367 U. S. 643, petitioner sought a writ of habeas corpus. The federal District Court denied the writ and the Court of Appeals affirmed. *Held:*

1. The exclusionary rule of *Mapp* v. *Ohio* does not apply retrospectively. *Linkletter* v. *Walker*, *ante*, p. 618, followed. P. 656.

2. The participation of federal agents in the search and seizure does not require reversal. *Rea* v. *United States*, 350 U. S. 214, distinguished. Even if an exclusionary rule were fashioned to bar the federal agents' testimony, it would not, under *Linkletter* v. *Walker*, have retrospective application. P. 656.

333 F. 2d 12, affirmed.

Leon B. Polsky argued the cause and filed a brief for petitioner.

Gray Thoron argued the cause for respondent. On the brief were *Louis J. Lefkowitz*, Attorney General of New York, *Samuel A. Hirshowitz*, First Assistant Attorney General, *Barry Mahoney*, Assistant Attorney General, and *Michael H. Rauch* and *Brenda Soloff*, Deputy Assistant Attorneys General.

Michael Juviler argued the cause for the National District Attorneys' Association, as *amicus curiae*, urging affirmance. With him on the brief was *H. Richard Uviller*. *Louis J. Lefkowitz*, Attorney General of New York, *Samuel A. Hirshowitz*, First Assistant Attorney General, *Barry Mahoney* and *Thomas F. O'Hare, Jr.*, Assistant Attorneys General, *H. Richard Uviller* and

Michael Juviler filed a supplementary memorandum on behalf of the National District Attorneys' Association, as *amicus curiae.*

MR. JUSTICE CLARK delivered the opinion of the Court.

This is a companion case to No. 95, *Linkletter* v. *Walker, ante,* p. 618. Petitioner was convicted in a New York State court in 1951 for possession of narcotics with intent to sell. On December 21, 1950, two detectives attached to the Narcotics Squad of the New York City Police Department entered petitioner's apartment by a door opened by a painter who was just leaving. They ignored the protest of petitioner and proceeded, without a warrant, to search the apartment. Upon entering, one of the officers called an agent of the Federal Bureau of Narcotics. After two federal agents arrived the local and federal officers made a thorough search of the apartment. One of the local officers found 54 cellophane envelopes, 106 empty capsules, a box of staples and a scale. A federal agent found four packages under a hat. Analysis revealed that three of the packets contained heroin and the other contained cocaine. These items were introduced in evidence at the state trial without objection of petitioner's counsel. Nor was objection made to the participation of the federal narcotics agents in the investigation. After conviction petitioner filed a notice of appeal to the Appellate Division but the appeal was dismissed in March of 1952.

In August 1961, after *Mapp* v. *Ohio,* 367 U. S. 643, was decided, petitioner resorted to state post-conviction remedies claiming that the evidence found in his apartment and introduced against him had been illegally seized and that his conviction had therefore been obtained in violation of the Fourth and Fourteenth Amendments. Upon seeking habeas corpus in the United States District Court on the same grounds his application was denied. The

trial judge refused to apply *Mapp* retrospectively. The Court of Appeals sitting *en banc* affirmed by a divided vote. 333 F. 2d 12. We granted certiorari, 379 U. S. 815 (1964), and set this case for argument with *Linkletter, supra.* That case answers petitioner's point as to the retrospective application of *Mapp.*

However, petitioner also contends that the participation of federal narcotics agents in the search and seizure requires reversal here, citing *Rea* v. *United States,* 350 U. S. 214 (1956). We cannot agree. That case invoked the supervisory power of a federal court over a federal law enforcement officer and we held that the latter might be enjoined from appearing in a state trial for the purpose of offering evidence previously seized by him illegally as a federal officer and so found by a federal court. But even if an exclusionary rule were fashioned to bar use of the federal agent's testimony in the absence of a federal court restraint, the petitioner would be entitled to no relief. Such an exclusionary rule would depend upon the reasons given in *Mapp* and under *Linkletter, supra,* would not have retrospective application.

Affirmed.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS would reverse the judgment of the Court of Appeals for the reasons stated in MR. JUSTICE BLACK's dissenting opinion in *Linkletter* v. *Walker, ante,* p. 640.

Syllabus.

UNITED MINE WORKERS OF AMERICA *v.* PENNINGTON ET AL.

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

No. 48. Argued January 27, 1965.—Decided June 7, 1965.

The trustees of the United Mine Workers of America Welfare and Retirement Fund sued respondents, partners in a coal mining company, for royalty payments under the National Bituminous Coal Wage Agreement of 1950, as amended. Respondents filed a cross claim for damages, alleging that the trustees, the UMW and certain large coal operators had conspired to restrain and monopolize commerce in violation of §§ 1 and 2 of the Sherman Act. It was alleged that, to eradicate overproduction in the coal industry, the UMW and large operators agreed to eliminate the smaller companies, by imposing the terms of the 1950 Agreement on all companies regardless of ability to pay, by increasing royalties due the welfare fund, by excluding the marketing, production and sale of nonunion coal, by refusing to lease coal lands to nonunion operators and refusing to buy or sell coal mined by such operators, by obtaining from the Secretary of Labor the establishment of a minimum wage under the Walsh-Healey Act higher than that in other industries, by urging TVA to curtail spot market purchases which were exempt from the Walsh-Healey order, and by waging a price-cutting campaign to drive small companies out of the spot market. Petitioner's motions to dismiss were denied and the jury returned a verdict against the trustees and the UMW. The trial court set aside the verdict against the trustees but overruled the union's motion for judgment notwithstanding the verdict or for a new trial. The Court of Appeals affirmed, ruling that the union was not exempt from liability under the Sherman Act under the facts of the case. *Held:*

1. An agreement between the union and large operators to secure uniform labor standards throughout the industry would not be exempt from the antitrust laws. Pp. 661–669.

(a) An agreement resulting from union-employer bargaining is not automatically exempt from Sherman Act scrutiny merely because the negotiations covered wage standards, or any other compulsory subject of bargaining. Pp. 664–665.

(b) A union may make wage agreements with a multi-employer bargaining unit and may, in pursuance of its own self-interests, seek to obtain the same terms from other employers, but it forfeits its antitrust exemption when it agrees with a group of employers to impose a certain wage scale on other bargaining units and thus joins a conspiracy to curtail competition. Pp. 665–666.

(c) Nothing in the national labor policy indicates that a union and employers in one bargaining unit are free to bargain about wages or working conditions of other bargaining units or to settle these matters for the whole industry, nor does it allow an employer to condition the signing of an agreement on the union's imposition of a similar contract on his competitors. Pp. 666–667.

(d) Antitrust policy clearly restricts employer-union agreements seeking to set labor standards outside the bargaining unit, in view of the anticompetitive potential and the surrender by the union of its freedom of action with respect to bargaining policy. P. 668.

2. Concerted efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. *Eastern R. Conf.* v. *Noerr Motors*, 365 U. S. 127, followed. Pp. 669–672.

(a) Instructions to the jury that anticompetitive purpose could support an illegal conspiracy based solely on the Walsh-Healey and TVA episodes did not constitute merely harmless error. P. 670.

(b) Respondents were not entitled to damages under the Sherman Act for any injury suffered from the actions of the Secretary of Labor, and the jury should have been so instructed. Pp. 671–672.

325 F. 2d 804, reversed and remanded.

Harrison Combs argued the cause for petitioner. With him on the briefs were *E. H. Rayson, R. R. Kramer* and *M. E. Boiarsky.*

John A. Rountree argued the cause and filed briefs for respondents.

Theodore J. St. Antoine argued the cause for the American Federation of Labor and Congress of Industrial

Organizations, as *amicus curiae,* urging reversal. With him on the brief were *J. Albert Woll, Robert C. Mayer* and *Thomas E. Harris.*

Guy Farmer filed a brief for the Bituminous Coal Operators' Association, as *amicus curiae,* urging reversal.

MR. JUSTICE WHITE delivered the opinion of the Court.

This action began as a suit by the trustees of the United Mine Workers of America Welfare and Retirement Fund against the respondents, individually and as owners of Phillips Brothers Coal Company, a partnership, seeking to recover some $55,000 in royalty payments alleged to be due and payable under the trust provisions of the National Bituminous Coal Wage Agreement of 1950, as amended, September 29, 1952, executed by Phillips and United Mine Workers of America on or about October 1, 1953, and re-executed with amendments on or about September 8, 1955, and October 22, 1956. Phillips filed an answer and a cross claim against UMW, alleging in both that the trustees, the UMW and certain large coal operators had conspired to restrain and to monopolize interstate commerce in violation of §§ 1 and 2 of the Sherman Antitrust Act, as amended, 26 Stat. 209, 15 U. S. C. §§ 1, 2 (1958 ed.). Actual damages in the amount of $100,000 were claimed for the period beginning February 14, 1954, and ending December 31, 1958.[1]

The allegations of the cross claim were essentially as follows: Prior to the 1950 Wage Agreement between the operators and the union, severe controversy had existed in the industry, particularly over wages, the welfare fund and the union's efforts to control the working time of

[1] The parties stipulated that the damages period would include the four-year limitation period, 15 U. S. C. § 15b (1958 ed.), preceding the filing of Phillips' cross claim and extend up to December 31, 1958, the date on which Phillips terminated its business.

its members. Since 1950, however, relative peace has existed in the industry, all as the result of the 1950 Wage Agreement and its amendments and the additional understandings entered into between UMW and the large operators. Allegedly the parties considered overproduction to be the critical problem of the coal industry. The agreed solution was to be the elimination of the smaller companies, the larger companies thereby controlling the market. More specifically, the union abandoned its efforts to control the working time of the miners, agreed not to oppose the rapid mechanization of the mines which would substantially reduce mine employment, agreed to help finance such mechanization and agreed to impose the terms of the 1950 agreement on all operators without regard to their ability to pay. The benefit to the union was to be increased wages as productivity increased with mechanization, these increases to be demanded of the smaller companies whether mechanized or not. Royalty payments into the welfare fund were to be increased also, and the union was to have effective control over the fund's use. The union and large companies agreed upon other steps to exclude the marketing, production, and sale of nonunion coal. Thus the companies agreed not to lease coal lands to nonunion operators, and in 1958 agreed not to sell or buy coal from such companies. The companies and the union jointly and successfully approached the Secretary of Labor to obtain establishment under the Walsh-Healey Act, as amended, 49 Stat. 2036, 41 U. S. C. § 35 *et seq.* (1958 ed.), of a minimum wage for employees of contractors selling coal to the TVA, such minimum wage being much higher than in other industries and making it difficult for small companies to compete in the TVA term contract market. At a later time, at a meeting attended by both union and company representatives, the TVA was urged to curtail its spot market purchases, a substantial portion of which

were exempt from the Walsh-Healey order. Thereafter four of the larger companies waged a destructive and collusive price-cutting campaign in the TVA spot market for coal, two of the companies, West Kentucky Coal Co. and its subsidiary Nashville Coal Co., being those in which the union had large investments and over which it was in position to exercise control.

The complaint survived motions to dismiss and after a five-week trial before a jury, a verdict was returned in favor of Phillips and against the trustees and the union, the damages against the union being fixed in the amount of $90,000, to be trebled under 15 U. S. C. § 15 (1958 ed.). The trial court set aside the verdict against the trustees but overruled the union's motion for judgment notwithstanding the verdict or in the alternative for a new trial. The Court of Appeals affirmed. 325 F. 2d 804. It ruled that the union was not exempt from liability under the Sherman Act on the facts of this case, considered the instructions adequate and found the evidence generally sufficient to support the verdict. We granted certiorari. 377 U. S. 929. We reverse and remand the case for proceedings consistent with this opinion.

I.

We first consider UMW's contention that the trial court erred in denying its motion for a directed verdict and for judgment notwithstanding the verdict, since a determination in UMW's favor on this issue would finally resolve the controversy. The question presented by this phase of the case is whether in the circumstances of this case the union is exempt from liability under the antitrust laws. We think the answer is clearly in the negative and that the union's motions were correctly denied.

The antitrust laws do not bar the existence and operation of labor unions as such. Moreover, § 20 of the Clayton Act, 38 Stat. 738, and § 4 of the Norris-LaGuardia

Act, 47 Stat. 70, permit a union, acting alone, to engage in the conduct therein specified without violating the Sherman Act. *United States* v. *Hutcheson,* 312 U. S. 219; *United States* v. *International Hod Carriers Council,* 313 U. S. 539, affirming *per curiam,* 37 F. Supp. 191 (D. C. N. D. Ill. 1941); *United States* v. *American Federation of Musicians,* 318 U. S. 741, affirming *per curiam,* 47 F. Supp. 304 (D. C. N. D. Ill. 1942).

But neither § 20 nor § 4 expressly deals with arrangements or agreements between unions and employers. Neither section tells us whether any or all such arrangements or agreements are barred or permitted by the antitrust laws. Thus *Hutcheson* itself stated:

> "So long as a union acts in its self-interest *and does not combine with non-labor groups,* the licit and the illicit under § 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means." 312 U. S., at 232. (Emphasis added.)

And in *Allen Bradley Co.* v. *Union,* 325 U. S. 797, this Court made explicit what had been merely a qualifying expression in *Hutcheson* and held that "when the unions participated with a combination of business men who had complete power to eliminate all competition among themselves and to prevent all competition from others, a situation was created not included within the exemptions of the Clayton and Norris-LaGuardia Acts." *Id.,* at 809. See also *Brotherhood of Carpenters* v. *United States,* 330 U. S. 395, 398–400; *United States* v. *Employing Plasterers Assn.,* 347 U. S. 186, 190. Subsequent cases have applied the *Allen Bradley* doctrine to such combinations without regard to whether they found expression in a collective bargaining agreement, *Brother-*

hood of Carpenters v. *United States, supra;* see *Teamsters Union* v. *Oliver,* 358 U. S. 283, 296, and even though the mechanism for effectuating the purpose of the combination was an agreement on wages, see *Adams Dairy Co.* v. *St. Louis Dairy Co.,* 260 F. 2d 46 (C. A. 8th Cir. 1958), or on hours of work, *Philadelphia Record Co.* v. *Manufacturing Photo-Engravers Assn.,* 155 F. 2d 799 (C. A. 3d Cir. 1946).

If the UMW in this case, in order to protect its wage scale by maintaining employer income, had presented a set of prices at which the mine operators would be required to sell their coal, the union and the employers who happened to agree could not successfully defend this contract provision if it were challenged under the antitrust laws by the United States or by some party injured by the arrangement. Cf. *Allen Bradley Co.* v. *Union,* 325 U. S. 797; *United States* v. *Borden Co.,* 308 U. S. 188, 203–205; *Lumber Prods. Assn.* v. *United States,* 144 F. 2d 546, 548 (C. A. 9th Cir. 1944), aff'd on this issue *sub nom. Brotherhood of Carpenters* v. *United States,* 330 U. S. 395, 398–400; *Las Vegas Merchant Plumbers Assn.* v. *United States,* 210 F. 2d 732 (C. A. 9th Cir. 1954), cert. denied, 348 U. S. 817; *Local 175, IBEW* v. *United States,* 219 F. 2d 431 (C. A. 6th Cir. 1955), cert. denied, 349 U. S. 917. In such a case, the restraint on the product market is direct and immediate, is of the type characteristically deemed unreasonable under the Sherman Act and the union gets from the promise nothing more concrete than a hope for better wages to come.

Likewise, if as is alleged in this case, the union became a party to a collusive bidding arrangement designed to drive Phillips and others from the TVA spot market, we think any claim to exemption from antitrust liability would be frivolous at best. For this reason alone the motions of the unions were properly denied.

A major part of Phillips' case, however, was that the union entered into a conspiracy with the large operators to impose the agreed-upon wage and royalty scales upon the smaller, nonunion operators, regardless of their ability to pay and regardless of whether or not the union represented the employees of these companies, all for the purpose of eliminating them from the industry, limiting production and pre-empting the market for the large, unionized operators. The UMW urges that since such an agreement concerned wage standards, it is exempt from the antitrust laws.

It is true that wages lie at the very heart of those subjects about which employers and unions must bargain and the law contemplates agreements on wages not only between individual employers and a union but agreements between the union and employers in a multi-employer bargaining unit. *Labor Board* v. *Truck Drivers Union,* 353 U. S. 87, 94–96. The union benefit from the wage scale agreed upon is direct and concrete and the effect on the product market, though clearly present, results from the elimination of competition based on wages among the employers in the bargaining unit, which is not the kind of restraint Congress intended the Sherman Act to proscribe. *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 503–504; see *Adams Dairy Co.* v. *St. Louis Dairy Co.,* 260 F. 2d 46 (C. A. 8th Cir. 1958). We think it beyond question that a union may conclude a wage agreement with the multi-employer bargaining unit without violating the antitrust laws and that it may as a matter of its own policy, and not by agreement with all or part of the employers of that unit, seek the same wages from other employers.

This is not to say that an agreement resulting from union-employer negotiations is automatically exempt from Sherman Act scrutiny simply because the negotiations involve a compulsory subject of bargaining, regard-

less of the subject or the form and content of the agreement. Unquestionably the Board's demarcation of the bounds of the duty to bargain has great relevance to any consideration of the sweep of labor's antitrust immunity, for we are concerned here with harmonizing the Sherman Act with the national policy expressed in the National Labor Relations Act of promoting "the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation," *Fibreboard Paper Prods. Corp.* v. *Labor Board,* 379 U. S. 203, 211. But there are limits to what a union or an employer may offer or extract in the name of wages, and because they must bargain does not mean that the agreement reached may disregard other laws. *Teamsters Union* v. *Oliver,* 358 U. S. 283, 296; *Brotherhood of Carpenters* v. *United States,* 330 U. S. 395, 399–400.

We have said that a union may make wage agreements with a multi-employer bargaining unit and may in pursuance of its own union interests seek to obtain the same terms from other employers. No case under the antitrust laws could be made out on evidence limited to such union behavior.[2] But we think a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from

[2] Unilaterally, and without agreement with any employer group to do so, a union may adopt a uniform wage policy and seek vigorously to implement it even though it may suspect that some employers cannot effectively compete if they are required to pay the wage scale demanded by the union. The union need not gear its wage demands to wages which the weakest units in the industry can afford to pay. Such union conduct is not alone sufficient evidence to maintain a union-employer conspiracy charge under the Sherman Act. There must be additional direct or indirect evidence of the conspiracy. There was, of course, other evidence in this case, but we indicate no opinion as to its sufficiency.

the industry and the union is liable with the employers if it becomes a party to the conspiracy. This is true even though the union's part in the scheme is an undertaking to secure the same wages, hours or other conditions of employment from the remaining employers in the industry.

We do not find anything in the national labor policy that conflicts with this conclusion. This Court has recognized that a legitimate aim of any national labor organization is to obtain uniformity of labor standards and that a consequence of such union activity may be to eliminate competition based on differences in such standards. *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 503. But there is nothing in the labor policy indicating that the union and the employers in one bargaining unit are free to bargain about the wages, hours and working conditions of other bargaining units or to attempt to settle these matters for the entire industry. On the contrary, the duty to bargain unit by unit leads to a quite different conclusion. The union's obligation to its members would seem best served if the union retained the ability to respond to each bargaining situation as the individual circumstances might warrant, without being strait-jacketed by some prior agreement with the favored employers.

So far as the employer is concerned it has long been the Board's view that an employer may not condition the signing of a collective bargaining agreement on the union's organization of a majority of the industry. *American Range Lines, Inc.,* 13 N. L. R. B. 139, 147 (1939); *Samuel Youlin,* 22 N. L. R. B. 879, 885 (1940); *Newton Chevrolet, Inc.,* 37 N. L. R. B. 334, 341 (1941); see *Labor Board* v. *George P. Pilling & Son Co.,* 119 F. 2d 32, 38 (C. A. 3d Cir. 1941). In such cases the obvious interest of the employer is to ensure that acceptance of the union's wage demands will not adversely affect his competitive position. In *American Range Lines, Inc., supra,* the

Board rejected that employer interest as a justification for the demand. "[A]n employer cannot lawfully deny his employees the right to bargain collectively through their designated representative in an appropriate unit because he envisions competitive disadvantages accruing from such bargaining." 13 N. L. R. B., at 147. Such an employer condition, if upheld, would clearly reduce the extent of collective bargaining. Thus, in *Newton Chevrolet, Inc., supra,* where it was held a refusal to bargain for the employer to insist on a provision that the agreed contract terms would not become effective until five competitors had signed substantially similar contracts, the Board stated that "[t]here is nothing in the Act to justify the imposition of a duty upon an exclusive bargaining representative to secure an agreement from a majority of an employer's competitors as a condition precedent to the negotiation of an agreement with the employer. To permit individual employers to refuse to bargain collectively until some or all of their competitors had done so clearly would lead to frustration of the fundamental purpose of the Act to encourage the practice of collective bargaining." 37 N. L. R. B., at 341. Permitting insistence on an agreement by the union to attempt to impose a similar contract on other employers would likewise seem to impose a restraining influence on the extent of collective bargaining, for the union could avoid an impasse only by surrendering its freedom to act in its own interest *vis-à-vis* other employers, something it will be unwilling to do in many instances. Once again, the employer's interest is a competitive interest rather than an interest in regulating its own labor relations, and the effect on the union of such an agreement would be to limit the free exercise of the employees' right to engage in concerted activities according to their own views of their self-interest. In sum, we cannot conclude that the national labor policy provides any support for such agreements.

On the other hand, the policy of the antitrust laws is clearly set against employer-union agreements seeking to prescribe labor standards outside the bargaining unit. One could hardly contend, for example, that one group of employers could lawfully demand that the union impose on other employers wages that were significantly higher than those paid by the requesting employers, or a system of computing wages that, because of differences in methods of production, would be more costly to one set of employers than to another. The anticompetitive potential of such a combination is obvious, but is little more severe than what is alleged to have been the purpose and effect of the conspiracy in this case to establish wages at a level that marginal producers could not pay so that they would be driven from the industry. And if the conspiracy presently under attack were declared exempt it would hardly be possible to deny exemption to such avowedly discriminatory schemes.

From the viewpoint of antitrust policy, moreover, all such agreements between a group of employers and a union that the union will seek specified labor standards outside the bargaining unit suffer from a more basic defect, without regard to predatory intention or effect in the particular case. For the salient characteristic of such agreements is that the union surrenders its freedom of action with respect to its bargaining policy. Prior to the agreement the union might seek uniform standards in its own self-interest but would be required to assess in each case the probable costs and gains of a strike or other collective action to that end and thus might conclude that the objective of uniform standards should temporarily give way. After the agreement the union's interest would be bound in each case to that of the favored employer group. It is just such restraints upon the freedom of economic units to act according to their own choice and discretion that run counter to antitrust policy. See, *e. g., Associated*

Press v. *United States,* 326 U. S. 1, 19; *Fashion Originators' Guild* v. *Federal Trade Comm'n,* 312 U. S. 457, 465; *Anderson* v. *Shipowners Assn.,* 272 U. S. 359, 364–365.

Thus the relevant labor and antitrust policies compel us to conclude that the alleged agreement between UMW and the large operators to secure uniform labor standards throughout the industry, if proved, was not exempt from the antitrust laws.

II.

The UMW next contends that the trial court erroneously denied its motion for a new trial based on claimed errors in the admission of evidence.

In *Eastern R. Conf.* v. *Noerr Motors,* 365 U. S. 127, the Court rejected an attempt to base a Sherman Act conspiracy on evidence consisting entirely of activities of competitors seeking to influence public officials. The Sherman Act, it was held, was not intended to bar concerted action of this kind even though the resulting official action damaged other competitors at whom the campaign was aimed. Furthermore, the legality of the conduct "was not at all affected by any anticompetitive purpose it may have had," *id.,* at 140—even though the "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," *id.,* at 138. Nothing could be clearer from the Court's opinion than that anticompetitive purpose did not illegalize the conduct there involved.

We agree with the UMW that both the Court of Appeals and the trial court failed to take proper account of the *Noerr* case. In approving the instructions of the trial court with regard to the approaches of the union and the operators to the Secretary of Labor and to the TVA officials, the Court of Appeals considered *Noerr* as applying only to conduct "unaccompanied by a purpose or intent to further a conspiracy to violate a statute. It is

the illegal purpose or intent inherent in the conduct which vitiates the conduct which would otherwise be legal." 325 F. 2d, at 817. *Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose. The Court of Appeals, however, would hold the conduct illegal depending upon proof of an illegal purpose.

The instructions of the trial court to the jury exhibit a similar infirmity. The jury was instructed that the approach to the Secretary of Labor was legal unless part of a conspiracy to drive small operators out of business and that the approach to the TVA was not a violation of the antitrust laws "unless the parties so urged the TVA to modify its policies in buying coal for the purpose of driving the small operators out of business." If, therefore, the jury determined the requisite anticompetitive purpose to be present, it was free to find an illegal conspiracy based solely on the Walsh-Healey and TVA episodes, or in any event to attribute illegality to these acts as part of a general plan to eliminate Phillips and other operators similarly situated. Neither finding, however, is permitted by *Noerr* for the reasons stated in that case. Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act. The jury should have been so instructed and, given the obviously telling nature of this evidence, we cannot hold this lapse to be mere harmless error.[3]

[3] It would of course still be within the province of the trial judge to admit this evidence, if he deemed it probative and not unduly prejudicial, under the "established judicial rule of evidence that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character

There is another reason for remanding this case for further proceedings in the lower courts. It is clear under *Noerr* that Phillips could not collect any damages under the Sherman Act for any injury which it suffered from the action of the Secretary of Labor. The conduct of the union and the operators did not violate the Act, the action taken to set a minimum wage for government purchases of coal was the act of a public official who is not claimed to be a co-conspirator, and the jury should have been instructed, as UMW requested, to exclude any damages which Phillips may have suffered as a result of the Secretary's Walsh-Healey determinations.[4] See also *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 358; *Angle* v. *Chicago, St. Paul, Minneapolis & Omaha R. Co.*, 151 U. S. 1, 16–21; *Okefenokee Rural Elec. Mem. Corp.* v. *Florida P. & L. Co.*, 214 F. 2d 413, 418 (C. A. 5th Cir. 1954). The trial court, however, admitted evi-

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of the particular transactions under scrutiny. *Standard Oil Co.* v. *United States*, 221 U. S. 1, 46–47; *United States* v. *Reading Co.*, 253 U. S. 26, 43–44." *Federal Trade Comm'n* v. *Cement Institute*, 333 U. S. 683, 705; see also *Heike* v. *United States*, 227 U. S. 131, 145; *American Medical Assn.* v. *United States*, 76 U. S. App. D. C. 70, 87–89, 130 F. 2d 233, 250–252 (1942), aff'd, 317 U. S. 519 (certiorari limited to other issues).

[4] By contrast, in *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U. S. 690, we held that the acts of a wartime purchasing agent appointed by the Canadian Government could be proved as part of the conspiracy and as an element in computing damages. The purchasing agent, however, was not a public official but the wholly owned subsidiary of an American corporation alleged to be a principal actor in the conspiracy. The acts complained of had been performed at the direction of the purchasing agent's American parent and there was "no indication that the Controller or any other official within the structure of the Canadian Government approved or would have approved of joint efforts to monopolize the production and sale of vanadium or directed that purchases from [the plaintiff] be stopped." 370 U. S., at 706. That case is wholly dissimilar to both *Noerr* and the present case.

dence concerning the Walsh-Healey episodes for "whatever bearing it may have on the overall picture" and told the jury in its final instructions to include in the verdict all damages resulting directly from any act which was found to be part of the conspiracy. The effect this may have had on the jury is reflected by the statement of the Court of Appeals that the jury could reasonably conclude "that the wage determination for the coal industry under the Walsh-Healey Act and the dumping of West Kentucky coal on the TVA spot market materially and adversely affected the operations of Phillips in the important TVA market . . . ," 325 F. 2d, at 815, and that "[t]his minimum wage determination prevented Phillips from bidding on the TVA term market . . . ," *id.*, at 814.[5]

The judgment is reversed and the case remanded for further proceedings consistent with this opinion.

It is so ordered.

[For opinion of MR. JUSTICE GOLDBERG dissenting from the opinion but concurring in the reversal, see *post*, p. 697.]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK and MR. JUSTICE CLARK agree, concurring.

As we read the opinion of the Court, it reaffirms the principles of *Allen Bradley Co.* v. *Union*, 325 U. S. 797, and tells the trial judge:

First. On the new trial the jury should be instructed that if there were an industry-wide collective bargaining agreement whereby employers and the union agreed on a

[5] This latter conclusion regarding the term market would seem doubly erroneous as Phillips had virtually conceded, in the course of offering evidence respecting bids of the alleged conspirators on the term market, that it was claiming no damages from its exclusion from the term market, a market it never had any immediate prospect of entering. The trial court ruled that the proffered testimony was inadmissible on the damages phase of the case.

wage scale that exceeded the financial ability of some operators to pay and that if it was made for the purpose of forcing some employers out of business, the union as well as the employers who participated in the arrangement with the union should be found to have violated the anti-trust laws.

Second. An industry-wide agreement containing those features is prima facie evidence of a violation.*

In *Allen Bradley Co.* v. *Union, supra,* the union was promoting closed shops in the New York City area. It got contractors to purchase equipment only from local manufacturers who had closed-shop agreements with the union; and it got manufacturers to confine their New York City sales to contractors employing the union's members. Agencies were set up to boycott recalcitrant local contractors and manufacturers and bar from the area equipment manufactured outside its boundaries. As we said:

> "The combination among the three groups, union, contractors, and manufacturers, became highly successful from the standpoint of all of them. The business of New York City manufacturers had a phenomenal growth, thereby multiplying the jobs available for the Local's members. Wages went up, hours were shortened, and the New York electrical equip-

*"It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. *Schenck* v. *United States,* 253 F. 212, 213, aff'd, 249 U. S. 47; *Levey* v. *United States,* 92 F. 2d 688, 691. Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act. *Eastern States Lumber Assn.* v. *United States,* 234 U. S. 600; *Lawlor* v. *Loewe,* 235 U. S. 522, 534; *American Column Co.* v. *United States,* 257 U. S. 377; *United States* v. *American Linseed Oil Co.,* 262 U. S. 371." *Interstate Circuit* v. *United States,* 306 U. S. 208, 227.

ment prices soared, to the decided financial profit of local contractors and manufacturers." 325 U. S., at 800.

I repeat what we said in *Allen Bradley Co.* v. *Union, supra,* at 811:

> "The difficulty of drawing legislation primarily aimed at trusts and monopolies so that it could also be applied to labor organizations without impairing the collective bargaining and related rights of those organizations has been emphasized both by congressional and judicial attempts to draw lines between permissible and prohibited union activities. There is, however, one line which we can draw with assurance that we follow the congressional purpose. We know that Congress feared the concentrated power of business organizations to dominate markets and prices. It intended to outlaw business monopolies. A business monopoly is no less such because a union participates, and such participation is a violation of the [Sherman] Act."

Congress can design an oligopoly for our society, if it chooses. But business alone cannot do so as long as the antitrust laws are enforced. Nor should business and labor working hand-in-hand be allowed to make that basic change in the design of our so-called free enterprise system. If the allegations in this case are to be believed, organized labor joined hands with organized business to drive marginal operators out of existence. According to those allegations the union used its control over West Kentucky Coal Co. and Nashville Coal Co. to dump coal at such low prices that respondents, who were small operators, had to abandon their business. According to those allegations there was a boycott by the union and the major companies against small companies who needed major companies' coal land on which to operate. Accord-

ing to those allegations, high wage and welfare terms of employment were imposed on the small, marginal companies by the union and the major companies with the knowledge and intent that the small ones would be driven out of business.

The only architect of our economic system is Congress. We are right in adhering to its philosophy of the free enterprise system as expressed in the antitrust laws and as enforced by *Allen Bradley Co.* v. *Union, supra,* until the Congress delegates to big business and big labor the power to remold our economy in the manner charged here.

LOCAL UNION NO. 189, AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, AFL–CIO, ET AL. *v.* JEWEL TEA CO., INC.

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

No. 240. Argued January 27–28, 1965.—Decided June 7, 1965.

Respondent brought this action under §§ 1 and 2 of the Sherman Act against petitioners, seven local unions, Associated Food Retailers of Greater Chicago, Inc. (Associated), an association of retail food stores, and Associated's secretary and treasurer, alleging that petitioners and Associated had conspired to restrain competition in retail meat markets in the Chicago area by limiting the marketing hours for the sale of fresh meat through a clause in the collective bargaining agreement between Associated and petitioners and between respondent and petitioners. The District Court, after trial, held that there was no evidence in the record to support a finding of a conspiracy to force the restrictive provision on respondent, that the marketing-hours limitation was imposed by the unions to serve their own interests respecting conditions of employment, and that such action was clearly within the labor exemption of the Sherman Act. The Court of Appeals reversed the dismissal of the complaint as to the unions and Associated, and without upsetting the District Court's finding that, apart from the contractual provision itself, there was no evidence of conspiracy, concluded that a conspiracy in restraint of trade was shown. It held that the employer-union contract concerning working hours is unlawful, as the establishment of the hours of work is a function of the employer. *Held:* The judgment is reversed. Pp. 679–735.

331 F. 2d 547, reversed.

MR. JUSTICE WHITE, joined by THE CHIEF JUSTICE and MR. JUSTICE BRENNAN, concluded that:

1. This controversy involving whether a proposed bargaining subject is a term or condition of employment is not within the exclusive primary jurisdiction of the National Labor Relations Board. Pp. 684–688.

(a) Courts have had experience in classifying bargaining subjects as terms or conditions of employment, as under the Norris-LaGuardia Act. P. 686.

(b) The primary-jurisdiction doctrine does not require resort to an administrative proceeding when the case must eventually be decided on a controlling legal issue unrelated to the administrative determination. P. 686.

(c) There is no procedure available in this case for obtaining a determination by the Labor Board. P. 687.

2. Exemption of union-employer agreements from the coverage of the Sherman Act is a matter of accommodating that Act to the policy of the labor laws, as this Court pointed out in *United Mine Workers* v. *Pennington, ante,* p. 657, and the fact that employers and unions are required to bargain about wages, hours and working conditions weighs heavily in favor of antitrust exemption for agreement on these subjects. P. 689.

3. A provision establishing the particular hours of work would be within the ambit of wages, hours and working conditions requiring mandatory bargaining, and the unions' success in obtaining that provision through negotiation in pursuit of their own policies falls within the protection of the national labor policy and is exempt from the Sherman Act. Pp. 689–691.

4. Likewise a marketing-hours restriction would be exempt if night operation of meat markets would require night employment of butchers, impair the butchers' jurisdiction or substantially affect their workload. P. 692.

5. But if self-service markets could conduct night operations without affecting the vital interests of butchers, there might be restraint on the product market, and the limitation imposed by the unions might be nothing more than an attempt to protect one group of employers from competition from another group, which is conduct not exempt from the Sherman Act. Pp. 692–693.

6. The resolution by the District Court of the question of whether night operations without butchers, and without infringement of the butchers' interests, are feasible, in favor of the unions' position, was supported by evidence in the record and is not clearly erroneous. Pp. 694–697.

MR. JUSTICE GOLDBERG, joined by MR. JUSTICE HARLAN and MR. JUSTICE STEWART, concluded that:

The history of legislative enactments in the area of collective bargaining demonstrates a consistent congressional purpose to limit severely judicial intervention into the formulation of labor policy through the use of the antitrust laws. Congress intended to foreclose judges and juries from making essentially economic judgments

in antitrust cases by determining whether unions or employers had good or bad motives for their agreements on mandatory subjects of collective bargaining. Pp. 697–735.

(a) Where Congress deemed there were specific abuses on the part of labor unions it enacted specific proscriptions in the labor statutes. Pp. 707–708.

(b) The Court should follow the approach of *United States* v. *Hutcheson*, 312 U. S. 219, that the labor exemption from the antitrust laws derives from a synthesis of all pertinent legislation, and hold that collective bargaining activity concerning mandatory subjects of bargaining under the National Labor Relations Act is not subject to the antitrust laws. Pp. 709–710.

(c) Multi-employer bargaining is not illegal or opposed to the national labor policy. Pp. 712–713.

(d) Labor contracts establishing standardized wages, hours or other conditions of employment are often secured by bargaining with multi-employer associations or through bargaining with market leaders that sets a "pattern," and the policy of pattern bargaining should not lead to antitrust liability merely because of its form. P. 722.

(e) In this case even if the self-service markets could operate after 6 p. m., without their butchers and without increasing the work of their butchers at other times, the result of such operation can reasonably be expected to be either that the small, independent service markets would have to remain open in order to compete, thus requiring their union butchers to work at night, or that the small, independent service markets would not be able to operate at night and thus be put at a competitive disadvantage. Pp. 727–728.

(f) Since it is clear that the large, automated self-service markets employ fewer butchers per volume of sales than service markets do, the Union has a legitimate interest in keeping service markets competitive so as to preserve jobs. P. 728.

(g) The direct interest of the Union in not working undesirable hours by curtailing all business at those hours is a far cry from the indirect interest of a union in fixing prices and allocating markets solely to increase the profits of favored employers. Pp. 728–729.

(h) If unions are held liable under the antitrust laws for activities concerning mandatory subjects of collective bargaining, then the employer parties to such bargaining would also be subject to antitrust penalties, which would be clearly contrary to congres-

sional policy and manifestly unfair in view of their statutory duty to bargain. Pp. 729–730.

Bernard Dunau argued the cause for petitioners. With him on the briefs were *Lester Asher, Leo Segall* and *Robert C. Eardley.*

George B. Christensen argued the cause for respondent. With him on the brief were *Fred H. Daugherty, Theodore A. Groenke* and *Samuel Weisbard.*

Solicitor General Cox, by special leave of Court, argued the cause for the United States, as *amicus curiae,* urging reversal. With him on the brief were *Assistant Attorney General Orrick, Robert J. Hoerner, Charles Donahue* and *Arnold Ordman.*

Briefs of *amici curiae,* urging affirmance, were filed by *Allen A. Lauterbach* for the American Farm Bureau Federation; by *Edwin H. Pewett, Jonathan W. Sloat* and *George A. Avery* for the National Independent Meat Packers Association, and by *Allen Whitfield* for the National Livestock Feeders Association et al.

MR. JUSTICE WHITE announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE and MR. JUSTICE BRENNAN join.

Like No. 48, *United Mine Workers* v. *Pennington,* decided today, *ante,* p. 657, this case presents questions regarding the application of §§ 1 and 2 of the Sherman Antitrust Act, 26 Stat. 209, as amended, 15 U. S. C. §§ 1, 2 (1958 ed.), to activities of labor unions. In particular, it concerns the lawfulness of the following restriction on the operating hours of food store meat departments contained in a collective bargaining agreement executed after joint multi-employer, multi-union negotiations:

"Market operating hours shall be 9:00 a. m. to 6:00 p. m. Monday through Saturday, inclusive. No cus-

tomer shall be served who comes into the market before or after the hours set forth above."

This litigation arose out of the 1957 contract negotiations between the representatives of 9,000 Chicago retailers of fresh meat and the seven union petitioners, who are local affiliates of the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL–CIO, representing virtually all butchers in the Chicago area. During the 1957 bargaining sessions the employer group presented several requests for union consent to a relaxation of the existing contract restriction on marketing hours for fresh meat, which forbade the sale of meat before 9 a. m. and after 6 p. m. in both service and self-service markets.[1] The unions rejected all such suggestions, and their own proposal retaining the marketing-hours restriction was ultimately accepted at the final bargaining session by all but two of the employers, National Tea Co. and Jewel Tea Co. (hereinafter "Jewel"). Associated Food Retailers of Greater Chicago, a trade association having about 1,000 individual and independent merchants as members and representing some 300 meat dealers in the negotiations, was among those who accepted. Jewel, however, asked the union negotiators to present to their membership, on behalf of it and National Tea, a counteroffer that included provision for Friday night operations. At the same time Jewel voiced its

[1] The practice in the Chicago area is for the employers and the butchers to execute separate, but similar, collective bargaining agreements for self-service and service markets. A self-service market is "one in which fresh beef, veal, lamb, mutton or pork are available for sale on a prepackage self-service basis." Semi-self-service markets, those in which fresh meat is made available on a prepackaged basis but there is also a service counter offering custom cutting for those who prefer it, are governed by the self-service contract. Service markets are those in which no fresh meat is made available on a self-service basis.

belief, as it had midway through the negotiations, that any marketing-hours restriction was illegal. On the recommendation of the union negotiators, the Jewel offer was rejected by the union membership, and a strike was authorized. Under the duress of the strike vote, Jewel decided to sign the contract previously approved by the rest of the industry.

In July 1958 Jewel brought suit against the unions, certain of their officers, Associated, and Charles H. Bromann, Secretary-Treasurer of Associated, seeking invalidation under §§ 1 and 2 of the Sherman Act of the contract provision that prohibited night meat market operations. The gist of the complaint was that the defendants and others had conspired together to prevent the retail sale of fresh meat before 9 a. m. and after 6 p. m. As evidence of the conspiracy Jewel relied in part on the events during the 1957 contract negotiations—the acceptance by Associated of the market-hours restriction and the unions' imposition of the restriction on Jewel through a strike threat. Jewel also alleged that it was a part of the conspiracy that the unions would neither permit their members to work at times other than the hours specified nor allow any grocery firm to sell meat, with or without employment of their members, outside those hours; that the members of Associated, which had joined only one of the 1957 employer proposals for extended marketing hours, had agreed among themselves to insist on the inclusion of the marketing-hours limitation in all collective bargaining agreements between the unions and any food store operator; that Associated, its members and officers had agreed with the other defendants that no firm was to be permitted to operate self-service meat markets between 6 p. m. and 9 p. m.; and that the unions, their officers and members had acted as the enforcing agent of the conspiracy.

The complaint stated that in recent years the prepackaged, self-service system of marketing meat had come into vogue, that 174 of Jewel's 196 stores were equipped to vend meat in this manner, and that a butcher need not be on duty in a self-service market at the time meat purchases were actually made. The prohibition of night meat marketing, it was alleged, unlawfully impeded Jewel in the use of its property and adversely affected the general public in that many persons find it inconvenient to shop during the day. An injunction, treble damages and attorneys' fees were demanded.

The trial judge held the allegations of the complaint sufficient to withstand a motion to dismiss made on the grounds, *inter alia,* that (a) the alleged restraint was within the exclusive regulatory scope of the National Labor Relations Act and was therefore outside the jurisdiction of the Court and (b) the controversy was within the labor exemption to the antitrust laws. That ruling was sustained on appeal. *Jewel Tea Co.* v. *Local Unions Nos. 189, etc., Amalgamated Meat Cutters, AFL–CIO,* 274 F. 2d 217 (C. A. 7th Cir. 1960), cert. denied, 362 U. S. 936. After trial, however, the District Judge ruled the "record was devoid of any evidence to support a finding of conspiracy" between Associated and the unions to force the restrictive provision on Jewel. 215 F. Supp. 839, 845. Testing the unions' action standing alone, the trial court found that even in self-service markets removal of the limitation on marketing hours either would inaugurate longer hours and night work for the butchers or would result in butchers' work being done by others unskilled in the trade. Thus, the court concluded, the unions had imposed the marketing-hours limitation to serve their own interests respecting conditions of employment, and such action was clearly within the labor exemption of the Sherman Act established by *Hunt* v. *Crumboch,* 325 U. S. 821; *United States* v. *Hutcheson,* 312 U. S. 219; *United States*

v. *American Federation of Musicians,* 318 U. S. 741. Alternatively, the District Court ruled that even if this was not the case, the arrangement did not amount to an unreasonable restraint of trade in violation of the Sherman Act.

The Court of Appeals reversed the dismissal of the complaint as to both the unions and Associated. Without disturbing the District Court's finding that, apart from the contractual provision itself, there was no evidence of conspiracy, the Court of Appeals concluded that a conspiracy in restraint of trade had been shown. The court noted that "[t]he rest of the Industry agreed with the Defendant Local Unions to continue the ban on night operations," while plaintiff resisted, and concluded that Associated and the unions "entered into a combination or agreement, which constituted a conspiracy, as charged in the complaint . . . [w]hether it be called an agreement, a contract or a conspiracy, is immaterial." 331 F. 2d 547, 551.

Similarly, the Court of Appeals did not find it necessary to review the lower court's finding that night marketing would affect either the butchers' working hours or their jurisdiction, for the court held that an employer-union contract respecting working hours would be unlawful. "One of the proprietary functions is the determination of what days a week and what hours of the day the business will be open to supply its customers. . . . As long as all rights of employees are recognized and duly observed by the employer, including the number of hours per day that any one shall be required to work, any agreement by a labor union, acting in concert with business competitors of the employer, designed to interfere with his operation of a retail business . . . is a violation of the Sherman Act . . . . [T]he furnishing of a place and advantageous hours of employment for the butchers to

supply meat to customers are the prerogatives of the employer." 331 F. 2d 547, 549.

We granted certiorari on the unions' petition,[2] 379 U. S. 813,[3] and now reverse the Court of Appeals.

I.

We must first consider the unions' attack on the appropriateness of the District Court's exercise of jurisdiction, which is encompassed in their contention that this controversy is within the exclusive primary jurisdiction of the National Labor Relations Board. On this point, which is distinct from the unions' argument that the operating-hours restriction is subject to regulation only by the Board and is thus wholly exempt from the antitrust laws, the unions' thesis is that the pivotal issue is whether the operating-hours restriction is a "term or condition of employment" and that the District Court should have held the case on its docket pending a Board proceeding to resolve that issue, which is said to be peculiarly within the competence of the Board.

"The doctrine of primary jurisdiction . . . applies where a claim is originally cognizable in the courts, and comes

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[2] Action upon the separate petition of Associated and Bromann, No. 321 Oct. Term, 1964, has been withheld, pending disposition of this case.

[3] The grant of certiorari was limited to the following questions:

"1. Based on the District Court's undisturbed finding that the limitation 'was imposed after arm's length bargaining, . . . and was fashioned exclusively by the unions to serve their own interests—how long and what hours members shall work, what work they shall do, and what pay they shall receive,' whether the limitation upon market operating hours and the controversy concerning it are within the labor exemption of the Sherman Antitrust Act.

"2. Whether a claimed violation of the Sherman Antitrust Act which falls within the regulatory scope of the National Labor Relations Act is within the exclusive primary jurisdiction of the National Labor Relations Board."

into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views." *United States* v. *Western Pac. R. Co.,* 352 U. S. 59, 63–64. The doctrine is based on the principle "that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over," *Far East Conference* v. *United States,* 342 U. S. 570, 574, and "requires judicial abstention in cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme," *United States* v. *Philadelphia Nat. Bank,* 374 U. S. 321, 353.

Whether a proposed bargaining subject is a term or condition of employment is an issue that the Board frequently determines in considering charges that an employer or union has violated the duty to bargain in good faith concerning "wages, hours, and other terms and conditions of employment," the mandatory subjects of bargaining described in § 8 (d) of the National Labor Relations Act, 49 Stat. 452, as amended. Such an issue may be raised by an unfair labor practice charge of violation of § 8 (a)(5) or § 8 (b)(3) through, for example, a refusal to bargain on a mandatory subject of bargaining, see *Labor Board* v. *Katz,* 369 U. S. 736, or insistence on a nonmandatory subject, see *Labor Board* v. *Borg-Warner Corp.,* 356 U. S. 342. Thus, the unions contend, Jewel could have filed an unfair labor practice charge with the Board on the ground that the unions had insisted on a nonmandatory subject—the marketing-hours restriction. Obviously, classification of bargaining subjects as "terms

or conditions of employment" is a matter concerning which the Board has special expertise. Nevertheless, for the reasons stated below we cannot conclude that this is a proper case for application of the doctrine of primary jurisdiction.

To begin with, courts are themselves not without experience in classifying bargaining subjects as terms or conditions of employment. Just such a determination must be frequently made when a court's jurisdiction to issue an injunction affecting a labor dispute is challenged under the Norris-LaGuardia Act, which defines "labor dispute" as including "any controversy concerning terms or conditions of employment," Norris-LaGuardia Act, § 13 (c), 47 Stat. 73, 29 U. S. C. § 113 (c) (1958 ed.). See *Order of Railroad Telegraphers* v. *Chicago & N. W. R. Co.*, 362 U. S. 330; *Bakery Drivers Union* v. *Wagshal*, 333 U. S. 437; cf. *Teamsters Union* v. *Oliver*, 358 U. S. 283.

Secondly, the doctrine of primary jurisdiction is not a doctrine of futility; it does not require resort to "an expensive and merely delaying administrative proceeding when the case must eventually be decided on a controlling legal issue wholly unrelated to determinations for the ascertainment of which the proceeding was sent to the agency." *Maritime Board* v. *Isbrandtsen Co.*, 356 U. S. 481, 521 (Frankfurter, J., dissenting). It was only after commencement of trial that it became evident that a major issue in this case would be whether the marketing-hours restriction was a term or condition of employment. Jewel's complaint alleged the existence of a conspiracy between Associated and the unions to impose the marketing-hours provision on Jewel—that is, it was alleged that the unions had agreed with a part of the bargaining unit to impose certain terms on the rest of the unit. We hold today in *United Mine Workers* v. *Pennington* with respect to allegations of a similar employer-union agreement to

impose a particular scale of wages—indisputably at the core of "wages, hours, and other terms and conditions of employment"—that such an understanding is not exempt from the Sherman Act. At the stage when the decision whether to refer the parties to the Board was made, therefore, the issues were so framed that a Board determination would have been of subsidiary importance at best.

Finally, we must reject the unions' primary-jurisdiction contention because of the absence of an available procedure for obtaining a Board determination. The Board does not classify bargaining subjects in the abstract but only in connection with unfair labor practice charges of refusal to bargain. The typical antitrust suit, however, is brought by a stranger to the bargaining relationship, and the complaint is not that the parties have refused to bargain but, quite the contrary, that they have agreed. Jewel's conspiracy allegation in the present case was just such a complaint. Agreement is of course not a refusal to bargain, and in such cases the Board affords no mechanism for obtaining a classification of the subject matter of the agreement. Moreover, even in the few instances when the antitrust action could be framed as a refusal to bargain charge, there is no guarantee of Board action. It is the function of the Board's General Counsel rather than the Board or a private litigant to determine whether an unfair labor practice complaint will ultimately issue. National Labor Relations Act, § 3 (d), 29 U. S. C. § 153 (d) (1958 ed.). And the six-month limitation period of § 10 (b) of the Act, 29 U. S. C. § 160 (b) (1958 ed.), would preclude many litigants from even filing a charge with the General Counsel. Indeed, Jewel's complaint in this very case was filed more than six months after it signed the 1957 collective bargaining agreement. "[W]e know of no case where the court has ordered reference of an issue which the administrative body would not itself

have jurisdiction to determine in a proceeding for that purpose." *Montana-Dakota Utilities Co.* v. *Northwestern Public Serv. Co.*, 341 U. S. 246, 254.[4]

II.

Here, as in *United Mine Workers* v. *Pennington, ante,* p. 657, the claim is made that the agreement under attack is exempt from the antitrust laws. We agree, but not on the broad grounds urged by the union.

It is well at the outset to emphasize that this case comes to us stripped of any claim of a union-employer conspiracy against Jewel. The trial court found no evidence to sustain Jewel's conspiracy claim and this finding was not disturbed by the Court of Appeals. We therefore have a situation where the unions, having obtained a marketing-hours agreement from one group of employers, have successfully sought the same terms from a single employer, Jewel, not as a result of a bargain between the unions and some employers directed against other employers, but pursuant to what the unions deemed to be in their own labor union interests.

Jewel does not allege that it has been injured by the elimination of competition among the other employers within the unit with respect to marketing hours; Jewel complains only of the unions' action in forcing it to accept the same restriction, the unions acting not at the behest of any employer group but in pursuit of their own policies. It might be argued that absent any union-employer conspiracy against Jewel and absent any agreement between Jewel and any other employer, the union-Jewel contract cannot be a violation of the Sherman Act. But the issue

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[4] To be distinguished are the pre-emption cases in which the possibility that the Board may not exercise jurisdiction renders state courts no less powerless to act, see *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236, 245–246. See generally, *Teamsters Local 20* v. *Morton,* 377 U. S. 252.

before us is not the broad substantive one of a violation of the antitrust laws—was there a conspiracy or combination which unreasonably restrained trade or an attempt to monopolize and was Jewel damaged in its business?—but whether the agreement is immune from attack by reason of the labor exemption from the antitrust laws. See note 3, *supra.* The fact that the parties to the agreement are but a single employer and the unions representing its employees does not compel immunity for the agreement. We must consider the subject matter of the agreement in the light of the national labor policy. Cf. *Bakery Drivers Union* v. *Wagshal,* 333 U. S. 437.

We pointed out in *Pennington* that exemption for union-employer agreements is very much a matter of accommodating the coverage of the Sherman Act to the policy of the labor laws. Employers and unions are required to bargain about wages, hours and working conditions, and this fact weighs heavily in favor of antitrust exemption for agreements on these subjects. But neither party need bargain about other matters and either party commits an unfair labor practice if it conditions its bargaining upon discussions of a nonmandatory subject. *Labor Board* v. *Borg-Warner Corp.,* 356 U. S. 342. Jewel, for example, need not have bargained about or agreed to a schedule of prices at which its meat would be sold and the unions could not legally have insisted that it do so. But if the unions had made such a demand, Jewel had agreed and the United States or an injured party had challenged the agreement under the antitrust laws, we seriously doubt that either the unions or Jewel could claim immunity by reason of the labor exemption, whatever substantive questions of violation there might be.

Thus the issue in this case is whether the marketing-hours restriction, like wages, and unlike prices, is so intimately related to wages, hours and working conditions that the unions' successful attempt to obtain that provi-

sion through bona fide, arm's-length bargaining in pursuit of their own labor union policies, and not at the behest of or in combination with nonlabor groups, falls within the protection of the national labor policy and is therefore exempt from the Sherman Act.[5] We think that it is.

The Court of Appeals would classify the marketing-hours restriction with the product-pricing provision and place both within the reach of the Sherman Act. In its view, labor has a legitimate interest in the number of hours it must work but no interest in whether the hours fall in the daytime, in the nighttime or on Sundays. "[T]he furnishing of a place and advantageous hours of employment for the butchers to supply meat to customers are the prerogatives of the employer." 331 F. 2d 547, 549. That reasoning would invalidate with respect to both service and self-service markets the 1957 provision that "eight hours shall constitute the basic work day, Monday through Saturday; *work to begin at 9:00 a. m.*

[5] The crucial determinant is not the form of the agreement—*e. g.*, prices or wages—but its relative impact on the product market and the interests of union members. Thus in *Teamsters Union* v. *Oliver*, 358 U. S. 283, we held that federal labor policy precluded application of state antitrust laws to an employer-union agreement that when leased trucks were driven by their owners, such owner-drivers should receive, in addition to the union wage, not less than a prescribed minimum rental. Though in form a scheme fixing prices for the supply of leased vehicles, the agreement was designed "to protect the negotiated wage scale against the possible undermining through diminution of the owner's wages for driving which might result from a rental which did not cover his operating costs." *Id.*, at 293–294. As the agreement did not embody a " 'remote and indirect approach to the subject of wages' . . . but a direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure established by the collective bargaining contract," *id.*, at 294, the paramount federal policy of encouraging collective bargaining proscribed application of the state law. See also *Meat Drivers* v. *United States*, 371 U. S. 94, 98; *Milk Wagon Drivers' Union, Local No. 753* v. *Lake Valley Farm Products, Inc.*, 311 U. S. 91.

and stop at 6:00 p. m. . . ." as well as the marketing-hours restriction.

Contrary to the Court of Appeals, we think that the particular hours of the day and the particular days of the week during which employees shall be required to work are subjects well within the realm of "wages, hours, and other terms and conditions of employment" about which employers and unions must bargain. National Labor Relations Act, § 8 (d); see *Timken Roller Bearing Co.*, 70 N. L. R. B. 500, 504, 515–516, 521 (1946), rev'd on other grounds, 161 F. 2d 949 (C. A. 6th Cir. 1947) (employer's unilateral imposition of Sunday work was refusal to bargain); *Massey Gin & Machine Works, Inc.*, 78 N. L. R. B. 189, 195, 199 (1948) (change in starting and quitting time); *Camp & McInnes, Inc.*, 100 N. L. R. B. 524, 532 (1952) (reduction of lunch hour and advancement of quitting time). And, although the effect on competition is apparent and real, perhaps more so than in the case of the wage agreement, the concern of union members is immediate and direct. Weighing the respective interests involved, we think the national labor policy expressed in the National Labor Relations Act places beyond the reach of the Sherman Act union-employer agreements on when, as well as how long, employees must work. An agreement on these subjects between the union and the employers in a bargaining unit is not illegal under the Sherman Act, nor is the union's unilateral demand for the same contract of other employers in the industry.

Disposing of the case, as it did, on the broad grounds we have indicated, the Court of Appeals did not deal separately with the marketing-hours provision, as distinguished from hours of work, in connection with either service or self-service markets. The dispute here pertains principally to self-service markets.

The unions argue that since night operations would be impossible without night employment of butchers, or an impairment of the butchers' jurisdiction, or a substantial effect on the butchers' workload, the marketing-hours restriction is either little different in effect from the valid working-hours provision that work shall stop at 6 p. m. or is necessary to protect other concerns of the union members. If the unions' factual premises are true, we think the unions could impose a restriction on night operations without violation of the Sherman Act; for then operating hours, like working hours, would constitute a subject of immediate and legitimate concern to union members.

Jewel alleges on the other hand that the night operation of self-service markets requires no butcher to be in attendance and does not infringe any other legitimate union concern. Customers serve themselves; and if owners want to forgo furnishing the services of a butcher to give advice or to make special cuts, this is not the unions' concern since their desire to avoid night work is fully satisfied and no other legitimate interest is being infringed. In short, the connection between working hours and operating hours in the case of the self-service market is said to be so attenuated as to bring the provision within the prohibition of the Sherman Act.

If it were true that self-service markets could actually operate without butchers, at least for a few hours after 6 p. m., that no encroachment on butchers' work would result and that the workload of butchers during normal working hours would not be substantially increased, Jewel's position would have considerable merit. For then the obvious restraint on the product market—the exclusion of self-service stores from the evening market for meat—would stand alone, unmitigated and unjustified by the vital interests of the union butchers which are relied upon in this case. In such event the limitation imposed

by the unions might well be reduced to nothing but an effort by the unions to protect one group of employers from competition by another, which is conduct that is not exempt from the Sherman Act. Whether there would be a violation of §§ 1 and 2 would then depend on whether the elements of a conspiracy in restraint of trade or an attempt to monopolize had been proved.[6]

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[6] One issue, for example, would be whether the restraint was unreasonable. Judicial pronouncements regarding the reasonableness of restraints on hours of business are relatively few. Some cases appear to have viewed such restraints as tantamount to limits on hours of work and thus reasonable, even though contained in agreements among competitors. Thus in *Chicago Board of Trade* v. *United States,* 246 U. S. 231, the Court upheld a rule of a grain exchange that had the form of a restriction on prices of transactions outside regular trading hours but was characterized by the Court as a rule designed to shift transactions to the regular trading period, *i. e.,* to limit hours of operation. The Court, per Mr. Justice Brandeis, stated:

"Every board of trade and nearly every trade organization imposes some restraint upon the conduct of business by its members. Those relating to the hours in which business may be done are common; and they make a special appeal where, as here, *they tend to shorten the working day* or, at least, limit the period of most exacting activity." 246 U. S., at 241. (Emphasis added.) See also *La Duc* v. *Teamsters & Chauffeurs Union, Local No. 43,* 1946–1947 Trade Cas., ¶ 57,631 (Wis. Cir. Ct. 1947); *Cielesz* v. *Local 189, Amalgamated Meat Cutters,* 25 Ill. App. 2d 491, 167 N. E. 2d 302 (1960).

Other cases have upheld operating-hours restraints in factual circumstances that make it seem likely that the agreement affected hours of operation and hours of work in equal measure but without stressing that fact. See *Dunkel Oil Corp.* v. *Anich,* 1944–1945 Trade Cas., ¶ 57,306 (D. C. E. D. Ill. 1944); *Baker* v. *Retail Clerks Assn.,* 313 Ill. App. 432, 40 N. E. 2d 571 (1942); *Stovall* v. *McCutchen,* 107 Ky. 577, 54 S. W. 969 (1900).

Kold Kist, Inc. v. *Amalgamated Meat Cutters, Local No. 421,* 99 Cal. App. 2d 191, 221 P. 2d 724 (1950), held unreasonable a union-employer agreement limiting night sales of frozen poultry, which had previously been obtained from the plaintiff-distributor. The plaintiff alleged, however, that it had been severely affected, since many stores had stopped carrying its products entirely due to the lack of storage

Thus the dispute between Jewel and the unions essentially concerns a narrow factual question: Are night operations without butchers, and without infringement of butchers' interests, feasible? The District Court resolved this factual dispute in favor of the unions. It found that "in stores where meat is sold at night it is impractical to operate without either butchers or other employees. Someone must arrange, replenish and clean the counters and supply customer services." Operating without butchers would mean that "their work would be done by others unskilled in the trade," and "would involve an increase in workload in preparing for the night work and cleaning the next morning." 215 F. Supp., at 846. Those findings were not disturbed by the Court of Appeals, which, as previously noted, proceeded on a broader ground. Our function is limited to reviewing the record to satisfy ourselves that the trial judge's findings are not clearly erroneous. Fed. Rules Civ. Proc. 52 (a).

The trial court had before it evidence concerning the history of the unions' opposition to night work, the development of the provisions respecting night work and night operations, the course of collective bargaining negotiations in 1957, 1959, and 1961 [7] with regard to those provisions, and the characteristics of meat marketing insofar as they bore on the feasibility of night operations without butchers.

The unions' opposition to night work has a long history. Prior to 1919 the operating hours of meat markets in Chicago were 7 a. m. to 7 p. m., Monday through Friday;

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facilities in which to keep the poultry during hours in which sale was prohibited, and such effects may be atypical.

The decided cases thus do not appear to offer any easy answer to the question whether in a particular case an operating-hours restraint is unreasonable.

[7] In 1959, and again in 1961, new collective bargaining agreements containing the challenged provision were executed. In each instance, Jewel reserved its position with respect to this litigation.

7 a. m. to 10 p. m. on Saturday, and 7 a. m. to 1 p. m. on Sunday. Butchers worked the full 81-hour, seven-day week. The Chicago butchers' strike of 1919 was much concerned with shortening working hours, and the resulting contract, signed in 1920, set the working day at 8 a. m. to 6 p. m., Monday through Friday, and 8 a. m. to 9 p. m. on Saturday. Various alterations in the hours were made in 1937, 1941, 1945, 1946, and again in 1947, when the present working hours (9 a. m. to 6 p. m., Monday through Saturday) were established. In a mail ballot conducted by the unions in October 1962, Jewel's meat cutters voted 759 to 28 against night work.

Concomitant with the unions' concern with the working hours of butchers was their interest in the hours during which customers might be served. The 1920 agreement provided that "no customers will be served who come into the market after 6 P. M. and 9 P. M. on Saturdays and on days preceding holidays . . . ." That provision was continued until 1947, when it was superseded by the formulation presently in effect and here claimed to be unlawful:

> "Market operating hours shall be 9:00 a. m. to 6:00 p. m. Monday through Saturday, inclusive. No customer shall be served who comes into the market before or after the hours set forth above."

In 1947, Jewel had just started investigating the self-service method of meat vending. It introduced that method in the Chicago area in 1948 and in the territory of these unions in 1953.

During the 1957 negotiations numerous proposals for relaxation of the operating-hours restriction were presented by the employer group. Each of these proposals, including that submitted separately by Jewel for consideration at the unions' ratification meetings, combined a provision for night operations with a provision for a more flexible workday that would permit night employment

of butchers. Such juxtaposition of the two provisions could, of course, only serve to reinforce the unions' fears that night operations meant night work. Jewel did allege in its complaint, filed in July 1958, that night operations were possible without butchers, but even in the 1959 bargaining sessions Jewel failed to put forth any plan for night operations that did not also include night work. Finally, toward the end of the 1961 negotiations, Jewel did make such a suggestion, but, as the trial judge remarked, the "unions questioned the seriousness of that proposal under the circumstances." 215 F. Supp., at 843.

The unions' evidence with regard to the practicability of night operations without butchers was accurately summarized by the trial judge as follows:

> "[I]n most of plaintiff's stores outside Chicago, where night operations exist, meat cutters are on duty whenever a meat department is open after 6 P. M. . . . Even in self-service departments, ostensibly operated without employees on duty after 6 P. M., there was evidence that requisite customer services in connection with meat sales were performed by grocery clerks. In the same vein, defendants adduced evidence that in the sale of delicatessen items, which could be made after 6 P. M. from self-service cases under the contract, 'practically' always during the time the market was open the manager, or other employees, would be rearranging and restocking the cases. There was also evidence that even if it were practical to operate a self-service meat market after 6 P. M. without employees, the night operations would add to the workload in getting the meats prepared for night sales and in putting the counters in order the next day." 215 F. Supp., at 844.

Jewel challenges the unions' evidence on each of these points—arguing, for example, that its preference to have butchers on duty at night, where possible under the union contract, is not probative of the feasibility of not having butchers on duty and that the evidence that grocery clerks performed customer services within the butchers' jurisdiction was based on a single instance resulting from "entrapment" by union agents. But Jewel's argument—when considered against the historical background of union concern with working hours and operating hours and the virtually uniform recognition by employers of the intimate relationship between the two subjects, as manifested by bargaining proposals in 1957, 1959, and 1961—falls far short of a showing that the trial judge's ultimate findings were clearly erroneous. *Reversed.*

MR. JUSTICE GOLDBERG, with whom MR. JUSTICE HARLAN and MR. JUSTICE STEWART join, dissenting from the opinion but concurring in the reversal in No. 48 and concurring in the judgment of the Court in No. 240.

Stripped of all the pejorative adjectives and reduced to their essential facts, both *Pennington* and *Jewel Tea* represent refusals by judges to give full effect to congressional action designed to prohibit judicial intervention via the antitrust route in legitimate collective bargaining. The history of these cases furnishes fresh evidence of the observation that in this area, necessarily involving a determination of "what public policy in regard to the industrial struggle demands," *Duplex Co.* v. *Deering,* 254 U. S. 443, 479, 485 (dissenting opinion of Mr. Justice Brandeis), "courts have neither the aptitude nor the criteria for reaching sound decisions." Cox, Labor and the Antitrust Laws—A Preliminary Analysis, 104 U. Pa. L. Rev. 252, 269–270 (1955); see Winter, Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities, 73 Yale L. J. 14 (1963).

I.

Pennington presents a case of a union negotiating with the employers in the industry for wages, fringe benefits, and working conditions. Despite allegations of conspiracy, which connotes clandestine activities, it is no secret that the United Mine Workers, acting to further what it considers to be the best interests of its members, espouses a philosophy of achieving uniform high wages, fringe benefits, and good working conditions. As the *quid pro quo* for this, the Union is willing to accept the burdens and consequences of automation. Further, it acts upon the view that the existence of marginal operators who cannot afford these high wages, fringe benefits, and good working conditions does not serve the best interests of the working miner but, on the contrary, depresses wage standards and perpetuates undesirable conditions. This has been the articulated policy of the Union since 1933. See Baratz, The Union and the Coal Industry 62–74 (1955). The Mine Workers has openly stated its preference, if need be, for a reduced working force in the industry, with those employed working at high wages, rather than for greater total employment at lesser wage rates. *Ibid.* See also Folliard, Roar of John L. Lewis Subdued at 85, The Washington Post, Feb. 14, 1965, § E, p. 3; Hearings before a Subcommittee of the Senate Committee on Labor and Public Welfare on S. Res. 274, 81st Cong., 2d Sess., 1–10; Hearings before a Subcommittee of the House Committee on Education and Labor, Welfare of Miners, 80th Cong., 1st Sess.; 1 Proceedings of Forty-Second Consecutive Constitutional Convention of the United Mine Workers of America, 9–14 (1956). Consistent with this view, the Union welcomes automation, insisting only that the workers participate in its benefits.[1]

[1] For these policies, John L. Lewis, the long-time head of the Mine Workers, has been variously condemned and praised. See, *e. g.*,

Jewel Tea presents another and different aspect of collective bargaining philosophy. The Chicago Local of the Amalgamated Meat Cutters bargains for its members with small, independent service butchers as well as large automated self-service chains. It seeks from both a uniform policy that no fresh meat be sold after 6 p. m. This union policy, as my Brother WHITE recognizes, *ante,* at 694–696, has a long history dating back to 1919 and has grown out of the Union's struggle to reduce the long, arduous hours worked by butchers, which in 1919 were 81 hours per week. It took a long strike to achieve the first limitation on hours in 1920, and it has required hard extensive collective bargaining since then to maintain the policy and further reduce the number of hours worked. While it is claimed by Jewel Tea, a large operator of automated self-service markets, that it can operate beyond the set hours without increasing the work of butchers or having others do butchers' work—a claim rejected by the trial court and the majority of this Court—it is conceded, on this record, that the small, independent service operators cannot do so. Therefore to the extent that the Union's uniform policy limiting hours of selling fresh meat has the effect of aiding one group of employers at the expense of another, here the union policy, unlike that in *Pennington,* aids the small employers at the expense of the large.

Although evidencing these converse economic effects, both *Pennington* and *Jewel Tea,* as the Court in *Pennington,* and my Brother WHITE'S opinion in *Jewel Tea*

Baratz, *op. cit. supra,* at 138–151; Folliard, *op. cit. supra;* Alinsky, John L. Lewis 346–372 (1949); Wechsler, Labor Baron: A Portrait of John L. Lewis (1944). Among the praise has been a Presidential Medal of Freedom, awarded on September 14, 1964, in which Mr. Lewis was cited as follows: "Eloquent spokesman of labor, he has given voice to the aspirations of the industrial workers of the country and led the cause of free trade unions within a healthy system of free enterprise."

acknowledge, involve conventional collective bargaining on wages, hours, and working conditions—mandatory subjects of bargaining under the National Labor Relations Act, 49 Stat. 452, as amended, 29 U. S. C. § 158 (d) (1958 ed.). Yet the Mine Workers' activity in *Pennington* was held subject to an antitrust action by two lower courts. This decision was based upon a jury determination that the Union's economic philosophy is undesirable, and it resulted in an award against the Union of treble damages of $270,000 and $55,000 extra for respondent's attorneys' fees. In *Jewel Tea,* the Union has also been subjected to an antitrust suit in which a court of appeals, with its own notions as to what butchers are legitimately interested in, would subject the Union to a treble damage judgment in an as yet undetermined amount.

Regretfully these cases, both in the lower courts and in expressions in the various opinions filed today in this Court, as I shall demonstrate, constitute a throwback to past days when courts allowed antitrust actions against unions and employers engaged in conventional collective bargaining, because "a judge considered" the union or employer conduct in question to be "socially or economically" objectionable. *Duplex Co.* v. *Deering, supra,* at 485 (dissenting opinion of Mr. Justice Brandeis). It is necessary to recall that history to place the cases before us in proper perspective.

II.

The Sherman Act, 26 Stat. 209, 15 U. S. C. § 1 *et seq.* (1958 ed.), "was enacted in the era of 'trusts' and of 'combinations' of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern." *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, 492–493. Despite the fact that the Act was therefore aimed at business combinations, not labor unions, and

that a careful reading of the legislative history shows that the interdiction of "every" contract, combination or conspiracy in restraint of trade was not intended to apply to labor unions and the activities of labor unions in their own interests, aimed at promotion of the labor conditions of their members,[2] the Court in *Loewe* v. *Lawlor,* 208 U. S. 274, held that the Act proscribed activities of labor unions and, in that case, prohibited the use of a secondary boycott as part of an organizational campaign. Congress responded by adopting in §§ 6 and 20 of the Clayton Act, 38 Stat. 731, 738, 15 U. S. C. § 17, 29 U. S. C. § 52 (1958 ed.), what has come to be known as the labor exemption from the Sherman Act. See Frankfurter & Greene, The Labor Injunction 139–144 (1930). Section 6 states: "The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations, instituted for the purposes of mutual help . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof . . . ." [3] Sec-

[2] The legislative history is well summarized in Berman, Labor and the Sherman Act 3–54 (1930). See also Frankfurter & Greene, The Labor Injunction 139, n. 17 (1930).

[3] One of the expressed aims of the Act appears to have been approval of such union-employer agreements as "the protocol in the sweated industries of New York City and vicinity which abolished sweatshops and long hours of labor, and the burdensome, miserable toil prevailing, and established the combination of employers and of work men and work women by which certain standards are to be enforced, and [which provided that] no employer can become a member of the manufacturers' association in that trade unless he is willing to undersign an agreement by which the conditions prevailing in the protocol will be inaugurated by him." H. R. Rep. No. 627, 63d Cong., 2d Sess., 15; S. Rep. No. 698, 63d Cong., 2d Sess., 11. This quotation was a part of the statement of Samuel Gompers to the House Committee in which he argued for adoption of a labor exemption to the Sherman Act. He stated his fear that while he did not believe

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tion 20 barred federal court injunctions "in any case between an employer and employees, or between employers and employees" involving a dispute over terms and conditions of employment. It specifically prohibited issuance of injunctions against certain activities such as quitting work, persuading others to do the same, etc., and concluded with the provision: "nor shall any of the acts specified . . . be considered or held to be violations of any law of the United States."

These congressional provisions, however, were frustrated, as thoughtful commentators have acknowledged, by decisions of this Court. See, *e. g.*, Frankfurter & Greene, *op. cit. supra,* at 165–176; Cox, *op. cit. supra,* at 257–258. See also H. R. Rep. No. 669, 72d Cong., 1st Sess., 3, 7–8. In *Duplex Co.* v. *Deering,* 254 U. S. 443, the Court was again faced with a secondary boycott used as an organizational tool, that is, a post-Clayton Act *Lawlor* situation. Despite the Act, the Court again held the activity to violate the Sherman Act on the basis that § 6 did not confer immunity from antitrust liabilities "where . . . [unions] depart from . . . normal and legitimate objects . . . ." *Id.,* at 469. What constitutes a "normal and legitimate" union object was to be determined by the courts; the *Duplex* Court held that a secondary boycott was not such an object. Section 20 was swept away on the ground that it only applied to controversies between "employers and employees," and that

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that courts would declare the existence of labor unions *per se* to be violations of the Sherman Act, he believed that such protocols as the one discussed above would be held unlawful and stated that the manufacturers' association involved had already been sued. He was therefore seeking a congressional enactment declaring such a protocol lawful both for labor and business. It is significant that in both Senate and House Reports, almost the entire discussion of § 6 of the Clayton Act consists of this extract from Mr. Gompers' testimony. The inference is inescapable that the Clayton Act was designed, *inter alia,* to immunize such protocols from antitrust liability.

"it would do violence to the . . . language employed," *id.*, at 472, to hold that the section included an attempt to organize a new employer. Mr. Justice Brandeis, in dissent (joined by Mr. Justice Holmes and Mr. Justice Clarke), forcefully argued that the decision of the majority violated the clear congressional purpose to remove from judges the determination of "what public policy in regard to the industrial struggle demands," *id.*, at 485, and to "declare the right of industrial combatants to push their struggle to the limits of the justification of self-interest . . . ." *Id.*, at 488.

Duplex was followed by other decisions of this Court and lower federal courts which sustained the application of the antitrust laws to curb both primary and secondary union activity. See, *e. g.*, *Bedford Co.* v. *Stone Cutters Assn.*, 274 U. S. 37; *Coronado Coal Co.* v. *United Mine Workers*, 268 U. S. 295; *Alco-Zander Co.* v. *Amalgamated Clothing Workers*, 35 F. 2d 203 (D. C. E. D. Pa.); *United States* v. *Railway Employees' Dept.*, 283 F. 479 (D. C. N. D. Ill.).

Mr. Justice Brandeis' dissent in *Duplex* has, however, carried the day in the courts of history as evidenced by subsequent congressional action and decisions of this Court. The Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C. § 101 (1958 ed.), was passed by Congress in 1932 expressly to overrule the majority opinion of *Duplex* and the cases that followed it and to affirm the philosophy of the dissenters in those cases. See *United States* v. *Hutcheson*, 312 U. S. 219, 235–236; *Milk Wagon Drivers Union* v. *Lake Valley Farm Products, Inc.*, 311 U. S. 91, 102–103; *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U. S. 552, 562.[4] Although framed in terms of restric-

[4] As the House Committee stated in reporting out the Norris-LaGuardia Act, "[t]he purpose of the bill is to protect the rights of labor in the same manner the Congress intended when it enacted the Clayton Act, October 15, 1914 (38 Stat. L., 738), which act, by reason

tions on the use of injunctions, this Court in *United States* v. *Hutcheson,* 312 U. S. 219, 235–236, recognized that the Act's "underlying aim . . . was to restore the broad purpose which Congress thought it had formulated in the Clayton Act but which was frustrated . . . ." See H. R. Rep. No. 669, 72d Cong., 1st Sess., 6–8. As this Court has recognized, congressional enactment of the Norris-LaGuardia Act "was prompted by a desire . . . to withdraw federal courts from a type of controversy for which many believed they were ill-suited and from participation in which, it was feared, judicial prestige might suffer." *Marine Cooks & Stewards* v. *Panama S. S. Co.,* 362 U. S. 365, 370, n. 7. The Wagner Act, 49 Stat. 449, as amended, 29 U. S. C. § 151 *et seq.* (1958 ed.), followed the Norris-LaGuardia Act and gave affirmative protection and encouragement to union organization and collective bargaining and further reflected congressional desire to narrow the judiciary's role in the formulation of labor policy by entrusting principal enforcement responsibility to an administrative agency.

Following adoption of the Norris-LaGuardia and Wagner Acts, in *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, the Court gave proper recognition to congressional purpose in this area. In holding that union use of a sit-down strike as an organizational tool did not violate the antitrust laws, even though attended with violence, the Court stated:

> "Strikes or agreements not to work, entered into by laborers to compel employers to yield to their demands, may restrict to some extent the power of employers who are parties to the dispute to compete in the market with those not subject to such demands.

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of its construction and application by the Federal courts, is ineffectual to accomplish the congressional intent." H. R. Rep. No. 669, 72d Cong., 1st Sess., 3; see also *id.,* at 7–8.

> But . . . the mere fact of such restrictions on competition does not in itself bring the parties to the agreement within the condemnation of the Sherman Act. . . . Furthermore, successful union activity, as for example consummation of a wage agreement with employers, may have some influence on price competition by eliminating that part of such competition which is based on differences in labor standards. Since, in order to render a labor combination effective it must eliminate the competition from non-union made goods, . . . an elimination of price competition based on differences in labor standards is the objective of any national labor organization. But this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act." [5] 310 U. S., at 503–504.

Apex was followed by the Court in *United States* v. *Hutcheson, supra,* which has been recognized as a landmark case. Mr. Justice Frankfurter, after an extensive review of the history of the application of the antitrust laws to labor unions, concluded, for the Court, that "whether trade union conduct constitutes a violation

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[5] In reaching this conclusion the Court relied, in part, on the provision of § 6 of the Clayton Act that "the labor of a human being is not a commodity or article of commerce . . . nor shall such [labor] organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in the restraint of trade under the antitrust laws." 310 U. S., at 503. It also relied on provisions of the Norris-LaGuardia Act, the Railway Labor Act, 48 Stat. 1185, as amended, 45 U. S. C. § 151 *et seq.* (1958 ed.), the National Labor Relations Act, the Walsh-Healey Act, 49 Stat. 2036, as amended, 41 U. S. C. §§ 35–45 (1958 ed.), and the Fair Labor Standards Act, 52 Stat. 1060, as amended, 29 U. S. C. §§ 201–219 (1958 ed.). Its conclusion was that "[t]his series of acts clearly recognizes that combinations of workers eliminating competition among themselves and restricting competition among their employers based on wage cutting are not contrary to the public policy." 310 U. S., at 504, n. 24.

of the Sherman Law is to be determined only by reading the Sherman Law and § 20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of outlawry of labor conduct." 312 U. S., at 231. The Court then went on to hold: "So long as a union acts in its self-interest and does not combine with non-labor groups,[6] the licit and the illicit . . . are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means." 312 U. S., at 232.

In *Allen Bradley Co.* v. *Union,* 325 U. S. 797, the only relevant case in this area since *Hutcheson,* the Court reaffirmed the *Hutcheson* holding "that a union's exemption from the Sherman Act is not to be determined by a judicial 'judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.' " 325 U. S., at 810–811. The Court, however, held that the Union was subject to Sherman Act liability on the facts of the case as there were "industry-wide understandings, looking not merely to terms and conditions of employment but also to price and market control. Agencies were set up composed of representatives of all three groups [the union-contractor-manufacturer combination] to boycott recalcitrant local contractors and manufacturers and to bar from the [New York City] area equipment manufactured outside its boundaries."

[6] The Court clarified this statement by citation to *United States* v. *Brims,* 272 U. S. 549, a case involving an employer conspiracy to allocate markets. See *Bedford Co.* v. *Stone Cutters Assn.,* 274 U. S. 37, 56, 64 (dissenting opinion of Mr. Justice Brandeis). This, of course, is quite similar to the situation presented in *Allen Bradley Co.* v. *Union,* 325 U. S. 797. It is far different from the situations in the cases decided today and the situation in the garment industry which was specifically approved by Congress in the Clayton Act. See note 3, *supra.*

325 U. S., at 799–800. And "this combination of business men" "intended to and did restrain trade in and monopolize the supply of electrical equipment in the New York City area to the exclusion of equipment manufactured in and shipped from other states, and did also control its price and discriminate between its would-be customers." 325 U. S., at 800–801. Thus *Allen Bradley* involved two elements: (1) union participation in price fixing and market allocation, with the only union interest being the indirect prospect that these anticompetitive devices might increase employers' profits which might then trickle down to the employees, (2) accomplished by the union's joining a combination or conspiracy of the employers.[7]

To round out this history it should be noted that, while rejecting attempts to restrict or eliminate the labor exemption from the antitrust laws,[8] Congress, in the 1947 Taft-Hartley Act, 61 Stat. 136, 29 U. S. C. § 141 *et seq.* (1958 ed.), and the 1959 Landrum-Griffin Act, 73 Stat. 519, 29 U. S. C. § 401 *et seq.* (1958 ed., Supp. V), has taken steps to proscribe union activities which, in its legislative judgment, it considers to be detrimental to the public good. Consistent, however, with its policy of not turning the lawfulness of union conduct on subjective judgments of purpose or effect, a policy expressed in §§ 6 and 20 of the Clayton Act and in the Norris-LaGuardia Act, Congress did this by making unlawful certain specific union activities under the National Labor

[7] Cf. the opinion of my Brother WHITE in *Jewel Tea, ante,* at 688–689, 692–693; *infra,* pp. 727–729, *United States* v. *Brims,* 272 U. S. 549, discussed in note 6, *supra.*

[8] See, *e. g.,* H. R. 3020 §§ 301 (a), (b), 80th Cong., 1st Sess.; S. Rep. No. 105, 80th Cong., 1st Sess., 22; H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 65; 93 Cong. Rec. A844–A846, A1910, 1834–1844, 3834–3836, 4130–4136, 4858–4875, 7347; S. 2573, 87th Cong., 1st Sess.; Sovern, Some Ruminations on Labor, the Antitrust Laws and *Allen Bradley,* 13 Lab. L. J. 957 (1962).

Relations Act. Congress, for example, has curbed the secondary boycott in § 8 (b)(4)(B) of the National Labor Relations Act, preserving from condemnation certain secondary activities deemed legitimate.[9] The jurisdictional strike is regulated by § 8 (b)(4)(D) in conjunction with § 10 (k) of the Act.[10] Union opposition to automation has been regulated to the limited extent Congress wished to do so by § 8 (b)(6) of the Act.[11] Strikes and pressure by minority unions for organization or recognition are controlled by §§ 8 (b)(4)(C) and 8 (b)(7) of the Act.[12] Union restrictions on contracting out and subcontracting of work are delineated by § 8 (e) of the Act.[13] For the issue presently before us, it is most

[9] As this case does not involve an *Allen Bradley* situation, it is not necessary to determine whether Congress, in enacting these Taft-Hartley boycott and related revisions to the Act and at the same time rejecting an attempted codification of the *Allen Bradley* doctrine in the antitrust laws, intended that all union activities in this area be covered solely under the comprehensive regulation of the labor statutes with their restricted injunctive and damage provisions. See sources cited in note 8, *supra*. Cf. *Teamsters Union* v. *Lester Morton Trucking Co.*, 377 U. S. 252; *Teamsters Union* v. *Oliver*, 358 U. S. 283; *Garner* v. *Teamsters Union*, 346 U. S. 485.

[10] As an antitrust issue, see *United States* v. *Hutcheson*, *supra*.

[11] As an antitrust issue, see *United States* v. *Hod Carriers*, 313 U. S. 539, affirming *United States* v. *Carrozzo*, 37 F. Supp. 191 (D. C. N. D. Ill.).

[12] As antitrust issues, see *United States* v. *Building & Construction Trades Council*, 313 U. S. 539.

[13] In *Pennington* the collective bargaining agreement restricted subleasing, which is a mining form of subcontracting. Indeed, the *Pennington* case bristles with potential unfair labor practices. The Mine Workers allegedly imposed the national wage agreement on the small coal operators at a time when the Union did not represent their employees. For a minority union to enter into a collective bargaining contract covering all the employees of a unit has been held to infringe the rights of employees under § 7 of the NLRA. *Garment Workers* v. *Labor Board*, 366 U. S. 731. A "protective wage clause" in the national wage agreement provided that signatory companies would not buy coal mined under terms and conditions less favorable than

significant that in enacting this last prohibition, Congress in the exercise of its legislative judgment, specifically excepted the unusual situations existing in the garment and building industries. Such exceptions for particular industries, which may be proper subjects of legislative discretion, would, of course, be most difficult for courts to make in employing a broad proscription like the Sherman Act.

III.

In my view, this history shows a consistent congressional purpose to limit severely judicial intervention in collective bargaining under cover of the wide umbrella of the antitrust laws, and, rather, to deal with what Congress deemed to be specific abuses on the part of labor unions by specific proscriptions in the labor statutes. I believe that the Court should respect this history of congressional purpose and should reaffirm the Court's holdings in *Apex* and *Hutcheson* which, unlike earlier decisions, gave effect to, rather than frustrated, the congressional design. The sound approach of *Hutcheson* is that the labor exemption from the antitrust laws derives from a synthesis of all pertinent congressional legislation—the nature of the Sherman Act itself,[14] §§ 6 and 20 of the Clayton Act, the Norris-LaGuardia Act, the Fair Labor Standards Act,[15] the Walsh-Healey[16] and Davis-Bacon[17] Acts, and the Wagner Act with its Taft-Hartley and Landrum-Griffin amendments. This last statute, in particular, provides

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those in the national wage agreement. The Labor Board has held that this type of clause violates § 8 (e) of the NLRA, as amended, 29 U. S. C. § 158 (e) (1958 ed., Supp. V). See *Raymond O. Lewis, W. A. Boyle & John Owens, etc.*, 144 N. L. R. B. 228. See also *Raymond O. Lewis et al.*, 148 N. L. R. B. —, 1964 CCH, N. L. R. B. Decisions ¶ 13,334.

[14] See pp. 700–701, *supra; Apex Hosiery Co.* v. *Leader, supra.*

[15] 52 Stat. 1060, as amended, 29 U. S. C. §§ 201–219 (1958 ed.).

[16] 49 Stat. 2036, as amended, 41 U. S. C. §§ 35–45 (1958 ed.).

[17] 46 Stat. 1494, as amended, 40 U. S. C. § 276a (1958 ed.).

that both employers and unions must bargain over "wages, hours, and other terms and conditions of employment." 29 U. S. C. §§ 158 (a)(5), (b)(3), (d) (1958 ed.). Following the sound analysis of *Hutcheson,* the Court should hold that, in order to effectuate congressional intent, collective bargaining activity concerning mandatory subjects of bargaining under the Labor Act is not subject to the antitrust laws.[18] This rule flows directly from the *Hutcheson* holding that a union acting as a union, in the interests of its members, and not acting to fix prices or allocate markets in aid of an employer conspiracy to accomplish these objects, with only indirect union benefits, is not subject to challenge under the antitrust laws. To hold that mandatory collective bargaining is completely protected would effectuate the congressional policies of encouraging free collective bargaining, subject only to specific restrictions contained in the labor laws, and of limiting judicial intervention in labor matters via the antitrust route—an intervention which necessarily under the Sherman Act places on judges and juries the determination of "what public policy in regard to the industrial struggle demands." *Duplex Co.* v. *Deering, supra,* at 485 (dissenting opinion of Mr. Justice Brandeis). See Winter, Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities, 73 Yale L. J. 14 (1963).

Section 6 of the Clayton Act made it clear half a century ago that it is not national policy to force workers to compete in the "sale" of their labor as if it were a commodity or article of commerce. The policy was confirmed

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[18] Although I agree with my Brother WHITE in *Jewel Tea* that the doctrine of primary jurisdiction does not apply here, decisions of the Labor Board as to what constitutes a subject of mandatory bargaining are, of course, very significant in determination of the applicability of the labor exemption.

and extended in the subsequent Norris-LaGuardia Act. Other federal legislation establishing minimum wages and maximum hours takes labor standards out of competition. The Fair Labor Standards Act, 52 Stat. 1060, as amended, 29 U. S. C. §§ 201–219 (1958 ed.), clearly states that the existence of "labor conditions" insufficient for a "minimum standard of living . . . constitutes an unfair method of competition in commerce." 29 U. S. C. § 202 (a). Moreover, this Court has recognized that in the Walsh-Healey Act, 49 Stat. 2036, as amended, 41 U. S. C. §§ 35–45 (1958 ed.), Congress brought to bear the "leverage of the Government's immense purchasing power to raise labor standards" by eliminating substandard producers from eligibility for public contracts. *Endicott Johnson Corp.* v. *Perkins,* 317 U. S. 501, 507. See also Davis-Bacon Act, 46 Stat. 1494, 40 U. S. C. § 276a (1958 ed.). The National Labor Relations Act itself clearly expresses one of its purposes to be "the stabilization of competitive wage rates and working conditions within and between industries." 29 U. S. C. § 151. In short, business competition based on wage competition is not national policy and "the mere fact of such restrictions on competition does not . . . bring the parties . . . within the condemnation of the Sherman Act." *Apex Hosiery Co.* v. *Leader, supra,* at 503.

The National Labor Relations Act also declares it to be the policy of the United States to promote the establishment of wages, hours, and other terms and conditions of employment by free collective bargaining between employers and unions. The Act further provides that both employers and unions must bargain about such mandatory subjects of bargaining. This national scheme would be virtually destroyed by the imposition of Sherman Act criminal and civil penalties upon employers and unions engaged in such collective bargaining. To tell the parties

that they must bargain about a point but may be subject to antitrust penalties if they reach an agreement is to stultify the congressional scheme.

Moreover, mandatory subjects of bargaining are issues as to which union strikes may not be enjoined by either federal or state courts.[19] To say that the union can strike over such issues but that both it and the employer are subject to possible antitrust penalties for making collective bargaining agreements concerning them is to assert that Congress intended to permit the parties to collective bargaining to wage industrial warfare but to prohibit them from peacefully settling their disputes. This would not only be irrational but would fly in the face of the clear congressional intent of promoting "the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation." *Fibreboard Paper Prods. Corp.* v. *Labor Board,* 379 U. S. 203, 211.

Congress has also recognized that some labor organizations seek, as in *Pennington,* through industry-wide bargaining, to eliminate differences in labor standards among employers. This was common knowledge in 1935 when the Wagner Act was enacted. The aims and practices of unions engaging in industry-wide bargaining were well known in 1947 at the time of the Taft-Hartley revision. Then and on subsequent occasions Congress re-

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[19] See, *e. g., Weber* v. *Anheuser-Busch, Inc.,* 348 U. S. 468; *Garner* v. *Teamsters Union,* 346 U. S. 485, 490–491. Although *Allen Bradley* held that the Clayton and Norris-LaGuardia Acts precluded federal courts from enjoining activities concerned with even some nonmandatory subjects of bargaining, Congress has since provided that union insistence on bargaining over nonmandatory subjects is an unfair labor practice, cf. *Labor Board* v. *Wooster Division of Borg-Warner Corp.,* 356 U. S. 342, and thus the Labor Board can order the union to cease and desist from such insistence as well as from auxiliary conduct like strikes designed to effectuate it; see *Local 164, Brotherhood of Painters* v. *Labor Board,* 110 U. S. App. D. C. 294, 293 F. 2d 133.

fused to enact bills to restrict or prohibit industry-wide bargaining. See, *e. g.*, H. R. 3020, 80th Cong., 1st Sess., §§ 2 (16), 9 (f)(1), 12 (a)(3)(A), 12 (a)(4), H. R. Rep. No. 245, 80th Cong., 1st Sess., 24, 73; note 8, *supra,* and citations contained therein; H. R. 8449, 82d Cong., 2d Sess. Nor can it be seriously argued that multi-employer bargaining, as in *Jewel Tea,* introduces an illegal element or is otherwise opposed to the national labor policy. Indeed, this Court, to implement congressional policy sanctioning multi-employer bargaining, permitted employers to resort, under certain circumstances, to lockouts to protect the integrity of the multi-employer bargaining unit. See *Labor Board* v. *Truck Drivers Union, No. 449,* 353 U. S. 87; *Labor Board* v. *Brown,* 380 U. S. 278.[20] The wisdom of permitting industry-wide and multi-employer bargaining is for Congress to decide, unless this Court is to return to the discredited approach of the majority in *Duplex* and substitute its notion for that of Congress as to how unions and employers should conduct their collective bargaining.

IV.

The Court in *Pennington* today ignores this history of the discredited judicial attempt to apply the antitrust laws to legitimate collective bargaining activity, and it

[20] Today, between 80% and 100% of the workers under union agreement are covered by multi-employer contracts in such important industries as men's and women's clothing, coal mining, building construction, hotel, longshoring, maritime, trucking, and warehousing. Between 60% and 80% of unionized workers are under multi-employer pacts in baking, book and job printing, canning and preserving, textile dyeing and finishing, glass and glassware, malt liquor, pottery and retail trades. See Reynolds, Labor Economics and Labor Relations 170 (3d ed. 1959). Furthermore, in some other major industries relatively uniform terms of employment are obtained through the negotiation of a contract with one leading employer and the subsequent acceptance of that contract's key provisions, with only minor modifications by the other employers in the industry. See Chamberlain, Collective Bargaining 259–263 (1951).

flouts the clearly expressed congressional intent that, since "[t]he labor of a human being is not a commodity or article of commerce," [21] the antitrust laws do not proscribe, and the national labor policy affirmatively promotes, the "elimination of price competition based on differences in labor standards," *Apex Hosiery Co.* v. *Leader, supra,* at 503. While purporting to recognize the indisputable fact that the elimination of employer competition based on substandard labor conditions is a proper labor union objective endorsed by our national labor policy and that, therefore, "a union may make wage agreements with a multi-employer bargaining unit and may in pursuance of its own union interests seek to obtain the same terms from other employers," *Pennington, ante,* at 665, the Court holds that "a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units." *Ibid.*

This rule seems to me clearly contrary to the congressional purpose manifested by the labor statutes, and it will severely restrict free collective bargaining. Since collective bargaining inevitably involves and requires discussion of the impact of the wage agreement reached with a particular employer or group of employers upon competing employers, the effect of the Court's decision will be to bar a basic element of collective bargaining from the conference room. If a union and employer are prevented from discussing and agreeing upon issues which are, in the great majority of cases, at the central core of bargaining, unilateral force will inevitably be substituted for rational discussion and agreement. Plainly and simply, the Court would subject both unions and employers to antitrust sanctions, criminal as well as civil, if in collective bargaining they concluded a wage agreement and, as part of the agreement, the union has undertaken to use its best efforts

[21] Section 6 of the Clayton Act. See p. 701, *supra.*

to have this wage accepted by other employers in the industry. Indeed, the decision today even goes beyond this. Under settled antitrust principles which are accepted by the Court as appropriate and applicable, which were the basis for jury instructions in *Pennington,* and which will govern it upon remand, there need not be direct evidence of an express agreement. Rather the existence of such an agreement, express or implied, may be inferred from the conduct of the parties. See, *e. g., Interstate Circuit, Inc.* v. *United States,* 306 U. S. 208; *American Tobacco Co.* v. *United States,* 328 U. S. 781; *United States* v. *Paramount Pictures, Inc.,* 334 U. S. 131; *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.,* 346 U. S. 537. Or, as my Brother DOUGLAS, concurring in *Pennington,* would have it, conduct of the parties could be prima facie evidence of an illegal agreement. *Ante,* at 673. As the facts of *Pennington* illustrate, the jury is therefore at liberty to infer such an agreement from "clear" evidence that a union's philosophy that high wages and mechanization are desirable has been accepted by a group of employers and that the union has attempted to achieve like acceptance from other employers. For, as I have pointed out, stripped of all adjectives, this is what *Pennington* presents. Yet the Court today holds "the alleged agreement between UMW and the large operators to secure uniform labor standards throughout the industry, if proved, was not exempt from the antitrust laws." *Ante,* at 669.

The rational thing for an employer to do, when faced with union demands he thinks he cannot meet, is to explain why, in economic terms, he believes that he cannot agree to the union requests. Indeed, the Labor Act's compulsion to bargain in good faith requires that he meaningfully address himself to the union's requests. See *Labor Board* v. *Truitt Mfg. Co.,* 351 U. S. 149. A recurring and most understandable reason given by employers for their resistance to union demands is that com-

petitive factors prevent them from accepting the union's proposed terms. Under the Court's holding today, however, such a statement by an employer may start both the employer and union on the road to antitrust sanctions, criminal and civil. For a jury may well interpret such discussion and subsequent union action as showing an implicit or secret agreement to impose uniform standards on other employers. Nor does the Court's requirement that there be "direct or indirect evidence of the conspiracy," *ante,* at 665, n. 2—whatever those undefined terms in the opinion may mean—provide any substantial safeguard for uninhibited collective bargaining discussions. In *Pennington* itself, the trial court instructed the jury that a union's unilateral actions did not subject it to antitrust sanctions, and yet the jury readily inferred a "conspiracy" from the "direct or indirect evidence" of the union's publicly stated policy in favor of high wages and mechanization, its collective bargaining agreement with a group of employers establishing high wages, and its attempts to obtain similar high wages from other employers.

Furthermore, in order to determine whether, under the Court's standard, a union is acting unilaterally or pursuant to an agreement with employers, judges and juries will inevitably be drawn to try to determine the purpose and motive of union and employer collective bargaining activities. The history I have set out, however, makes clear that Congress intended to foreclose judges and juries from roaming at large in the area of collective bargaining, under cover of the antitrust laws, by inquiry into the purpose and motive of the employer and union bargaining on mandatory subjects. Such roaming at large, experience shows, leads to a substitution of judicial for congressional judgment as to how collective bargaining should operate.

The case of *Alco-Zander Co.* v. *Amalgamated Clothing Workers,* 35 F. 2d 203 (D. C. E. D. Pa.), is one example of

judicial inadequacy in this sensitive economic area. That case involved a situation where the unionized garment industry in New York was being undersold by the lower-priced, nonunion garment industry of Philadelphia. The union, fearing for the future of the jobs of its members employed in the unionized New York industry, started an organizing drive in Philadelphia. A federal district court enjoined, as a violation of the antitrust laws, the union's organizational campaign which consisted of primary strikes and peaceful picketing. The court declared that "the primary purpose of the campaign for the unionization of the Philadelphia market was the protection of the unionized markets in other states," and that "the object of the strikes was to put an end to all production in Philadelphia under nonunion conditions and only to permit it to be resumed if and when the manufacturers were willing to operate upon an union basis and under union wage scales." 35 F. 2d, at 205. It is clear, therefore, that the court enjoined the union's activities as antitrust violations because it believed that this purpose and object was socially and economically undesirable. *Alco-Zander* and other similar cases [22] were almost universally condemned as striking examples of judicial interference in legitimate collective bargaining via the antitrust laws because of judge-made notions as to the economic wisdom of the union conduct. See, *e. g.*, Berman, Labor and the Sherman Act 248–259 (1930); Comment, 24 Ill. L. Rev. 925 (1930). There is no doubt that the Norris-LaGuardia

[22] See, *e. g.*, *Coronado Coal Co.* v. *United Mine Workers*, 268 U. S. 295 (union primary strike activities in an organizational campaign enjoined on the grounds that the "purpose" of the organizational campaign was to prevent nonunion coal from undercutting union coal); *United States* v. *Railway Employees' Dept.*, 283 F. 479 (D. C. N. D. Ill.) (primary strike against railroad held invalid on the ground that it interrupted commerce); *Bedford Co.* v. *Stone Cutters Assn.*, 274 U. S. 37 (union's unilateral refusal to work on nonunion goods held invalid).

Act was designed to overrule them. See H. R. Rep. No. 669, 72d Cong., 1st Sess., 3–7; S. Rep. No. 163, 72d Cong., 1st Sess., 9–10.

Congress in the Norris-LaGuardia Act and other labor statutes, as this Court recognized in *Apex* and *Hutcheson,* determined that judicial notions of the social and economic desirability of union action should not govern antitrust liability in the area of collective bargaining. The fact that a purpose-motive approach necessarily opens the door to basing criminal or civil penalties under the Sherman Act on just such a determination and to making courts the arbiters of our national labor policy is borne out not only by the history of cases like *Alco-Zander* but also by the cases decided today.

In *Pennington,* central to the alleged conspiracy is the claim that hourly wage rates and fringe benefits were set at a level designed to eliminate the competition of the smaller nonunion companies by making the labor cost too high for them to pay. Indeed, the trial judge charged that there was no violation of the Sherman Act in the establishing of wages and welfare payments through the national contract, "provided" the mine workers and the major coal producers had not agreed to fix "high" rates "in order to drive the small coal operators out of business." Under such an instruction, if the jury found the wage scale too "high" it could impute to the union the unlawful purpose of putting the nonunion operators out of business. It is clear that the effect of the instruction therefore, was to invite 12 jurymen to become arbiters of the economic desirability of the wage scale in the Nation's coal industry. The Court would sustain the judgment based on this charge and thereby put its stamp of approval on this role for courts and juries.

The Court's approval of judges and juries determining the permissible wage scale for working men in an industry is confirmed by the Court's express statement "there are

limits to what a union or an employer may offer or extract in the name of wages," *Pennington, ante,* at 665. To allow a jury to infer an illegal "conspiracy" from the agreed-upon wage scale means that the jury must determine at what level the wages could be fixed without impelling the parties into the ambit of the antitrust laws. Is this not another way of saying that, via the antitrust route, a judge or jury may determine, according to its own notions of what is economically sound, the amount of wages that a union can properly ask for or that an employer can pay? It is clear, as experience shows, that judges and juries neither have the aptitude nor possess the criteria for making this kind of judgment. In *Pennington,* absent the alleged conspiracy, would the wage rate and fringe benefits have been lower? Should they have been lower? If *Pennington* were an action for injunctive relief, what would be the appropriate remedy to reach the labor cost which is at the heart of the alleged antitrust violation? A judicial determination of the wage rate? A judicial nullification of the existing rate with a direction to negotiate a lower one? I cannot believe that Congress has sanctioned judicial wage control under the umbrella of the Sherman Act, for, absent a national emergency,[23] Congress has never legislated wage control in our free-enterprise economy.

The history I have set out makes clear that Congress intended to foreclose judges and juries from making essentially economic judgments in antitrust actions by determining whether unions or employers had good or bad motives for their agreements on subjects of mandatory bargaining. Moreover, an attempted inquiry into the motives of employers or unions for entering into collective bargaining agreements on subjects of mandatory bargain-

[23] See Exec. Orders Nos. 9250 and 9328, 7 Fed. Reg. 7871, 8 Fed. Reg. 4681, promulgated pursuant to the Act of October 2, 1942, 56 Stat. 765.

ing is totally artificial. It is precisely in this area of wages, hours, and other working conditions that Congress has recognized that unions have a substantial, direct, and basic interest of their own to advance.

As I have discussed, the Court's test is not essentially different from the discredited purpose-motive approach. Only rarely will there be direct evidence of an express agreement between a union and an employer to impose a particular wage scale on other employers. In most cases, as was true of *Pennington,* the trial court will instruct the jury that such an illegal agreement may be inferred from the conduct—"indirect evidence"—of the union and employers. To allow a court or a jury to infer an illegal agreement from collective bargaining conduct inevitably requires courts and juries to analyze the terms of collective bargaining agreements and the purposes and motives of unions and employers in agreeing upon them. Moreover, the evidence most often available to sustain antitrust liability under the Court's theory would show, as it did in *Pennington,* simply that the motives of the union and employer coincide—the union seeking high wages and protection from low-wage, nonunion competition, and the employer who pays high wages seeking protection from competitors who pay lower wages. When there is this coincidence of motive, does the illegality of the "conspiracy" turn on whether the Union pursued its goal of a uniform wage policy through strikes and not negotiation? As I read the Court's opinion this is precisely what the result turns on and thus unions are forced, in order to show that they have not illegally "agreed" with employers, to pursue their aims through strikes and not negotiations. Yet, it is clear that such a result was precisely what the National Labor Relations Act was designed to prevent. The only alternative to resolution of collective bargaining issues by force available to the parties under the Court's holding is the encouragement of fraud and deceit. An employer will be forced to take a

public stand against a union's wage demands, even if he is willing to accept them, lest a too ready acceptance be used by a jury to infer an agreement between the union and employer that the same wages will be sought from other employers. Yet, I have always thought that in collective bargaining, even more than in other areas of contractual agreement, the objective is open covenants openly arrived at.

Furthermore, I do not understand how an inquiry can be formulated in terms of whether the union action is unilateral or is a consequence of a "conspiracy" with employers independently of the economic terms of the collective bargaining agreement. The agreement must be admitted into evidence and the Court holds that its economic consequences are relevant. In the end, one way or another, the entire panoply of economic fact becomes involved, and judges and juries under the Court's view would then be allowed to speculate about why a union bargained for increased compensation, or any other labor standard within the scope of mandatory bargaining. It is precisely this type of speculation that Congress has rejected.

The plain fact is that it makes no sense to turn antitrust liability of employers and unions concerning subjects of mandatory bargaining on whether the union acted "unilaterally" or in "agreement" with employers. A union can never achieve substantial benefits for its members through unilateral action; I should have thought that the unsuccessful history of the Industrial Workers of the World, which eschewed collective bargaining and espoused a philosophy of winning benefits by unilateral action, proved this beyond question. See Dulles, Labor in America 208–223 (1949); Chaplin, Wobbly (1948). Furthermore, I cannot believe that Congress, by adopting the antitrust laws, put its stamp of approval on this discredited IWW philosophy of industrial relations; rather, in the Clayton Act and the labor statutes, Congress has

repudiated such a philosophy. Our national labor policy is designed to encourage the peaceful settlement of industrial disputes through the negotiation of agreements between employers and unions. Unions cannot, as the history of the IWW shows, successfully retain employee benefits by unilateral action; nor can employers be assured of continuous operation without contractual safeguards. The history of labor relations in this country shows, as Congress has recognized, that progress and stability for both employers and employees can be achieved only through collective bargaining agreements involving mutual rights and responsibilities.

This history also shows that labor contracts establishing more or less standardized wages, hours, and other terms and conditions of employment in a given industry or market area are often secured either through bargaining with multi-employer associations or through bargaining with market leaders that sets a "pattern" for agreements on labor standards with other employers. These are two similar systems used to achieve the identical result of fostering labor peace through the negotiation of uniform labor standards in an industry. Yet the Court makes antitrust liability for both unions and employers turn on which of these two systems is used. It states that uniform wage agreements may be made with multi-employer units but an agreement cannot be made to affect employers outside the formal bargaining unit. I do not believe that the Court understands the effect of its ruling in terms of the practical realities of the automobile, steel, rubber, shipbuilding, and numerous other industries which follow the policy of pattern collective bargaining. See Chamberlain, Collective Bargaining 259–263 (1951); note 20, *supra*. I also do not understand why antitrust liability should turn on the form of unit determination rather than the substance of the collective bargaining impact on the industry.

Finally, it seems clear that the essential error at the core of the Court's reasoning is that it ignores the express command of Congress that "[t]he labor of a human being is not a commodity or article of commerce," [24] and therefore that the antitrust laws do not prohibit the "elimination of price competition based on differences in labor standards." *Apex Hosiery Co.* v. *Leader, supra,* at 503. This is made clear by a simple question that the Court does not face. Where there is an "agreement" to seek uniform wages in an industry, in what item is competition restrained? The answer to this question can only be that competition is restrained in employee wage standards. That is, the union has agreed to restrain the free competitive market for labor by refusing to provide labor to other employers below the uniform rate. Under such an analysis, it would seem to follow that the existence of a union itself constitutes a restraint of trade, for the object of a union is to band together the individual workers in an effort, by common action, to obtain better wages and working conditions—*i. e.,* to obtain a higher price for their labor. The very purpose and effect of a labor union is to limit the power of an employer to use competition among workingmen to drive down wage rates and enforce substandard conditions of employment. If competition between workingmen to see who will work for the lowest wage is the ideal, all labor unions should be eliminated. Indeed the Court itself apparently realizes that its holding that the antitrust laws are violated when a labor union agrees with employers not to compete on wages is premised on the belief that labor is a commodity and that this premise leads to the logical conclusion that unions themselves restrain trade in this commodity. This is the only reason I can imagine for the Court's felt need, in 1965, to assert that "[t]he antitrust laws do not

[24] Section 6 of the Clayton Act. See p. 701, *supra.*

bar the existence and operation of labor unions *as such.*" *Pennington, ante,* at 661. (Emphasis added.)

As I have already discussed, however, if one thing is clear, it is that Congress has repudiated the view that labor is a commodity and thus there should be competition to see who can supply it at the cheapest price. See pp. 710–713, *supra.* The kind of competition which is suppressed by employer-union agreement on uniform wages can only be competition between unions to see which union will agree to supply labor at a lower rate, or competition between employers in the sale of their products based on differences in labor costs. Neither type of "suppression," I submit, can be supported as a restraint of trade condemned by the antitrust laws. No one, I think, believes that Congress intended that there be an economic system under which unions would compete with each other to supply labor at the lowest possible cost. It is equally clear that Congress did not intend that competition among manufacturers should be carried on, not on the basis of their relative efficiency or ability to produce what the consumer demands, but on their ability to operate at substandard wage rates. One of the important social advantages of competition mandated by the antitrust laws is that it rewards the most efficient producer and thus ensures the optimum use of our economic resources. This result, as Congress recognized, is not achieved by creating a situation in which manufacturers compete on the basis of who pays the lowest wages. As this Court stated in *Apex Hosiery Co.* v. *Leader, supra,* at 503–504, the "elimination of price competition based on differences in labor standards is the objective of any national labor organization. But this effect on competition has not been considered to be the kind of curtailment of price competition prohibited by the Sherman Act."

The assumption running through the Court's opinion in *Pennington,* as well as the opinion of my Brother DOUGLAS, is that giving full scope to the congressional

exemption of labor unions from the antitrust laws will operate to the advantage of large employers and big unions to the prejudice of small employers. Although I cannot see how that should affect the result reached on the basis of congressional intent even if the assumption were true, see *Hunt* v. *Crumboch*, 325 U. S. 821, 825, n. 1, I feel compelled to note that this assumption is not accurate and is belied by the actualities of industrial relations. Experience in this area shows that frequently unions first organize the small and weak employers. These small employers are understandably afraid that unless other, larger employers are also organized, effective competition will be impossible. They will thus often seek to have the union attempt to organize and bargain for similar labor standards with their larger competitors so that the requirement to pay high union wages will not force the small businessmen to close down their enterprises.

The Court's holding in *Pennington* today flies in the face of *Apex* and *Hutcheson* and restrains collective bargaining in the same way as did the holding of the majority in *Duplex*—a holding which Congress has expressly repudiated in favor of Mr. Justice Brandeis' dissenting views. It represents contemporary manifestations of the reluctance of judges to give full effect to congressional purpose in this area and the substitution of judges' views for those of Congress as to how free collective bargaining should operate.[25]

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[25] The Court in *Pennington* states that it "cannot conclude that the national labor policy provides any support" for agreements whereby unions undertake to attempt to obtain uniform terms from other employers in the industry. *Pennington, ante,* at 667. In making this statement the Court ignores clear congressional expressions in §§ 6 and 20 of the Clayton Act, the Norris-LaGuardia Act, the Fair Labor Standards Act, the Walsh-Healey Public Contracts Act, the Davis-Bacon Act, and the express purpose of the National Labor Relations Act. See generally, pp. 709–713, *supra.* Moreover, the Court's reliance on three old Labor Board cases for its conclusions is clearly misplaced. These cases hold, at most, as the Court itself recognizes, that

V.

The judicial expressions in *Jewel Tea* represent another example of the reluctance of judges to give full effect to congressional purpose in this area and the substitution by judges of their views for those of Congress as to how free collective bargaining should operate. In this case the Court of Appeals would have held the Union subject to the Sherman Act's criminal and civil penalties because in the court's social and economic judgment, the determination of the hours at which meat is to be sold is a "proprietary" matter within the exclusive control of management and thus the Union had no legitimate interest in bargaining over it. My Brother DOUGLAS, joined by MR. JUSTICE BLACK and MR. JUSTICE CLARK, would affirm this judgment apparently because the agreement was reached through a multi-employer bargaining unit. But, as I have demonstrated above, there is nothing even remotely illegal about such bargaining. Even if an independent conspiracy test were applicable to the *Jewel Tea* situation, the simple fact is that multi-employer bargaining conducted at arm's length does not constitute union abetment of a business combination. It is often a self-defensive form of employer bargaining designed to match union strength. See *Labor Board* v. *Truck Drivers Union, supra; Labor Board* v. *Brown, supra.*

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an employer may not refuse to recognize a union chosen by his employees or refuse to sign any contract until such time as the union has successfully organized the employer's competitors. Such situations, of course, are completely different from the situation in which an employer with established collective bargaining relations voluntarily agrees with the union that the union will attempt to have other employers accept similar or uniform terms. They also are completely different from the situation in which an employer signs a collective bargaining agreement the terms of which contain a "most favored nation" clause, or labor standards on a sliding scale adjusted to the average or some other prevailing wage standard.

My Brother WHITE, joined by THE CHIEF JUSTICE and MR. JUSTICE BRENNAN, while not agreeing with my Brother DOUGLAS, would reverse the Court of Appeals. He also, however, refuses to give full effect to the congressional intent that judges should not, under cover of the Sherman Act umbrella, substitute their economic and social policies for free collective bargaining. My Brother WHITE recognizes that the issue of the hours of sale of meat concerns a mandatory subject of bargaining based on the trial court's findings that it directly affected the hours of work of the butchers in the self-service markets, and therefore, since there was a finding that the Union was not abetting an independent employer conspiracy, he joins in reversing the Court of Appeals. In doing so, however, he apparently draws lines among mandatory subjects of bargaining, presumably based on a judicial determination of their importance to the worker, and states that not all agreements resulting from collective bargaining based on mandatory subjects of bargaining are immune from the antitrust laws, even absent evidence of union abetment of an independent conspiracy of employers. Following this reasoning, my Brother WHITE indicates that he would sustain a judgment here, even absent evidence of union abetment of an independent conspiracy of employers, if the trial court had found "that self-service markets could actually operate without butchers, at least for a few hours after 6 p. m., that no encroachment on butchers' work would result and that the workload of butchers during normal working hours would not be substantially increased . . . ." *Ante,* at 692. Such a view seems to me to be unsupportable. It represents a narrow, confining view of what labor unions have a legitimate interest in preserving and thus bargaining about. Even if the self-service markets could operate after 6 p. m., without their butchers and without increasing the work of their butchers

at other times, the result of such operation can reasonably be expected to be either that the small, independent service markets would have to remain open in order to compete, thus requiring their union butchers to work at night, or that the small, independent service markets would not be able to operate at night and thus would be put at a competitive disadvantage.[26] Since it is clear that the large, automated self-service markets employ fewer butchers per volume of sales than service markets do, the Union certainly has a legitimate interest in keeping service markets competitive so as to preserve jobs. Job security of this kind has been recognized to be a legitimate subject of union interest. See *Telegraphers* v. *Chicago & N. W. R. Co.*, 362 U. S. 330; *Teamsters Union* v. *Oliver*, 358 U. S. 283, 362 U. S. 605; *United States* v. *Hod Carriers*, 313 U. S. 539, affirming *United States* v. *Carrozzo*, 37 F. Supp. 191 (D. C. N. D. Ill.); *United States* v. *American Federation of Musicians*, 318 U. S. 741, affirming 47 F. Supp. 304 (D. C. N. D. Ill.); *Window Glass Mfrs.* v. *United States*, 263 U. S. 403; cf. *Teamsters Union* v. *Hanke*, 339 U. S. 470, 475 (opinion of Mr. Justice Frankfurter); see also *California Sportswear & Dress Assn., Inc.*, 54 F. T. C. 835. As I have previously stated: "To believe that labor union interests may not properly extend beyond mere direct job and wage competition is to ignore not only economic and social realities so obvious as not to need mention, but also the graphic lessons of American labor union history." *Los Angeles Meat & Provision Drivers Union* v. *United States*, 371 U. S. 94, 103, 104 (concurring opinion). The direct interest of the union in not working undesirable hours by curtailing all business at those hours is, of course, a far cry from the indirect "interest" in *Allen*

[26] It is clear that the small service butcher shops cannot operate at night without butchers on duty. There is no doubt that the Union could bargain with them as to the hours its members worked.

Bradley in fixing prices and allocating markets solely to increase the profits of favored employers.

Indeed, if the Union in *Jewel Tea* were attempting to aid the small service butcher shops and thus save total employment against automation, perhaps at a necessarily reduced wage scale, the case would present the exact opposite union philosophy from that of the Mine Workers in *Pennington*. Putting the opinion of the Court in *Pennington* together with the opinions of my Brothers DOUGLAS and WHITE in *Jewel Tea*, it would seem that unions are damned if their collective bargaining philosophy involves acceptance of automation (*Pennington*) and are equally damned if their collective bargaining philosophy involves resistance to automation (*Jewel Tea*). Again, the wisdom of a union adopting either philosophy is not for judicial determination. This Court recently stated that "we emphatically refuse to go back to the time when courts used the Due Process Clause 'to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.' " *Ferguson* v. *Skrupa*, 372 U. S. 726, 731–732. I likewise see no reason why this Court should go back to the time when judges determined "according to their own economic and social views whether the damage inflicted on an employer in an industrial struggle was *damnum absque injuria*, because an incident of trade competition, or a legal injury, because in their opinion, economically and socially objectionable." *Duplex Co.* v. *Deering*, *supra*, at 486 (dissenting opinion of Mr. Justice Brandeis).

VI.

Moreover, while these cases involve suits against unions, we should not overlook the fact that if unions are held liable under the antitrust laws for collective bargaining activities concerning mandatory subjects, then

the employer parties to this mandatory collective bargaining would also be subject to antitrust penalties, criminal and civil. It would seem the height of unfairness so to penalize employers for the discharge of their statutory duty to bargain on wages, hours, and other terms and conditions of employment, which duty, this Court has held, requires the employer to enter into a signed contract with the union embodying the collective bargaining terms agreed upon. See *H. J. Heinz Co.* v. *Labor Board,* 311 U. S. 514. The unfairness to employers of this situation is aptly illustrated by the record facts of *Pennington.* From 1930 until the formation of the Bituminous Coal Operators' Association and the negotiation of a uniform wage agreement between the Association and the union in 1950, bargaining in the coal industry was highlighted by bitter and protracted negotiations. Costly strikes were a recurring phenomenon and government seizure of the mines was characteristic of most of the period. Unfair labor practice charges were often exchanged and lawsuits resulting from bargaining differences were on court dockets continuously. In 1934, 400,000 miners struck for one week. In 1939, a five-week strike ended only after presidential intervention. In 1941, the union struck southern mines after those operators withdrew from negotiations in which the union was seeking to eliminate a regional wage differential. Shortly thereafter the union struck the so-called "captive" mines (mines which produce coal to be used in the processing of other products, mainly steel). One hundred thousand other miners struck in sympathy with the captive mine employees. During negotiations in 1943, there were a number of strikes over a six-month period and the Government twice seized the struck mines. Similarly in 1945 a number of strikes following a breakdown in negotiations resulted in government seizure of 235 mines. When the Government seized the mines once again in 1946 because

of a breakdown in negotiations over a welfare fund, a settlement was reached only through the active intervention of the Secretary of the Interior, who himself negotiated the beginning of the program of welfare fund benefits.

It was the opinion of many employers and neutral observers of the scene that these chaotic collective bargaining conditions were a result, at least in part, of the disorganized bargaining on the employer side. With each new effort at negotiations the operators had attempted to form a committee with various subcommittees to receive and present bargaining proposals. There was, however, no permanent organization to unify the operators' bargaining position and thereby to attempt to maintain peaceful and stable labor relations. The amorphous and *ad hoc* nature of the employers' bargaining organization was felt to have subjected the operators to whipsawing by the union and thus impaired serious, good faith and business-like bargaining. It was to try to correct this situation that the Association was formed. The Association is open to any coal operator who wishes to participate in the negotiations through it. Since this change in 1950, collective bargaining has been, to a marked degree, stabilized in the industry. There have been no governmental seizures or nation-wide strikes. Collective bargaining problems have not ended as a matter of course in Labor Board or court proceedings, or in governmental seizure or other intervention. While the negotiations have not always been easy and many difficult issues have arisen, the procedure for solving them has gone from the earlier jungle-type economic warfare to the reasoned and rational process of the conference table. I cannot believe that Congress, which has manifested a clear general purpose of promoting labor peace and stability, and, in particular, has a long history of attention to collective bar-

gaining in coal,[27] one of our basic industries, intended that these employer efforts to perfect a solid front in bargaining with the miners' union should have the effect of subjecting the employers, as well as the union, to the penalties of the antitrust laws. To apply the antitrust laws at this late date to such activities would endanger the stability which now characterizes collective bargaining in the coal industry and other basic industries with similar collective bargaining histories. It is in recognition of this fact that Congress has on a number of occasions refused to enact legislation that would curtail industry-wide bargaining [28] or would make the antitrust laws generally applicable to collective bargaining activity.[29]

VII.

My view that Congress intended that collective bargaining activity on mandatory subjects of bargaining under the Labor Act not be subject to the antitrust laws does not mean that I believe that Congress intended that activity involving all nonmandatory subjects of bargaining be similarly exempt. The direct and overriding interest of unions in such subjects as wages, hours, and other working conditions, which Congress has recognized in making them subjects of mandatory bargaining, is clearly

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[27] See, *e. g.*, Hearings before a Subcommittee of the Senate Committee on Interstate Commerce on S. 1417, 74th Cong., 1st Sess.; Hearings before the Senate Committee on Interstate Commerce on S. 4668, 74th Cong., 2d Sess.; Hearings before a Subcommittee of the Senate Committee on Interstate Commerce on S. 1, 75th Cong., 1st Sess.; Hearings before a Subcommittee of the House Committee on Education and Labor, Welfare of Miners, 80th Cong., 1st Sess.; Hearings before a Subcommittee of the Senate Committee on Labor and Public Welfare on S. Res. 274, 81st Cong., 2d Sess.; Hearings before a Subcommittee of the Senate Committee on Labor and Public Welfare, Causes of Unemployment in the Coal and Other Domestic Industries, 84th Cong., 1st Sess.

[28] See pp. 712–713, *supra.*

[29] See notes 8, 9, *supra,* and accompanying text.

lacking where the subject of the agreement is price-fixing and market allocation. Moreover, such activities are at the core of the type of anticompetitive commercial restraint at which the antitrust laws are directed.

Nor does my view mean that where a union operates as a businessman, exercising a proprietary or ownership function, it is beyond the reach of the antitrust laws merely because it is a union. On the contrary, the labor exemption is inapplicable where the union acts not as a union but as an entrepreneur. See, *e. g., Streiffer* v. *Seafarers Sea Chest Corp.,* 162 F. Supp. 602 (D. C. E. D. La.); *United States* v. *Seafarers Sea Chest Corp.,* 1956 CCH Trade Cases ¶ 68,298 (D. C. E. D. N. Y.). Therefore, if a union is found by sufficient evidence and under proper instructions to have participated as a proprietor in actions violative of the antitrust laws, it is no more shielded from antitrust sanctions than any other business participant.

In *Pennington,* there were allegations that a part of the conspiracy of the large coal operators consisted of collusive bidding on the TVA spot market of West Kentucky Coal Company, Nashville Coal Company, and two other coal operators, for which the Union allegedly shared responsibility. It was asserted that the effect of this alleged collusive bidding was to drive down the prices on the spot market and thereby injure the small coal operators. Although the Court of Appeals apparently accepted this position, it did not deal directly with the question of whether the evidence was sufficient to show the Union's participation in the alleged scheme. Rather, the Court of Appeals relied upon the fact that the Union was a major stockholder in West Kentucky and had substantial interests in Nashville. It examined the origin and growth of the union interest in these two companies and concluded: "It was not unreasonable for the jury to conclude from these facts that it was the purpose of the UMW to have a very material voice, if not the domi-

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nant one, in determining the policies and operations of these two major coal companies, which, as is hereinafter pointed out are charged with playing an important role in the alleged conspiracy." 325 F. 2d 804, 814. This, it appears, is as near as the Court of Appeals came to passing upon the sufficiency of the evidence connecting the Union with the alleged collusive spot market bidding and in effect is a holding that the ownership of a controlling or substantial interest in a company which violates the antitrust laws subjects the owner of that interest to personal antitrust liability. In my view, this is clearly not the law. The ownership of a controlling or substantial interest in a company which conspires with others in violation of the antitrust laws does not in itself impose antitrust liability on the owner. *Hartford-Empire Co.* v. *United States,* 323 U. S. 386, 403; *Buckeye Powder Co.* v. *E. I. du Pont de Nemours P. Co.,* 223 F. 881, 885–886 (C. A. 3d Cir.), aff'd on other grounds, 248 U. S. 55; *Union Pacific Coal Co.* v. *United States,* 173 F. 737 (C. A. 8th Cir.). Rather the owner must be shown to have participated knowingly and actively in the alleged illegal activity. See *United States* v. *Wise,* 370 U. S. 405, 416. Cf. *Coronado Coal Co.* v. *United Mine Workers,* 268 U. S. 295, 299–305; *United Mine Workers* v. *Coronado Co.,* 259 U. S. 344, 393–396.

Moreover, the trial court erred in its instruction to the jury on this issue. It correctly instructed the jury that union ownership of a coal company did not violate the law. However, it erroneously refused to instruct the jury that the Union's financial stake in the two coal companies did not of itself show participation in an illegal conspiracy, if there was one, and that the Union must have been shown to have participated through being party to an overall plan which included the spot-market bidding or through its participation in the particular practices complained

of. Thus it is clear that the judgment against the Union cannot stand on the basis of this part of the case.

Finally, my conclusion that unions and employers are exempt from the operations of the antitrust laws for activities involving subjects of mandatory bargaining is based solely on congressional statutes which I believe clearly grant such an exemption and not on any views past or present as to the economic desirability of such an exemption. Whether it is wise or sound public policy for this exemption to continue to exist in its present form, or at all, or whether the exemption gives too much power to labor organizations, is solely for Congress to determine. The problem of the application of the antitrust laws to collective bargaining is but another aspect of the question of whether it is sound public policy to recognize or to limit the "right of industrial combatants to push their struggle to the limits of the justification of self-interest." *Duplex Co.* v. *Deering, supra,* at 488 (dissenting opinion of Mr. Justice Brandeis).

On this issue I am in agreement with the Court in *Hunt* v. *Crumboch, supra,* at 825, n. 1: "That which Congress has recognized as lawful, this Court has no constitutional power to declare unlawful, by arguing that Congress has accorded too much power to labor organizations."

For the reasons expressed above, I dissent from the opinion of the Court but concur in the reversal of the Court of Appeals in *Pennington,* and concur in the judgment of the Court in *Jewel Tea.*

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

If we followed *Allen Bradley Co.* v. *Union,* 325 U. S. 797,* we would hold with the Court of Appeals that this

*The *Allen Bradley* decision has been reaffirmed and approved by the Court on numerous occasions. See *Brotherhood of Carpenters* v. *United States,* 330 U. S. 395, 400, 411; *United States* v. *Women's*

multi-employer agreement with the union not to sell meat between 6 p. m. and 9 a. m. was not immunized from the antitrust laws and that respondent's evidence made out a prima facie case that it was in fact a violation of the Sherman Act.

If, in the present case, the employers alone agreed not to sell meat from 6 p. m. to 9 a. m., they would be guilty of an anticompetitive practice, barred by the antitrust laws. Absent an agreement or conspiracy, a proprietor can keep his establishment open for such hours as he chooses. Cf. *Textile Workers* v. *Darlington Mfg. Co.*, 380 U. S. 263. My Brother WHITE recognizes, as he must, that the agreement in this case has an "effect on competition [that] is apparent and real" and that it is an "obvious restraint on the product market," *ante*, pp. 691 and 692. That Jewel has been coerced by the unions into respecting this agreement means that Jewel cannot use convenience of shopping hours as a means of competition. As the Court of Appeals pointed out, 331 F. 2d, at 550, there is nothing procompetitive about this agreement. Cf. *Chicago Board of Trade* v. *United States*, 246 U. S. 231.

At the conclusion of respondent's case, the District Court dismissed Associated and Bromann from the action, which was tried without a jury, on the ground that there was no evidence of a conspiracy between Associated and the unions. But in the circumstances of this case the collective bargaining agreement itself, of which the District Court said there was clear proof, was evidence of a conspiracy among the employers with the unions to impose the marketing-hours restriction on Jewel via a strike threat by the unions. This tended to take from the merchants who agreed among themselves their freedom to

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Sportswear Assn., 336 U. S. 460, 464; *Giboney* v. *Empire Storage Co.*, 336 U. S. 490, 497; *United States* v. *Employing Plasterers Assn.*, 347 U. S. 186, 190; *Teamsters Union* v. *Oliver*, 358 U. S. 283, 296; *Meat Drivers* v. *United States*, 371 U. S. 94, 99–101.

work their own hours and to subject all who, like Jewel, wanted to sell meat after 6 p. m. to the coercion of threatened strikes, all of which if done in concert only by businessmen would violate the antitrust laws. See *Fashion Guild* v. *Federal Trade Comm'n*, 312 U. S. 457, 465.

In saying that there was no conspiracy, the District Court failed to give any weight to the collective bargaining agreement itself as evidence of a conspiracy and to the context in which it was written. This Court makes the same mistake. We said in *Allen Bradley Co.* v. *Union, supra*, at 808, ". . . we think Congress never intended that unions could, consistently with the Sherman Act, aid non-labor groups to create business monopolies and to control the marketing of goods and services." Here the contract of the unions with a large number of employers shows it was planned and designed not merely to control but entirely to prohibit "the marketing of goods and services" from 6 p. m. until 9 a. m. the next day. Some merchants relied chiefly on price competition to draw trade; others employed courtesy, quick service, and keeping their doors open long hours to meet the convenience of customers. The unions here induced a large group of merchants to use their collective strength to hurt others who wanted the competitive advantage of selling meat after 6 p. m. Unless *Allen Bradley* is either overruled or greatly impaired, the unions can no more aid a group of businessmen to force their competitors to follow uniform store marketing hours than to force them to sell at fixed prices. Both practices take away the freedom of traders to carry on their business in their own competitive fashion.

My Brother WHITE'S conclusion that the concern of the union members over *marketing* hours is "immediate and direct" depends upon there being a necessary connection between marketing hours and working hours. That connection is found in the District Court's finding that

"in stores where meat is sold at night it is impractical to operate without either butchers or other employees." 215 F. Supp. 839, 846. It is, however, undisputed that on some nights Jewel does so operate in some of its stores in Indiana, and even in Chicago it sometimes operates without butchers at night in the sale of fresh poultry and sausage, which are exempt from the union ban.

It is said that even if night self-service could be carried on without butchers, still the union interest in store hours would be immediate and direct because competitors would have to stay open too or be put at a disadvantage—and some of these competitors would be non-self-service stores that would have to employ union butchers at night. But *Allen Bradley* forecloses such an expansive view of the labor exemption to the antitrust laws.

Per Curiam.

FEDERAL TRADE COMMISSION *v.* TEXACO, INC., ET AL.

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

No. 635. Decided June 7, 1965.

The Court of Appeals set aside a Federal Trade Commission (FTC) cease-and-desist order on the grounds that the FTC Chairman was disqualified for prejudging the case and the order was not supported by substantial evidence and remanded it to the FTC with instructions to dismiss in view of the long delays. No review of the Chairman's disqualification was sought. The judgment is remanded with instructions to remand immediately to the FTC for further proceedings, without participation of the Chairman, in light of *Atlantic Refining Co.* v. *Federal Trade Commission, ante,* p. 357.

Certiorari granted; 118 U. S. App. D. C. 366, 336 F. 2d 754, vacated and remanded.

Solicitor General Cox, Assistant Attorney General Orrick, Lionel Kestenbaum, James McI. Henderson, Alvin L. Berman and *Louis R. Harding* for petitioner.

Milton Handler and *Frederick W. P. Lorenzen* for Texaco, Inc., and *Edgar E. Barton* and *Macdonald Flinn* for B. F. Goodrich Co., respondents.

PER CURIAM.

In this case the Federal Trade Commission entered a cease-and-desist order prohibiting Texaco, Inc., and the B. F. Goodrich Company from participating in any sales-commission program for the distribution of tires, batteries and accessories. The Court of Appeals set the order aside and remanded to the Commission with instructions to dismiss the complaint. The court held, first, that Chairman Dixon was disqualified from participating in the decision

because he had indicated in a speech made while the case was pending that he had prejudged it. The majority of the court held, further, that the Commission's order was not supported by substantial evidence on the record as a whole. Although it recognized that under these circumstances a remand would ordinarily be called for, the court concluded that because of the delays that had existed throughout the litigation the complaint should be dismissed.

The United States does not seek review of the ruling that Chairman Dixon was disqualified from participating in this case. We therefore venture no opinion as to the correctness of that conclusion. The petition for writ of certiorari is granted. The judgment of the United States Court of Appeals for the District of Columbia Circuit is vacated and the case is remanded with instructions to remand it immediately to the Federal Trade Commission for further proceedings, without the participation of Chairman Dixon, in light of *Atlantic Refining Co.* v. *Federal Trade Comm'n, ante,* p. 357. The judgment shall issue forthwith.

Vacated and remanded.

MR. JUSTICE GOLDBERG would vacate the judgment of the Court of Appeals and remand the case for reconsideration by the Federal Trade Commission, without the participation of Chairman Dixon, in accordance with the views expressed in MR. JUSTICE GOLDBERG'S dissenting opinion in *Atlantic Refining Co.* v. *Federal Trade Comm'n, ante,* at 382.

MR. JUSTICE HARLAN and MR. JUSTICE STEWART would affirm the judgment of the Court of Appeals for the reasons stated in MR. JUSTICE STEWART'S dissenting opinion in *Atlantic Refining Co.* v. *Federal Trade Comm'n, ante,* at 377.

CAMERON ET AL. *v.* JOHNSON, GOVERNOR OF MISSISSIPPI, ET AL.

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

No. 587, Misc. Decided June 7, 1965.

Judgment vacated and cause remanded.

Reported below: 244 F. Supp. 846.

Arthur Kinoy, William M. Kunstler, Benjamin E. Smith, Bruce C. Waltzer, Melvin Wulf and *Morton Stavis* for appellants.

Joe T. Patterson, Attorney General of Mississippi, and *William A. Allain,* Assistant Attorney General, for appellees.

PER CURIAM.

Appellants brought this action, *inter alia,* under § 1979 of the Revised Statutes, 42 U. S. C. § 1983 (1958 ed.), to enjoin enforcement of the Mississippi Anti-Picketing statute,* on the grounds that it was an unconstitutionally broad regulation of speech, and that it was being applied for the purpose of discouraging appellants' civil rights activities.

The motion for leave to proceed *in forma pauperis* is granted. The judgment is vacated and the cause remanded for reconsideration in light of *Dombrowski* v. *Pfister,* 380 U. S. 479. On remand, the District Court should first consider whether 28 U. S. C. § 2283 (1958 ed.) bars a federal injunction in this case, see 380 U. S., at 484, n. 2. If § 2283 is not a bar, the court should then deter-

*House Bill No. 546, Gen. Laws of Miss. 1964, c. 343.

mine whether relief is proper in light of the criteria set forth in *Dombrowski.*

MR. JUSTICE BLACK, with whom MR. JUSTICE HARLAN and MR. JUSTICE STEWART join, dissenting.

I dissent from the reversal of this judgment and from the manner in which it is done. A cryptic, uninformative *per curiam* order is no way, I think, for this Court to decide a case involving as this one does a State's power to make it an offense for people to obstruct public streets and highways and to block ingress and egress to and from its public buildings and properties. The case also involves the question whether, having passed such a law, valid on its face, the State can prosecute offenders in its own courts or whether United States courts have power to enjoin all state prosecutions merely because of a charge that the law is unconstitutional on its face, without first determining the constitutionality of the statute.

Every person who has the slightest information about what is going on in this country can understand the importance of these issues. The summary disposition the Court makes of this case fails properly to enlighten state or federal courts or the people who deserve to know what are the rights of the people, the rights of affected groups, the rights of the Federal Government, and the rights of the States in this field of activities which encompasses some of the most burning, pressing and important issues of our time. There are many earnest, honest, good people in this Nation who are entitled to know exactly how far they have a constitutional right to go in using the public streets to advocate causes they consider just. State officials are also entitled to the same information. The Court has already waited entirely too long, in my judgment, to perform its duty of clarifying these consti-

tutional issues.[1] These issues are of such great importance that I am of the opinion that before this Court relegates the States to the position of mere onlookers in struggles over their streets and the accesses to their public buildings, this Court should at least write an opinion making clear to the States and interested people the boundaries between what they can do in this field and what they cannot. Today's esoteric and more or less mysterious *per curiam* order gives no such information.

This action was brought by and on behalf of picketers and demonstrators in Mississippi, some of whom have charges now pending against them which were brought in the Mississippi state courts [2] for violating a Mississippi statute which provided:

> "It shall be unlawful for any person, singly or in concert with others, to engage in picketing or mass demonstrations in such a manner as to obstruct or interfere with free ingress or egress to and from any public premises, State property, county or municipal courthouses, city halls, office buildings, jails, or other

[1] See *Bell* v. *Maryland,* 378 U. S. 226, 242 (opinion of DOUGLAS, J.); *id.,* at 318 (BLACK, J., dissenting); *Hamm* v. *City of Rock Hill,* 379 U. S. 306, 318 (BLACK, J., dissenting).

[2] We are informed that after the decision of the District Court in the present case, 170 of the state-court defendants removed their prosecutions to a federal district court, purportedly under authority of 28 U. S. C. § 1443 (1958 ed.). The Federal District Court ordered the cases remanded to the state courts. The Court of Appeals stayed the remand orders, and an appeal from those orders is now pending before the Fifth Circuit. *Hartfield* v. *Mississippi,* No. 21811; *Anderson* v. *Mississippi,* No. 21813; *Carmichael* v. *City of Greenwood,* No. 22289. It can be assumed that if appellants are unsuccessful in the Fifth Circuit they will seek review in this Court, which will take at least another year. Today's decision appears to add more devices to the collection of delaying tactics by which state criminal defendants may use collateral litigation in the federal courts to prevent their prosecutions in state courts from coming to trial for many years, if ever.

> public buildings or property owned by the State of Mississippi or any county or municipal government located therein or with the transaction of public business or administration of justice therein or thereon conducted or so as to obstruct or interfere with free use of public streets, sidewalks or other public ways adjacent or contiguous thereto." [3]

Their complaint in the United States District Court asked that the Governor of Mississippi and other state officials be enjoined from enforcing the statute against them and others. The complaint alleged that the law was unconstitutional on its face and as applied to the plaintiffs and persons similarly situated because the language of the statute was so vague and ambiguous that a person of ordinary intelligence could not understand it, and so broad and sweeping in its terms that it could be used, had been used, and would be used, to harass and persecute the plaintiffs and others, not merely for blocking streets and doors and passageways, but also for simply picketing and demonstrating, activities which this statute does not prohibit.[4] They alleged in addition that the Mississippi Legislature actually passed the law to discourage picketers and demonstrators from protesting against state denial of voting rights to Negroes. The District Court majority found as a fact on the evidence stipulated by the parties that neither the plaintiffs nor anyone else had been interfered with for simply picketing and demonstrating,[5] and also found that

> "on the occasions in suit when some of the plaintiffs were arrested and charged with violating this Act,

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[3] House Bill No. 546, Gen. Laws of Miss. 1964, c. 343.

[4] The complaint alleged that the statute violated the First, Fifth, Thirteenth, Fourteenth and Fifteenth Amendments.

[5] "The Court, therefore, further finds as a fact that the State of Mississippi is prosecuting the plaintiffs in the state court under said picketing statute in good faith, and is fully entitled under the law to do so to conclusion of such prosecution . . . ." — F. Supp., at —.

> that such persons deliberately and intentially [*sic*] blocked the sidewalk and one of the entrances to the county courthouse in Forrest County, Mississippi, by walking so close together as to make use of such entrance and exit to and from said county courthouse by the officials and business visitors impossible."

The District Court held that no serious claim could be made that the statute was unconstitutionally vague or too broad on its face, and therefore refused to issue an injunction forbidding the prosecution of offenses under that law. And having found from the evidence that there had been no harassment of the plaintiffs, except as harassment could be said to exist in the ordinary enforcement of any valid law, the court refused to enjoin the state officials from enforcing the law against them and others, and dismissed the complaint.[6]

If, as I believe, the Mississippi statute is not unconstitutional on its face, then the District Court in dismissing the complaint and leaving the trials to the state courts acted in accordance with an unbroken line of this Court's cases going back to the early days of this country. See, *e. g., Douglas* v. *City of Jeannette,* 319 U. S. 157; *Watson* v. *Buck,* 313 U. S. 387; *Beal* v. *Missouri Pac. R. Co.,* 312 U. S. 45; *Spielman Motor Sales Co.* v. *Dodge,* 295 U. S. 89; *Fenner* v. *Boykin,* 271 U. S. 240. It is true that *Ex parte Young,* 209 U. S. 123, held that state officials could be enjoined from harassing people by starting multitudinous criminal prosecutions against them where severe

[6] We understand from the District Court's opinion and conclusions of law that it did not dismiss the complaint on the ground that it thought it necessary to have the state courts construe the statute, but rather on the ground that having found the statute constitutional it dismissed in order for the criminal cases to be tried in the state courts. Moreover, whatever the reasons assigned for dismissal by the District Court, it is well established that an appellee in whose favor a judgment has been rendered is entitled to an affirmance on any proper ground.

cumulative punishments might accrue before the constitutionality of the state law involved could be tested. In the absence of some such extraordinary situation, however, this Court has uniformly held that federal courts should refrain from interfering with enforcement of state criminal laws. Thus in *Douglas* v. *City of Jeannette, supra,* this Court found no reason to permit a federal court to enjoin a state criminal proceeding even though the statute involved was the same day declared unconstitutional in a similar application. *Murdock* v. *Pennsylvania,* 319 U. S. 105.[7]

The Court in its cryptic *per curiam* order directs that "On remand, the District Court should first consider whether 28 U. S. C. § 2283 (1958 ed.) bars a federal injunction in this case . . . ." But the District Court has already considered § 2283 [8] and at the very beginning of its opinion stated that § 2283

> ". . . is not jurisdictional, but expresses very clearly and definitely the policy and thinking of Congress. Such a statute has been on the books for many years and still stands in the above quoted form. Certainly

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[7] In an opinion joined by MR. JUSTICE CLARK denying a petition for habeas corpus in similar circumstances, I stated:

"This petition for habeas corpus is denied because the factual allegations fall far short of showing that there are not Mississippi state processes available by appeal or otherwise for Petitioner to challenge her state conviction, which processes would effectively protect her constitutional rights, particularly since any denial of such rights by the highest court of a State can be remedied by appropriate appellate proceedings in the Supreme Court of the United States. See 28 U. S. Code, Sections 2241, 2254 and 1257." *Application of Wyckoff,* 6 Race Rel. L. Rep. 786, 794, discussed in *Brown* v. *Rayfield,* 320 F. 2d 96, 98–99 (C. A. 5th Cir.).

[8] "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U. S. C. § 2283 (1958 ed.).

> there are times and occasions which are exceptional, when it is proper for the Court to enjoin the prosecution of a criminal case, but the facts of this case and of this record do not approach such a situation." —— F. Supp., at ——.

The appellants argue that 28 U. S. C. § 2283, which bars injunctions against actions already instituted in state courts, is not applicable here because the pending prosecutions were removed and the remand orders have been stayed, and because in this class action "The basic relief sought in the complaint is the enjoining of the prospective enforcement of the state statute . . . ." The question of applicability of § 2283 is here on appeal, and if the Court is uncertain about that statute's application here it has the duty to decide the question now and not remand to the lower court which has already decided it.

The Court's exceedingly brief order directs the District Court on remand, if § 2283 does not bar this action, to "determine whether relief is proper in light of the criteria set forth in *Dombrowski*" v. *Pfister,* 380 U. S. 479. Apparently the Court means to indicate that this recent decision created a new rule authorizing federal courts to enjoin state officers from enforcing state laws even though clearly and narrowly drawn to forbid picketers and demonstrators from obstructing street traffic and blocking the entrances of public buildings. The Court by citing *Dombrowski* seems to be indicating the existence of such a rule, since it would be a futile gesture to remand the case to the District Court merely to have it state formally what it said in dismissing under the *Jeannette* rule before: that "There is no basis of fact in this record or by a reasonable construction of the statute by which its constitutionality could be doubted." Since the District Court has expressed its view that the statute is constitutional on its face and has found in addition that there has been no unlawful harassing application of it,

there is no reason for us to remand the case to the District Court unless this Court wants either to upset the District Court's findings of fact or to order the District Court to hold, as this Court held about a subversive activities statute in *Dombrowski,* that the statute challenged is also unconstitutional on its face.

I did not participate in *Dombrowski,* but I do not think it is applicable here. *Dombrowski* did approve federal district court injunctions to prevent state officers from enforcing a state statute alleged and found to be void on its face as a violation of the First and Fourteenth Amendments on the ground that overbreadth made it susceptible of sweeping and improper application abridging freedom of expression, where it was also alleged that the statute was part of a plan "to employ arrests, seizures, and threats of prosecution" under the statute in a way that would discourage the complainants and their supporters from asserting and attempting to vindicate their constitutional rights. This Court in *Dombrowski* held, as I read the opinion, that an injunction against any enforcement of any kind of the state statute (as distinguished from an order enjoining state officers from committing lawless acts) could issue there only because (1) there were threats of prosecutions purely to harass, with no hope of ultimate success, (2) the law was challenged as, and found to be on its face, an "overly broad and vague regulation of expression," and (3) "no readily apparent construction suggests itself as a vehicle for rehabilitating the statute in a single prosecution . . . ." Crucial to the holding in *Dombrowski* that any enforcement whatever of the statute should be enjoined was this Court's finding that the statute involved was unconstitutional on its face. This is clearly shown by the Court's statement that:

> "[A]bstention serves no legitimate purpose where a statute *regulating speech* is *properly attacked on its*

> *face,* and where, as here, the conduct charged in the indictments is not within the reach of an acceptable limiting construction readily to be anticipated as the result of a single criminal prosecution and is not the sort of 'hard-core' conduct that would obviously be prohibited under any construction." 380 U. S., at 491–492. (Emphasis supplied.)

Dombrowski also indicates to me that there might be cases in which state or federal officers, acting under color of a law which is valid, could be enjoined from engaging in unlawful conduct which deprives persons of their federally guaranteed statutory or constitutional rights. Compare 17 Stat. 13, 42 U. S. C. § 1983 (1958 ed.). Stating these bases for permitting injunction against all enforcement in *Dombrowski,* most of which bases are not present here, is enough without more to show that *Dombrowski* cannot control the decision in this case. Here there is no allegation of improper conduct by law enforcement officers, and in fact, there is a specific finding to the contrary. And certainly the one unquestionably indispensable ingredient of *Dombrowski* required for a blanket injunction on enforcement—a finding that the statute is unconstitutionally vague or broad on its face—is absent here unless the Court is convinced, without even hearing argument, that this Mississippi statute is unconstitutional on its face as an infringement on constitutionally protected expression.

I think that no such claim of unconstitutionality on its face can possibly be maintained. What the Mississippi statute forbids is so clear that any person of ordinary intelligence can or should understand it. I find it hard to take seriously a vagueness argument, since I doubt that there is a fourth grade schoolboy in this country who would not understand that the statute forbids him, either alone or with others, to block or obstruct ingress and egress to and from Mississippi public buildings (here

a courthouse) and to obstruct free use of the streets adjacent to those public properties. Nor is the statute overly broad in what it covers. It does not even undertake to forbid or regulate picketing or demonstrating on the streets (as I think it could—see *Cox* v. *Louisiana,* 379 U. S. 559, 575 (concurring opinion); *Labor Board* v. *Fruit & Vegetable Packers,* 377 U. S. 58, 76 (concurring opinion)). It simply modestly provides that those who carry on such activities shall do so in a way that will not obstruct others who want to use the streets to travel or want to go in or out of a public building. The Mississippi statute is narrowly and precisely drawn, patently designed to accomplish this objective. Thus it fits this Court's often-repeated description of the kind of law which should be drawn in the State's exercise of its generally unquestioned constitutional power to regulate picketing and street activities. See, *e. g., Cox* v. *Louisiana,* 379 U. S. 536, 554–555; *Thornhill* v. *Alabama,* 310 U. S. 88, 105; *Schneider* v. *State,* 308 U. S. 147, 160–161. Far from questioning the power of States to regulate conduct on the streets and in public buildings, this Court said in *Schneider* v. *State, supra,* at 160:

> "Municipal authorities, as trustees for the public, have the duty to keep their communities' streets open and available for movement of people and property, the primary purpose to which the streets are dedicated. So long as legislation to this end does not abridge the constitutional liberty of one rightfully upon the street to impart information through speech or the distribution of literature, it may lawfully regulate the conduct of those using the streets. For example, 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 . . . ."

It would seem inconsistent with our whole federal system to say that the Federal Constitution somehow takes away from States and their subdivisions the general power to control their streets and ingress and egress to and from their public buildings and other public properties. Such state control would have to be exercised consistently with special federal constitutional guarantees, such as the right not to be discriminated against on account of race, color or religion; but the statute here does not, on its face, draw any such invidious discriminations and the statute is attacked on its face. And of course Mississippi has no less power over its public buildings and streets than does any other State.

The Mississippi statute is in many respects like one that this Court sustained a few months ago against a challenge that it was void for vagueness on its face, and that it was an unjustified restriction upon the freedoms guaranteed by the First and Fourteenth Amendments. That statute, modeled after an Act of Congress passed in 1950, 64 Stat. 1018, 18 U. S. C. § 1507 (1958 ed.), made it an offense in Louisiana to picket or parade in or near a courthouse with an intent of interfering with or obstructing or impeding the administration of justice. The Court's opinion stated:

> "The conduct which is the subject of this statute—picketing and parading—is subject to regulation even though intertwined with expression and association." *Cox* v. *Louisiana,* 379 U. S. 559, 563.

And in a companion case, decided the same day, this Court stated: "Governmental authorities have the duty and responsibility to keep their streets open and available for movement." *Cox* v. *Louisiana,* 379 U. S. 536, 554–555. "A group of demonstrators," this Court said, "could not insist upon the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who

did not agree to listen to their exhortations." *Id.*, at 555. The Court also emphasized in that same case that the "control of travel on the streets is a clear example of governmental responsibility to insure" "public order, without which liberty itself would be lost in the excesses of anarchy." *Id.*, at 554. It is true that we have only recently held that Mississippi must not deny the constitutional right of Negroes to register and vote. *United States* v. *Mississippi*, 380 U. S. 128. But this, of course, does not mean that no good or valid law could come out of the State of Mississippi. We should without hesitation condemn as unconstitutional discriminatory voting laws of Mississippi or of any other State. We should with equal firmness, however, approve a law which on its face is designed merely to carry out the State's responsibility to protect people who want to get into and out of the State's public buildings and to move along its highways freely without obstruction.

I cannot believe for one moment that this Court in *Dombrowski* intended to authorize federal injunctions completely suspending all enforcement of a constitutionally valid state criminal law merely because state defendants allege that state officials are about to harass them by doing no more than enforcing that valid law against them in the state courts. If *Dombrowski* held any such thing, I think the quicker that case is reconsidered in order to give it a "limiting construction" the better it will be for the courts, the States, the United States and the people in this country who want to live in an atmosphere of peace and quiet. Creating new hurdles to the conviction of people who violate valid laws cannot be ranked as one of the most pressing and exigent needs of the times, to say the least. Perhaps at no time in the Nation's history has there been a greater need to make clear to all that the United States Constitution does not render States impotent to require people permitted to advocate views and

air grievances on the streets to do so without obstructing the use of those streets by those who want to use them to move from place to place—the primary use for which all the people pay taxes to build and maintain streets.

The record in this case tells us that there are probably hundreds of cases like these in one State alone. It is not difficult to foresee that reversal of the District Court's denial of injunction here will be a signal and invitation for many, many more efforts to tie the hands of state officials in many more States on charges that threatened prosecutions under valid laws are prompted by a desire to harass. Much has been said of late about the threat to prompt and efficient administration of justice from the increasing workload of our United States courts.[9] If that is a valid argument in deciding cases, it is not amiss to point out that the rule which the Court implicitly adopts here is bound to bring an ever-increasing number of cases into federal courts, where state prosecutions will be enjoined until a federal court can first weigh the motives of state officials in instituting prosecutions. This of course means more and more delays between the arrests of people accused of violating state laws and their trials. The law's delays—which many believe are really a guilty man's most effective defense—are bound to be multiplied beyond measure. Moreover, it should not be forgotten that this is a big country—too big to expect the Federal Government to take over the creation and enforcement of local criminal laws throughout the country. The Nation was not formed with any such purpose in mind. It is wise and right and in conformity with the national governmental plan for federal courts to be vigilant and alert to protect federally guaranteed rights. But we put too much strain on the federal courts if we bodily transfer

[9] See *Case* v. *Nebraska, ante,* pp. 337, 340 (concurring opinions); *Linkletter* v. *Walker, ante,* p. 618.

from state- to federal-court jurisdiction what is, in effect, the initial step in the trial of persons charged with violating state or local criminal laws which are far from being unconstitutional on their face. The Federal Constitution certainly does not require us to do it and, in my judgment, forbids it. I would affirm the District Court's judgment.

MR. JUSTICE WHITE, dissenting.

I dissent from the *per curiam* remand of this case on the authority of *Dombrowski* v. *Pfister,* 380 U. S. 479, for while I joined the opinion of the Court in *Dombrowski,* I do not think it is applicable here.

The appellants in *Dombrowski* attacked numerous and sundry provisions of Louisiana's Subversive Activities and Communist Control Law and the Communist Propaganda Control Law on the ground that the statutes "violate the First and Fourteenth Amendment guarantees securing freedom of expression, because overbreadth makes them susceptible of sweeping and improper application abridging those rights." 380 U. S. 479, 482. There was also an allegation of threats to enforce these sweeping provisions as part of a "plan to employ arrests, seizures, and threats of prosecution under color of the statutes to harass" the appellants and to discourage their protected activities. The lower court denied relief on the ground that these allegations did not present a case of threatened irreparable injury to constitutional rights warranting the intervention of a federal court. We reversed. The Court, at the outset, fully and explicitly accepted the teaching of the cases "that federal interference with a State's good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework" and that "the mere possibility of erroneous initial application of constitutional standards will

usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings." 380 U. S., at 484–485. Without questioning the rule that the possible invalidity of a state statute is not itself ground for equitable relief, *Terrace* v. *Thompson*, 263 U. S. 197, 214, or the imminence of prosecution under such a statute, since no person is immune from prosecution in good faith for alleged criminal acts, *Douglas* v. *City of Jeannette*, 319 U. S. 157, 163–164, we held that there was a sufficient showing of threatened irreparable injury to federal rights, which could not be dissipated by a particular prosecution, to warrant equitable intervention by a federal court. What was controlling on both the exercise of equitable power and the abstention issue was the depiction of a "situation in which defense of the State's criminal prosecution will not assure adequate vindication of constitutional rights." 380 U. S., at 485. The situation depicted here does not contain the elements which were operative in *Dombrowski*.

Dombrowski did not hold that the traditional equitable limitations on a federal court's power to enjoin imminent or pending criminal proceedings are relaxed whenever a statute is attacked as void on its face or as applied in violation of the First and Fourteenth Amendments. Rather that case makes clear that two particular kinds of challenges to state criminal statutes warrant extraordinary intervention in a State's criminal processes. They are planned prosecutorial misuse of a statute regulating freedom of expression and a vagueness attack on such a statute. Where threats of enforcement are without any expectation of conviction and are "part of a plan to employ arrests, seizures, and threats of prosecution under color of the statutes to harass," it is obvious that defense in a state criminal prosecution will not suffice to avoid irreparable injury. The very prosecution is said to be a part of the unconstitutional scheme and the

scheme, including future use of the statutes, is quite irrelevant to the prosecution in the state courts. Similarly where a plethora of statutory provisions are assailed as invalidly vague, uncertain or overbroad, with a consequent reach into areas of expression protected by the First Amendment, and such provisions are not susceptible of clarifying construction under the impact of one case, defense in the state prosecution cannot remove the unconstitutional vice of vagueness. For "those affected by a statute are entitled to be free of the burdens of defending prosecutions, however expeditious, aimed at hammering out the structure of the statute piecemeal, with no likelihood of obviating similar uncertainty for others." *Dombrowski* v. *Pfister,* 380 U. S., at 491. To relegate the party to defense in a state proceeding would be likely to leave standing a statute susceptible of having a severe *in terrorem* effect on expression, even if one prosecuted under such a statute is not convicted. It is this reasoning that accounts for relaxation of the abstention doctrine where sweeping and unclear statutes are attacked on their face, as in *Baggett* v. *Bullitt,* 377 U. S. 360, a case quite pertinent to the rationale of *Dombrowski.*

Here there is no more harassment alleged than that ordinarily and necessarily entailed by a criminal prosecution based on a good faith belief that the defendants have violated a statute. Although it is said that the statute is aimed at demonstrations, and that the prosecutions interfere with them, these allegations do not charge a misuse of the statute. Indeed, the petitioners allege that the picketing said to be unlawful under it was peaceful and nonobstructive, and the State claims quite the contrary. This issue is at the core of the criminal trial and to decide it in a federal court represents a wholly duplicative adjudication of an ordinary factual matter in dispute in a state criminal trial.

Nor do I think that any substantial claim of vagueness or overbroadness can be made about the statute here at issue.[1] Its provisions are these:

> "It shall be unlawful for any person, singly or in concert with others, to engage in picketing or mass demonstrations in such a manner as to obstruct or interfere with free ingress or egress to and from any public premises, State property, county or municipal courthouses, city halls, office buildings, jails, or other public buildings or property owned by the State of Mississippi or any county or municipal government located therein or with the transaction of public business or administration of justice therein or thereon conducted or so as to obstruct or interfere with free use of public streets, sidewalks or other public ways adjacent or contiguous thereto."

To me the terms "obstruct" and "interfere" raise no issues of vagueness or overbreadth such as were considered to be present in *Baggett* v. *Bullitt,* 377 U. S. 360, and *Dombrowski,* 380 U. S. 479, for the terms are neither unclear nor open-ended. The statute does not deal with belief or expression as such—it does not ban all forms of picketing, *Thornhill* v. *Alabama,* 310 U. S. 88; *Cox* v. *Louisiana,* 379 U. S. 559—but rather with obstructions to and interferences with ingress or egress to and from public buildings and the sidewalks and streets contiguous thereto, assuredly permissible subjects of state regulation. *Cox* v. *Louisiana,* 379 U. S. 536, 554. The statute does "aim specifically at evils within the allowable area of state control," *Thornhill* v. *Alabama,* 310 U. S. 88, 97, and does not leave one to guess at where fanciful possibility ends and intended coverage begins. Cf. *Baggett* v. *Bullitt,* 377 U. S. 360, 373–375.

[1] House Bill No. 546, Gen. Laws of Miss. 1964, c. 343.

The constitutional challenge to this statute which thus emerges is, in my view, an assertion that the type of conduct covered by the clear terms of the statute, obstructive picketing at public buildings, for example, cannot constitutionally be proscribed. Whether the attack is made on the face of the statute or as applied is beside the point, for in neither case would there be those special circumstances which *Dombrowski* requires to sanction federal intervention into a State's criminal processes. Whatever "criteria" *Dombrowski* contains, they do not indicate that in this situation the ordinary rule barring injunctive relief against state criminal prosecutions should be waived.

"[T]he mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings," and what is required for extraordinary intervention is a "situation in which defense of the State's criminal prosecution will not assure adequate vindication of constitutional rights." *Dombrowski* v. *Pfister,* 380 U. S. 479, 484–485. In *Douglas* v. *City of Jeannette,* 319 U. S. 157, the Court denied injunctive relief against threatened application of a city ordinance to constitutionally protected religious solicitation, "since the lawfulness or constitutionality of the statute or ordinance on which the prosecution is based may be determined as readily in the criminal case as in a suit for an injunction." 319 U. S., at 163. The constitutional challenge to this Mississippi statute, unlike the attack on the statutes in *Dombrowski* v. *Pfister* and *Baggett* v. *Bullitt,* but indistinguishable from that in *Douglas* v. *City of Jeannette,* does not entail "extensive adjudications, under the impact of a variety of factual situations," *Baggett* v. *Bullitt,* 377 U. S. 360, 378, to bring it within constitutional bounds. This is not a case where "no readily apparent construction suggests itself as a vehicle

for rehabilitating the statutes in a single prosecution." *Dombrowski* v. *Pfister,* 380 U. S., at 491.

In these circumstances it is difficult to see what hazards to federal rights are posed by requiring one to follow orderly proceedings in the state courts. Numerous cases establish that the possible invalidity of a statute, or the imminence of a prosecution under it, itself will not suffice to warrant intervention. *Terrace* v. *Thompson,* 263 U. S. 197, 214; *Fenner* v. *Boykin,* 271 U. S. 240; *Spielman Motor Sales Co.* v. *Dodge,* 295 U. S. 89; *Beal* v. *Missouri Pac. R. Co.,* 312 U. S. 45; *Douglas* v. *City of Jeannette,* 319 U. S. 157. *Dombrowski* v. *Pfister* is not to the contrary.

It is obvious, however, that several of my Brethren find more guidance in *Dombrowski* than I do and more than I think a district judge can find in either that case or this unrevealing *per curiam* remand, which ignores the differences between this case and *Dombrowski.* The issues are important and of immediate concern and I would note probable jurisdiction and set this case down for argument.[2]

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[2] As the Court recognizes, the question whether § 2283 bars an injunction in suits brought under 42 U. S. C. § 1983 (1958 ed.) is an open one; I think that the presence of that issue is a further reason why a *per curiam* remand is inappropriate.

CALIFORNIA *v.* HURST.

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

No. 45. Decided June 7, 1965.

Certiorari granted and judgment reversed.

Reported below: 325 F. 2d 891.

Stanley Mosk, Attorney General of California, *Doris H. Maier,* Assistant Attorney General, and *Edsel W. Haws,* Deputy Attorney General, for petitioner.

PER CURIAM.

The motion of respondent for leave to proceed *in forma pauperis* is granted. The petition for writ of certiorari is granted and the judgment is reversed. *Linkletter* v. *Walker, ante,* p. 618.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent for the reasons stated in their dissenting opinion in *Linkletter* v. *Walker, ante,* at 640.

REDMOND *v.* VIRGINIA.

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 1082. Decided June 7, 1965.

Appeal dismissed and certiorari denied.

John Alvin Croghan for appellant.

PER CURIAM.

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

ASSOCIATED FOOD RETAILERS OF GREATER CHICAGO, INC., ET AL. *v.* JEWEL TEA CO., INC.

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

No. 321. Decided June 7, 1965.

Certiorari granted and judgment reversed.

Reported below: 331 F. 2d 547.

Eugene Kart for petitioners.

George B. Christensen, Fred H. Daugherty, Theodore A. Groenke and *Samuel Weisbard* for respondent.

Solicitor General Cox for the United States, as *amicus curiae,* in support of the petition.

PER CURIAM.

The petition for writ of certiorari is granted and the judgment below is reversed. *Meat Cutters* v. *Jewel Tea, ante,* p. 676.

MR. JUSTICE HARLAN, MR. JUSTICE STEWART and MR. JUSTICE GOLDBERG concur in the judgment of the Court for the reasons stated in MR. JUSTICE GOLDBERG'S opinion in *United Mine Workers of America* v. *Pennington* and *Meat Cutters* v. *Jewel Tea, ante,* at 697.

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS and MR. JUSTICE CLARK dissent.

FEDERAL POWER COMMISSION *v.* PAN AMERICAN PETROLEUM CORP.

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

No. 1024. Decided June 7, 1965.*

Certiorari granted and judgment reversed.

Reported below: 339 F. 2d 694.

Solicitor General Cox, Richard A. Solomon, Howard E. Wahrenbrock, Robert L. Russell and *Peter H. Schiff* for petitioner in No. 1024.

Herbert E. Squires and *Joseph C. Bruno* for petitioner in No. 1025.

J. P. Hammond, William J. Grove and *Carroll L. Gilliam* for respondent in both cases.

PER CURIAM.

The petitions for writs of certiorari are granted and the judgment is reversed. *United Gas Improvement Co.* v. *Continental Oil Co.*, and *Federal Power Comm'n* v. *Marr, ante*, p. 392.

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*Together with No. 1025, *Pennsylvania Public Utility Commission* v. *Pan American Petroleum Corp.*, also on petition for writ of certiorari to the same court.

KNOWLES *v.* FLORIDA.

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

No. 884, Misc. Decided June 7, 1965.

Certiorari granted and judgment reversed.

Petitioner *pro se*.

Earl Faircloth, Attorney General of Florida, and *George R. Georgieff*, Assistant Attorney General, for respondent.

PER CURIAM.

The petition for writ of certiorari is granted and the judgment dismissing the appeal is reversed. *Raley* v. *Ohio*, 360 U. S. 423, 437–440. Cf. *Lane* v. *Brown*, 372 U. S. 477; *Douglas* v. *California*, 372 U. S. 353.

MR. JUSTICE STEWART would deny certiorari.

MR. JUSTICE CLARK and MR. JUSTICE HARLAN dissent.

REPORTER'S NOTE.

The next page is purposely numbered 901. The numbers between 763 and 901 were intentionally 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 immediately available.

773-305 O-65-53

ORDERS FROM MAY 3 THROUGH JUNE 7, 1965.

MAY 3, 1965.

Miscellaneous Orders.

No. 1044, Misc. FOSTER *v.* BOLES, WARDEN;

No. 1072, Misc. WHITE *v.* HEINZE, WARDEN;

No. 1087, Misc. STILTNER *v.* RHAY, PENITENTIARY SUPERINTENDENT, ET AL.; and

No. 1104, Misc. KROEGER *v.* CALIFORNIA. Motions for leave to file petitions for writs of habeas corpus denied.

No. 1054, Misc. GONZALES *v.* CALIFORNIA;

No. 1089, Misc. EDGERTON *v.* NORTH CAROLINA;

No. 1090, Misc. DOWNER *v.* CALIFORNIA; and

No. 1108, Misc. STEVENSON *v.* CHAPPELL, CHAIRMAN, U. S. BOARD OF PAROLE, ET AL. Motions for leave to file petitions for writs of habeas corpus denied. Treating the papers submitted as petitions for writs of certiorari, certiorari is denied.

No. 941, Misc. SKOLNICK *v.* HASTINGS ET AL., U. S. CIRCUIT JUDGES. Motion for leave to file petition for writ of mandamus and/or prohibition and for other relief denied.

Certiorari Granted. (See also No. 923, *ante,* p. 126; and No. 958, *ante,* p. 129.)

No. 806. BROWN ET AL. *v.* LOUISIANA. Sup. Ct. La. Certiorari granted. *Carl Rachlin, Robert F. Collins, Nils R. Douglas* and *Floyd McKissick* for petitioners. *Jack P. F. Gremillion,* Attorney General of Louisiana, and *Carroll Buck,* First Assistant Attorney General, for respondent.

No. 824, Misc. KENT *v.* UNITED STATES. C. A. D. C. Cir. Motion of Elyce Zenoff Ferster et al. for leave to file a brief, as *amici curiae,* granted. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari granted. Case transferred to appellate docket. *Myron G. Ehrlich* and *Richard Arens* for petitioner. *Solicitor General Cox* for the United States. Reported below: —— U. S. App. D. C. ——, 343 F. 2d 247.

Certiorari Denied. (See also Misc. Nos. 1054, 1089, 1090 and 1108, *supra.*)

No. 688. KRISTOVICH, PUBLIC ADMINISTRATOR *v.* SHU TONG NG. Dist. Ct. App. Cal., 2d App. Dist. Certiorari denied. *Harold W. Kennedy* and *George W. Wakefield* for petitioner. *Hiram W. Kwan* for respondent. *Solicitor General Cox* filed a memorandum for the United States. Reported below: 228 Cal. App. 2d 160, 39 Cal. Rptr. 254.

No. 982. STIRONE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Lloyd F. Engle, Jr.,* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 341 F. 2d 253.

No. 984. FERINA *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Walter A. Raymond* and *Kenneth C. West* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Marshall Tamor Golding* for the United States. Reported below: 340 F. 2d 837.

No. 986. ROSENZWEIG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Joseph Henry Wolf* and *Paul Wyler* for petitioner. *Solicitor General Cox* for the United States.

No. 981. WHITESIDE *v.* CONNECTICUT. Sup. Ct. Err. Conn. Certiorari denied. Petitioner *pro se*. *Ralph H. Clark* for respondent.

No. 988. ALLIED CENTRAL STORES, INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Percy W. Phillips* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Gilbert E. Andrews* and *Norman H. Wolfe* for respondent. Reported below: 339 F. 2d 503.

No. 989. SHAHADI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *George P. Walker* and *Robert M. Taylor* for petitioner. *Solicitor General Cox* for the United States. Reported below: 340 F. 2d 56.

No. 991. SUMMERLIN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Josiah Lyman* and *Sophie B. Lyman* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Daniel H. Benson* for the United States.

No. 998. TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS LOCAL UNION 612 *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. *David Previant* and *L. N. D. Wells, Jr.*, for petitioner. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli, Norton J. Come* and *Allison W. Brown, Jr.*, for respondent. Reported below: 337 F. 2d 697.

No. 999. GODENY ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. *Robert M. Taylor* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *I. Henry Kutz* for respondent. Reported below: 339 F. 2d 262.

No. 1005. McNeil *v.* Udall, Secretary of the Interior. C. A. D. C. Cir. Certiorari denied. *Leif Erickson* and *Ellis Lyons* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Williams, Roger P. Marquis* and *Thos. L. McKevitt* for respondent. Reported below: —— U. S. App. D. C. ——, 340 F. 2d 801.

No. 1007. Ferry et al. *v.* Udall, Secretary of the Interior, et al. C. A. 9th Cir. Certiorari denied. *Elmer C. Coker* and *Eugene Gressman* for petitioners. *Solicitor General Cox, Acting Assistant Attorney General Williams, Roger P. Marquis* and *S. Billingsley Hill* for respondents. *Darrell F. Smith,* Attorney General of Arizona, and *Dale R. Shumway,* Special Assistant Attorney General, for the State of Arizona, and *James R. Holman* for Gust, Rosenfeld & Divelbess et al., as *amici curiae,* in support of the petition. Reported below: 336 F. 2d 706.

No. 971. Graham *v.* Pennsylvania Railroad et al. C. A. D. C. Cir. Certiorari denied. Mr. Justice Black and Mr. Justice Goldberg are of the opinion that certiorari should be granted and the judgment reversed based on the dissenting opinion below of Judge J. Skelly Wright. *Melvin Hirshman* and *Earl H. Davis* for petitioner. *Thomas A. Flannery* and *Stephen A. Trimble* for respondents. Reported below: —— U. S. App. D. C. ——, 342 F. 2d 914.

No. 481, Misc. Brady *v.* Ohio. Sup. Ct. Ohio. Certiorari denied.

No. 1013. Schwartz *v.* Tanner. Sup. Ct. Ohio. Certiorari denied. *Richard D. Haney* for petitioner. *Douglas G. Cole* for respondent.

No. 1001. MOYNIHAN *v.* NEW YORK CENTRAL RAILROAD CO. C. A. 1st Cir. Certiorari denied. *Lawrence F. O'Donnell* for petitioner. *Timothy H. Donohue* for respondent. Reported below: 338 F. 2d 644.

No. 1014. CITIES SERVICE OIL CO. *v.* ARUNDEL CORP. C. A. 2d Cir. Certiorari denied. *David C. Wood* for petitioner. *Christopher E. Heckman* for respondent. Reported below: 337 F. 2d 842.

No. 686, Misc. KERN *v.* RUNDLE, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 860, Misc. DEAN *v.* GREEN, CORRECTIONAL SUPERINTENDENT, ET AL. Sup. Ct. Ohio. Certiorari denied. Petitioner *pro se*. *William B. Saxbe,* Attorney General of Ohio, and *Leo J. Conway,* Assistant Attorney General, for respondents. Reported below: 177 Ohio St. 22, 201 N. E. 2d 598.

No. 932, Misc. FERGUSON *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. *A. H. Leatherwood, Sr.,* for petitioner. *Eugene Cook,* Attorney General of Georgia, *Albert Sidney Johnson,* Assistant Attorney General, and *Dan Winn,* Solicitor General, for respondent. Reported below: 220 Ga. 364, 138 S. E. 2d 881.

No. 950, Misc. ARMSTRONG *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 339 F. 2d 1015.

No. 991, Misc. WILLIAMS *v.* MACBRIDE, U. S. DISTRICT JUDGE. C. A. 9th Cir. Certiorari denied.

No. 942, Misc. OGLETREE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 946, Misc. DORTON *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Petitioner *pro se*. *Frank S. Hogan* and *H. Richard Uviller* for respondent.

No. 951, Misc. PAUL *v.* CELEBREZZE, SECRETARY OF HEALTH, EDUCATION AND WELFARE. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for respondent. Reported below: 337 F. 2d 352.

No. 984, Misc. ROOD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 340 F. 2d 506.

No. 1000, Misc. KIRBY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 1003, Misc. JACKSON *v.* WARDEN, MARYLAND PENITENTIARY. C. A. 4th Cir. Certiorari denied.

No. 1035, Misc. GOINS *v.* WALKER, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 340 F. 2d 6.

No. 1069, Misc. FINK *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

Rehearing Denied.

No. 21. CHICAGO & NORTH WESTERN RAILWAY CO. *v.* CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD CO. ET AL., 380 U. S. 448;

No. 887. NEW YORK CENTRAL RAILROAD CO. *v.* SOUTHERN RAILWAY CO., 380 U. S. 954; and

No. 504, Misc. FERRARIO *v.* SIGLER, WARDEN, 380 U. S. 957. Petitions for rehearing denied.

MAY 7, 1965.

Dismissal Under Rule 60.

No. 1033. MINNESOTA EX REL. BRANCHAUD *v.* HEDMAN, SHERIFF. Sup. Ct. Minn. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. *John S. Connolly* for petitioner. Reported below: 269 Minn. 375, 130 N. W. 2d 628.

MAY 13, 1965.

Dismissal Under Rule 60.

No. 1102, Misc. JONES *v.* UNITED STATES. C. A. 4th Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 340 F. 2d 599.

MAY 17, 1965.

Miscellaneous Orders.

No. 919, October Term, 1961. GONDECK *v.* PAN AMERICAN WORLD AIRWAYS, INC., ET AL. C. A. 5th Cir. (Certiorari denied, 370 U. S. 918; rehearing denied, 371 U. S. 856.) Respondents requested to file response to second petition for rehearing within 30 days.

No. 6. HENRY *v.* MISSISSIPPI. (379 U. S. 443; 380 U. S. 926.) Motion of respondent to retax costs denied. *Joe T. Patterson,* Attorney General of Mississippi, and *G. Garland Lyell, Jr.,* Assistant Attorney General, on the motion.

No. 1015. UNITED STATES *v.* LEWIS FOOD CO., INC. Appeal from D. C. S. D. Cal. Motion to transfer this case to the United States Court of Appeals for the Ninth Circuit granted and case remanded to that court pursuant to 18 U. S. C. § 3731. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States on the motion. Reported below: 236 F. Supp. 849.

No. 1016. EASTERN AIR LINES, INC. *v.* FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION ET AL. C. A. 5th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 1027. LIST *v.* LERNER DBA LERNER & CO., ET AL. C. A. 2d Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 1023, Misc. STONE *v.* UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT. Motion for leave to file petition for writ of mandamus denied. Petitioner *pro se*. *Solicitor General Cox* for respondent.

No. 1045, Misc. CHASE *v.* SUPERIOR COURT FOR GRAYS HARBOR COUNTY, WASHINGTON, ET AL. Motion for leave to file petition for writ of mandamus denied.

No. 1123, Misc. FISHER, ALIAS MUELLER *v.* ILLINOIS; and

No. 1143, Misc. JOSEPH *v.* VITEK, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 543, October Term, 1963. UNITED STATES *v.* MARYLAND FOR THE USE OF MEYER ET AL. C. A. D. C. Cir. (Certiorari denied, 375 U. S. 954.) Respondents requested to file response to petition for rehearing within 30 days.

No. 1152. SCOTT, TREASURER OF ILLINOIS, ET AL. *v.* GERMANO ET AL. Appeal from D. C. N. D. Ill. Motion of appellants for accelerated consideration of appeal granted and appellees allowed seven days to file responses to statement as to jurisdiction. MR. JUSTICE GOLDBERG took no part in the consideration or decison of this motion. *Don H. Reuben* and *Howard J. Trienens* for appellants. *Lester Asher* and *Bernard Kleiman* for Germano et al., and *William G. Clark,* Attorney General of Illinois, for Kerner et al., appellees.

No. 608, Misc. FARRINGTON *v.* TAHASH, WARDEN. Motion for leave to file petition for writ of habeas corpus denied. Petitioner *pro se.* *Robert W. Mattson,* Attorney General of Minnesota, and *Charles E. Houston,* Special Assistant Attorney General, for respondent.

No. 1162, Misc. GUNTER *v.* KROPP, WARDEN; and

No. 1166, Misc. DIXON *v.* WILSON, 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.

Probable Jurisdiction Noted.

No. 750. UNITED STATES *v.* EWELL ET AL. Appeal from D. C. S. D. Ind. Motion of appellees for leave to proceed *in forma pauperis* granted. Probable jurisdiction noted. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Appellees *pro se.* Reported below: 242 F. Supp. 451.

No. 1081. UNITED STATES *v.* GRINNELL CORP. ET AL.;

No. 1083. GRINNELL CORP. *v.* UNITED STATES;

No. 1084. AMERICAN DISTRICT TELEGRAPH CO. *v.* UNITED STATES;

No. 1085. HOLMES ELECTRIC PROTECTIVE CO. *v.* UNITED STATES; and

No. 1086. AUTOMATIC FIRE ALARM CO. OF DELAWARE *v.* UNITED STATES. Appeals from D. C. R. I. Probable jurisdiction noted. Cases consolidated and a total of two hours allowed for oral argument. *Solicitor General Cox, Assistant Attorney General Orrick, Robert B. Hummel* and *Gerald Kadish* for the United States in No. 1081. *John F. Sonnett* and *Denis G. McInerney* for appellant in No. 1083. *Macdonald Flinn* and *Robert O. Donnelly* for appellant in No. 1084. *John W. Drye, Jr., Francis S. Bensel* and *Bud G. Holman* for appellant in No. 1085. *J. Francis Hayden* for appellant in No. 1086. Reported below: 236 F. Supp. 244.

Certiorari Granted. (See also No. 262, *ante,* p. 274); No. 789, *ante,* p. 275; and No. 363, Misc., *ante,* p. 278.)

No. 265. ALBERTSON ET AL. *v.* SUBVERSIVE ACTIVITIES CONTROL BOARD. C. A. D. C. Cir. Certiorari granted. MR. JUSTICE WHITE took no part in the consideration or decision of this petition. *John J. Abt* and *Joseph Forer* for petitioners. *Solicitor General Cox, Assistant Attorney General Yeagley, Kevin T. Maroney* and *Lee B. Anderson* for respondent. Reported below: 118 U. S. App. D. C. 117, 332 F. 2d 317.

Certiorari Denied. (See also No. 967, *ante,* p. 276; No. 994, Misc., *ante,* p. 274; No. 1031, Misc., *ante,* p. 275; and Misc. Nos. 1162 and 1166, *supra.*)

No. 388, Misc. MARCHESE *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 620. REAL ESTATE INVESTMENT TRUST OF AMERICA ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 1st Cir. Certiorari denied. *Henry Hixon Meyer* and *Charles D. Post* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Wayne G. Barnett* and *Joseph Kovner* for respondent. Reported below: 334 F. 2d 986.

No. 864. IRWIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Al Matthews* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States. Reported below: 338 F. 2d 770.

No. 924. ALLEGRETTI *v.* UNITED STATES;

No. 925. DARLAK *v.* UNITED STATES; and

No. 926. FALZONE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Maurice J. Walsh* and *Anna R. Lavin* for petitioner in No. 924. Petitioner *pro se* in No. 925. *Daniel C. Ahern* for petitioner in No. 926. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 340 F. 2d 243, 254.

No. 946. AAA CON DRIVERS EXCHANGE, INC., ET AL. *v.* INTERSTATE COMMERCE COMMISSION. C. A. 2d Cir. Certiorari denied. *Harold Harper* and *Vincent P. Uihlein* for petitioners. *Solicitor General Cox, Assistant Attorney General Orrick, Robert B. Hummel, Donald L. Hardison, Robert W. Ginnane, Betty Jo Christian, Bernard A. Gould* and *Seymour Glanzer* for respondent. Reported below: 340 F. 2d 820.

No. 1022. BROTHERHOOD OF RAILROAD TRAINMEN INSURANCE DEPARTMENT, INC. *v.* ELLGASS. C. A. 9th Cir. Certiorari denied. *Clifton Hildebrand* for petitioner. Reported below: 342 F. 2d 1.

No. 927. FORE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Larry W. Morris* and *Bennett B. Patterson* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Joseph Kovner* for the United States. Reported below: 339 F. 2d 70.

No. 933. EASTER ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. Petitioners *pro se*. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Melva M. Graney* for respondent. Reported below: 338 F. 2d 968.

No. 978. B. RAY ROBBINS CO., INC. *v.* VALLEY NATIONAL BANK OF ARIZONA. C. A. 9th Cir. Certiorari denied. *Albert Sidney Johnston, Jr.*, for petitioner. *R. J. Ellis* for respondent. Reported below: 338 F. 2d 467.

No. 997. STROLLO *v.* UNITED STATES; and

No. 1011. SERMAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Jack Wasserman* and *David Carliner* for petitioner in No. 997. *Dan W. Duffy* and *Sydney A. Hesse* for petitioner in No. 1011. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States.

No. 1003. BOUNDY *v.* CALIFORNIA. Dist. Ct. App. Cal., 2d App. Dist. Certiorari denied. *I. Glovin* for petitioner.

No. 1029. PACIFIC NATIONAL INSURANCE CO. *v.* TRANSPORT INSURANCE CO. C. A. 8th Cir. Certiorari denied. *Edward Brodkey* for petitioner. *Dan M. Burge, Richard A. Reid, Donald E. Prevallet, James W. Steinsiek* and *James M. Gardner* for respondent. Reported below: 341 F. 2d 514.

No. 1008. DINSIO *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. *Lawrence V. Cregan* and *Ben F. Kelly* for petitioner.

No. 1018. A. G. V. ASSOCIATES, INC. *v.* CROSS, TRUSTEE IN BANKRUPTCY. C. A. 2d Cir. Certiorari denied. *Bernard Finkel* and *Arthur Argiriou* for petitioner. *Jeremiah F. Cross,* respondent, *pro se.* Reported below: 340 F. 2d 42.

No. 1019. SMITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Charles P. Howard, Jr.,* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 342 F. 2d 525.

No. 1021. MIMS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Fleetwood M. McCoy* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Daniel H. Benson* for the United States. Reported below: 340 F. 2d 851.

No. 1031. CAPITOL AIRWAYS, INC. *v.* AIRLINE PILOTS ASSOCIATION, INTERNATIONAL. C. A. 6th Cir. Certiorari denied. *Judson Harwood* for petitioner. *Cecil D. Branstetter* and *Harry Noe* for respondent. Reported below: 341 F. 2d 288.

No. 1036. ALLAN HERSCHELL CO., INC., ET AL. *v.* UNITED STATES FIDELITY & GUARANTY CO. ET AL. C. A. 5th Cir. Certiorari denied. *Ralph L. Kaskell, Jr.,* for petitioners. Reported below: 337 F. 2d 881.

No. 1037. JANAF, INC. *v.* ORSINGER. C. A. D. C. Cir. Certiorari denied. *Winfred R. Mundle* for petitioner. *Joseph G. Dooley* for respondent.

No. 1038. PLAZA LIQUOR STORE, INC. *v.* CITY OF ATLANTA. Sup. Ct. Ga. Certiorari denied. *Robert L. Mitchell* for petitioner. *Henry L. Bowden, Martin McFarland* and *Lewis R. Slaton* for respondent. Reported below: 220 Ga. 615, 140 S. E. 2d 868.

No. 1051. DISTRICT COUNCIL OF PAINTERS NO. 48, BROTHERHOOD OF PAINTERS, DECORATORS & PAPERHANGERS OF AMERICA *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. *Herbert M. Ansell* for petitioner. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 340 F. 2d 107.

No. 1064. CALEF *v.* ROSENBERG, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, ET AL. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for respondents.

No. 814. LANDON *v.* NORTHERN NATURAL GAS CO. C. A. 10th Cir. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of this petition. *Byron M. Gray* and *William S. Richardson* for petitioner. *F. Vinson Roach* and *Ralph W. Oman* for respondent. *Solicitor General Cox, Richard A. Solomon, Howard E. Wahrenbrock* and *Josephine H. Klein* for the Federal Power Commission, as *amicus curiae*. Reported below: 338 F. 2d 17.

No. 938. MONOLITH PORTLAND CEMENT CO. *v.* RIDDELL, DISTRICT DIRECTOR OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of this petition. *Joseph T. Enright, Norman Elliott* and *William A. Sutherland* for petitioner. *Solicitor General Cox* for respondent. Reported below: 336 F. 2d 402.

No. 1058. HARRINGTON *v.* TEXACO, INC. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *William Alan Mudgett* and *Jack W. Flock* for respondent. Reported below: 339 F. 2d 814.

No. 834. ZIZZO ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. MR. JUSTICE WHITE took no part in the consideration or decision of this petition. *Maurice J. Walsh* and *Edward J. Calihan, Jr.*, for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 338 F. 2d 577.

No. 1006. T. B. HARMS CO. *v.* ELISCU ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE GOLDBERG took no part in the consideration or decision of this petition. *Gustave B. Garfield* for petitioner. *Leonard J. Linden* for Eliscu, and *Lewis A. Dreyer* for Ross Jungnickel, Inc., respondents. Reported below: 339 F. 2d 823.

No. 1028. JONES ET AL. *v.* UNITED STATES. C. A. 5th Cir. Motion to dispense with printing petition for certiorari granted. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Guy Johnson* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller* and *Philip R. Monahan* for the United States. Reported below: 339 F. 2d 419.

No. 440, Misc. SPENCER *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied.

No. 749, Misc. ROMANELLO *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. *A. K. Black* for petitioner. *Earl Faircloth*, Attorney General of Florida, and *James T. Carlisle*, Assistant Attorney General, for respondent.

No. 692, Misc. PEOPLES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 337 F. 2d 91.

No. 750, Misc. PEACOCK *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. *A. K. Black* for petitioner. *Earl Faircloth*, Attorney General of Florida, and *James T. Carlisle*, Assistant Attorney General, for respondent.

No. 755, Misc. LEPISCOPO *v.* MACGRATH. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for respondent.

No. 791, Misc. LOSIEAU *v.* SIGLER, WARDEN. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Clarence A. H. Meyer*, Attorney General of Nebraska, and *Melvin Kent Kammerlohr*, Assistant Attorney General, for respondent.

No. 802, Misc. SMITH *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Daniel H. Benson* for the United States. Reported below: 337 F. 2d 49.

No. 865, Misc. SULLIVAN *v.* TAYLOR, WARDEN. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Acting Assistant Attorney General Doar* and *Harold H. Greene* for respondent. Reported below: 338 F. 2d 1004.

No. 875, Misc. TUCKER *v.* INDIANA. Sup. Ct. Ind. Certiorari denied.

No. 869, Misc. Cook *v.* Maxwell, Warden. Sup. Ct. Ohio. Certiorari denied. Petitioner *pro se*. *William B. Saxbe,* Attorney General of Ohio, and *Leo J. Conway,* Assistant Attorney General, for respondent. Reported below: 177 Ohio St. 41, 201 N. E. 2d 787.

No. 889, Misc. Leyde *v.* Rhay, Penitentiary Superintendent. Super. Ct. Wash., Walla Walla County. Certiorari denied. Petitioner *pro se*. *John J. O'Connell,* Attorney General of Washington, and *Stephen C. Way* and *Paul J. Murphy,* Assistant Attorneys General, for respondent.

No. 891, Misc. Haines *v.* Randolph, Warden. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *William G. Clark,* Attorney General of Illinois, and *Edward A. Berman,* Assistant Attorney General, for respondent.

No. 954, Misc. Bjornsen *v.* New York. App. Div., Sup. Ct. N. Y., 1st Jud. Dept. Certiorari denied. Petitioner *pro se*. *Frank S. Hogan* and *H. Richard Uviller* for respondent.

No. 961, Misc. Dunford *v.* Virginia. Sup. Ct. App. Va. Certiorari denied.

No. 964, Misc. Boruski *v.* Securities and Exchange Commission. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* and *Philip A. Loomis, Jr.,* for respondent. Reported below: 339 F. 2d 196.

No. 977, Misc. Matysek *v.* United States. C. A. 9th Cir. Certiorari denied. *Morris Lavine* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Philip R. Monahan* for the United States. Reported below: 339 F. 2d 389.

No. 986, Misc. BASHA *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied.

No. 999, Misc. MIDDLETON *v.* FAY, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1001, Misc. REEVES *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Sup. Ct. Fla. Certiorari denied.

No. 1005, Misc. LOPER *v.* CONNALLY, GOVERNOR OF TEXAS, ET AL. Ct. Crim. App. Tex. Certiorari denied.

No. 1012, Misc. WALLACE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 1017, Misc. DUTTON *v.* WARDEN, TENNESSEE PRISON. C. A. 6th Cir. Certiorari denied.

No. 1028, Misc. ELLIS *v.* SUPREME COURT OF CALIFORNIA. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Thomas C. Lynch,* Attorney General of California, *Charles E. Corker,* Assistant Attorney General, and *N. B. Peek* and *Robert H. O'Brien,* Deputy Attorneys General, for respondent.

No. 1030, Misc. ROSARIO *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 1032, Misc. GALLEGOS *v.* COX, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 341 F. 2d 107.

No. 1036, Misc. JUSTUS *v.* NEW MEXICO. Sup. Ct. N. M. Certiorari denied.

No. 1034, Misc. KERNS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States. Reported below: 338 F. 2d 770.

No. 1039, Misc. WATTS *v.* PEYTON, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied

No. 1041, Misc. PARKER *v.* MAXWELL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 1042, Misc. GUERRIERI *v.* MAXWELL, WARDEN, ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 1 Ohio St. 2d 75, 204 N. E. 2d 60.

No. 1049, Misc. BALLAY *v.* TINSLEY, WARDEN. Sup. Ct. Colo. Certiorari denied. Petitioner *pro se. Duke W. Dunbar,* Attorney General of Colorado, *Frank E. Hickey,* Deputy Attorney General, and *James W. Creamer, Jr.,* Assistant Attorney General, for respondent.

No. 1050, Misc. SANTOS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 1081, Misc. GREENE *v.* MICHIGAN DEPARTMENT OF CORRECTIONS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 339 F. 2d 139.

No. 1092, Misc. BORBON *v.* CLERK, SUPERIOR COURT, COUNTY OF KINGS, HANFORD, CALIFORNIA, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 1111, Misc. KONIGSBERG *v.* KOSON, CITY HOSPITAL WARDEN. C. A. 2d Cir. Certiorari denied. *Frances Kahn* for petitioner.

No. 1131, Misc. LANE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 198, Misc. KLING *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *John Dwight Evans, Jr.*, and *Leon B. Polsky* for petitioner. Reported below: 14 N. Y. 2d 571, 198 N. E. 2d 46.

No. 298, Misc. SMITH *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Leon B. Polsky* for petitioner.

No. 785, Misc. LEWIS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Henry Lincoln Johnson, Jr.*, for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: —— U. S. App. D. C. ——, 337 F. 2d 541.

No. 665, Misc. AUSTIN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied without prejudice to an application for a writ of habeas corpus in the appropriate United States District Court. Petitioner *pro se*. *Earl Faircloth*, Attorney General of Florida, and *James G. Mahorner*, Assistant Attorney General, for respondent.

No. 982, Misc. EVANS *v.* KATZENBACH, ATTORNEY GENERAL, ET AL. C. A. 3d Cir. Certiorari and other relief denied. Petitioner *pro se*. *Solicitor General Cox* for respondents. Reported below: 343 F. 2d 913.

Rehearing Denied.

No. 113. THOMAS ET UX. *v.* UNITED STATES, 379 U. S. 819;

No. 193. ROMANO ET AL. *v.* UNITED STATES, 380 U. S. 942;

No. 865. PATSIS, AKA NICKAS *v.* IMMIGRATION AND NATURALIZATION SERVICE, 380 U. S. 952;

No. 897. CASIDA ET AL. *v.* INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL–CIO, ET AL., 380 U. S. 955;

No. 886, Misc. JAMES *v.* ANDERSON, JAIL SUPERINTENDENT, ET AL., 380 U. S. 966; and

No. 893, Misc. GRAVES *v.* TEXAS, 380 U. S. 967. Petitions for rehearing denied.

No. 64. SWAIN *v.* ALABAMA, 380 U. S. 202. Motion of the American Civil Liberties Union for leave to file a brief, as *amicus curiae*, in support of rehearing, granted. Petition for rehearing denied.

Dismissal Under Rule 60.

No. 1077, Misc. VIDA *v.* UNITED STATES. C. A. 6th Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. Petitioner *pro se*. *Solicitor General Cox* for the United States.

MAY 18, 1965.

Dismissal Under Rule 60.

No. 1155, Misc. EARNSHAW *v.* ANDERSON, JAIL SUPERINTENDENT. C. A. D. C. Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. Petitioner *pro se*. *Chester H. Gray, Milton D. Korman, Hubert B. Pair* and *John R. Hess* for respondent.

MAY 19, 1965.

Dismissal Under Rule 60.

No. 1051, Misc. McCARTY *v.* ANDERSON, JAIL SUPERINTENDENT. C. A. D. C. Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. Petitioner *pro se*. *Solicitor General Cox* for respondent.

No. 1173, Misc. SCHLETTE *v.* SUPREME COURT OF CALIFORNIA. Motion for leave to file petition for writ of mandamus dismissed pursuant to Rule 60 of the Rules of this Court.

MAY 24, 1965.

Miscellaneous Orders.

No. 1140, Misc. IN RE DISBARMENT OF HAMMETT. It having been reported to the Court that Bernard J. Hammett of Silver Spring, State of Maryland, has been disbarred from the practice of the law by judgment of the United States Court of Appeals for the District of Columbia Circuit, duly entered on the 12th day of March, 1965, and this Court by order of March 29, 1965, having suspended the said Bernard J. Hammett from the practice of law in this Court and directed that a rule issue requiring him to show cause why he should not be disbarred;

And it appearing that the said rule was duly issued and served upon the respondent, and that the time within which to file a return to the rule has expired;

IT IS ORDERED that the said Bernard J. Hammett be, and he is hereby, disbarred and that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court.

No. 1163, Misc. HENIG ET AL. *v.* GESREGAN. Motion for leave to file petition for writ of habeas corpus denied.

No. 1167, Misc. LISHEY *v.* CALIFORNIA ET AL. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for a writ of certiorari, certiorari is denied.

Probable Jurisdiction Noted.

No. 831. GIACCIO *v.* PENNSYLVANIA. Appeal from Sup. Ct. Pa. Probable jurisdiction noted. *Peter Hearn, James C. N. Paul* and *Paul J. Mishkin* for appellant. *Walter E. Alessandroni,* Attorney General of Pennsylvania, and *Graeme Murdock,* Deputy Attorney General, for appellee. Reported below: 415 Pa. 139, 202 A. 2d 55.

Certiorari Granted. (See also No. 957, *ante,* p. 353; No. 1072, *ante,* p. 355; and No. 1117, Misc., *ante,* p. 356.)

No. 819. LINN *v.* UNITED PLANT GUARD WORKERS OF AMERICA, LOCAL 114, ET AL. C. A. 6th Cir. Certiorari granted. *Donald F. Welday* for petitioner. *Harold A. Cranefield* for respondents. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* filed a memorandum for the United States. Reported below: 337 F. 2d 68.

No. 877. TEHAN, SHERIFF *v.* SHOTT. C. A. 6th Cir. Certiorari granted. The parties are requested to brief and argue the question of the retroactivity of the doctrine announced in *Griffin* v. *California,* 380 U. S. 609. MR. JUSTICE DOUGLAS dissents, being of the view that the case should be remanded to the District Court for a finding on allegation that the respondent at the trial waived any objection to the comment made on his failure to testify. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. *Melvin G. Rueger, Calvin W. Prem* and *Harry C. Schoettmer* for petitioner. *Thurman Arnold, James G. Andrews, Jr.,* and *John A. Lloyd, Jr.,* for respondent. Reported below: 337 F. 2d 990.

Certiorari Denied. (See also No. 1002, *ante,* p. 354; No. 1034, *ante,* p. 354; and No. 1167, Misc., *supra.*)

No. 832. AVGIKOS *v.* LOUISIANA. Sup. Ct. La. Certiorari denied. *Chester E. Wallace* for petitioner. *Jack P. F. Gremillion,* Attorney General of Louisiana, and *M. E. Culligan* and *Harry J. Kron, Jr.,* Assistant Attorneys General, for respondent. Reported below: 246 La. 914, 168 So. 2d 823.

No. 972. HOLLAND FURNACE CO. *v.* SCHNACKENBERG, U. S. CIRCUIT JUDGE, ET AL. C. A. 7th Cir. Certiorari denied. *Charles Trynin* for petitioner. *Solicitor General Cox, E. K. Elkins* and *Miles J. Brown* for respondents. Reported below: 341 F. 2d 548.

No. 1026. AHTANUM IRRIGATION DISTRICT ET AL. *v.* UNITED STATES; and

No. 1035. UNITED STATES *v.* AHTANUM IRRIGATION DISTRICT ET AL. C. A. 9th Cir. Certiorari denied. *Fred C. Palmer, John Gavin, Northcutt Ely* and *Jerome C. Muys* for Ahtanum Irrigation District et al., and *John J. O'Connell,* Attorney General of Washington, and *Charles B. Roe, Jr.,* Assistant Attorney General, for the State of Washington, petitioners in No. 1026. *Solicitor General Cox, Acting Assistant Attorney General Williams, Roger P. Marquis* and *Edmund B. Clark* for the United States in both cases. *Charles B. Roe, Jr.,* Assistant Attorney General of Washington, for the State of Washington, respondent in No. 1035. Reported below: 330 F. 2d 897; 338 F. 2d 307.

No. 1042. ALLIED AIR FREIGHT, INC., ET AL. *v.* PAN AMERICAN WORLD AIRWAYS, INC., ET AL. C. A. 2d Cir. Certiorari denied. *Milton Horowitz* for petitioners. *William L. Lynch* and *George Weisz* for respondents. Reported below: 340 F. 2d 160.

No. 1041. ZIMMERMAN *v.* LEHMANN, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 7th Cir. Certiorari denied. *Maurice J. Walsh* and *Anna R. Lavin* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Vinson* and *Beatrice Rosenberg* for respondent. Reported below: 339 F. 2d 943.

No. 1045. LEIGHTON *v.* PARAMOUNT PICTURES CORP. ET AL. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Leonard Kaufman* and *Whitney North Seymour, Jr.*, for respondents. Reported below: 340 F. 2d 859.

No. 1048. PORESKY *v.* WAHLSTROM, JUDGE, ET AL. Sup. Jud. Ct. Mass. Certiorari denied.

No. 1049. OMAN CONSTRUCTION CO., INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. *Cecil Sims* for petitioner. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli, Norton J. Come* and *Melvin Pollack* for respondent. Reported below: 338 F. 2d 125.

No. 1052. MOONEY *v.* STAINLESS, INC., ET AL. C. A. 6th Cir. Certiorari denied. *Irving R. M. Panzer* for petitioner. *Ben F. McAuley* for respondents. Reported below: 338 F. 2d 127.

No. 1056. TJONAMAN *v.* A/S GLITTRE ET AL. C. A. 2d Cir. Certiorari denied. *Jacob Rassner* for petitioner. *David P. H. Watson* and *James M. Estabrook* for respondents. Reported below: 340 F. 2d 290.

No. 1065. STIRONE *v.* HURTT, TRUSTEE IN BANKRUPTCY. Sup. Ct. Pa. Certiorari denied. *Lloyd F. Engle, Jr.*, for petitioner. *Carl E. Glock* for respondent. Reported below: 416 Pa. 493, 206 A. 2d 624.

No. 1069. SKOLNICK *v.* MARTIN ET AL. Sup. Ct. Ill. Certiorari denied. Petitioner *pro se*. *Walter T. Fisher* for respondent Martin. Reported below: 32 Ill. 2d 55, 203 N. E. 2d 428.

No. 1094. ATWOOD ET AL. *v.* HUMBLE OIL & REFINING CO. C. A. 5th Cir. Certiorari denied. *David Bland* for petitioners. *Walter B. Morgan* for respondent. Reported below: 338 F. 2d 502.

No. 1100. SOUTHWESTERN LIFE INSURANCE CO. ET AL. *v.* PAN AMERICAN PETROLEUM CORP. ET AL. C. A. 5th Cir. Certiorari denied. *James P. Swift* for petitioners. *Chas. F. Potter* and *Roy L. Merrill* for respondents. Reported below: 340 F. 2d 211.

No. 1046. THOMPSON *v.* UNITED STATES. C. A. 5th Cir. Motion of Earl N. Stokes to be added as party petitioner denied. Certiorari denied. *L. J. Cushman* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 342 F. 2d 137.

No. 657, Misc. GRAY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 730, Misc. VALCARCEL *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Acting Assistant Attorney General Doar* and *Harold H. Greene* for the United States.

No. 778, Misc. O'CALLAHAN *v.* ATTORNEY GENERAL ET AL. C. A. 1st Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Doar* and *Harold H. Greene* for respondents. Reported below: 338 F. 2d 989.

No. 912, Misc. SALINAS *v.* COX, WARDEN. Sup. Ct. N. M. Certiorari denied. Petitioner *pro se*. *Boston E. Witt*, Attorney General of New Mexico, and *Thomas A. Donnelly* and *Roy G. Hill*, Assistant Attorneys General, for respondent.

No. 947, Misc. WILSON *v.* ANDERSON, JAIL SUPERINTENDENT. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Acting Assistant Attorney General Doar* and *Harold H. Greene* for respondent.

No. 960, Misc. HODGE *v.* MARKLEY, WARDEN. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Acting Assistant Attorney General Doar* and *Harold H. Greene* for respondent. Reported below: 339 F. 2d 973.

No. 998, Misc. WELLS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Chester C. Shore* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States.

No. 1040, Misc. CARTER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 1046, Misc. CARRINGTON *v.* CIVIL AERONAUTICS BOARD ET AL. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Orrick, Lionel Kestenbaum, Joseph B. Goldman, O. D. Ozment* and *Robert L. Toomey* for respondents. Reported below: 337 F. 2d 913.

No. 1093, Misc. WALKER *v.* WILSON, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 1052, Misc. CUNNINGHAM *v.* MYERS, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 1058, Misc. HALYSHYN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *James J. Laughlin* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States.

Nos. 1078, Misc., and 1079, Misc. GOINS *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Petitioner *pro se*. *George F. McCanless,* Attorney General of Tennessee, and *Edgar P. Calhoun,* Assistant Attorney General, for respondent in No. 1078, Misc. *George F. McCanless,* Attorney General of Tennessee, and *Thomas E. Fox,* Assistant Attorney General, for respondent in No. 1079, Misc.

No. 1086, Misc. BORUSKI *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* and *Philip A. Loomis, Jr.,* for respondent.

No. 1094, Misc. JEFFERSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States. Reported below: 340 F. 2d 193.

No. 1095, Misc. BRONAUGH *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 1096, Misc. SEYMOUR *v.* WILKINS, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1119, Misc. WEINREICH *v.* WARDEN, MISSOURI PENITENTIARY. Sup. Ct. Mo. Certiorari denied.

No. 1097, Misc. FIRO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States. Reported below: 340 F. 2d 597.

No. 1100, Misc. CASTLE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Alan Y. Naftalin* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States.

No. 1105, Misc. LINDENMUTH *v.* PROTHONOTARY, CHESTER COUNTY, PENNSYLVANIA. Ct. Common Pleas, Pa., Chester County. Certiorari denied.

No. 1113, Misc. LINARES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States.

No. 1125, Misc. MADDOCK *v.* LEWIS ET AL. Sup. Ct. Mo. Certiorari denied. *Alan C. Kohn* for petitioner. *Harry H. Craig* for Lewis et al., and *John S. Marsalek* for Anheuser-Busch, Inc., respondents. Reported below: 386 S. W. 2d 406.

No. 1137, Misc. WOOD *v.* MAINE ET AL. Sup. Jud. Ct. Me. Certiorari denied. Petitioner *pro se*. *Richard J. Dubord,* Attorney General of Maine, and *John W. Benoit,* Assistant Attorney General, for respondents. Reported below: 161 Me. 87, 207 A. 2d 398.

No. 1152, Misc. GLINTON *v.* DENNO, WARDEN. C. A. 2d Cir. Certiorari denied. *James T. Sherwin* for petitioner. *Frank S. Hogan, H. Richard Uviller* and *Michael Juviler* for respondent. Reported below: 339 F. 2d 872.

No. 1118, Misc. GUNSTON *v.* UNITED STATES. Ct. Cl. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 1127, Misc. HACKATHORN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. *Fred S. Abney* and *Robert Power* for petitioner. *Henry Wade* for respondent.

No. 580, Misc. HALL *v.* PINTO, PRISON SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. Petitioner *pro se*. *Guy W. Calissi* for respondent.

Rehearing Denied.

No. 784. BATTEN *v.* UNITED STATES, 380 U. S. 912;

No. 900, Misc. LEMONS *v.* UNITED STATES, 380 U. S. 985;

No. 940, Misc. STREETER *v.* ILLINOIS, 380 U. S. 985; and

No. 1000, Misc. KIRBY *v.* UNITED STATES, *ante*, p. 906. Petitions for rehearing denied.

Dismissal Under Rule 60.

No. 1244, Misc. PURCELL *v.* COURT OF APPEALS OF ALABAMA. Motion for leave to file petition for writ of mandamus dismissed pursuant to Rule 60 of the Rules of this Court.

MAY 26, 1965.

Dismissal Under Rule 60.

No. 1150. TROY CO. *v.* PRODUCTS RESEARCH CO. C. A. 9th Cir. Petition for writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. *John B. Young* for petitioner. Reported below: 339 F. 2d 364.

JUNE 1, 1965.

Miscellaneous Orders.

No. 13, Original. TEXAS *v.* NEW JERSEY ET AL. (379 U. S. 674, 380 U. S. 518.) Motion for clarification and modification of opinion denied. *Arthur J. Sills,* Attorney General of New Jersey, *Alan B. Handler,* First Assistant Attorney General, and *Charles J. Kehoe,* Deputy Attorney General, on the motion.

No. 780. ROSENBLATT *v.* BAER. Sup. Ct. N. H. (Certiorari granted, 380 U. S. 941.) Motion of petitioner for leave to proceed further herein *in forma pauperis* denied. It is ordered that the case be heard on the typewritten record. *Conrad E. Snow* on the motion.

No. 906. UNITED STATES *v.* ADAMS ET AL. Ct. Cl. (Certiorari granted, 380 U. S. 949.) Further consideration of motion of respondents to dismiss writ of certiorari postponed to the hearing of the case on the merits. *John A. Reilly* on the motion.

No. 1190, Misc. SCHRUDER *v.* RHAY, PENITENTIARY SUPERINTENDENT, ET AL.;

No. 1199, Misc. CARUTH *v.* KELLER, DISTRICT ATTORNEY OF SAN DIEGO COUNTY, CALIFORNIA;

No. 1229, Misc. DORSEY *v.* KEARNEY, WARDEN;

No. 1237, Misc. STEWART *v.* MICHIGAN ET AL.;

No. 1259, Misc. DRAPER *v.* WASHINGTON ET AL.;

No. 1278, Misc. HERNANDEZ *v.* EYMAN, WARDEN;

No. 1288, Misc. HORNER *v.* FLORIDA;

No. 1295, Misc. SCHWARTZ *v.* KANSAS;

No. 1296, Misc. SHEPHERD *v.* BETO, CORRECTIONS DIRECTOR, ET AL.; and

No. 1301, Misc. BROWN *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Motions for leave to file petitions for writs of habeas corpus denied.

No. 1224, Misc. COTTOM *v.* CALIFORNIA ET AL.;

No. 1270, Misc. JOHNSON *v.* BURKE, WARDEN;

No. 1294, Misc. COPESTICK *v.* RHAY, PENITENTIARY SUPERINTENDENT;

No. 1302, Misc. HUNTER *v.* PRASSE, CORRECTIONAL COMMISSIONER, ET AL.; and

No. 1330, Misc. SELZ *v.* CALIFORNIA. 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. 1134, Misc. GOODSON *v.* UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT; and

No. 1227, Misc. EX PARTE GUY. Motions for leave to file petitions for writs of mandamus denied.

No. 968, Misc. WALKER *v.* SUPERIOR COURT OF CALIFORNIA, CITY AND COUNTY OF SAN FRANCISCO, ET AL. Motion for leave to file petition for writ of mandamus denied. THE CHIEF JUSTICE took no part in the consideration or decision of this motion.

No. 1147, Misc. RAY *v.* UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA. Motion for leave to file petition for writ of mandamus and for other relief denied.

No. 1170, Misc. BIGGS *v.* JUSTICES OF THE SUPREME COURT OF ILLINOIS ET AL. Motion for leave to file petition for writ of mandamus and/or prohibition denied.

Question as to Jurisdiction Postponed.

No. 1023. UNITED STATES *v.* GUEST ET AL. Appeal from D. C. M. D. Ga. Further consideration of question of jurisdiction postponed to hearing of case on merits. *Solicitor General Cox, Acting Assistant Attorney General Doar, Louis F. Claiborne, Harold H. Greene* and *Howard A. Glickstein* for the United States. *Charles J. Bloch* for appellee Lackey.

Certiorari Granted. (See also Nos. 950 and 951, *ante*, p. 413.)

No. 992. CONSOLO *v.* FEDERAL MARITIME COMMISSION ET AL. C. A. D. C. Cir. Certiorari granted. *William J. Lippman* and *Amy Scupi* for petitioner. *Solicitor General Cox, Assistant Attorney General Orrick, Irwin A. Seibel, Donald L. Hardison, Milan C. Miskovsky* and *Walter H. Mayo III* for the Federal Maritime Commission et al., and *Odell Kominers* for Flota Mercante Grancolombiana, S. A., respondents. Reported below: —— U. S. App. D. C. ——, 342 F. 2d 924.

No. 1157. HOLT ET AL. *v.* ALLEGHANY CORP. ET AL.; and

No. 1158. HOLT ET AL. *v.* KIRBY ET AL. C. A. 2d Cir. Certiorari granted. Cases consolidated and a total of two hours allotted for oral argument. *Stuart N. Updike* for petitioners. *Mark F. Hughes* and *Allan F. Conwill* for Alleghany Corp., and *Walter R. Mansfield* for Kirby et al., respondents. Reported below: No. 1157, 344 F. 2d 571; No. 1158, 340 F. 2d 311.

Certiorari Denied. (See also No. 1010, *ante*, p. 421; No. 934, Misc., *ante*, p. 411; No. 1158, Misc., *ante*, p. 411; and Misc. Nos. 1224, 1270, 1294, 1302 and 1330, *supra*.)

No. 246. NATIONAL BULK CARRIERS, INC. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Jacquin D. Bierman* for petitioner. *Solicitor General Cox* for the United States. Reported below: 331 F. 2d 407.

No. 1047. POWER AUTHORITY OF NEW YORK *v.* FEDERAL POWER COMMISSION. C. A. 2d Cir. Certiorari denied. *Thomas F. Moore, Jr.*, and *Stephen D. Finale* for petitioner. *Solicitor General Cox, Richard A. Solomon, Howard E. Wahrenbrock* and *Joseph Hobbs* for respondent. Reported below: 339 F. 2d 269.

No. 815. COMISARIA GENERAL DE ABASTECIMIENTOS Y TRANSPORTES *v.* VICTORY TRANSPORT INC. C. A. 2d Cir. Certiorari denied. *Arthur M. Becker* and *Harry Wallach* for petitioner. *Norman M. Barron* for respondent. *Solicitor General Cox, Assistant Attorney General Douglas, Morton Hollander* and *John C. Eldridge* for the United States, as *amicus curiae*. Reported below: 336 F. 2d 354.

No. 918. SUNSET REALTY CORP. *v.* TAX ASSESSOR OF LEE COUNTY, FLORIDA, ET AL. Dist. Ct. App. Fla., 2d Dist. Certiorari denied. *Thomas P. Ford* and *Arthur Norman Field* for petitioner. *Frank A. Pavese* for respondents. Reported below: 165 So. 2d 782, 783.

No. 968. SIMMONS *v.* WASHINGTON. Sup. Ct. Wash. Certiorari denied. Petitioner *pro se*. *Richard F. Broz* for respondent. Reported below: 65 Wash. 2d 88, 395 P. 2d 1013.

No. 1009. KEISER *v.* HARTMAN ET AL. C. A. 3d Cir. Certiorari denied. *Herman A. Adler* for petitioner. *Solicitor General Cox* for respondents. Reported below: 339 F. 2d 597.

No. 1017. INTERLAKE STEAMSHIP CO. *v.* NIELSEN ET AL. C. A. 6th Cir. Certiorari denied. *Thomas V. Koykka, McAlister Marshall* and *Robert B. Preston* for petitioner. *J. Harold Traverse* for Nielsen, and *Solicitor General Cox, Assistant Attorney General Douglas, Morton Hollander* and *David L. Rose* for O'Hearne, respondents. Reported below: 338 F. 2d 879.

No. 1040. BAXTER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *John F. Dugger* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 342 F. 2d 773.

No. 1039. KRUM *v.* MICHIGAN. Sup. Ct. Mich. Certiorari denied. *Charles C. Wickett* and *Andrew F. Oehmann* for petitioner. *Frank J. Kelley,* Attorney General of Michigan, *Robert A. Derengoski,* Solicitor General, and *James R. Ramsey,* Assistant Attorney General, for respondent. Reported below: 374 Mich. 356, 132 N. W. 2d 69.

No. 1050. BEH *v.* CITY OF WEST DES MOINES. Sup. Ct. Iowa. Certiorari denied. *David W. Belin* for petitioner. *Jack R. Hall* for respondent. Reported below: —— Iowa ——, 131 N. W. 2d 488.

No. 1053. RANDALL ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *William C. Jordan* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Melva M. Graney* and *David I. Granger* for respondent. Reported below: 338 F. 2d 924.

No. 1055. COX, U. S. DISTRICT JUDGE *v.* HAUBERG, U. S. ATTORNEY, ET AL. C. A. 5th Cir. Certiorari denied. *Earl T. Thomas, L. Arnold Pyle* and *Garner W. Green, Sr.,* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas, Morton Hollander* and *David L. Rose* for respondents. Reported below: 342 F. 2d 167.

No. 1059. LAURENCE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Joseph J. Lyman* and *Jacob A. Stein* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 341 F. 2d 565.

No. 1074. MCGREGOR *v.* VIRGINIA. Sup. Ct. App. Va. Certiorari denied. *Edward Stehl III* and *Quinlan H. Hancock* for petitioner.

No. 1060. DISTRICT OF COLUMBIA FOR THE USE AND BENEFIT OF CAPITAL LIGHTING & SUPPLY INC. *v.* MERANDO INC. ET AL. C. A. D. C. Cir. Certiorari denied. *Irwin S. Landau* and *I. Irwin Bolotin* for petitioner.

No. 1061. GROSH ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *E. Barrett Prettyman, Jr.*, and *Charles W. Halleck* for petitioners. *Solicitor General Cox, Acting Assistant Attorney General Vinson, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 342 F. 2d 141.

No. 1063. ESPEY *v.* LAUGHLIN. C. A. D. C. Cir. Certiorari denied.

No. 1066. POSTER EXCHANGE, INC. *v.* PARAMOUNT FILM DISTRIBUTING CORP. ET AL. C. A. 5th Cir. Certiorari denied. *Francis T. Anderson* for petitioner. *Robert S. Sams* for Paramount Film Distributing Corp., et al., and *Louis Nizer* for National Screen Service Corp., respondents. Reported below: 340 F. 2d 320.

No. 1067. W. M. R. WATCH CASE CORP. ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. D. C. Cir. Certiorari denied. *B. Paul Noble* for petitioners. *Solicitor General Cox, Assistant Attorney General Orrick, Lionel Kestenbaum, Jerry Pruzansky, James McI. Henderson* and *Lester Klaus* for respondent. Reported below: —— U. S. App. D. C. ——, 343 F. 2d 302.

No. 1068. I-T-E CIRCUIT BREAKER CO. *v.* CITY OF PHILADELPHIA ET AL. C. A. 3d Cir. Certiorari denied. *Philip Price* and *Raymond W. Midgett, Jr.*, for petitioner. *Harold E. Kohn* and *Aaron M. Fine* for City of Philadelphia et al., respondents.

No. 1071. SHUPE *v.* NEW YORK CENTRAL SYSTEM. C. A. 7th Cir. Certiorari denied. *John J. Milano* for petitioner. *George B. Christensen* for respondent. Reported below: 339 F. 2d 998.

No. 1075. BRUCKER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *T. N. Petersen* and *Eugene Gressman* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas, Morton Hollander* and *David L. Rose* for the United States. Reported below: 338 F. 2d 427.

No. 1076. DEANE HILL COUNTRY CLUB, INC., ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *William Earl Badgett* for petitioners. *Solicitor General Cox, Acting Assistant Attorney General Vinson, Beatrice Rosenberg* and *Marshall Tamor Golding* for the United States. Reported below: 342 F. 2d 794.

No. 1012. CALIFORNIA *v.* DORADO. Sup. Ct. Cal. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *Arlo E. Smith,* Chief Assistant Attorney General, and *Albert W. Harris, Jr.,* and *Michael R. Marron,* Deputy Attorneys General, for petitioner. *William Klein* for respondent. Reported below: 62 Cal. 2d 338, 398 P. 2d 361.

No. 1078. HEININGER *v.* DEPARTMENT OF REGISTRATION & EDUCATION OF ILLINOIS ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. *Robert A. Sprecher* for petitioner. *William G. Clark,* Attorney General of Illinois, and *Richard A. Michael* and *Edward A. Berman,* Assistant Attorneys General, for Department of Registration & Education of Illinois et al., and *Owen Rall* for Stephens, respondents. Reported below: 53 Ill. App. 2d 182, 202 N. E. 2d 865.

No. 1077. LEVY *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *Samuel Lawrence Brennglass* for petitioner. *Frank S. Hogan* and *H. Richard Uviller* for respondent. Reported below: 15 N. Y. 2d 159, 204 N. E. 2d 842.

No. 1079. WESTERN RADIO CORP. ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. 7th Cir. Certiorari denied. *Charles Rowan* for petitioners. *Solicitor General Cox, Assistant Attorney General Orrick, Robert B. Hummel, James McI. Henderson* and *Charles C. Moore, Jr.*, for respondent. Reported below: 339 F. 2d 937.

No. 1080. LUKASIK *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Anna R. Lavin* and *Edward J. Calihan, Jr.*, for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 341 F. 2d 325.

No. 1088. LOMBARDOZZI ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *William Sonenshine* for petitioners. *Solicitor General Cox, Acting Assistant Attorney General Vinson, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 343 F. 2d 127.

No. 1095. QUAGLIATO ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *David H. Finkle* for petitioners. *Solicitor General Cox, Acting Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 343 F. 2d 533.

No. 790, Misc. STEVENSON *v.* WILKINS, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1106. RATKE ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Milton A. Bass* and *Solomon H. Friend* for petitioners. *Solicitor General Cox, Acting Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States.

No. 1156. UNITED STATES FOR THE USE AND BENEFIT OF ROBERTSON LUMBER CO. *v.* CONTINENTAL CASUALTY CO. ET AL. C. A. 8th Cir. Certiorari denied. *Harold D. Shaft* for petitioner. *Thomas L. Degnan* for respondents. Reported below: 340 F. 2d 958.

No. 715, Misc. CHASE ET AL. *v.* MCCAIN ET AL. C. A. 4th Cir. Certiorari denied. *Arthur Kinoy, William M. Kunstler, Samuel W. Tucker, J. L. Williams* and *Harry I. Wood* for petitioners. *Rutledge C. Clement* and *John W. Carter* for respondents. Reported below: 337 F. 2d 579.

No. 845, Misc. SCHUMAN *v.* CALIFORNIA ET AL. Sup. Ct. Cal. Certiorari denied. Petitioner *pro se*. *Thomas C. Lynch*, Attorney General of California, *Doris H. Maier*, Assistant Attorney General, and *Raymond M. Momboisse*, Deputy Attorney General, for respondents.

No. 927, Misc. COOK *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 340 F. 2d 959.

No. 993, Misc. HAIRSTON *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Sup. Ct. Fla. Certiorari denied.

No. 1047, Misc. GOLDBERG *v.* OFFICE EMPLOYES INTERNATIONAL UNION, LOCAL 153, ET AL. Ct. App. N. Y. Certiorari denied.

No. 967, Misc. BARKAN *v.* UNITED STATES. C. A. 10th 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: 341 F. 2d 95.

No. 992, Misc. CONLAN *v.* HASKINS, CORRECTIONAL SUPERINTENDENT. Sup. Ct. Ohio. Certiorari denied. *Walter S. Haffner* for petitioner. Reported below: 177 Ohio St. 65, 202 N. E. 2d 419.

No. 995, Misc. FEYRER *v.* BOLDT, U. S. DISTRICT JUDGE, ET AL. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Doar* and *Harold H. Greene* for respondents.

No. 997, Misc. MURRAY ET AL. *v.* MARYLAND. Ct. App. Md. Certiorari denied. *Leonard J. Kerpelman* for petitioners. Reported below: 236 Md. 375, 381, 203 A. 2d 908, 912.

No. 1009, Misc. DI PALERMO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Philip R. Monahan* for the United States. Reported below: 340 F. 2d 988.

No. 1048, Misc. SANCHEZ *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States. Reported below: 341 F. 2d 379.

No. 1065, Misc. GLOUSER ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioners *pro se*. *Solicitor General Cox, Acting Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 340 F. 2d 436.

No. 1055, Misc. HILBRICH *v.* UNITED STATES; and No. 1159, Misc. USELDING *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *George L. Saunders, Jr.*, for petitioner in No. 1055, Misc. *James E. Knox, Jr.*, for petitioner in No. 1159, Misc. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 341 F. 2d 555.

No. 1060, Misc. POPE *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. 1067, Misc. WORLEY *v.* HAYNES, PRISON SUPERINTENDENT. Sup. Ct. Mo. Certiorari denied.

No. 1068, Misc. HALL *v.* CROUSE, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 339 F. 2d 316.

No. 1073, Misc. JEFFERSON *v.* MCGEE, CORRECTIONAL ADMINISTRATOR, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 1074, Misc. JAMES *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. *Earl E. Leming* for petitioner. *George F. McCanless*, Attorney General of Tennessee, and *Thomas E. Fox*, Assistant Attorney General, for respondent. Reported below: —— Tenn. ——, 385 S. W. 2d 86.

No. 1084, Misc. CARBONE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Acting Assistant Attorney General Vinson, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 341 F. 2d 4.

No. 1098, Misc. DOUGLAS *v.* RHAY, PENITENTIARY SUPERINTENDENT. Super. Ct. Wash., Walla Walla County. Certiorari denied.

No. 1103, Misc. IN RE SCHAWARTZBERG. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 1110, Misc. BELLITTO ET AL. *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Petitioners *pro se*. *John T. Corrigan* for respondent.

No. 1112, Misc. FERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Acting Assistant Attorney General Vinson, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 341 F. 2d 565.

No. 1114, Misc. HOERLER *v.* HEINZE, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 1116, Misc. EVANS *v.* BOARD OF EMBALMERS & FUNERAL DIRECTORS OF OHIO. Sup. Ct. Ohio. Certiorari denied. *John H. Bustamante* for petitioner.

No. 1120, Misc. GANGER *v.* VIRGINIA. Sup. Ct. App. Va. Certiorari denied.

No. 1126, Misc. SMITH *v.* CRAIN BROTHERS, INC. C. A. 3d Cir. Certiorari denied. *Louis C. Glasso* for petitioner. *Carl E. Glock* for respondent. Reported below: 339 F. 2d 599.

No. 1129, Misc. MADISON *v.* MAXWELL, WARDEN. Sup. Ct. Ohio. Certiorari denied. *William J. Davis* for petitioner. Reported below: 177 Ohio St. 84, 202 N. E. 2d 617.

No. 1122, Misc. CLARK *v.* PAYNE. C. A. 3d Cir. Certiorari denied.

No. 1128, Misc. BORUSKI *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* and *Philip A. Loomis, Jr.*, for respondent. Reported below: 340 F. 2d 991.

No. 1130, Misc. NELMS *v.* UNITED STATES. Ct. Cl. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States. Reported below: —— Ct. Cl. ——.

No. 1133, Misc. HAIRSTON *v.* MYERS, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 1135, Misc. MALLORY *v.* MYERS, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 1136, Misc. WATSON *v.* COMMERCIAL CREDIT CORP. ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 341 F. 2d 915.

No. 1138, Misc. AZZONE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 341 F. 2d 417.

No. 1144, Misc. FRANCIS *v.* BROWN, GOVERNOR OF CALIFORNIA, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 1145, Misc. CORONADO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States. Reported below: 341 F. 2d 918.

No. 1149, Misc. O'NEILL *v.* RUNDLE, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 341 F. 2d 303.

No. 1150, Misc. MACFADDEN *v.* HEINZE, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 1153, Misc. CARTER *v.* HARRIS, WARDEN. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for respondent.

No. 1154, Misc. BORUSKI *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* and *Philip A. Loomis, Jr.*, for respondent. Reported below: 340 F. 2d 991.

No. 1160, Misc. CARROLL *v.* EYMAN, WARDEN, ET AL. Sup. Ct. Ariz. Certiorari denied.

No. 1161, Misc. HERRING *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 1164, Misc. HOWARD *v.* COLORADO. Sup. Ct. Colo. Certiorari denied.

No. 1174, Misc. BLAKE *v.* HEINZE, WARDEN, ET AL. Sup. Ct. Cal. Certiorari denied.

No. 1176, Misc. FORESTER ET UX. *v.* TEXAS & PACIFIC RAILWAY CO. C. A. 5th Cir. Certiorari denied. *Otto B. Mullinax* and *L. N. D. Wells, Jr.*, for petitioners. *Lucian Touchstone* for respondent. Reported below: 338 F. 2d 970.

No. 1186, Misc. HEARD *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied.

No. 1177, Misc. HEADRICK *v.* ILLINOIS. App. Ct. Ill., 2d Dist. Certiorari denied. *John R. Snively* for petitioner. Reported below: 54 Ill. App. 2d 44, 203 N. E. 2d 157.

No. 1191, Misc. DUNN *v.* UNITED STATES; and
No. 1256, Misc. LUCIANO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioners *pro se*. *Solicitor General Cox, Acting Assistant Attorney General Vinson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 343 F. 2d 172.

No. 1193, Misc. ROBINSON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 341 F. 2d 379.

No. 1196, Misc. FINLEY *v.* HEINZE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 1197, Misc. McMORRIS *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF SACRAMENTO, APPELLATE DEPARTMENT, ET AL. Dist. Ct. App. Cal., 3d App. Dist. Certiorari denied. *S. Carter McMorris* for petitioner.

No. 1201, Misc. LANDMAN *v.* MARSHALL, JUDGE, ET AL. Sup. Ct. App. Va. Certiorari denied.

No. 1203, Misc. MEYER *v.* KLINGER, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 1205, Misc. WILLIAMS *v.* FAY, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1206, Misc. GONZALES *v.* COLORADO. Sup. Ct. Colo. Certiorari denied. Reported below: 156 Colo. —, 398 P. 2d 236.

No. 1207, Misc. NEWKIRK *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 1208, Misc. LAWSON *v.* KENTUCKY. Ct. App. Ky. Certiorari denied. Reported below: 386 S. W. 2d 734.

No. 1213, Misc. SILVERMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 1214, Misc. COOPER *v.* MARONEY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 1219, Misc. POMPEY *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. *Irving Bronstein* for petitioner.

No. 1230, Misc. CAMPBELL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 1252, Misc. BLAND *v.* MARYLAND. Ct. App. Md. Certiorari denied. Reported below: 236 Md. 652, 205 A. 2d 237.

No. 1258, Misc. BRUCE *v.* HOGAN, DISTRICT ATTORNEY OF NEW YORK COUNTY, ET AL. C. A. 2d Cir. Certiorari denied. *Edward de Grazia* and *Ernst Liebman* for petitioner. *Frank S. Hogan* and *William Cahn*, respondents, *pro se*.

No. 1253, Misc. GREEN *v.* RUNDLE, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 337 F. 2d 1013.

No. 1264, Misc. DORADO *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. *William Klein* for petitioner. Reported below: 62 Cal. 2d 338, 398 P. 2d 361.

No. 1251, Misc. JOHNSON *v.* CALIFORNIA. Dist. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 1255, Misc. DEMOSS *v.* HEINZE, WARDEN. Sup. Ct. Cal. Certiorari denied.

No. 1303, Misc. POULSON *v.* UTAH. Sup. Ct. Utah. Certiorari denied. Reported below: 16 Utah 2d 151, 397 P. 2d 70.

No. 1106, Misc. MCINTOSH *v.* UNITED STATES. C. A. 8th Cir. Certiorari and other relief denied. Petitioner *pro se*. *Solicitor General Cox, Acting Assistant Attorney General Vinson* and *Beatrice Rosenberg* for the United States. Reported below: 341 F. 2d 448.

Rehearing Denied.

No. 839. SMITH *v.* LOUISVILLE TRUST CO. ET AL., ADMINISTRATORS, 380 U. S. 943;

No. 879. BISHOP ET AL. *v.* OHIO, 380 U. S. 973; and

No. 1027, Misc. VINCENT *v.* UNITED STATES, 380 U. S. 988. Petitions for rehearing denied.

JUNE 7, 1965.

Miscellaneous Orders.

No. 14, Original. LOUISIANA *v.* MISSISSIPPI ET AL. The Report of the Special Master is received and ordered filed. Exceptions, if any, with supporting briefs, to the Report of the Special Master may be filed by the parties on or before August 25, 1965. Reply briefs, if any, to such exceptions may be filed on or before September 24, 1965. [For earlier orders herein, see 375 U. S. 803, 950; 377 U. S. 901.]

773-305 O-65-56

No. 13, Original. TEXAS *v.* NEW JERSEY ET AL. (379 U. S. 674, 380 U. S. 518, *ante*, p. 931.) Motion of State of New Jersey for modification of final decree denied. *Arthur J. Sills*, Attorney General of New Jersey, *Alan B. Handler*, First Assistant Attorney General, and *Charles J. Kehoe*, Deputy Attorney General, on the motion.

No. 515, Misc. MILNE *v.* MILNE. Ct. App. Md. The Attorney General of the State of Maryland is invited to file a brief expressing the views of the State of Maryland.

No. 147, Misc. BELTOWSKI *v.* TAHASH, WARDEN. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for a writ of certiorari, certiorari is denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS dissent from the denial of certiorari for the reasons stated in their dissenting opinion in *Linkletter* v. *Walker*, *ante*, p. 640. Petitioner *pro se*. *Walter F. Mondale*, Attorney General of Minnesota, and *Charles E. Houston*, Special Assistant Attorney General, for respondent.

No. 1038, Misc. IN RE BLEVINS. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for a writ of certiorari, certiorari is denied. Petitioner *pro se*. *Thomas C. Lynch*, Attorney General of California, and *Albert W. Harris, Jr.*, and *Michael R. Marron*, Deputy Attorneys General, for the State of California.

No. 1308, Misc. LEAF *v.* INDIAN CLAIMS COMMISSION. Motion for leave to file petition for writ of mandamus denied. Petitioner *pro se*. *Solicitor General Cox, Acting Assistant Attorney General Weisl* and *Roger P. Marquis* for respondent.

Probable Jurisdiction Noted.

No. 1054. BROTHERHOOD OF LOCOMOTIVE ENGINEERS ET AL. *v.* CHICAGO, ROCK ISLAND & PACIFIC RAILROAD CO. ET AL.; and

No. 1070. HARDIN ET AL. *v.* CHICAGO, ROCK ISLAND & PACIFIC RAILROAD CO. ET AL. Appeals from D. C. W. D. Ark. Probable jurisdiction noted. Cases consolidated and a total of two hours allotted for oral argument. *James E. Youngdahl* for appellants in No. 1054. *Bruce Bennett,* Attorney General of Arkansas, and *Jack L. Lessenberry* for appellants in No. 1070. *Robert V. Light, Thurman Arnold, Dennis G. Lyons, W. J. Smith* and *H. H. Friday* for appellees in both cases. Reported below: 239 F. Supp. 1.

Certiorari Granted. (See also No. 45, *ante,* p. 760; No. 321, *ante,* p. 761; No. 635, *ante,* p. 739; Nos. 1024 and 1025, *ante,* p. 762; and No. 884, Misc., *ante,* p. 763.)

No. 838, Misc. BAXSTROM *v.* HEROLD, STATE HOSPITAL DIRECTOR. Ct. App. N. Y. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari granted. Case transferred to the appellate docket. Petitioner *pro se. Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *Anthony J. Lokot,* Assistant Attorney General, for respondent.

Certiorari Denied. (See also No. 1082, *ante,* p. 760; and Misc. Nos. 147 and 1038, *supra.*)

No. 39. PENNINGTON ET AL. *v.* LEWIS ET AL., TRUSTEES. C. A. 6th Cir. Certiorari denied. *John A. Rowntree* for petitioners. *Val J. Mitch, Harold H. Bacon, R. R. Kramer, E. H. Rayson* and *M. E. Boiarsky* for respondents. Reported below: 325 F. 2d 804.

No. 1062. COLE ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Edward Bennett Williams* and *Seymour B. Goldfeld* for petitioners. *Solicitor General Cox, Acting Assistant Attorney General Jones* and *Joseph M. Howard* for the United States. Reported below: 342 F. 2d 5.

No. 1089. RALSTON STEEL CORP., ASSIGNEE *v.* UNITED STATES. Ct. Cl. Certiorari denied. *Max A. Reinstein* for petitioner. *Solicitor General Cox* for the United States. Reported below: —— Ct. Cl. ——, 340 F. 2d 663.

No. 1091. COOK *v.* REPUBLIC STEEL CORP. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Mathias J. DeVito* for respondent. Reported below: 340 F. 2d 318.

No. 1092. WILLIAMSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *James P. Coleman* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 340 F. 2d 612.

No. 1093. TENNESSEE GAS TRANSMISSION CO. *v.* FEDERAL POWER COMMISSION. C. A. 10th Cir. Certiorari denied. *W. C. Braden, Jr., B. J. Williamson* and *Stanley M. Morley* for petitioner. *Solicitor General Cox, Richard A. Solomon, Howard E. Wahrenbrock, Robert L. Russell* and *Peter H. Schiff* for respondent. Reported below: 340 F. 2d 100.

No. 1096. HAIR INDUSTRY, LTD., ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Nicholas Atlas* and *Anthony H. Atlas* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Joseph M. Howard* and *Burton Berkley* for the United States. Reported below: 340 F. 2d 510.

No. 1097. EASTERN DIE CO. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 1st Cir. Certiorari denied. *Henry Friedman* for petitioner. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 340 F. 2d 607.

No. 1105. KOOLISH ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Albert E. Jenner, Jr.,* for petitioners. *Solicitor General Cox, Acting Assistant Attorney General Vinson, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 340 F. 2d 513.

No. 1129. DIVERSIFIED DEVELOPMENT CORP. ET AL. *v.* SECURITY TRUST CO. C. A. 7th Cir. Certiorari denied. *Gordon Burroughs* for petitioners. *William H. Armstrong* and *Robert Broderick* for respondent. Reported below: 341 F. 2d 58.

No. 1184. SPARBER *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. *Maurice Edelbaum* for petitioner. *Frank S. Hogan* and *H. Richard Uviller* for respondent.

No. 442. LAVALLEE ET AL. *v.* CARAFAS ET AL. C. A. 2d Cir. Motion of respondents Wilson and West for leave to proceed *in forma pauperis* granted. Certiorari denied. *Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, *Barry Mahoney,* Assistant Attorney General, and *Brenda Soloff,* Deputy Assistant Attorney General, for petitioners. *Leon B. Polsky* for Wilson et al., respondents. Reported below: 334 F. 2d 331; 335 F. 2d 230.

No. 827, Misc. WRIGHT *v.* MYERS, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 1131. AIRLINE PILOTS ASSOCIATION, INTERNATIONAL *v.* CAPITOL AIRWAYS, INC. C. A. 6th Cir. Certiorari denied. *Cecil D. Branstetter* and *Harry Noe* for petitioner. *Judson Harwood* for respondent. Reported below: 341 F. 2d 288.

No. 180, Misc. FORD *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Petitioner *pro se*. *Frank S. Hogan* for respondent.

No. 400, Misc. DRAPER *v.* MARYLAND. Ct. App. Md. Certiorari denied. Petitioner *pro se*. *Thomas B. Finan*, Attorney General of Maryland, and *R. Randolph Victor*, Assistant Attorney General, for respondent. Reported below: 235 Md. 641, 201 A. 2d 496.

No. 678, Misc. ADAMS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: —— U. S. App. D. C. ——, 337 F. 2d 548.

No. 743, Misc. LLOYD *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Morris Kanfer* and *Alvin O. West* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: —— U. S. App. D. C. ——, 343 F. 2d 242.

No. 933, Misc. TUCKER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States. Reported below: —— U. S. App. D. C. ——, 343 F. 2d 305.

No. 835, Misc. HERNANDEZ *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Petitioner *pro se*. *Thomas C. Lynch*, Attorney General of California, *Doris H. Maier*, Assistant Attorney General, and *Daniel J. Kremer*, Deputy Attorney General, for respondent.

No. 853, Misc. RANDAZZO *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 15 N. Y. 2d 526, 202 N. E. 2d 549.

No. 885, Misc. MADISON *v.* NORTH CAROLINA. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Thomas Wade Bruton*, Attorney General of North Carolina, and *Theodore C. Brown, Jr.*, for respondent.

No. 890, Misc. CASTLE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. *Monroe H. Freedman* and *David Carliner* for the National Capital Area Civil Liberties Union, as *amicus curiae*, in support of the petition.

No. 901, Misc. CORTEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 337 F. 2d 699.

No. 1071, Misc. MURPHY *v.* MAXWELL, WARDEN. Sup. Ct. Ohio. Certiorari denied. Reported below: 177 Ohio St. 174, 203 N. E. 2d 233.

No. 1076, Misc. SUMPTER *v.* NEW YORK. Ct. App. N. Y. Certiorari denied.

No. 924, Misc. HICKOK *v.* CALIFORNIA. Dist. Ct. App. Cal., 1st App. Dist. Certiorari denied. Petitioner *pro se.* *Thomas C. Lynch,* Attorney General of California, and *Albert W. Harris, Jr.,* and *John F. Kraetzer,* Deputy Attorneys General, for respondent.

No. 966, Misc. WARE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States.

Nos. 979, Misc., and 990, Misc. SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioners *pro se.* *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 340 F. 2d 126.

No. 1121, Misc. WHITE *v.* CROUSE, WARDEN. Sup. Ct. Kan. Certiorari denied. *Charles S. Scott* for petitioner. Reported below: 193 Kan. 674, 396 P. 2d 333.

No. 415, Misc. EASTMAN *v.* FAY, WARDEN. C. A. 2d Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted and the judgment reversed for the reasons stated in their dissenting opinion in *Linkletter* v. *Walker, ante,* p. 640. *Leon B. Polsky* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, *Barry Mahoney,* Assistant Attorney General, and *Brenda Soloff,* Deputy Assistant Attorney General, for respondent. Reported below: 333 F. 2d 28.

No. 1183, Misc. MOUNT *v.* PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. *Stephen M. Feldman* for petitioner. Reported below: 416 Pa. 343, 205 A. 2d 924.

No. 975, Misc. JONES *v.* VIRGINIA. Sup. Ct. App. Va. Certiorari denied. *Robert Lee Watt* and *Robert L. Murphy* for petitioner. *Ralph G. Louk* and *Donald C. Crounse* for respondent.

No. 373, Misc. CARNEY *v.* LAVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted and the judgment reversed for the reasons stated in their dissenting opinion in *Linkletter* v. *Walker*, *ante*, p. 640. Petitioner *pro se*. *Louis J. Lefkowitz*, Attorney General of New York, *Paxton Blair*, Solicitor General, and *Barry Mahoney*, Assistant Attorney General, for respondent.

No. 612, Misc. BERMAN *v.* FAY, WARDEN. C. A. 2d Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted and the judgment reversed for the reasons stated in their dissenting opinion in *Linkletter* v. *Walker*, *ante*, p. 640. Petitioner *pro se*. *Frank S. Hogan* for respondent.

No. 513, Misc. CRAWFORD *v.* BANNAN, WARDEN. C. A. 6th Cir. Certiorari and other relief denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted and the judgment reversed for the reasons stated in their dissenting opinion in *Linkletter* v. *Walker*, *ante*, p. 640. Petitioner *pro se*. *Frank J. Kelley*, Attorney General of Michigan, *Robert A. Derengoski*, Solicitor General, and *James R. Ramsey*, Assistant Attorney General, for respondent. *Erwin Ellmann* for the American Civil Liberties Union of Michigan, as *amicus curiae*, in support of the petition. Reported below: 336 F. 2d 505.

No. 1169, Misc. ROBERTS *v.* NEW YORK. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. *Douglas A. Jacobsen* for petitioner.

No. 748, Misc. SOUTHERLAND *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied without prejudice to an application for a writ of habeas corpus in the appropriate United States District Court. *Chester E. Wallace* for petitioner. *Eugene Cook*, Attorney General of Georgia, and *Peyton S. Hawes, Jr.*, and *Alfred L. Evans, Jr.*, Assistant Attorneys General, for respondent.

Rehearing Denied.

No. 123. FEDERAL POWER COMMISSION *v.* UNION ELECTRIC CO., *ante*, p. 90;

No. 363. SIMONS *v.* MIAMI BEACH FIRST NATIONAL BANK, EXECUTOR, *ante*, p. 81;

No. 871. CAUER ET AL. *v.* BRENNER, COMMISSIONER OF PATENTS, 380 U. S. 953;

No. 899. MURPHY OIL CORP. *v.* UNITED STATES, 380 U. S. 979;

No. 924. ALLEGRETTI *v.* UNITED STATES, *ante*, p. 911;

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No. 991. SUMMERLIN *v.* UNITED STATES, *ante*, p. 903;

No. 1013. SCHWARTZ *v.* TANNER, *ante*, p. 904;

No. 1094. ATWOOD ET AL. *v.* HUMBLE OIL & REFINING CO., *ante*, p. 926; and

No. 237, Misc. STEPHENS *v.* TEXAS, 380 U. S. 980. Petitions for rehearing denied.

No. 481, Misc. BRADY *v.* OHIO, *ante*, p. 904;

No. 932, Misc. FERGUSON *v.* GEORGIA, *ante*, p. 905;

No. 982, Misc. EVANS *v.* KATZENBACH, ATTORNEY GENERAL, ET AL., *ante*, p. 920;

No. 994, Misc. ALLEN *v.* HOFFIUS ET AL., *ante*, p. 274; and

No. 1050, Misc. SANTOS *v.* CALIFORNIA, *ante*, p. 919. Petitions for rehearing denied.

No. 202. GRIFFIN *v.* CALIFORNIA, 380 U. S. 609. Petition for rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition.

No. 677, Misc. LAWSON *v.* UNITED STATES, 380 U. S. 919, 989. Motion for leave to file second petition for rehearing denied.

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF, AND REMAINING ON DOCKETS AT CONCLUSION OF OCTOBER TERMS—1962, 1963, AND 1964

	ORIGINAL			APPELLATE			MISCELLANEOUS			TOTALS		
Terms	1962	1963	1964	1962	1963	1964	1962	1963	1964	1962	1963	1964
Number of cases on dockets	15	9	11	1, 182	1, 238	1, 247	1, 627	1, 532	1, 404	2, 824	2, 779	2, 662
Number disposed of during terms	7	2	2	972	1, 036	1, 027	1, 371	1, 374	1, 151	2, 350	2, 412	2, 180
Number remaining on dockets	8	7	9	210	202	220	256	158	253	474	367	482

	TERMS		
	1962	1963	1964
Distribution of cases disposed of during terms:			
Original cases	7	2	2
Appellate cases on merits	282	303	236
Petitions for certiorari	690	733	791
Miscellaneous docket applications	1, 371	1, 374	1, 151

	TERMS		
	1962	1963	1964
Distribution of cases remaining on dockets:			
Original cases	8	7	9
Appellate cases on merits	108	81	86
Petitions for certiorari	102	121	134
Miscellaneous docket applications	256	158	253

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1. *Antitrust laws as guidelines—Business justification.*—Violations of § 5 of the Federal Trade Commission Act consist of conduct contrary to the public policy declared in the Act, and the FTC may use as guidelines recognized violations of the antitrust laws; and the FTC is justified in refusing to consider evidence of business justification for a program which has widespread destructive effect on competition. Atlantic Rfg. Co. v. FTC, p. 357.

2. *Remand of order—Disqualification of Chairman.*—Judgment of Court of Appeals setting aside an FTC order on grounds that the Chairman was disqualified for prejudging the case and the order was not supported by substantial evidence is remanded for further proceedings by the FTC, without participation of the Chairman. FTC v. Texaco, p. 739.

FEDERAL TRADE COMMISSION—Continued.

3. *Sales-commission plan—Gasoline dealers—Automobile accessories.*—There was substantial evidence to support the FTC's findings that sales-commission plan used by gasoline distributor and tire manufacturer to sell latter's products through the former's dealers was unfair use of economic power in one market to destroy competition in another. Atlantic Rfg. Co. v. FTC, p. 357.

4. *Unfair competition—Prohibition of future agreements.*—FTC's order prohibiting each petitioner from entering into similar agreements is not unreasonable in view of long existence of plan resulting in unfair competition, active participation of the parties, and coercion of dealers. Atlantic Rfg. Co. v. FTC, p. 357.

FIFTH AMENDMENT. See **Constitutional Law**, III, 3; **Immigration and Nationality Act of 1952**; **Jurisdiction**, 2; **Passports.**

FILLING STATIONS. See **Federal Trade Commission**, 1–4; **Judicial Review**, 2.

FINAL JUDGMENTS. See **Constitutional Law**, VI.

FIRST AMENDMENT. See **Constitutional Law**, IV; **Procedure**, 2.

FLORIDA. See **Constitutional Law**, V; **Dower**; **Jurisdiction**, 1.

FOREIGN MAIL. See **Constitutional Law**, IV.

FOURTEENTH AMENDMENT. See **Constitutional Law**, III; **Contempt of Court**; **Procedure**, 2; **Reapportionment.**

FOURTH AMENDMENT. See **Constitutional Law**, VI.

FREEDOM OF SPEECH. See **Procedure**, 2.

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FULL FAITH AND CREDIT CLAUSE. See **Constitutional Law**, V; **Dower.**

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ILLINOIS. See **Reapportionment.**

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Passports—Travel in violation of an area restriction.—Adjudication of the reach and constitutionality of § 215 (b) of the Act as applied to travel in violation of an area restriction must await a concrete factual situation. Zemel v. Rusk, p. 1.

INCOME. See **Insurance Companies; Merchant Ship Sales Act of 1946.**

INCOME TAXES. See **Commissioner of Internal Revenue; Taxes.**

INDICTMENT. See **Statute of Limitations.**

INLAND WATERS. See **Accretion; Submerged Lands Act of 1953.**

INSURANCE COMPANIES.

Investment income—Tax-exempt interest—Pro rata allocation.—There is no statutory or constitutional barrier to the application of the pro rata formula of the Life Insurance Company Income Tax Act of 1959 allocating all income including tax-exempt interest between the policyholders' share for reserves and the company's share. United States v. Atlas Ins. Co., p. 233.

INTEREST. See **Insurance Companies; Taxes.**

INTERNAL REVENUE CODE. See **Commissioner of Internal Revenue; Statute of Limitations; Taxes.**

INTERSTATE COMMERCE. See **Federal Power Act.**

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JUDGES. See **Constitutional Law,** III, 1; **Contempt of Court.**

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JUDICIAL CANONS. See **Constitutional Law,** III, 2.

JUDICIAL REVIEW. See also **Federal Communications Commission.**

1. *Administrative rule-making—Judicial responsibility.*—District courts, in reviewing administrative rule-making, are not empowered to substitute their judgment for that of the agency; their responsibility is limited to insuring consistency with governing statutes and the demands of the Constitution. FCC v. Schreiber, p. 279.

2. *Federal Trade Commission—Unfair competition—Function of courts.*—Where Congress has empowered the FTC to determine

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whether methods of competition are unfair, the function of the courts is to determine whether the FTC's decision is warranted by the record and has a reasonable basis in law. Atlantic Rfg. Co. v. FTC, p. 357.

JURISDICTION. See also **Administrative Procedure; Constitutional Law,** II; III, 3–4; **Immigration and Nationality Act of 1952; Natural Gas Act; Passports.**

1. *Supreme Court—Minor procedural defect does not bar review.*—Minor procedural defect which petitioners tried to correct does not constitute an adequate independent state ground for decision barring review by this court. Parrot v. City of Tallahassee, p. 129.

2. *District Courts—Three-judge court.*—Since the complaint launched a substantial constitutional attack on federal statutes and prayed that their operation be enjoined, a three-judge court was properly convened. Zemel v. Rusk, p. 1.

LABOR. See also **Antitrust Acts,** 2.

1. *Collective bargaining agreement—Antitrust laws.*—An agreement between the unions and large coal mine operators to secure uniform labor standards throughout the industry would not be exempt from the antitrust laws. Mine Workers v. Pennington, p. 657.

2. *Collective bargaining agreement—Sherman Act exemption.*—The holding of the Court of Appeals that a conspiracy in restraint of trade was shown by actions of unions and retail food store association in limiting the marketing hours for the sale of fresh meat is reversed. Meat Cutters v. Jewel Tea, p. 677.

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959. See **Constitutional Law,** I.

LABOR ORGANIZATION. See **Constitutional Law,** I.

LEASES. See **Administrative Procedure; Natural Gas Act.**

LEGISLATURES. See **Reapportionment.**

LIFE INSURANCE COMPANY INCOME TAX ACT OF 1959. See **Insurance Companies.**

MAIL. See **Constitutional Law,** IV.

MALAPPORTIONMENT. See **Reapportionment.**

MARITIME COMMISSION. See **Merchant Ship Sales Act of 1946.**

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MEDICAL ADVICE. See **Constitutional Law**, II; III, 4.

MERCHANT SHIP SALES ACT OF 1946.

Adjustment of purchase price of war-built ships—Unwinding of transactions—Cost basis for depreciation.—To realize the Act's purpose of putting petitioner and the Government in the positions they would have occupied had the sales been made on the date of enactment, the net charter hire paid by the Government must be treated as a return of capital reducing petitioner's cost and thus its basis for depreciation. Waterman S. S. Corp. v. U. S., p. 252.

MOTIONS. See **Constitutional Law**, III, 1; **Contempt of Court.**

NARCOTICS. See **Constitutional Law**, VI, 2.

NATIONAL GUARD.

Negligence of pilot—Federal Tort Claims Act liability—State employee.—National Guard pilot was an employee of the State of Maryland in both his civilian and military capacities and the United States is not liable under the Act for his negligence in either capacity. Maryland v. United States, p. 41.

NATURAL GAS ACT. See also **Administrative Procedure.**

Sales of leasehold interests—Proven and developed field—"Production or gathering."—Sales of leasehold interests in a proven and substantially developed natural gas field are "sales" of natural gas within the meaning of § 1 (b) of the Act, and are not within the "production or gathering" exemption. United Gas Co. v. Continental Oil Co., p. 392.

NAVIGABLE STREAMS. See **Federal Power Act.**

NEBRASKA. See **Procedure**, 1.

NEGLIGENCE. See **National Guard.**

NEW YORK. See **Constitutional Law**, V; **Dower.**

NONNAVIGABLE TRIBUTARIES. See **Federal Power Act.**

ORIGINAL ISSUE DISCOUNT. See **Commissioner of Internal Revenue; Taxes.**

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Passport Act of 1926—Travel to Cuba.—The Act grants authority to the Executive to refuse validation of passports for travel to Cuba. Zemel v. Rusk, p. 1.

PIPELINES. See **Administrative Procedure; Natural Gas Act.**

POSTAL SERVICE AND FEDERAL EMPLOYEES SALARY ACT OF 1962. See **Constitutional Law,** IV.

POSTCONVICTION PROCEDURE. See **Procedure,** 1.

PRIVATE ANTITRUST SUITS. See **Antitrust Acts.**

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1. *Criminal law—Supervening state statute—Postconviction procedure.*—Cause remanded to the state court for reconsideration in light of supervening statute establishing postconviction procedure apparently providing a hearing for petitions such as involved here. Case v. Nebraska, p. 336.

2. *Dismissal of schoolteachers—Alleged violation of First Amendment rights—Supervening changes in state law.*—Case is remanded to the state court to consider the effect of supervening changes in state law on dismissals of schoolteachers who allege violations of their First Amendment rights. Watts v. Seward School Board, p. 126.

PROMISSORY NOTES. See **Taxes.**

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REAPPORTIONMENT.

Redistricting state senate—State action encouraged.—State action to correct malapportionment of Illinois Senate is to be encouraged, and District Court order is vacated and remanded to fix reasonable time for appropriate action by state agency. Scott v. Germano, p. 407.

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SIXTH AMENDMENT. See **Constitutional Law,** III, 2.

STATE DEPARTMENT. See **Constitutional Law,** III, 3; **Immigration and Nationality Act of 1952; Jurisdiction,** 2; **Passports.**

STATUTE OF LIMITATIONS. See also **Antitrust Acts,** 1.

Internal Revenue Code—Complaint filed with Commissioner—Probable cause.—To initiate the extension of the statute of limitations authorized by § 6531 of the 1954 Internal Revenue Code, the complaint filed with the Commissioner must show probable cause to believe that defendant committed the offense, and all other steps of the complaint procedure provided by Rules 3, 4 and 5 of the Federal Rules of Criminal Procedure must be satisfied. Jaben v. United States, p. 214.

SUBMERGED LANDS ACT OF 1953. See also **Accretion.**

State boundaries—Inland waters—Coastline.—The Act's legislative history shows that "inland waters" was to be defined by the courts, and the definition as used in the Act should conform to the Convention on the Territorial Sea and the Contiguous Zone, to which this Nation is a party. United States v. California, p. 139.

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TAXES. See also **Commissioner of Internal Revenue; Insurance Companies; Merchant Ship Sales Act of 1946; Statute of Limitations.**

Original issue discount—Internal Revenue Code of 1939—Ordinary income.—Earned original issue discount is not entitled to capital gains treatment under the Internal Revenue Code of 1939 but is taxable as ordinary income. United States v. Midland-Ross Corp., p. 54; Dixon v. United States, p. 68.

TAX-EXEMPT INTEREST. See **Insurance Companies.**

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TIRES. See **Federal Trade Commission,** 1–4; **Judicial Review,** 2.

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WORDS.

"Production or gathering of natural gas."—§ 1 (b), Natural Gas Act, 15 U. S. C. § 717 (b). United Gas Co. v. Continental Oil Co., p. 392.

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