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CASES AND MATERIALS

ON

ADMINISTRATIVE LAW

BY

MILTON KATZ

BYRNE PROFESSOR OF ADMINISTRATIVE LAW, HARVARD UNIVERSITY

AMERICAN CASEBOOK SERIES

WARREN A. SEAVEY

GENERAL EDITOR

ST. PAUL, MINN.

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PREFACE

THIS CASEBOOK endeavors to reveal the nature and growth of the administrative process through an examination of the organic elements of the process itself. In consequence, the editorial text has been held to a minimum. The editing has been given effect primarily in the plan and arrangement of the book, the titles and subtitles of the various chapters, sections and subdivisions, and the selection of materials. Brief passages of editorial text are included only where deemed necessary to help delineate an issue or to point up a line of inquiry.

In the selection of cases and materials for each of the various chapters, sections and subdivisions of the book, the objective has been (1) to bring out the relationship of particular problems to the evolving pattern of administrative and judicial doctrine and to the underlying considerations of economic and social policy, (2) to reflect the historical development of methods and concepts, and (3) to delineate frontier issues. Because of the controlling importance of the particular facts and the particular statutory and procedural setting in administrative law cases, the cases have been printed in full wherever possible. Where cutting has been unavoidable, the editor has consistently endeavored to retain the presentation of the facts and of the governing elements of procedure and statutory construction intact in their setting.

Administrative and legislative materials, as well as judicial cases, have been used throughout the book. The administrative and legislative materials are treated not merely as supplements to the judicial cases, but as primary components of the plan of study.

MILTON KATZ

April 18, 1947

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CASES AND MATERIALS
ON
ADMINISTRATIVE LAW

Chapter I
INTRODUCTORY

Administrative law in the widest sense is conceived herein as the system of legal control exercised through the law administering agencies other than the courts. More precisely, it is taken to treat of the objectives, problems, methods and elements of doctrine which are common to the various agencies. It comprehends, as an integral element, the relationship of these agencies to the courts.

The work of the administrative agencies is intricate and diverse, hardly less varied, in fact, than the economic life of the nation itself. It embraces the administration of tax statutes, and systems of regulation which have come to seem almost all-pervading. A sense of the scope and variety of their work may be evoked by a brief and random enumeration of some of the more familiar agencies. Within the federal government, there may be mentioned the Interstate Commerce Commission, the Federal Trade Commission, the Securities and Exchange Commission, the National Labor Relations Board, the Administrator of the Wages and Hours Division of the Department of Labor, the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Commissioner of Internal Revenue and the Tax Court, the Secretary of Agriculture as Administrator under the Packers and Stockyards Act and a number of other regulatory statutes, the Federal Communications Commission, the Federal Power Commission, the Commissioner of Immigration and Naturalization, the Price Administrator, the Maritime Commission, the Passport and Visa Divisions of the Department of State. Within the governments of the several states, there are superintendents of banking, insurance commissioners, public utility commissions, labor relations boards, fair employment practice commissions, workmen's compensation boards. Within municipal governments, one finds zoning boards, local transportation boards, commissioners of health and sanitation, adminis-

Chapter II

THE FORMULATION OF THE STATUTORY SCHEME

SECTION 1. EVOLUTION OF THE STATUTORY PATTERN OF REGULATION UNDER THE INTERSTATE COMMERCE ACT

A. The Original Pattern: The Act of February 4, 1887

(1) The Appraisal by Public Opinion and by Congress of the Problem to be Met

REPORT OF THE SELECT COMMITTEE[a] APPOINTED TO INVESTIGATE AND REPORT UPON THE SUBJECT OF THE REGULATION OF THE TRANSPORTATION OF FREIGHTS AND PASSENGERS BETWEEN THE SEVERAL STATES BY RAILROAD AND WATER ROUTES

Sen.Rep. No. 46, 49th Cong., 1st Session (1886) Part 1, 1-3; 5-6; 180-1; 182.

The committee was appointed by the President of the Senate March 21, 1885, under authority of a resolution adopted by the Senate of the United States March 17, 1885, and reading as follows:

Resolved, That a select committee of five Senators be appointed to investigate and report upon the subject of the regulation of the transportation by railroad and water routes in connection or in competition with said railroads of freights and passengers between the several States, with authority to sit during the recess of Congress, and with power to summon witnesses and to do whatever is necessary for a full examination of the subject, and report to the Senate on or before the second Monday of December next. Said committee shall have power to appoint a clerk and stenographer, and the expenses of such investigation shall be paid from the appropriation for expenses of inquiries and investigations ordered by the Senate.

The committee began its work impressed with the importance of the duty with which it had been charged, and with each step taken in in prosecuting the inquiry directed has realized more fully how serious were the obstacles to be overcome in attempting to faithfully carry out its instructions. The field opened up for investigation was so extensive, the social, economic, legal, and other questions involved so

[a] Popularly known as the Cullom Committee, from the name of its Chairman, Senator Cullom of Illinois.

complicated, and the agricultural, commercial, industrial, and corporate interests affected so vast and varied as to require for a thorough and satisfactory examination into technical details more time and labor than could be given, with the facilities at command, during the summer recess of the Senate.

As the committee was unable to avail itself of the assistance of experts in the different branches of the inquiry, being restricted to the employment of a single clerk, the investigation could not be made as comprehensive and searching in the matter of collecting technical information and compiling detailed statistics as the importance of the subject deserved. Under these circumstances the conclusion was reached that the committee would best serve the public interest and carry out the purpose of the resolution under which it was appointed by devoting its attention mainly to the consideration of the question whether any legislation to regulate the management of the transportation lines of the country is advisable, and, if so, what the scope and character of that legislation should be. This is the question that awaits the decision of Congress.

The committee has endeavored to obtain information that would be of practical value in the decision of this question, and presents the results of its work, confidently believing that it will be of service to those who are seeking the solution of what is known as "the railroad problem."

PLAN OF WORK ADOPTED

As it was understood to be the desire of the Senate that the committee should endeavor to ascertain what causes of complaint existed against the corporations engaged in transportation between the several States and the opinions of the people as to what remedies could be applied by Congress, arrangements were made to visit some of the leading commercial centers of the United States and take testimony. Public notice was given of these hearings, and efforts were made, by correspondence and otherwise, to secure the attendance of those most competent to speak as the representatives of every interest and of every shade of opinion. With the view of suggesting subjects for discussion at these hearings and of indicating to those invited to appear the line of examination to be pursued and to allow time for preparation, the committee issued a circular, containing a series of interrogatories, calling attention to the questions that have been most prominently agitated of late years in connection with efforts to control the railroad corporations by legislation. At the same time an extensive correspondence, reaching into all parts of the United States, was carried on, and written statements were solicited from localities which the committee found itself unable to visit, as well as from persons who could not appear at the public hearings.

In the course of this correspondence letters and circulars were sent to the railroad commissioners of the several States, to the boards of

trade, chambers of commerce, and the numerous other commercial and business exchanges and associations of every character throughout the country, to the president of each State board of agriculture or State agricultural society, to the master of each State grange of the Patrons of Husbandry in the United States, to the secretary of the Farmers' Alliance in each State and Territory where organized, to railroad managers, and generally to gentlemen who were known to have given special attention to the transportation question in any of its different phases. Especial efforts were made to reach those whose opinions were most valuable as the representatives of the producing interests or by reason of their study of the subject or practical experience; but the committee, while gratified at the success which attended these efforts, is not disposed to claim that all were reached who should have been heard in an investigation covering so broad a field.

* * * The interest everywhere manifested in its investigation has convinced the committee that *no general question of governmental policy occupies at this time so prominent a place in the thoughts of the people as that of controlling the steady growth and extending influence of corporate power and of regulating its relations to the public;* and as no corporations are more conspicuously before the public eye, and as there are none whose operations so directly affect every citizen in the daily pursuit of his business or avocation as the corporations engaged in transportation, they naturally receive the most consideration in this connection. * * *

The conditions and circumstances that environed the earlier beginnings of the development of the railroad system of the United States were such that it is easy to understand why no comprehensive and uniform plan of regulation was then thought of or adopted. The question then was how to get railroads, not how to control them. Had the system grown up under such systematic regulations as many now believe would have proved advantageous, the commercial relations of the railroad to the community would doubtless have been adjusted more satisfactorily, but, on the other hand, it cannot be doubted that the transportation facilities of the country could not as rapidly have reached their present magnificent proportions under any other conditions than those which have so successfully stimulated their growth and expansion. The course of events has been inevitable. It was a matter of necessity in a new country with undeveloped resources and struggling with other burdens which fully taxed its capacity that the work of railroad construction should be left to private enterprise. Such a policy was also in accordance with the genius and spirit of our institutions and Government, and the rapid evolution of the system could have been secured only as it was secured—by offering every encouragement to the investment of private capital and every temptation to speculation. A method of uniform regulation adopted at the outset might have prevented a needless waste of capital

and might have obviated or mitigated existing evils, but it would assuredly have retarded the building up of the country in comparison with the progress attained under freedom from legislative restrictions. If a mistaken policy was adopted in the beginning, it is questionable whether its resulting general advantages do not outweigh its injurious effects. Indeed, it may be said that in a certain sense the evils complained of to-day are in the nature of a mortgage handed down for payment to the present generation as its share of the price paid for making habitable and building up our vast domain at a rate of progress never equaled in any other country. Freedom from legislative restrictions has facilitated our grand achievements in this direction, and it is proper that the very important part played by the rapid increase of transportation facilitates in hastening the progress and advancing the prosperity of the country should be given due weight by those who now enjoy and profit by the results, as at least a partial offset to the inequalities with which they may be obliged to contend.

It by no means follows, however, that regulation is not now needed, or that the policy which was adopted in the beginning as a matter of necessity, and has served a useful purpose, is still the one best adapted to the present requirements of the country, and should be permanently continued. That such is not the case it will be the purpose of this report to show; but attention has been invited to the advantages which have followed the policy of non-interference so long pursued in order to emphasize the necessity of exercising the utmost caution in so shaping the legislation now required by the changed condition of affairs as not to check the future progress of the transportation interests of the country, which have certainly not yet reached the zenith of their development. * * *

THE CAUSES OF COMPLAINT AGAINST THE RAILROAD SYSTEM

* * *

7. That the effect of the prevailing policy of railroad management is, by an elaborate system of secret special rates, rebates, drawbacks, and concessions, to foster monopoly, to enrich favored shippers, and to prevent free competition in many lines of trade in which the item of transportation is an important factor.

8. That such favoritism and secrecy introduce an element of uncertainty into legitimate business that greatly retards the development of our industries and commerce.

9. That the secret cutting of rates and the sudden fluctuation that constantly take place are demoralizing to all business except that of a purely speculative character, and frequently occasion great injustice and heavy losses.

10. That, in the absence of national and uniform legislation, the railroads are able by various devices to avoid their responsibility as carriers, especially on shipments over more than one road, or from

one State to another, and that shippers find great difficulty in recovering damages for the loss of property or for injury thereto. * * *

16. That the capitalization and bonded indebtedness of the roads largely exceed the actual cost of their construction or their present value, and that unreasonable rates are charged in the effort to pay dividends on watered stock and interest on bonds improperly issued. * * *

18. That the management of the railroad business is extravagant and wasteful, and that a needless tax is imposed upon the shipping and traveling public by the unnecessary expenditure of large sums in the maintenance of a costly force of agents engaged in a reckless strife for competitive business.

THE ESSENCE OF THE COMPLAINTS

It will be observed that the most important, and in fact nearly all, of the foregoing complaints are based upon the practice of discrimination in one form or another. This is the principal cause of complaint against the management and operation of the transportation system of the United States, and gives rise to the questions of greatest difficulty in the regulation of interstate commerce.

It is substantially agreed by all parties in interest that the great desideratum is to secure equality, so far as practicable, in the facilities for transportation afforded and the rates charged by the instrumentalities of commerce. The burden of complaint is against unfair differences in these particulars as between different places, persons, and commodities, and its essence is that these differences are unjust in comparison with the rates allowed or facilities afforded to other persons and places for a like service under similar circumstances.[b]

(2) The Primary Statutory Objectives: The Termination of Discriminatory Rates and Practices and Excessive Charges

CULLOM COMMITTEE REPORT[c]

Sen.Rep. No. 46, 49th Cong., 1st Sess. (1886) Part 1, 215–6.

THE COMMITTEE'S BILL

The committee has given the subject-matter of the inquiry with which it was charged careful examination and consideration, and the bill reported herewith embodies its most deliberate judgment, with

[b] See 1 Sharfman, The Interstate Commerce Commission (1931) 11–23; Ripley, Railway Problems (Revised Ed. 1913) c. I, III.

[c] See *supra*, n. a.

the best light it has been able to obtain, upon the varied and complex questions involved. This measure is not offered as a panacea for all the evils growing out of the management of the transportation system of which the people have for years complained, and for which they are disposed to seek a legislative cure. Indeed, as we have already said, "That a problem of such magnitude, importance, and intricacy can be summarily solved by any master-stroke of legislative wisdom is beyond the bounds of reasonable belief." Neither is it simply a tentative measure intended to pave the way for additional legislation. Its practical application, if it should become a law, may demonstrate that some of its features are inexpedient, or unjust to the corporate carriers of the country, or prejudicial to the public interests. While there have naturally been differences of opinion among the members of the committee as to certain of the less important features and provisions of the bill in its entirety, and in its general scope, purposes, and methods, it represents the substantially unanimous judgment of the committee as to the regulations which are believed to be expedient and necessary for the government and control of the carriers engaged in inter-State traffic.

The provisions of the bill are based upon the theory that the paramount evil chargeable against the operation of the transportation system of the United States as now conducted is unjust discrimination between persons, places, commodities, or particular descriptions of traffic. The underlying purpose and aim of the measure is the prevention of these discriminations, both by declaring them unlawful and adding to the remedies now available for securing redress and enforcing punishment, and also by requiring the greatest practicable degree of publicity as to the rates, financial operations, and methods of management of the carriers. * * *

EXCERPT FROM THE ACT OF FEBRUARY 4, 1887

24 Stat. 379, §§ 1–5.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of this act shall apply to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management, or arrangement, for a continuous carriage or shipment, from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a

foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country: *Provided, however,* That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one State, and not shipped to or from a foreign country from or to any State or Territory as aforesaid.

The term "railroad" as used in this act shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease; and the term "transportation" shall include all instrumentalities of shipment or carriage.

All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful.

Sec. 2. That if any common carrier subject to the provisions of this act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

Sec. 3. That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Every common carrier subject to the provisions of this act shall, according to their respective powers, afford all reasonable, proper and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines, but this shall not be con-

strued as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business.

Sec. 4. That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier within the terms of this act to charge and receive as great compensation for a shorter as for a longer distance: *Provided, however,* That upon application to the Commission appointed under the provisions of this act, such common carrier may, in special cases, after investigation by the Commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section of this act.

Sec. 5. That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offense. * * *

(3) The Primary Statutory Remedies: Publicity, and Cease and Desist Orders of the Interstate Commerce Commission Supplemented by Injunctive Proceedings in the Federal Courts

EXCERPT FROM THE ACT OF FEBRUARY 4, 1887

24 Stat. 379, §§ 6, 11, 12, 14–16.

* * *

Sec. 6. That every common carrier subject to the provisions of this act shall print and keep for public inspection schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established and which are in force at the time upon its railroad, as defined by the first section of this act. The schedules printed as aforesaid by any such common carrier shall plainly state the places upon its railroad between which property and passengers will be carried,

and shall contain the classification of freight in force upon such railroad, and shall also state separately the terminal charges and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates and fares and charges. Such schedules shall be plainly printed in large type, of at least the size of ordinary pica, and copies for the use of the public shall be kept in every depot or station upon any such railroad, in such places and in such form that they can be conveniently inspected.
* * *

No advance shall be made in the rates, fares, and charges which have been established and published as aforesaid by any common carrier in compliance with the requirements of this section, except after ten days' public notice, which shall plainly state the changes proposed to be made in the schedule then in force, and the time when the increased rates, fares, or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept for public inspection. Reductions in such published rates, fares, or charges may be made without previous public notice; but whenever any such reduction is made, notice of the same shall immediately be publicly posted and the changes made shall immediately be made public by printing new schedules, or shall immediately be plainly indicated upon the schedules at the time in force and kept for public inspection.

And when any such common carrier shall have established and published its rates, fares, and charges in compliance with the provisions of this section, it shall be unlawful for such common carrier to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of passengers or property, or for any services in connection therewith, than is specified in such published schedule of rates, fares, and charges as may at the time be in force.

Every common carrier subject to the provisions of this act shall file with the Commission hereinafter provided for copies of its schedules of rates, fares, and charges which have been established and published in compliance with the requirements of this section, and shall promptly notify said Commission of all changes in the same.
* * *

Sec. 11. That a Commission is hereby created and established to be known as the Inter-State Commerce Commission, which shall be composed of five Commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. The Commissioners first appointed under this act shall continue in office for the term of two, three, four, five, and six years, respectively, from the first day of January, Anno Domini eighteen hundred and eighty-seven, the term of each to be designated by the President; but their successors shall be appointed for terms of six years, except that any person chosen to fill a vacancy shall be appointed only for the unex-

pired term of the Commissioner whom he shall succeed. Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. Not more than three of the Commissioners shall be appointed from the same political party. No person in the employ of or holding any official relation to any common carrier subject to the provisions of this act, or owning stock or bonds thereof, or who is in any manner pecuniarily interested therein, shall enter upon the duties of or hold such office. Said Commissioners shall not engage in any other business, vocation, or employment. No vacancy in the Commission shall impair the right of the remaining Commissioners to exercise all the powers of the Commission.

Sec. 12. That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and for the purposes of this act the Commission shall have power to require the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation, and to that end may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

And any of the circuit courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any common carrier subject to the provisions of this act, or other person, issue an order requiring such common carrier or other person to appear before said Commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

* * *

Sec. 14. That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall include the findings of fact upon which the conclusions of the Commission are based, together with its recommendation as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured; and such findings so made shall thereafter, in all judicial proceedings, be deemed prima facie evidence as to each and every fact found.

All reports of investigations made by the Commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier that may have been complained of.

Sec. 15. That if in any case in which an investigation shall be made by said Commission it shall be made to appear to the satisfaction of the Commission, either by the testimony of witnesses or other evidence, that any thing has been done or omitted to be done in violation of the provisions of this act, or of any law cognizable by said Commission, by any common carrier, or that any injury or damage has been sustained by the party or parties complaining, or by other parties aggrieved in consequence of any such violation, it shall be the duty of the Commission to forthwith cause a copy of its report in respect thereto to be delivered to such common carrier, together with a notice to said common carrier to cease and desist from such violation, or to make reparation for the injury so found to have been done, or both, within a reasonable time, to be specified by the Commission; and if, within the time specified, it shall be made to appear to the Commission that such common carrier has ceased from such violation of law, and has made reparation for the injury found to have been done, in compliance with the report and notice of the Commission, or to the satisfaction of the party complaining, a statement to that effect shall be entered of record by the Commission, and the said common carrier shall thereupon be relieved from further liability or penalty for such particular violation of law.

Sec. 16. That whenever any common carrier, as defined in and subject to the provisions of this act, shall violate or refuse or neglect to obey any lawful order or requirement of the Commission in this act named, it shall be the duty of the Commission, and lawful for any company or person interested in such order or requirement, to apply, in a summary way, by petition, to the circuit court of the United States sitting in equity in the judicial district in which the common carrier complained of has its principal office, or in which the violation or disobedience of such order or requirement shall happen, alleging such violation or disobedience, as the case may be; and the said court shall have power to hear and determine the matter, on such short notice to the common carrier complained of as the court shall deem reasonable; and such notice may be served on such common carrier, his or its offices, agents, or servants, in such manner as the court shall direct; and said court shall proceed to hear and determine the matter speedily as a court of equity, and without the formal pleadings and proceedings applicable to ordinary suits in equity, but in such manner as to do justice in the premises; and to this end such court shall have power, if it think fit, to direct and prosecute, in such mode and by such persons as it may appoint, all such inquiries as the court may think needful to enable it to form a just judgment in the matter of such petition; and on such hearing the report of said Commission

shall be prima facie evidence of the matters therein stated; and if it be made to appear to such court, on such hearing or on report of any such person or persons, that the lawful order or requirement of said Commission drawn in question has been violated or disobeyed, it shall be lawful for such court to issue a writ of injunction or other proper process, mandatory or otherwise, to restrain such common carrier from further continuing such violation or disobedience of such order or requirement of said Commission, and enjoining obedience to the same; and in case of any disobedience of any such writ of injunction or other proper process, mandatory or otherwise, it shall be lawful for such court to issue writs of attachment, or any other process of said court incident or applicable to writs of injunction or other proper process, mandatory or otherwise, against such common carrier, and if a corporation, against one or more of the directors, officers, or agents of the same, or against any owner, lessee, trustee, receiver, or other person failing to obey such writ of injunction or other proper process, mandatory or otherwise; and said court may, if it shall think fit, make an order directing such common carrier or other person so disobeying such writ of injunction or other proper process, mandatory or otherwise, to pay such sum of money not exceeding for each carrier or person in default the sum of five hundred dollars for every day after a day to be named in the order that such carrier or other person shall fail to obey such injunction or other proper process, mandatory or otherwise; and such moneys shall be payable as the court shall direct, either to the party complaining, or into court to abide the ultimate decision of the court, or into the Treasury; and payment thereof may, with prejudice to any other mode of recovering the same, be enforced by attachment or order in the nature of a writ of execution, in like manner as if the same had been recovered by a final decree in personam in such court. When the subject in dispute shall be of the value of two thousand dollars or more, either party to such proceeding before said court may appeal to the Supreme Court of the United States, under the same regulations now provided by law in respect of security for such appeal; but such appeal shall not operate to stay or supersede the order of the court or the execution of any writ or process thereon; and such court may, in every such matter, order the payment of such costs and counsel fees as shall be deemed reasonable. Whenever any such petition shall be filed or presented by the Commission it shall be the duty of the district attorney, under the direction of the Attorney-General of the United States, to prosecute the same; and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States. For the purposes of this act, excepting its penal provisions, the circuit courts of the United States shall be deemed to be always in session.

* * *

B. Modification of the Pattern: The Hepburn Act

The Hepburn Act of 1906 not only amended the Interstate Commerce Act in numerous particulars, but effected a radical modification in the statutory scheme. The change related to the remedial powers of the Commission, the statutory objectives remaining substantially unaltered. No longer confined to the prohibition of discriminatory rates or practices, excessive charges or other specific abuses found to have been committed by the carriers, the Commission was empowered affirmatively to prescribe the rates and practices to which the carriers were required thereafter to adhere.

HEPBURN ACT, § 4

Act of June 29, 1906, § 4, 34 Stat. 584, 589.

* * *

Sec. 4. That section fifteen of said Act be amended so as to read as follows:

"Sec. 15. That the Commission is authorized and empowered, and it shall be its duty, whenever, after full hearing upon a complaint made as provided in section thirteen of this Act, or upon complaint [d] of any common carrier, it shall be of the opinion that any of the rates, or charges whatsoever, demanded, charged, or collected by any common carrier or carriers, subject to the provisions of this Act, for the transportation of persons or property as defined in the first section of this Act, or that any regulations or practices whatsoever of such carrier or carriers affecting such rates, are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged; and what regulation or practice in respect to such transportation is just, fair, and reasonable to be thereafter followed; and to make an order that the carrier shall cease and desist from such violation, to the extent to which the Commission find the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation in ex-

[d] By section 12 of the Mann-Elkins Act (Act of June 18, 1910, 36 Stat. 539), section 15 of the Interstate Commerce Act was further amended to authorize the Commission to act upon its own initiative as well as upon complaint. As then amended, section 15 of the Interstate Commerce Act read:

"Sec. 15. That whenever, after full hearing upon a complaint made as provided in section thirteen of this Act, or after full hearing under an order for investigation and hearing made by the commission on its own initiative (either in extension of any pending complaint or without any complaint whatever), the commission shall be of opinion * * *."

cess of the maximum rate or charge so prescribed, and shall conform to the regulation or practice so prescribed. All orders of the Commission, except orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the Commission, unless the same shall be suspended or modified or set aside by the Commission or be suspended or set aside by a court of competent jurisdiction. Whenever the carrier or carriers, in obedience to such order of the Commission or otherwise, in respect to joint rates, fares, or charges, shall fail to agree among themselves upon the apportionment or division thereof, the Commission may after hearing make a supplemental order prescribing the just and reasonable proportion of such joint rate to be received by each carrier party thereto, which order shall take effect as a part of the original order.

"The Commission may also, after hearing on a complaint, establish through routes and joint rates as the maximum to be charged and prescribe the division of such rates as hereinbefore provided, and the terms and conditions under which such through routes shall be operated, when that may be necessary to give effect to any provision of this Act, and the carriers complained of have refused or neglected to voluntarily establish such through routes and joint rates, provided no reasonable or satisfactory through route exists, and this provision shall apply when one of the connecting carriers is a water line.

"If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the service so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for in this section.

"The foregoing enumeration of powers shall not exclude any power which the Commission would otherwise have in the making of an order under the provisions of this Act." * * *

C. Further Development of the Pattern: Transportation Act, 1920 [e]

The First World War precipitated the United States into direct management of the railroad system by the national government. Transportation Act, 1920, which terminated federal possession and control of the railroads, also re-cast the entire statutory scheme of

[e] Act of February 26, 1920, 41 Stat. 456.

regulation. The old powers of the Interstate Commerce Commission were broadened and supplemented, and extensive new powers were added. The power of the Commission to prescribe rates had theretofore been limited to the establishment of maximum rates. By Transportation Act, 1920, the Commission was empowered to prescribe minimum rates, maximum rates or the absolute rates to be charged, in its discretion. It was also given extensive control over the issuance of securities, combinations and consolidations, and the extension and abandonment of lines. In a sense the most striking of its new powers and duties were those involved in the added section 15a,[f] which embodied the rule of rate-making for carriers as a whole and the recapture clause.[g]

All of these revisions and additions reflected a fundamental change in the statutory objective. The governing purpose of the system of regulation had ceased to be the elimination of abuses. It had become affirmative: to furnish the United States with an adequate system of railway transportation.

EXCERPT FROM RAILROAD COMMISSION OF WISCONSIN v. CHICAGO, BURLINGTON AND QUINCY R. R.

257 U.S. 563, 585, 42 S.Ct. 232, 236, 66 L.Ed. 371, 22 A.L.R. 1086 (1922).

It is manifest from this very condensed recital that the act made a new departure. Theretofore the control which Congress through the Interstate Commerce Commission exercised was primarily for the purpose of preventing injustice by unreasonable or discriminatory rates against persons and localities and the only provisions of the law that inured to the benefit of the carriers were the requirement that the rates should be reasonable in the sense of furnishing an adequate compensation for the particular service rendered and the abolition of rebates. The new measure imposed an affirmative duty on the Interstate Commerce Commission to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States. This is expressly declared in section 15a to be one of the purposes of the bill.

[f] Section 15a of the Interstate Commerce Act, as added by section 422 of Transportation Act, 1920. See Sharfman, Interstate Commerce Commission (1931) 196–225. Section 15a was thereafter amended and severely restricted by section 205 of the Act of June 16, 1933, 48 Stat. 220, and section 10(3) of the Transportation Act of 1940 (Act of September 18, 1940, 54 Stat. 898, 912).

[g] See Dayton-Goose Creek Ry. v. United States, 263 U.S. 456, 44 S.Ct. 169, 68 L.Ed. 388, 33 A.L.R. 472 (1924); St. Louis and O'Fallon Ry. v. United States, 279 U.S. 461, 49 S.Ct. 384, 73 L. Ed. 798 (1929); An.Rep.I.C.C.(1930) 86-9; An.Rep.I.C.C. (1932) 100-1. Both the rule of rate-making for carriers as a whole and the recapture clause were repealed by the amendments of 1933 and 1940 to section 15a. See n. f, *supra*.

EXCERPT FROM NEW ENGLAND DIVISIONS CASE

261 U.S. 184, 189-90, 43 S.Ct. 270, 273, 67 L.Ed. 605 (1923).

Transportation Act, 1920, introduced into the federal legislation a new railroad policy. Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co., 257 U.S. 563, 585, 42 S.Ct. 232, 66 L. Ed. 371, 22 A.L.R. 1086. Theretofore, the effort of Congress had been directed mainly to the prevention of abuses, particularly those arising from excessive or discriminatory rates. The 1920 act sought to insure, also, adequate transportation service. That such was its purpose Congress did not leave to inference. The new purpose was expressed in unequivocal language. And, to attain it, new rights, new obligations, new machinery, were created. The new provisions took a wide range.[h]

EXCERPT FROM DAYTON-GOOSE CREEK RY. v. UNITED STATES

263 U.S. 456, 478, 44 S.Ct. 169, 172, 68 L.Ed. 388, 33 A.L.R. 472 (1924).

In both cases it was pointed out that the Transportation Act adds a new and important object to previous interstate commerce legislation which was designed primarily to prevent unreasonable or discriminatory rates against persons and localities. The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission which is to supervise their issue of securities, their car supply and distribution, their joint use of terminals, their construction of new lines, their abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged.

It was insisted in the two cases referred to, and it is insisted here, that the power to regulate interstate commerce is limited to the fixing of reasonable rates and the prevention of those which are discriminatory, and that when these objects are attained, the power of regulation is exhausted. This is too narrow a view of the commerce clause. To regulate in the sense intended is to foster, protect and control

[h] For the remainder of this opinion, see *infra* at p. 383.

the commerce with appropriate regard to the welfare of those who are immediately concerned, as well as the public at large, and to promote its growth and insure its safety.

SECTION 15A OF THE INTERSTATE COMMERCE ACT, AS AMENDED [1]

49 U.S.C. § 15a.

Sec. 15a. (1) When used in this section the term "rates" means rates, fares, and charges, and all classifications, regulations, and practices relating thereto.

(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

D. Further Development of the Pattern: The Hoch-Smith Resolution

By the Hoch-Smith Resolution of 1925, the affirmative nature of the Interstate Commerce Commission's duties, as they had come to be, was reemphasized, and the scope of the objectives of regulation was expanded. The Commission was directed to seek to serve not only the need for an adequate transportation system, but also the development of the economy as a whole and the special requirements of a depressed agriculture, to the extent that this could be accomplished through proper adjustments in the rate level and the rate structure.

HOCH–SMITH RESOLUTION

Joint Res. of Jan. 30, 1925, 43 Stat. 801.

That it is hereby declared to be the true policy in rate making to be pursued by the Interstate Commerce Commission in adjusting freight rates, that the conditions which at any given time prevail in our several industries should be considered in so far as it is legally possible to do so, to the end that commodities may freely move.

That Interstate Commerce Commission is authorized and directed to make a thorough investigation of the rate structure of common

[1] See *supra*, n. f, p. 18.

carriers subject to the interstate commerce act, in order to determine to what extent and in what manner existing rates and charges may be unjust, unreasonable, unjustly discriminatory, or unduly preferential, thereby imposing undue burdens, or giving undue advantage as between the various localities and parts of the country, the various classes of traffic, and the various classes and kinds of commodities, and to make, in accordance with law, such changes, adjustments, and redistribution of rates and charges as may be found necessary to correct any defects so found to exist. In making any such change, adjustment, or redistribution the Commission shall give due regard, among other factors, to the general and comparative levels in market value of the various classes and kinds of commodities as indicated over a reasonable period of years to a natural and proper development of the country as a whole, and to the maintenance of an adequate system of transportation. In the progress of such investigation the Commission shall, from time to time, and as expeditiously as possible, make such decisions and orders as it may find to be necessary or appropriate upon the record then made in order to place the rates upon designated classes of traffic upon a just and reasonable basis with relation to other rates. Such investigation shall be conducted with due regard to other investigations or proceedings affecting rate adjustments which may be pending before the Commission.

In view of the existing depression in agriculture, the Commission is hereby directed to effect with the least practicable delay such lawful changes in the rate structure of the country as will promote the freedom of movement by common carriers of the products of agriculture affected by that depression, including livestock, at the lowest possible lawful rates compatible with the maintenance of adequate transportation service: *Provided,* That no investigation or proceeding resulting from the adoption of this resolution shall be permitted to delay the decision of cases now pending before the Commission involving rates on products of agriculture, and that such cases shall be decided in accordance with this resolution.

E. Further Development of the Pattern: The Present National Transportation Policy

PREAMBLE TO INTERSTATE COMMERCE ACT [J]

49 U.S.C.Supp., Introductory Note.

NATIONAL TRANSPORTATION POLICY

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

SECTION 2. EVOLUTION OF THE STATUTORY PATTERN OF REGULATION OF SECURITIES EXCHANGES AND OVER-THE-COUNTER MARKETS UNDER THE SECURITIES EXCHANGE ACT OF 1934

A. The Background of Regulation

EXCERPT FROM AN ADDRESS BY JAMES M. LANDIS BEFORE THE SWARTHMORE CLUB OF PHILADELPHIA, FEBRUARY 27, 1937

The fact that administrative agencies are the products, not of dogma or of abstract theory, but of the gradual development of control by a democratic government over the varying phases of our eco-

[J] As added by section 1 of the Transportation Act of 1940 (Act of September 18, 1940, 54 Stat 898, 899).

nomic life, makes generalization about their functions and about the powers that they should be permitted to exercise not only difficult but frequently superficial and misleading. A structure that is built for the railroad problem may have only a casual likeness to that created for banking. If they spring, as they should, from the ground up, their architecture will be indigenous, as varying in its utilitarian characteristics as the Grand Central Station and the First National Bank. True, a certain amount of imitativeness is always present—a method of adjusting stresses and strains found valuable in one structure will be employed in the creation of another. But it is banking, insurance, utilities or railroads that form the dominating motif, rather than some highly theoretical doctrine as to powers that should not be possessed.

Illustrative of this point is the creation of the Securities and Exchange Commission. Trading in securities on exchanges is not only a specialized technique but essentially a cooperative enterprise. An exchange begins with an association of men, who, for their earliest functioning, must have a form of government, perhaps only tacit in the beginning, but gradually becoming articulated in the form of a constitution that defines the rights and privileges of its members. As the volume of business increases and its membership grows, this internal regulation becomes more detailed. To protect the members and their business against unfair advantages taken by other members, regulations outlawing certain practices come into being. They expand as the pressure of outside forces demands further protection against the possibilities of exploitation. Other means, besides the banning of certain practices, for the protection of members also develop, chief among which are the requirements for the listing and approval of securities dealt in on the exchange. Devised originally to protect against the illegal overissuance of securities by corporations, possibilities for further control are envisaged, together with the realization of the necessity for getting some record of the performance of corporate enterprise. Means for the enforcement of these regulations naturally have to be invented, and governing committees come into existence with power to strike the securities of offending corporations from the list and to suspend or expel members guilty of breaking the rules governing the manner of trading.

The exchange is a full-fledged institution by the time it comes within the purview of regulation. In fact, it is a self-governing organization of numerous independent business enterprises, governed badly, it may be true, but still self-governed. Legislative, executive and judicial powers are all possessed by the institution and inextricably intermingled. Powers to impose penalties, that would obviously be arbitrary if exercised by government, are already possessed by it. Procedures that hardly bear any resemblance to traditional court procedures are pursued by the governing authorities in passing upon

charges of violation of rules, and practically accepted without objection by its membership.

Obviously a scheme of regulation that took no account of the institutional development of the enterprise with which it was concerned would prove futile. Assuming that some merit attended this scheme of self-regulation, that some contributions to the broader public interest had resulted from its operation, the central issue of regulation focussed upon the area to be allotted to self-government and the conditions of its supervision.

The structural plan of the Securities Exchange Act, under which the exchanges are regulated, when viewed in this light, is of intense interest to the student of government. Some matters it deemed of such importance to the public interest at large that it entrusted their regulation and administration directly to the government. This was true, for example, of the tactics of manipulation, the prescription of margins and the concomitant control of credit. On the other hand, it occasionally divided authority as in its treatment of the listing of securities. Here it required government to insist that no listing could take place without a certain minimum of disclosure, but at the same time left the exchange free to determine, whether, that minimum being met, the security was of the type and quality that it would admit to the list. Again, by a mechanism novel in governmental regulation, it entrusted certain aspects of exchange organization and exchange trading to the exchanges with the right, however, on the part of the government, in the event that the situations were handled inadequately by the exchange, not to prescribe its own rules but to insist that the exchange should adopt as its rules regulations formulated by government. Finally, by a system of licensing it imposed upon the exchanges the duty to police and enforce not only their own rules but also such regulations as government might adopt upon its own motion.

Regulation built along these lines welded together existing self-regulation and direct control by government. In so doing, it followed lines in institutional development, buttressing existing powers by the force of government, rather than absorbing all authority and all power to itself. In so doing, it made the loyalty of the institution to the broad objectives of government a condition of its continued existence, thus building from within as well as imposing from without.

Equally interesting is the choice made of the measures to compel conformance with the requirements of the law. Of course, the traditional heavy artillery of enforcement—criminal penalties of fine and imprisonment—were employed. Then, too, such other common equipment as the court system provided, including injunctive remedies and the duty to respond in damages for wrong done, were availed of. But the exchanges themselves had over the years developed their disciplinary technique. Nothing was more natural than to adapt this

to the uses of the new governing authority. Chief among them was the power to suspend or expel members and the power to strike securities from the list. To exercise them in the manner that they had been exercised by the exchanges seemed the natural course. * * *

B. The Statutory Pattern of Control over Securities Exchanges

SECURITIES EXCHANGE ACT OF 1934,[a] AS AMENDED

§§ 5, 6, 12(a) (b) (c) (d), 13(a) (b), 28(b); 15 U.S.C. §§ 78e, 78f, 78*l*(a) (b) (c) (d), 78m(a), 78s(a) (b), 78bb(b).

TRANSACTIONS ON UNREGISTERED EXCHANGES

Sec. 5. It shall be unlawful for any broker, dealer, or exchange, directly or indirectly, to make use of the mails or any means or instrumentality of interstate commerce for the purpose of using any facility of an exchange within or subject to the jurisdiction of the United States to effect any transaction in a security, or to report any such transaction, unless such exchange (1) is registered as a national securities exchange under section 6 of this title, or (2) is exempted from such registration upon application by the exchange because, in the opinion of the Commission, by reason of the limited volume of transactions effected on such exchange, it is not practicable and not necessary or appropriate in the public interest or for the protection of investors to require such registration.

REGISTRATION OF NATIONAL SECURITIES EXCHANGES

Sec. 6. (a) Any exchange may be registered with the Commission as a national securities exchange under the terms and conditions hereinafter provided in this section, by filing a registration statement in such form as the Commission may prescribe, containing the agreements, setting forth the information, and accompanied by the documents, below specified:

(1) An agreement (which shall not be construed as a waiver of any constitutional right or any right to contest the validity of any rule or regulation) to comply, and to enforce so far as is within its powers compliance by its members, with the provisions of this title, and any amendment thereto and any rule or regulation made or to be made thereunder;

(2) Such data as to its organization, rules of procedure, and membership, and such other information as the Commission may by rules

[a] Act of June 6, 1934, c. 404, 48 Stat. 881.

and regulations require as being necessary or appropriate in the public interest or for the protection of investors;

(3) Copies of its constitution, articles of incorporation with all amendments thereto, and of its existing bylaws or rules or instruments corresponding thereto, whatever the name, which are hereinafter collectively referred to as the "rules of the exchange"; and

(4) An agreement to furnish to the Commission copies of any amendments to the rules of the exchange forthwith upon their adoption.

(b) No registration shall be granted or remain in force unless the rules of the exchange include provision for the expulsion, suspension or disciplining of a member for conduct or proceeding inconsistent with just and equitable principles of trade, and declare that the willful violation of any provisions of this title or any rule or regulation thereunder shall be considered conduct or proceeding inconsistent with just and equitable principles of trade.

(c) Nothing in this title shall be construed to prevent any exchange from adopting and enforcing any rule not inconsistent with this title and the rules and regulations thereunder and the applicable laws of the State in which it is located.

(d) If it appears to the Commission that the exchange applying for registration is so organized as to be able to comply with the provisions of this title and the rules and regulations thereunder and that the rules of the exchange are just and adequate to insure fair dealing and to protect investors, the Commission shall cause such exchange to be registered as a national securities exchange.

(e) Within thirty days after the filing of the application, the Commission shall enter an order either granting or, after appropriate notice and opportunity for hearing, denying registration as a national securities exchange, unless the exchange applying for registration shall withdraw its application or consent to the Commission's deferring action on its application for a stated longer period after the date of filing. The filing with the Commission of an application for registration by an exchange shall be deemed to have taken place upon the receipt thereof. Amendments to an application may be made upon such terms as the Commission may prescribe.

(f) An exchange may, upon appropriate application in accordance with the rules and regulations of the Commission, and upon such terms as the Commission may deem necessary for the protection of investors, withdraw its registration. * * *

REGISTRATION REQUIREMENTS FOR SECURITIES

Sec. 12. (a) It shall be unlawful for any member, broker, or dealer to effect any transaction in any security (other than an exempted security) on a national securities exchange unless a registration is ef-

fective as to such security for such exchange in accordance with the provisions of this title and the rules and regulations thereunder.

(b) A security may be registered on a national securities exchange by the issuer filing an application with the exchange (and filing with the Commission such duplicate originals thereof as the Commission may require), which application shall contain—

(1) Such information, in such detail, as to the issuer and any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, the issuer, and any guarantor of the security as to principal or interest or both, as the Commission may by rules and regulations require, as necessary or appropriate in the public interest or for the protection of investors, in respect to the following:

(A) the organization, financial structure and nature of business;

(B) the terms, position, rights, and privileges of the different classes of securities outstanding;

(C) the terms on which their securities are to be, and during the preceding three years have been, offered to the public or otherwise;

(D) the directors, officers, and underwriters, and each security holder of record holding more than 10 percentum of any class of any equity security of the issuer (other than an ex-exempted security), their remuneration and their interests in the securities of, and their material contracts with, the issuer and any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, the issuer;

(E) remuneration to others than directors and officers exceeding $20,000 per annum;

(F) bonus and profit-sharing arrangements;

(G) management and service contracts;

(H) options existing or to be created in respect of their securities;

(I) balance sheets for not more than the three preceding fiscal years, certified if required by the rules and regulations of the Commission by independent public accountants;

(J) profit and loss statements for not more than the three preceding fiscal years, certified if required by the rules and regulations of the Commission by independent public accountants; and

(K) any further financial statements which the Commission may deem necessary or appropriate for the protection of investors.

(2) Such copies of articles of incorporation, bylaws, trust indentures, or corresponding documents by whatever name known, underwriting arrangements, and other similar documents of, and voting trust agreements with respect to, the issuer and any person directly or indirectly controlling or controlled by, or under direct or indirect

common control with, the issuer as the Commission may require as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security.

(c) If in the judgment of the Commission any information required under subsection (b) is inapplicable to any specified class or classes of issuers, the Commission shall require in lieu thereof the submission of such other information of comparable character as it may deem applicable to such class of issuers.

(d) If the exchange authorities certify to the Commission that the security has been approved by the exchange for listing and registration, the registration shall become effective thirty days after the receipt of such certification by the Commission or within such shorter period of time as the Commission may determine. A security registered with a national securities exchange may be withdrawn or stricken from listing and registration in accordance with the rules of the exchange and, upon such terms as the Commission may deem necessary to impose for the protection of investors, upon application by the issuer of the exchange to the Commission; whereupon the issuer shall be relieved from further compliance with the provisions of this section and section 13 of this title and any rules or regulations under such sections as to the securities so withdrawn or stricken. An unissued security may be registered only in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors. Such rules and regulations shall limit the registration of an unissued security to cases where such security is a right or the subject of a right to subscribe or otherwise acquire such security granted to holders of a previously registered security and where the primary purpose of such registration is to distribute such unissued security to such holders. * * *

PERIODICAL AND OTHER REPORTS

Sec. 13. (a) Every issuer of a security registered on a national securities exchange shall file the information, documents, and reports below specified with the exchange (and shall file with the Commission such duplicate originals thereof as the Commission may require), in accordance with such rules and regulations as the Commission may prescribe as necessary or appropriate for the proper protection of investors and to insure fair dealing in the security—

(1) Such information and documents as the Commission may require to keep reasonably current the information and documents filed pursuant to section 12.

(2) Such annual reports, certified if required by the rules and regulations of the Commission by independent public accountants and such quarterly reports, as the Commission may prescribe. * * *

POWERS WITH RESPECT TO EXCHANGES AND SECURITIES

Sec. 19. (a) The Commission is authorized, if in its opinion such action is necessary or appropriate for the protection of investors—

(1) After appropriate notice and opportunity for hearing, by order to suspend for a period not exceeding twelve months or to withdraw the registration of a national securities exchange if the Commission finds that such exchange has violated any provision of this title or of the rules and regulations thereunder or has failed to enforce, so far as is within its power, compliance therewith by a member or by an issuer of a security registered thereon.

(2) After appropriate notice and opportunity for hearing, by order to deny, to suspend the effective date of, to suspend for a period not exceeding twelve months, or to withdraw, the registration of a security if the Commission finds that the issuer of such security has failed to comply with any provision of this title or the rules and regulations thereunder.

(3) After appropriate notice and opportunity for hearing, by order to suspend for a period not exceeding twelve months or to expel from a national securities exchange any member or officer thereof whom the Commission finds has violated any provision of his title or the rules and regulations thereunder, or has effected any transaction for any other person who, he has reason to believe, is violating in respect of such transaction any provision of this title or the rules and regulations thereunder.

(4) And if in its opinion the public interest so requires, summarily to suspend trading in any registered security on any national securities exchange for a period not exceeding ten days, or with the approval of the President, summarily to suspend all trading on any national securities exchange for a period not exceeding ninety days.

(b) The Commission is further authorized, if after making appropriate request in writing to a national securities exchange that such exchange effect on its own behalf specified changes in its rules and practices, and after appropriate notice and opportunity for hearing, the Commission determines that such exchange has not made the changes so requested, and that such changes are necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange, by rules or regulations or by order to alter or supplement the rules of such exchange (insofar as necessary or appropriate to effect such changes) in respect of such matters as (1) safeguards in respect of the financial responsibility of members and adequate provision against the evasion of financial responsibility through the use of corporate forms or special partnerships; (2) the limitation or prohibition of the registration or trading in any security within a specified period after the issuance or primary distribution thereof;

(3) the listing or striking from listing of any security; (4) hours of trading; (5) the manner, method, and place of soliciting business; (6) fictitious or numbered accounts; (7) the time and method of making settlements, payments, and deliveries and closing accounts; (8) the reporting of transactions on the exchange and upon tickers maintained by or with the consent of the exchange, including the method of reporting short sales, stopped sales, sales of securities of issuers in default, bankruptcy or receivership, and sales involving other special circumstances; (9) the fixing of reasonable rates of commission, interest, listing, and other charges; (10) minimum units of trading; (11) odd-lot purchases and sales; (12) minimum deposits on margin accounts; (13) similar matters.[b]

Sec. 28. * * *

(b) Nothing in this title shall be construed to modify existing law (1) with regard to the binding effect on any member of any exchange of any action taken by the authorities of such exchange to settle disputes between its members, or (2) with regard to the binding effect of such action on any person who has agreed to be bound thereby, or (3) with regard to the binding effect on any such member of any disciplinary action taken by the authorities of the exchange as a result of violation of any rule of the exchange, insofar as the action taken is not inconsistent with the provisions of this title or the rules and regulations thereunder.

C. Extension to the Over-the-Counter Markets of the Statutory Scheme Previously Established for Control of Securities Exchanges

REPORT OF THE SENATE COMMITTEE ON BANKING AND CURRENCY ON S. 3255,[c] TO PROVIDE FOR THE ESTABLISHMENT OF A MECHANISM OF REGULATION AMONG OVER-THE-COUNTER BROKERS AND DEALERS

Sen.Rep. No. 1455, 75th Cong., 3d Sess., (1938) 2–5.

B. SCOPE OF THE PROBLEM

1. *Importance of the over-the-counter markets.*—Under the Securities Exchange Act of 1934, the over-the-counter markets are deemed to include all transactions in securities which take place otherwise than upon a national securities exchange. These markets are im-

[b] The Securities and Exchange Commission also has broad powers to deal directly with matters of this kind by the issuance of rules and regulations of its own. See *infra* pp. 223, 225, 264.

[c] S. 3255 was subsequently enacted as the Act of June 25, 1938, c. 677, 52 Stat. 1070, popularly known as the Maloney Act, from the name of its legislative sponsor, Senator Maloney of Connecticut.

mense, the activities embraced therein are varied, and they are of the utmost importance to the national economy.

Currently, some 6,766 firms of brokers and dealers are registered with the Commission as transacting business in the over-the-counter markets. For purposes of comparison, it may be pointed out that there are only 1,375 members of the New York Stock Exchange. Over-the-counter quotations for at least 60,000 separate issues of securities are published in services to which brokers and dealers subscribe, whereas only about 6,000 separate issues of stocks and bonds are admitted to trading on all the stock exchanges of the country.

Moreover, a great deal of trading takes place over the counter even in securities which are admitted to trading upon exchanges. This is particularly true of high-grade bonds and preferred stocks; in fact, many issues of high-grade bonds and preferred stocks are not admitted to trading upon any exchange, and have their only market over the counter. For example, an estimate indicates that, as of the summer of 1937, insurance company securities with an approximate market value of about $343,000,000 were admitted to trading upon exchanges, whereas some $1,209,000,000 of insurance company securities—roughly four times the previous figure—were not admitted to trading upon any exchange, and thus enjoyed their only market over the counter. Moreover, the primary operations of the great underwriting houses take place over the counter. Thus, the over-the-counter markets not only provide the medium for an immense volume of trading in a great variety of securities, but they also provide the principal channel by which the savings of the nation flow into new financing. It is scarcely necessary to state the importance of the process by which the financial requirements of expanding industry are met through the public sale of securities to investors. The process of distributing such securities takes place on a national scale over the counter.

The over-the-counter markets in their day-to-day operation may be envisaged as a network of telephone and telegraph wires connecting dealers in all parts of the country. One might almost describe the interstate telephone as a trade symbol for this highly important business. The mails, of course, are used extensively and continuously. Thus, the over-the-counter markets are national in a dual sense: First, because of their immense importance to the national economy; second, because the actual operations of these markets are interconnected on a national scale.

2. *Importance of regulating the over-the-counter markets in relation to the regulation of exchanges.*—The importance of the over-the-counter markets in and of themselves would suffice to justify a reasonable system of regulation. Effective regulation of these markets is, moreover, imperative to prevent the evasion of the system of regulation of exchange trading embodied in the Securities Exchange Act of 1934. This was recognized by the Congress in the original enactment of that act. Thus, the report of the Senate Committee on Bank-

ing and Currency (S. Rept. No. 792, 73d Cong., 2d sess.) accompanying the bill which became the Securities Exchange Act of 1934 included the following statements:

> It has been deemed advisable to authorize the Commission to subject such activities [i. e., trading in the over-the-counter markets] to regulation similar to that prescribed for transactions on organized exchanges. This power is vitally necessary to forestall the widespread evasion of stock-exchange regulation by the withdrawal of securities from listing on exchanges, and by transferring trading therein to "over-the-counter" markets where manipulative evils could continue to flourish, unchecked by any regulatory authority (p. 6).

Similarly, the report of the House Committee on Interstate and Foreign Commerce (H. Rept. No. 1383, 73d Cong., 2d sess.) accompanying the House bill for the regulation of exchanges quotes with approval the following statement from the report of the Twentieth Century Fund on Stock Market Control:

> To leave the over-the-counter markets out of a regulatory system would be to destroy the effects of regulating the organized exchanges (p. 16).

These statements remain no less true today.

3. *Abuses in the over-the-counter markets.*—A single phase of the administrative experience of the Securities and Exchange Commission suffices to illustrate the extent of the problem of policing the submarginal element among over-the-counter brokers and dealers. In 1937, the Commission made investigations in three areas outside the largest financial centers—in Cleveland, Detroit, and the Pacific Northwest. A few attorneys and accountants were sent to these areas to inquire into certain complaints and to make a brief survey. In the space of a few months 13 individuals were criminally convicted, 16 more were placed under indictment, 17 corporations and 41 more individuals were enjoined, and 2 firms were expelled or obliged to withdraw from national securities exchanges, all for elementary violations of the law. These results produced by so limited a staff within three restricted areas in so short a time speak for themselves. We are advised that the Commission has every reason to believe that the problem revealed thereby exists in other regions as well.

4. *Nature of the problem of regulation.*—The problem of regulation of the over-the-counter markets has three aspects: First, to protect the investor and the honest dealer alike from dishonest and unfair practices by the submarginal element in the industry; second, to cope with those methods of doing business which, while technically outside the area of definite illegality, are nevertheless unfair both to customer and to decent competitor, and are seriously damaging to the mechanism of the free and open market; and, third, to afford to the investor an economic service the efficiency of which will be commensurate with its economic importance, so that the machinery of the nation's

markets will operate to avoid the misdirection of the nation's savings, which contributes powerfully toward economic depressions and breeds distrust of our financial processes.

The committee believes that there are two alternative programs by which this problem could be met. The first would involve a pronounced expansion of the organization of the Securities and Exchange Commission; the multiplication of branch offices; a large increase in the expenditure of public funds; an increase in the problem of avoiding the evils of bureaucracy; and a minute, detailed, and rigid regulation of business conduct by law. It might very well mean expanding the present process of registration of brokers and dealers with the Commission to include the proscription not only of the dishonest, but also of those unwilling or unable to conform to rigid standards of financial responsibility, professional conduct, and technical proficiency. The second of these alternative programs, which the committee believes distinctly preferable to the first, is embodied in S. 3255. This program is based upon cooperative regulation, in which the task will be largely performed by representative organizations of investment bankers, dealers, and brokers, with the Government exercising appropriate supervision in the public interest, and exercising supplementary powers of direct regulation. In the concept of a really well organized and well-conducted stock exchange, under the supervision provided by the Securities Exchange Act of 1934, one may perceive something of the possibilities of such a program.

C. LEGISLATIVE BACKGROUND

In the Securities Exchange Act of 1934, as originally enacted, the over-the-counter markets were dealt with, in brief outline, in a single section. The brevity and generality of this treatment arose from a realistic recognition of the great difficulties of working out in any detail a suitable plan of regulation at that time, in view of the fact that so little was then known concerning these markets. But, though the Congress did not at that time have before it a sufficient record of data or experience to enable it to determine upon a detailed plan of regulation, it clearly set forth the objectives of and the standards for such regulation. Section 15, in its original form, expressly contemplated the adoption by the Securities and Exchange Commission of rules and regulations concerning the over-the-counter markets "necessary or appropriate in the public interest * * * to insure to investors protection comparable to that provided by and under authority of this title in the case of national securities exchanges". To that end, the Commission was authorized to adopt rules and regulations providing "for the regulation of all transactions by brokers and dealers on any such market, for the registration with the Commission of dealers and/or brokers making or creating such a market, and for the registration of the securities for which they make or create a market".

After a year and a half of administrative experience under the original section 15, that section was, in May 1936, amended to embody the results of that experience. In consequence, section 15 in its present form is far more specific than in its original form. Since that amendment, another year and a half of administrative experience has been accumulated. This experience has both demonstrated the need and laid the foundation for a further step, which is taken in the bill now under consideration. In the judgment of the committee this bill, like the amendment of section 15 enacted in May 1936, does not enlarge the objectives or the outline of regulatory functions initially set forth in the original section 15. On the contrary, it represents the essential process of filling in and implementing the original outline in order to make possible the realization of the original objectives.

D. GROWTH OF THE IDEA OF COOPERATIVE REGULATION

The plan of cooperative regulation embodied in S. 3255 rests upon 3 years of gradual and orderly growth. Almost from its inception, the Commission conducted extended conferences with representatives of various associations of investment bankers, dealers, and brokers from all parts of the country. About 3 years ago a conference committee was formed, representative of the industry, to obtain the views of investment bankers, dealers, and brokers as to the desirability of perfecting a permanent scheme of organization for the purposes hereinabove discussed. As a result of the activities of the conference committee, there came into existence in 1936 an organization known as the Investment Bankers Conference, Inc. This organization has enrolled and maintained a membership, the committee is informed, of some 1,700 firms situated in all parts of the United States. There are likewise in existence in the country a number of other associations of brokers and dealers which have for some time exercised a degree of supervision over the conduct of their members. Representatives of the Investment Bankers Conference and of several of the other associations, such as the Investment Bankers Association and the New York Security Dealers Association, appeared and testified before the committee concerning the bill.

The committee believes that these years of experiment in organization among members of the industry and in the development of their relations with the Commission provide a sound and practical basis for the program embodied in S. 3255. The committee is advised, moreover, that the bill in its present form is endorsed by representative leaders of the Investment Bankers Conference, of the Investment Bankers Association, of the New York Security Dealers Association, and of other representative regional or local groups of dealers from various parts of the country.

SECTION 15A [d] OF THE SECURITIES EXCHANGE ACT OF 1934

15 U.S.C. § 78*o*–3.

Sec. 15A. (a) Any association of brokers or dealers may be registered with the Commission as a national securities association pursuant to subsection (b), or as an affiliated securities association pursuant to subsection (d), under the terms and conditions hereinafter provided in this section, by filing with the Commission a registration statement in such form as the Commission may prescribe, setting forth the information, and accompanied by the documents, below specified:

(1) Such data as to its organization, membership, and rules of procedure, and such other information as the Commission may by rules and regulations require as necessary or appropriate in the public interest or for the protection of investors; and

(2) Copies of its constitution, charter, or articles of incorporation or association, with all amendments thereto, and of its existing bylaws, and of any rules or instruments corresponding to the foregoing, whatever the name, hereinafter in this title collectively referred to as the "rules of the association".

Such registration shall not be construed as a waiver by such association or any member thereof of any constitutional right or of any right to contest the validity of any rule or regulation of the Commission under this title.

(b) An applicant association shall not be registered as a national securities association unless it appears to the Commission that—

(1) by reason of the number of its members, the scope of their transactions, and the geographical distribution of its members such association will be able to comply with the provisions of this title and the rules and regulations thereunder and to carry out the purposes of this section;

(2) such association is so organized and is of such a character as to be able to comply with the provisions of this title and the rules and regulations thereunder, and to carry out the purposes of this section;

(3) the rules of the association provide that any broker or dealer who makes use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security otherwise than on a national securities exchange, may become a member of such association, except such as are excluded pursuant to paragraph (4) of this subsection; Provided, That the rules of the association may restrict membership in such association on such specified geographical basis, or on such specified basis relating to the type of business done by its members, or on such

[d] As added to the Securities Exchange Act of 1934 by the Maloney Act, See n. c, *supra*.

other specified and appropriate basis, as appears to the Commission to be necessary or appropriate in the public interest or for the protection of investors and to carry out the purpose of this section;

(4) the rules of the association provide that, except with the approval or at the direction of the Commission in cases in which the Commission finds it appropriate in the public interest so to approve or direct, no broker or dealer shall be admitted to or continued in membership in such association, if (1) such broker or dealer, whether prior or subsequent to becoming such, or (2) any partner, officer, director, or branch manager of such broker or dealer (or any person occupying a similar status or performing similar functions), or any person directly or indirectly controlling or controlled by such broker or dealer, whether prior or subsequent to becoming such, (A) has been and is suspended or expelled from a registered securities association (whether national or affiliated) or from a national securities exchange, for violation of any rule of such association or exchange which prohibits any act or transaction constituting conduct inconsistent with just and equitable principles of trade, or requires any act the omission of which constitutes conduct inconsistent with just and equitable principles of trade, or (B) is subject to an order of the Commission denying or revoking his registration pursuant to section 15 of this title, or expelling or suspending him from membership in a registered securities association or a national securities exchange, or (C) by his conduct while employed by, acting for, or directly or indirectly controlling or controlled by, a broker or dealer, was a cause of any suspension, expulsion, or order of the character described in clause (A) or (B) which is in effect with respect to such broker or dealer;

(5) the rules of the association assure a fair representation of its members in the adoption of any rule of the association or amendment thereto, the selection of its officers and directors, and in all other phases of the administration of its affairs;

(6) the rules of the association provide for the equitable allocation of dues among its members, to defray reasonable expenses of administration;

(7) the rules of the association are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to provide safeguards against unreasonable profits or unreasonable rates of commissions or other charges, and, in general, to protect investors and the public interest, and to remove impediments to and perfect the mechanism of a free and open market; and are not designed to permit unfair discrimination between customers or issuers, or brokers or dealers, to fix minimum profits, to impose any schedule or prices, or to impose any schedule or fix minimum rates of commissions, allowances, discounts, or other charges;

(8) the rules of the association provide that its members shall be appropriately disciplined, by expulsion, suspension, fine, censure, or any other fitting penalty, for any violation of its rules;

(9) the rules of the association provide a fair and orderly procedure with respect to the disciplining of members and the denial of membership to any broker or dealer seeking membership therein. In any proceeding to determine whether any member shall be disciplined, such rules shall require that specific charges be brought; that such member shall be notified of, and be given an opportunity to defend against, such charges; that a record shall be kept; and that the determination shall include (A) a statement setting forth any act or practice in which such member may be found to have engaged, or which such member may be found to have omitted, (B) a statement setting forth the specific rule or rules of the association of which any such act or practice, or omission to act, is deemed to be in violation, (C) a statement whether the acts or practices prohibited by such rule or rules, or the omission of any act required thereby, are deemed to constitute conduct inconsistent with just and equitable principles of trade, and (D) a statement setting forth the penalty imposed. In any proceeding to determine whether a broker or dealer shall be denied membership, such rules shall provide that the broker or dealer shall be notified of, and be given an opportunity to be heard upon, the specific grounds for denial which are under consideration; that a record shall be kept; and that the determination shall set forth the specific grounds upon which the denial is based; and

(10) the requirements of subsection (c), insofar as these may be applicable, are satisfied.

(c) The Commission may permit or require the rules of an association applying for registration pursuant to subsection (b), to provide for the admission of an association registered as an affiliated securities association, pursuant to subsection (d), to participation in said applicant association as an affiliate thereof, under terms permitting such powers and responsibilities to such affiliate, and under such other appropriate terms and conditions, as may be provided by the rules of said applicant association, if such rules appear to the Commission to be necessary or appropriate in the public interest or for the protection of investors and to carry out the purposes of this section. The duties and powers of the Commission with respect to any national securities association or any affiliated securities association shall in no way be limited by reason of any such affiliation.

(d) An applicant association shall not be registered as an affiliated securities association unless it appears to the Commission that—

(1) Such association, notwithstanding that it does not satisfy the requirements set forth in paragraph (1) of subsection (b), will, forthwith upon the registration thereof, be admitted to affiliation with an association registered as a national securities association pursuant to said subsection (b), in the manner and under the terms and conditions provided by the rules of said national securities association in accordance with subsection (c); and

(2) such association and its rules satisfy the requirements set forth in paragraphs (2) to (9), inclusive, of subsection (b); except that in the case of any such association any restrictions upon membership therein of the type authorized by paragraph (3) of subsection (b) shall not be less stringent than in the case of the national securities association with which such association is to be affiliated.

(e) Upon the filing of an application for registration pursuant to subsection (b) or subsection (d), the Commission shall by order grant such registration if the requirements of this section are satisfied. If, after appropriate notice and opportunity for hearing, it appears to the Commission that any requirement of this section is not satisfied, the Commission shall by order deny such registration. If any association granted registration as an affiliated securities association pursuant to subsection (d) shall fail to be admitted promptly thereafter to affiliation with a registered national securities association, the Commission shall revoke the registration of such affiliated securities association.

(f) A registered securities association (whether national or affiliated) may, upon such reasonable notice as the Commission may deem necessary in the public interest or for the protection of investors, withdraw from registration by filing with the Commission a written notice of withdrawal in such form as the Commission may by rules and regulations prescribe. Upon the withdrawal of a national securities association from registration, the registration of any association affiliated therewith shall automatically terminate.

(g) If any registered securities association (whether national or affiliated) shall take any disciplinary action against any member thereof, or shall deny admission to any broker or dealer seeking membership therein, such action shall be subject to review by the Commission, on its own motion, or upon application by any person aggrieved thereby filed within sixty days after such action has been taken or within such longer period as the Commission may determine. Application to the Commission for review, or the institution of review by the Commission on its own motion, shall operate as a stay of such action until an order is issued upon such review pursuant to subsection (h).

(h) (1) In a proceeding to review disciplinary action taken by a registered securities association against a member thereof, if the Commission, after appropriate notice and opportunity for hearing, upon consideration of the record before the association and such other evidence as it may deem relevant, shall (A) find that such member has engaged in such acts or practices, or has omitted such act, as the association has found him to have engaged in or omitted, and (B) shall determine that such acts or practices, or omission to act, are in violation of such rules of the association as have been designated in the determination of the association, the Commission shall by order dismiss the proceeding, unless it appears to the Com-

mission that such action should be modified in accordance with paragraph (2) of this subsection. The Commission shall likewise determine whether the acts or practices prohibited, or the omission of any act required, by any such rule constitute conduct inconsistent with just and equitable principles of trade, and shall so declare. If it appears to the Commission that the evidence does not warrant the finding required in clause (A) or if the Commission shall determine that such acts or practices as are found to have been engaged in are not prohibited by the designated rule or rules of the association, or that such act as is found to have been omitted is not required by such designated rule or rules, the Commission shall by order set aside the action of the association.

(2) If, after appropriate notice and opportunity for hearing, the Commission finds that any penalty imposed upon a member is excessive or oppressive, having due regard to the public interest, the Commission shall by order cancel, reduce, or require the remission of such penalty.

(3) In any proceeding to review the denial of membership in a registered securities association, if the Commission, after appropriate notice and hearing, and upon consideration of the record before the association and such other evidence as it may deem relevant, shall determine that the specific grounds on which such denial is based exist in fact and are valid under this section, the Commission shall by order dismiss the proceeding; otherwise, the Commission shall by order set aside the action of the association and require it to admit the applicant broker or dealer to membership therein.

(i) (1) The rules of a registered securities association may provide that no member thereof shall deal with any non-member broker or dealer (as defined in paragraph (2) of this subsection) except at the same prices, for the same commissions or fees, and on the same terms and conditions as are by such member accorded to the general public.

(2) For the purposes of this subsection, the term "non-member broker or dealer" shall include any broker or dealer who makes use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security otherwise than on a national securities exchange, who is not a member of any registered securities association, except a broker or dealer who deals exclusively in commercial paper, bankers' acceptances, or commercial bills.

(3) Nothing in this subsection shall be so construed or applied as to prevent any member of a registered securities association from granting to any other member of any registered securities association any dealer's discount, allowance, commission, or special terms.

(j) Every registered securities association shall file with the Commission in accordance with such rules and regulations as the Commis-

sion may prescribe as necessary or appropriate in the public interest or for the protection of investors, copies of any changes in or additions to the rules of the association, and such other information and documents as the Commission may require to keep current or to supplement the registration statement and documents filed pursuant to subsection (a). Any change in or addition to the rules of a registered securities association shall take effect upon the thirtieth day after the filing of a copy thereof with the Commission, or upon such earlier date as the Commission may determine, unless the Commission shall enter an order disapproving such change or addition; and the Commission shall enter such an order unless such change or addition appears to the Commission to be consistent with the requirements of subsection (b) and subsection (d).

(k) (1) The Commission is authorized by order to abrogate any rule of a registered securities association, if after appropriate notice and opportunity for hearing, it appears to the Commission that such abrogation is necessary or appropriate to assure fair dealing by the members of such association, to assure a fair representation of its members in the administration of its affairs or otherwise to protect investors or effectuate the purposes of this title.

(2) The Commission may in writing request any registered securities association to adopt any specified alteration of or supplement to its rules with respect to any of the matters hereinafter enumerated. If such association fails to adopt such alteration or supplement within a reasonable time, the Commission is authorized by order to alter or supplement the rules of such association in the manner theretofore requested if, after appropriate notice and opportunity for hearing it appears to the Commission that such alteration or supplement is necessary or appropriate in the public interest or for the protection of investors or to effectuate the purposes of this section, with respect to: (1) The basis for, and procedure in connection with, the denial of membership or the disciplining of members; (2) the method for adoption of any change in or addition to the rules of the association; (3) the method of choosing officers and directors; and (4) affiliation between registered securities associations.

(1) The Commission is authorized, if such action appears to it to be necessary or appropriate in the public interest or for the protection of investors or to carry out the purposes of this section—

(1) after appropriate notice and opportunity for hearing by order to suspend for a period not exceeding 12 months or to revoke the registration of a registered securities association, if the Commission finds that such association has violated any provision of this title or any rule or regulation thereunder, or has failed to enforce compliance with its own rules, or has engaged, in any other activity tending to defeat the purposes of this section;

(2) after appropriate notice and opportunity for hearing, by order to suspend for a period not exceeding 12 months or to expel from a registered securities association any member thereof who the Commission finds (A) has violated any provision of this title or any rule or regulation thereunder, or has effected any transaction for any other person who, he had reason to believe, was violating with respect to such transaction any provision of this title or any rule or regulation thereunder, or (B) has willfully violated any provision of the Securities Act of 1933, as amended, or of any rule or regulation thereunder, or has effected any transaction for any other person who, he had reason to believe, was willfully violating with respect to such transaction any provision of such Act or rule or regulation;

(3) after appropriate notice and opportunity for hearing, by order to remove from office any officer or director of a registered securities association who, the Commission finds, has willfully failed to enforce the rules of the association, or has willfully abused his authority.

(m) Nothing in this section shall be construed to apply with respect to any transaction by a broker or dealer in any exempted security.

(n) If any provision of this section is in conflict with any provision of any law of the United States in force on the date this section takes effect, the provision of this section shall prevail.

FIFTH ANNUAL REPORT OF THE SECURITIES AND EXCHANGE COMMISSION

Pages 57–58.

OVER-THE-COUNTER MARKETS

Formation of National and Affiliated Securities Associations Pursuant to Section 15(a) of the Securities Exchange Act of 1934, as Amended

In the over-the-counter securities markets, the Commission, during the period covered by this report, has continued to administer the program inaugurated by the Maloney Amendment to the Securities Exchange Act of 1934 (Public, No. 719, 75th Congress), approved by the President on June 25, 1938. This amendment, in its essentials, provides for a system of regulation in the over-the-counter markets through the formation of one or more voluntary associations of investment bankers, brokers, and dealers doing business in these markets under appropriate governmental supervision.

In furtherance of this program of voluntary regulation among brokers and dealers, it was deemed advisable to have the new legis-

lation and the policies of the Commission thereunder explained in detail to as large a number of firms and individuals conducting an over-the-counter securities business as possible. Furthermore, from the outset it was the desire of the Commission to obtain the views with respect to the formation of effective voluntary associations of as many such brokers and dealers as might wish to express themselves. To accomplish these objectives, members of the Commission and of its staff conducted conferences, open to all interested persons, in financial communities situated in the various sections of the country. This work was deemed to be an essential preliminary to the registration with the Commission of any national or affiliated securities association.

To facilitate this work and to assist brokers and dealers in the formation of associations, the Commission created a special unit, designated as the Securities Association Unit, within its Trading and Exchange Division. This unit has conducted a large number of informal round table conferences with committees of the Investment Bankers Conference, Inc., their counsel, and other interested groups and individuals. During the course of such conferences, the principal objective has been to be of all possible assistance to the representatives of the securities business in their work of creating an organization designed to secure the approval and support of the better element of brokers and dealers throughout the country and to be effective in the regulation of the business conduct of members.

The very scope of this program, together with the fact that it is without precedent in the over-the-counter securities markets, has made the task of organization a necessarily protracted one. However, as of the close of the past fiscal year, there was every indication that the Investment Bankers Conference, Inc., reconstituted as the National Association of Securities Dealers, Inc., and provided with a duly amended constitution, by-laws and rules of fair practice, would file an application for registration with the Commission in the reasonably near future.

Membership in this new association will be open to all brokers and dealers conducting business in the over-the-counter markets, except those who have disqualified themselves by their previous conduct and as a result, are laboring under certain disabilities set forth in the statute. However, both the Commission and the Conference have expressed themselves as favoring the grouping of those brokers and dealers who transact business in the more specialized types of securities, oil royalties, for example, in affiliated associations to be formed subsequent to the registration of a national association.

In order that every reasonable opportunity may be afforded such association or associations as may become registered with the Commission to exercise as broad a regulatory function as possible, the Commission has refrained from any substantial amplification of its own rules for regulation of over-the-counter markets. However, the

Commission recognizes its duty under the law to eliminate by direct regulation such abuses and undesirable practices as may be found by experience to be beyond the reach of registered securities associations. In this connection it should be stated that at conferences preliminary to the registration of an association it was definitely indicated that many of the regulatory measures intended by the Maloney Act which could have been assumed by such an association would not be so assumed.[e]

SECTION 3. CLARIFICATION OF THE ANTITRUST LAWS: A PROBLEM IN LEGISLATIVE AND ADMINISTRATIVE TECHNIQUE

MILTON KATZ, THE CONSENT DECREE IN ANTITRUST ADMINISTRATION

(1940) 53 Harv.L.Rev. 415, 427-34.

* * *

THE CONSENT DECREE AS A DEVICE FOR CLARIFICATION

The generality of the antitrust laws has caused deep concern to a president who cherished their purpose and wrought greatly to achieve it.[34] It has been the subject of extended and recurrent legislative inquiry,[35] the briefs of constitutional lawyers,[36] and the imprecations of businessmen. All have sought the way to clarification, which has been defined in accordance with the diverse objectives and philosophies of the seekers. In varying form and with varying degrees of emphasis, most of the proposals reflect one, or both, of two quite different purposes. Some would clarify the law by supplementing it with a series of specific prohibitions. Others aim primarily at clarification through authoritative advice to businessmen concerning the permissible limits of cooperative action.

[e] Footnotes of the Commission have been omitted.

[34] See the Address of President Wilson to Congress, Jan. 20, 1914, 51 Cong. Rec.1962, 1963 (1914). See *infra* note 37.

[35] See Sen. Rep. No. 597, 63d Cong., 2d Sess. (1914) 13; Preliminary Report of the Temporary National Economic Committee, July 17, 1939 (Sen Doc. No 95, 76th Cong., 1st Sess. (1939) 4).

[36] Nash v. United States, 229 U S. 373, 33 S.Ct. 780, 57 L.Ed. 1232 (1913).

Clarification through Specific Prohibitions

On the direct suggestion of President Wilson,[37] Congress, in the course of the many-sided legislative process out of which the Clayton Act and the Federal Trade Commission Act emerged, examined the practicability and desirability of incorporating explicit and "item by item" prohibitions in the law. The attempt was abandoned as unwise,[38] for reasons which have been stated forcibly and concisely by Mr. Justice Brandeis:

"Experience with existing laws had taught that definition, being necessarily rigid, would prove embarrassing and, if rigorously applied, might involve great hardship. Methods of competition which would be unfair in one industry, under certain circumstances, might, when adopted in another industry, or even in the same industry under different circumstances, be entirely unobjectionable. Furthermore, an enumeration, however comprehensive, of existing methods of unfair competition must necessarily soon prove incomplete, as with new conditions constantly arising novel unfair methods would be devised and developed." [39]

In part, the legislation which ensued continued to rely for clarification upon the accumulation of judicial precedents. In part, Congress sought to advance the purposes of definition by vesting in the Federal Trade Commission the power to proscribe unfair methods of competition by cease and desist orders issued upon the basis of

[37] "The business of the country awaits also, has long awaited and has suffered because it could not obtain, further and more explicit legislative definition of the policy and meaning of the existing antitrust law. Nothing hampers business like uncertainty. . . . Surely we are sufficiently familiar with the actual processes and methods of monopoly and of the many hurtful restraints of trade to make definition possible, at any rate up to the limits of what experience has disclosed. These practices, being now abundantly disclosed, can be explicitly and item by item forbidden by statute in such terms as will practically eliminate uncertainty, the law itself and the penalty being made equally plain." Address of President Wilson, 51 Cong.Rec. 1962, 1963 (1914).

[38] Sen.Rep. No.597, 63d Cong., 2d Sess. (1914) 13: "It is believed that the term 'unfair competition' has a legal significance which can be enforced by the commission and the courts, and that it is no more difficult to determine what is unfair competition than it is to determine what is a reasonable rate or what is an unjust discrimination. The committee was of the opinion that it would be better to put in a general provision condemning unfair competition than to attempt to define the numerous unfair practices, such as local price cutting, interlocking directorates, and holding companies intended to restrain substantial competition."

[39] See Brandeis, J., dissenting in Federal Trade Commission v. Gratz, 253 U. S. 421, 436–437, 40 S.Ct. 572, 64 L.Ed. 993 (1920). Compare the testimony of Mr. Leon Henderson before the Temporary National Economic Committee, Dec. 3, 1938, Hearings before Temporary National Economic Committee pursuant to Pub.Res. No. 113, 75th Cong., 3d Sess. (1938) pt. 1, 182–83.

See also Federal Trade Commission v. R. F. Keppel & Bro., Inc., 291 U.S. 304, 310–312, 54 S.Ct. 423, 78 L.Ed. 814 (1934).

the special facts determining the tendencies of the method of competition thus condemned. The power of the Commission, however, was conceived of only in part as a power to define. It was designed also as a power to supplement the broad prohibitions of the law, by checking any business practice "which would be likely to result in public injury—because in its nature it would tend to aid or develop into a restraint of trade." [40] The doleful experience of the Commission in its efforts toward these ends lies outside the scope of this paper.[41] It has been suggested, however, that something akin to the purpose of definition originally sought to be achieved through Section 5 of the Federal Trade Commission Act may be realized in substantial measure through the use of the consent decree. If, in the course of an antitrust proceeding, the defendants propose the entry of a consent decree enjoining the practices specified in the complaint or indictment, discussions are likely to ensue concerning the structure and dynamics of the industry of which these practices are a part. Since the excision of these practices will require a readjustment of the defendants' ways of doing business, they may not be averse to examining the possibility of a more comprehensive surgery, upon which they might base a definitive reorganization of their business methods. It may appear that other practices are current or in contemplation within the industry concerning the legality of which the defendants have a question; and they may deem it sound business judgment to terminate doubts and avoid the risk of successive prosecutions and piece-meal readjustments,[42] by consenting to a decree which prohibits not only the practices originally complained of, but also such of the other practices as the Department considers to be in violation of the antitrust laws.[43]

40 See Brandeis, J., dissenting in Federal Trade Commission v. Gratz, 253 U. S. 421, 435, 40 S.Ct. 572, 64 L.Ed. 993 (1920); *cf.* remarks of Senator Cummins, Chairman of the Senate Committee on Interstate Commerce, which reported the Federal Trade Commission bill: "The purpose of this bill . . . is to seize the offender before his ravages have gone to the length necessary in order to bring him within the law that we already have. . . .

". . . we have observed certain forms of industrial activity which ought to be prohibited whether in and of themselves they restrain trade or commerce or not. We have discovered that their tendency is evil; we have discovered that the end which is inevitably reached through those methods is an end which is destructive of fair commerce among the States." 51 Cong.Rec. 11455 (1914).

41 See, e.g., Federal Trade Commission v. Gratz, 253 U.S. 421, 40 S.Ct. 572, 64 L.Ed. 993 (1920); Mennen Co. v. Federal Trade Commission, 288 F. 774 (C.C.A. 2d, 1923), cert. denied, 262 U.S. 759, 43 S.Ct 705, 67 L.Ed. 1219 (1923).

42 Compare: "Not only judicial policy but prosecution policy must be developed by precedent and on publicly stated grounds if it is to clarify the law. . . . Business men are entitled to know what kinds of situations will lead to prosecution, because prosecution itself is a most important business hazard regardless of whether the Government succeeds in proving its case." Rep. Att'y Gen. (1938) 60.

43 Compare: "Although lack of enforcement in the past has left the limits of this device uncertain, it is clear that the scope of such a decree in any case may go beyond the issues of the case." Rep. Att'y Gen. (1938) 65.

Within the circumscribed area to which the decree applies, and subject to the possible impact of changed conditions, the injunctions of such a decree will approximate the explicit and item by item prohibitions against restraints of trade which President Wilson and so many others have sought to have incorporated into the statutes. Since it is limited in scope to the particular industry and the particular defendants, such a decree is well designed to avoid the danger of inappropriateness which is likely to beset definite prohibitions far wider in their application than the conditions with reference to which they were framed.[44] Insofar as adequate provision is made against the contingency of changing conditions,[45] the decree will likewise be free from the rigidity of specific statutory prohibitions enduring long after the expiration of the conditions which led to their enactment. As a device to achieve the purpose stated, such a decree has restricted scope, a measure of flexibility and a measure of adaptability.

In effect, the consent decree, when thus employed, represents a somewhat make-shift effort to achieve results which could be accomplished in a more orderly and effective way through the issuance of rules and regulations by an appropriate administrative agency. No suitable power to implement the antitrust laws by rules and regulations exists in any administrative agency,[46] and the Department of Justice has been impelled to improvise one. The improvisation reflects a need, and, with due care and understanding, it can be made to serve a beneficial purpose. But it is timely to recall the administrative setting of the antitrust laws. When the Sherman Act was passed, the administrative commission was a novel and unfamiliar device in national regulation. The Interstate Commerce Commission had been established just three years before, and had enjoyed a wholly independent status for only one year.[47] In the half-century which has elapsed since the passage of the Sherman Act, and in the

[44] Cf. Brandeis, J., dissenting in Federal Trade Commission v. Gratz, 253 U. S. 421, 436–437, 40 S.Ct. 572, 64 L.Ed. 993 (1920).

[45] Cf. discussion *supra* pp. 420–23—[of the original text—Ed.]

[46] Under § 6(g) of the Federal Trade Commission Act, the Commission is empowered "From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this Act." 38 Stat. 717, § 6(g) (1914), 15 U.S.C. § 46(g) (1934). The limits of this power are uncertain, and the Commission seems to have construed it narrowly. In any event it applies only in respect of the Federal Trade Commission Act, and not the antitrust laws.

The Commission's trade practice conference rules do not seem to be regulations of the Commission at all. They appear in effect to constitute announcements of Commission policy. See Ann. Rep. FTC (1926) 47–50; Ann Rep. FTC (1936) 97–101; FTC, Rules of Practice Rule XXIV. These conferences and conference rules represent an interesting and suggestive effort. In one aspect, they may be regarded as comparable to the consent decree when the decree is used as an instrument to clarify the law through specific prohibitions. Both reflect attempts to satisfy the same deeply felt administrative need.

[47] 24 Stat. 379, §§ 18, 21 (1887); id., as amended, 25 Stat. 855 (1889).

quarter-century since the adoption of the Federal Trade Commission and Clayton Acts, administrative law in America has progressed steadily toward maturity. The processes of administration have been enriched from time to time by new and improved methods, and the methods of administration have been tested in an increasingly wide and varied governmental experience. The Department of Justice, it is true, must seek to fill the gaps in the machinery of administration upon the antitrust laws as best it can with the instruments at hand, but Congress is under no such limitation. If an attempt to clarify the law through detailed and explicit prohibitions is to be made at all, it would be elementary good sense to draw upon the technique which the growth of our legal system has made available. In so doing, it would be equally good sense to recognize and make use of the peculiar virtues of the consent decree: that it grows always out of an actual proceeding, that it is framed always with reference to a concrete situation and that it is limited in its application to a comparatively narrow area. These attributes can be adapted to, and incorporated within, a more suitable administrative method. In the process, a renewed effort might be made to realize the purpose of supplementary prevention which Congress unsuccessfully tried to accomplish through Section 5 of the Federal Trade Commission Act.[48]

Congress might vest in an appropriate commission the power and the duty to implement the antitrust laws by rules and regulations designed more sharply to focus the general prohibitions of the law by defining their application to specific practices within specific industries.[49] The commission might likewise be empowered by rules and regulations to prescribe measures reasonably designed to prevent

[48] See *supra*, p. 429 [of the original text, corresponding to p. 45 herein.—Ed.] and note 40.

[49] Cf. § 15(c) (1), (2) of the Securities Exchange Act of 1934 (48 Stat. 881), as amended (52 Stat. 1075 (1938)), 15 U.S.C. § 78o(c) (1), (2) (Supp.1938).

"(c) (1) No broker or dealer shall make use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security (other than commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange, by means of any manipulative, deceptive, or other fraudulent device or contrivance. The Commission shall, for the purposes of this subsection, by rules and regulations define such devices or contrivances as are manipulative, deceptive or otherwise fraudulent.

"(2) No broker or dealer shall make use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange, in connection with which such broker or dealer engages in any fraudulent, deceptive, or manipulative act or practice, or makes any fictitious quotation. The Commission shall, for the purpose of this paragraph, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative and such quotations as are fictitious."

Cf. the trade practice conference rules, Group I, of the Federal Trade Commission: see Ann.Rep. FTC (1926) 47–50; Ann.Rep. FTC (1936) 97–101; FTC, Rules of Practice, Rule XXIV.

the circumvention of any provision of the antitrust laws by designated practices within specified industries.[50] Such regulations would be issued only if facts revealed in an actual proceeding under the antitrust laws had suggested the need for them, and would be limited in scope to the industry affected by the proceeding. They would not be promulgated until ample opportunity for criticism had been given to persons affected, and the criticisms had been received and weighed. Unlike a consent decree or a cease and desist order, which is directed only against the named defendants, the regulations would bind all persons within the designated industry. Aside from the criminal penalties, which it might be unwise to extend to breaches of regulations, the several remedies available against violations of the anti-

[50] Cf. § 15(c) (2) of the Securities Exchange Act of 1934, quoted *supra* note 49.

Cf. also §§ 9(a) and 10(b) of the Securities Exchange Act of 1934, as amended (15 U.S.C. §§ 78i(a), 78j(b) (Supp.1938)). Section 9(a) interdicts wash sales, matched orders, pools to rig or jiggle the market, and other manipulative and deceptive practices involving securities registered on a national security exchange. The prohibited practices are enumerated and described with some particularity. It is against the background of § 9(a) that § 10(b) should be read:

"Sec. 10. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—. . . .

"(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."

Cf. also, Public Utility Holding Company Act of 1935 (49 Stat. 803), §§ 12 (g), 13(e), 15 U.S.C. §§ 79*l*, 79m (Supp. 1938):

"Sec. 12. . . . (g) It shall be unlawful for any affiliate of any public-utility company, by use of the mails or any means or instrumentality of interstate commerce, or for any affiliate of any public-utility company engaged in interstate commerce, or of any registered holding company or any subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, to negotiate, enter into, or take any step in the performance of any transaction not otherwise unlawful under this title, with any such company of which it is an affiliate, in contravention of such rules and regulations or orders regarding reports, accounts, costs, maintenance of competitive conditions, disclosure of interest, duration of contracts, and similar matters as the Commission deems necessary or appropriate to prevent the circumvention of the provisions of this title."

"Sec. 13. . . . (e) It shall be unlawful for any affiliate of any public-utility company engaged in interstate commerce, or of any registered holding company or subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, to enter into or take any step in the performance of any service, sales, or construction contract, by which such affiliate undertakes to perform services or construction work for, or sell goods to, any such company of which it is an affiliate, in contravention of such rules and regulations or orders regarding reports, accounts, costs, maintenance of competitive conditions, disclosure of interest, duration of contracts, and similar matters, as the Commission deems necessary or appropriate to prevent the circumvention of the provisions of this title or the rules, regulations, or orders thereunder."

trust laws could be used to enforce these rules. The general provisions of the law would remain in full force and effect, and the rules and regulations would be prohibitory, not permissive, in their terms. In this way, the persistent and justifiable desire for certainty in the law might be accommodated to the requirements of flexibility.

Clarification by Advice Concerning Permissible Limits of Cooperative Action

A substantial portion of the business community is apt to regard specific prohibitions designed to clarify the antitrust laws with a jaundiced eye. Most businessmen want acutely to be told, not what they may not do, however definite the terms of statement, but what they may do; they are seeking interpretations of the law which will be permissive, not prohibitory, in character; and they want to be informed authoritatively, by competent government officials. In practice, this desire tends often to fuse with a more or less articulate program for the partial or complete relaxation of the antitrust laws, or for a wholly different system of regulation. But that is another story.[51] * * *

[51] [Footnote omitted.—Ed.]

Chapter III

ORGANIZATION OF THE ADMINISTRATIVE AGENCY [a]

SECTION 1. THE APPOINTMENT AND REMOVAL OF MEMBERS OF THE ADMINISTRATIVE AGENCY: CONTROL BY THE EXECUTIVE AND LEGISLATURE

CONSTITUTION OF THE UNITED STATES

Article II, Sections 1, 2.

Section 1. The executive Power shall be vested in a President of the United States of America. * * *

Section 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators pres-

[a] For comprehensive descriptions of the organization of the Bituminous Coal Division (Dept. of Interior), Civil Aeronautics Board, Bureau of Customs (Dept. of the Treasury), U. S. Employees' Compensation Commission, Wage and Hour Division (Dept. of Labor), Children's Bureau (Dept. of Labor), Comptroller of the Currency, Federal Alcohol Administration, Federal Communications Commission, Federal Deposit Insurance Corporation, Federal Power Commission, Federal Reserve Board, Federal Trade Commission, Grain Division of the Agricultural Marketing Service (Dept. of Agriculture), Grazing Service (Dept. of Interior), Office of Indian Affairs (Dept. of Interior), Bureau of Internal Revenue and Tax Court, Interstate Commerce Commission, General Land Office (Dept. of Interior), Bureau of Marine Inspection and Navigation (Dept. of Commerce), U. S. Maritime Commission, National Labor Relations Board, Department of Agriculture as Administrator of the Packers' and Stockyards Act, Post Office Department, Division of Public Contracts (Dept. of Labor), Railroad Retirement Board, National Railroad Adjustment Board and National Mediation Board, Securities and Exchange Commission, Social Security Board, U. S. Tariff Commission, Veterans' Administration, and the War Department as Administrator of statutes regulating the use of navigable waters, see the series of monographs published by the Attorney General's Committee on Administrative Procedure. The Committee was constituted on Feb. 24, 1939, by the Attorney General of the United States upon the direction of the President, and submitted its final report on Jan. 24, 1941.

ent concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

MYERS v. UNITED STATES

Supreme Court of the United States.

272 U.S. 52, 47 S.Ct. 21, 71 L.Ed. 160 (1926).

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

This case presents the question whether under the Constitution the President has the exclusive power of removing executive officers of the United States whom he has appointed by and with the advice and consent of the Senate.

Myers, appellant's intestate, was on July 21, 1917, appointed by the President, by and with the advice and consent of the Senate, to be a postmaster of the first class at Portland, Or., for a term of four years. On January 20, 1920, Myers' resignation was demanded. He refused the demand. On February 2, 1920, he was removed from office by order of the Postmaster General, acting by direction of the President. February 10th, Myers sent a petition to the President and another to the Senate committee on post offices, asking to be heard, if any charges were filed. He protested to the department against his removal, and continued to do so until the end of his term. He pursued no other occupation and drew compensation for no other service during the interval. On April 21, 1921, he brought this suit in the Court of Claims for his salary from the date of his removal, which, as claimed by supplemental petition filed after July 21, 1921, the end of his term, amounted to $8,838.71. In August, 1920, the President made a recess appointment of one Jones, who took office September 19, 1920.

The Court of Claims gave judgment against Myers and this is an appeal from that judgment. The court held that he had lost his right of action because of his delay in suing, citing Arant v. Lane, 249 U.S. 367, 39 S.Ct. 293, 63 L.Ed. 650; Nicholas v. United States, 257 U.S. 71, 42 S.Ct. 7, 66 L.Ed. 133, and Norris v. United States, 257 U.S. 77, 42 S.Ct. 9, 66 L.Ed. 136. These cases show that when a United States officer is dismissed, whether in disregard of the law or from

mistake as to the facts of his case, he must promptly take effective action to assert his rights. But we do not find that Myers failed in this regard. He was constant in his efforts at reinstatement. A hearing before the Senate committee could not be had till the notice of his removal was sent to the Senate or his successor was nominated. From the time of his removal until the end of his term, there were three sessions of the Senate without such notice or nomination. He put off bringing his suit until the expiration of the Sixty-Sixth Congress, March 4, 1921. After that, and three months before his term expired, he filed his petition. Under these circumstances, we think his suit was not too late. Indeed the Solicitor General, while not formally confessing error in this respect, conceded at the bar that no laches had been shown.

By the sixth section of the Act of Congress of July 12, 1876, 19 Stat. 80, 81, c. 179 (Comp.St. § 7190), under which Myers was appointed with the advice and consent of the Senate as a first-class postmaster, it is provided that:

"Postmasters of the first, second, and third classes shall be appointed and may be removed by the President by and with the advice and consent of the Senate, and shall hold their offices for four years unless sooner removed or suspended according to law."

The Senate did not consent to the President's removal of Myers during his term. If this statute in its requirement that his term should be four years unless sooner removed by the President by and with the consent of the Senate is valid, the appellant, Myers' administratrix, is entitled to recover his unpaid salary for his full term and the judgment of the Court of Claims must be reversed. The government maintains that the requirement is invalid, for the reason that under article 2 of the Constitution the President's power of removal of executive officers appointed by him with the advice and consent of the Senate is full and complete without consent of the Senate. If this view is sound, the removal of Myers by the President without the Senate's consent was legal, and the judgment of the Court of Claims against the appellant was correct, and must be affirmed, though for a different reason from that given by that court. We are therefore confronted by the constitutional question and cannot avoid it. * * *

The question where the power of removal of executive officers appointed by the President by and with the advice and consent of the Senate was vested, was presented early in the first session of the First Congress. There is no express provision respecting removals in the Constitution, except as section 4 of article 2, above quoted, provides for removal from office by impeachment. The subject was not discussed in the Constitutional Convention. * * *

After the great compromises of the convention—the one giving the states equality of representation in the Senate, and the other placing the election of the President, not in Congress, as once voted, but in an

electoral college, in which the influence of larger states in the selection would be more nearly in proportion to their population—the smaller states led by Roger Sherman, fearing that under the second compromise the President would constantly be chosen from one of the larger states, secured a change by which the appointment of all officers, which theretofore had been left to the President without restriction, was made subject to the Senate's advice and consent, and the making of treaties and the appointments of ambassadors, public ministers, consuls, and judges of the Supreme Court were transferred to the President, but made subject to the advice and consent of the Senate.
* * *

In the House of Representatives of the First Congress, on Tuesday, May 18, 1789, Mr. Madison moved in the committee of the whole that there should be established three executive departments, one of Foreign Affairs, another of the Treasury, and a third of War, at the head of each of which there should be a Secretary, to be appointed by the President by and with the advice and consent of the Senate, and to be removable by the President. The committee agreed to the establishment of a Department of Foreign Affairs, but a discussion ensued as to making the Secretary removable by the President. 1 Annals of Congress, 370, 371. "The question was now taken and carried, by a considerable majority, in favor of declaring the power of removal to be in the President." 1 Annals of Congress, 383.

On June 16, 1789, the House resolved itself into a committee of the whole on a bill proposed by Mr. Madison for establishing an executive department to be denominated the Department of Foreign Affairs, in which the first clause, after stating the title of the officer and describing his duties, had these words "to be removable from office by the President of the United States." 1 Annals of Congress, 455. After a very full discussion the question was put: Shall the words "to be removable by the President" be struck out? It was determined in the negative—yeas 20, nays 34. 1 Annals of Congress, 576.

On June 22, in the renewal of the discussion:

"Mr. Benson moved to amend the bill, by altering the second clause, so as to imply the power of removal to be in the President alone. The clause enacted that there should be a chief clerk, to be appointed by the Secretary of Foreign Affairs, and employed as he thought proper, and who, in case of vacancy, should have the charge and custody of all records, books, and papers appertaining to the department. The amendment proposed that the chief clerk, 'whenever the said principal officer shall be removed from office by the President of the United States, or in any other case of vacancy,' should during such vacancy, have the charge and custody of all records, books, and papers appertaining to the department." 1 Annals of Congress, 578.

"Mr. Benson stated that his objection to the clause 'to be removable by the President' arose from an idea that the power of removal by the President hereafter might appear to be exercised by virtue of a

legislative grant only, and consequently be subjected to legislative instability, when he was well satisfied in his own mind that it was fixed by a fair legislative construction of the Constitution." 1 Annals of Congress, 579.

"Mr. Benson declared, if he succeeded in this amendment, he would move to strike out the words in the first clause, 'to be removable by the President,' which appeared somewhat like a grant. Now, the mode he took would evade that point and establish a legislative construction of the Constitution. He also hoped his amendment would succeed in reconciling both sides of the House to the decision, and quieting the minds of gentlemen." 1 Annals of Congress, 578.

Mr. Madison admitted the objection made by the gentleman near him (Mr. Benson) to the words in the bill. He said:

"They certainly may be construed to imply a legislative grant of the power. He wished everything like ambiguity expunged, and the sense of the House explicitly declared, and therefore seconded the motion. Gentlemen have all along proceeded on the idea that the Constitution vests the power in the President, and what arguments were brought forward respecting the convenience or inconvenience of such disposition of the power were intended only to throw light upon what was meant by the compilers of the Constitution. Now, as the words proposed by the gentleman from New York expressed to his mind the meaning of the Constitution, he should be in favor of them, and would agree to strike out those agreed to in the committee." 1 Annals of Congress, 578, 579. * * *

It is very clear from this history that the exact question which the House voted upon was whether it should recognize and declare the power of the President under the Constitution to remove the Secretary of Foreign Affairs without the advice and consent of the Senate. That was what the vote was taken for. Some effort has been made to question whether the decision carries the result claimed for it, but there is not the slightest doubt, after an examination of the record, that the vote was, and was intended to be, a legislative declaration that the power to remove officers appointed by the President and the Senate vested in the President alone, and until the Johnson impeachment trial in 1868 its meaning was not doubted, even by those who questioned its soundness.

The discussion was a very full one. Fourteen out of the 29 who voted for the passage of the bill and 11 of the 22 who voted against the bill took part in the discussion. Of the members of the House, 8 had been in the Constitutional Convention, and of these 6 voted with the majority, and 2, Roger Sherman and Elbridge Gerry, the latter of whom had refused to sign the Constitution, voted in the minority. After the bill as amended had passed the House, it was sent to the Senate, where it was discussed in secret session, without report. The critical vote there was upon the striking out of the clause recognizing and affirming the unrestricted power of the President to re-

move. The Senate divided by 10 to 10, requiring the deciding vote of the Vice President, John Adams, who voted against striking out, and in favor of the passage of the bill as it had left the House.[1] Ten of the Senators had been in the Constitutional Convention, and of them 6 voted that the power of removal was in the President alone. The bill, having passed as it came from the House, was signed by President Washington and became a law. Act July 27, 1789, 1 Stat. 28. c. 4. * * *

The debates in the Constitutional Convention indicated an intention to create a strong executive, and after a controversial discussion the executive power of the government was vested in one person and many of his important functions were specified so as to avoid the humiliating weakness of the Congress during the Revolution and under the Articles of Confederation. 1 Farrand, 66–97.

Mr. Madison and his associates in the discussion in the House dwelt at length upon the necessity there was for construing article 2 to give the President the sole power of removal in his responsibility for the conduct of the executive branch, and enforced this by emphasizing his duty expressly declared in the third section of the article to "take care that the laws be faithfully executed." Madison, 1 Annals of Congress, 496, 497.

The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates. This view has since been repeatedly affirmed by this court. Wilcox v. Jackson, 13 Pet. 498, 513, 10 L.Ed. 264; United States v. Eliason, 16 Pet. 291, 302, 10 L.Ed. 968; Williams v. United States, 1 How. 290, 297, 11 L.Ed. 135; Cunningham v. Neagle, 135 U. S. 1, 63, 10 S.Ct. 658, 34 L.Ed. 55; Russell Co. v. United States, 261 U. S. 514, 523, 43 S.Ct. 428, 67 L.Ed. 778. As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws. The further implication must be, in the absence of any express limitation respecting removals, that as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible. Fisher Ames, 1 Annals of Congress, 474. It was urged that the natural meaning of the term "executive power" granted the President included the appointment and removal of executive subordinates. If such appointments and removals were not an exercise of the executive power, what were they?

[1] Maclay shows the vote 10 to 10. Journal of William Maclay, 116. John Adams' Diary shows 9 to 9 3 C. F. Adams, Works of John Adams, 412. Ellsworth's name appears in Maclay's list as voting against striking out, but not in that of Adams—evidently an inadvertence.

They certainly were not the exercise of legislative or judicial power in government as usually understood. * * *

The requirement of the second section of article 2 that the Senate should advise and consent to the presidential appointments, was to be strictly construed. * * *

The executive power was given in general terms strengthened by specific terms where emphasis was regarded as appropriate, and was limited by direct expressions where limitation was needed, and the fact that no express limit was placed on the power of removal by the executive was convincing indication that none was intended. This is the same construction of article 2 as that of Alexander Hamilton quoted infra. * * *

The history of the clause by which the Senate was given a check upon the President's power of appointment makes it clear that it was not prompted by any desire to limit removals. As already pointed out, the important purpose of those who brought about the restriction was to lodge in the Senate, where the small states had equal representation with the larger states, power to prevent the President from making too many appointments from the larger states. Roger Sherman and Oliver Ellsworth, delegates from Connecticut, reported to its Governor: "The equal representation of the states in the Senate and the voice of that branch in the appointment to offices will secure the rights of the lesser as well as of the greater states." 3 Farrand, 99. The formidable opposition to the Senate's veto on the President's power of appointment indicated that in construing its effect, it should not be extended beyond its express application to the matter of appointments. * * *

It was pointed out in this great debate that the power of removal, though equally essential to the executive power is different in its nature from that of appointment. Madison, 1 Annals of Congress, 497 et seq.; Clymer, 1 Annals, 489; Sedgwick, 1 Annals, 522; Ames, 1 Annals, 541, 542; Hartley, 1 Annals, 481. A veto by the Senate—a part of the legislative branch of the government—upon removals is a much greater limitation upon the executive branch, and a much more serious blending of the legislative with the executive, than a rejection of a proposed appointment. It is not to be implied. The rejection of a nominee of the President for a particular office does not greatly embarrass him in the conscientious discharge of his high duties in the selection of those who are to aid him, because the President usually has an ample field from which to select for office, according to his preference, competent and capable men. The Senate has full power to reject newly proposed appointees whenever the President shall remove the incumbents. Such a check enables the Senate to prevent the filling of offices with bad or incompetent men, or with those against whom there is tenable objection.

The power to prevent the removal of an officer who has served under the President is different from the authority to consent to or re-

ject his appointment. When a nomination is made, it may be presumed that the Senate is, or may become, as well advised as to the fitness of the nominee as the President, but in the nature of things the defects in ability or intelligence or loyalty in the administration of the laws of one who has served as an officer under the President are facts as to which the President, or his trusted subordinates, must be better informed than the Senate, and the power to remove him may therefore be regarded as confined for very sound and practical reasons, to the governmental authority which has administrative control. The power of removal is incident to the power of appointment, not to the power of advising and consenting to appointment, and when the grant of the executive power is enforced by the express mandate to take care that the laws be faithfully executed, it emphasizes the necessity for including within the executive power as conferred the exclusive power of removal. * * *

In all such cases, the discretion to be exercised is that of the President in determining the national public interest and in directing the action to be taken by his executive subordinates to protect it. In this field his cabinet officers must do his will. He must place in each member of his official family, and his chief executive subordinates, implicit faith. The moment that he loses confidence in the intelligence, ability, judgment, or loyalty of any one of them, he must have the power to remove him without delay. To require him to file charges and submit them to the consideration of the Senate might make impossible that unity and co-ordination in executive administration essential to effective action. * * *

Mr. Justice Story, after a very full discussion of the decision of 1789, in which he intimates that as an original question he would favor the view of the minority, says:

"That the final decision of this question so made was greatly influenced by the exalted character of the President then in office was asserted at the time, and has always been believed. Yet the doctrine was opposed, as well as supported, by the highest talents and patriotism of the country. The public, however, acquiesced in this decision, and it constitutes, perhaps, the most extraordinary case in the history of the government of a power, conferred by implication on the executive by the assent of a bare majority of Congress, which has not been questioned on many other occasions. Even the most jealous advocates of state rights seem to have slumbered over this vast reach of authority, and have left it untouched, as the neutral ground of controversy, in which they desired to reap no harvest, and from which they retired, without leaving any protestations of title or contest. Nor is this general acquiescence and silence without a satisfactory explanation." 2 Story, Constitution, § 1543.

He finds that until a then very recent period, namely, the administration of President Jackson, the power of unrestricted removal had been exercised by all the Presidents, but that moderation and forbear-

ance had been shown; that under President Jackson, however, an opposite course had been pursued extensively and brought again the executive power of removal to a severe scrutiny. The learned author then says:

"If there has been any aberration from the true constitutional exposition of the power of removal (which the reader must decide for himself), it will be difficult, and perhaps impracticable, after 40 years' experience, to recall the practice to correct theory. But, at all events, it will be a consolation to those who love the Union, and honor a devotion to the patriotic discharge of duty, that in regard to 'inferior officers' (which appellation probably includes ninety-nine out of a hundred of the lucrative offices in the government), the remedy for any permanent abuse is still within the power of Congress, by the simple expedient of requiring the consent of the Senate to removals in such cases." 2 Story, Constitution, § 1544.

In an article by Mr. Fish contained in American Historical Association Reports, for 1899 (page 67), removals from office, not including presidential removals in the Army and the Navy, in the administrations from Washington to Johnson are stated to have been as follows: Washington, 17; Adams, 19; Jefferson, 62; Madison, 24; Jackson, 180; Van Buren, 43; Harrison and Tyler, 389; Polk, 228; Taylor, 491; Fillmore, 73; Pierce, 771; Buchanan, 253; Lincoln, 1,400; Johnson, 726. These, we may infer, were all made in conformity to the legislative decision of 1789.

Mr. Webster is cited as opposed to the decision of the First Congress. His views were evoked by the controversy between the Senate and President Jackson. The alleged general use of patronage for political purposes by the President and his dismissal of Duane, Secretary of the Treasury, without reference to the Senate, upon Duane's refusal to remove government deposits from the United States Bank, awakened bitter criticism in the Senate, and led to an extended discussion of the power of removal by the President. In a speech, May 7, 1834, on the President's protest, Mr. Webster asserted that the power of removal, without the consent of the Senate, was in the President alone, according to the established construction of the Constitution, and that Duane's dismissal could not be justly said to be a usurpation. 4 Webster, Works, 103–105. A year later, in February, 1835, Mr. Webster seems to have changed his views somewhat, and in support of a bill requiring the President in making his removals from office to send to the Senate his reasons therefor made an extended argument against the correctness of the decision of 1789. He closed his speech thus:

"But I think the decision of 1789 has been established by practice, and recognized by subsequent laws, as the settled construction of the Constitution, and that it is our duty to act upon the case accordingly for the present, without admitting that Congress may not, hereafter, if necessity shall require it, reverse the decision of 1789." 4 Webster, 179, 198. * * *

In United States v. Perkins, 116 U.S. 483, 6 S.Ct. 449, 29 L.Ed. 700, a cadet engineer, a graduate of the Naval Academy, brought suit to recover his salary for the period after his removal by the Secretary of the Navy. It was decided that his right was established by Revised Statutes, § 1229 (Comp.St. § 2001), providing that no officer in the military or naval service should in time of peace be dismissed from service, except in pursuance of a sentence of court-martial. The section was claimed to be an infringement upon the constitutional prerogative of the executive. The Id., 20 Court of Claims, 438, 444, refused to yield to this argument and said:

"Whether or not Congress can restrict the power of removal incident to the power of appointment of those officers who are appointed by the President by and with the advice and consent of the Senate under the authority of the Constitution (article 2, section 2), does not arise in this case and need not be considered. We have no doubt that, when Congress by law vests the appointment of inferior officers in the heads of departments it may limit and restrict the power of removal as it deems best for the public interest. The constitutional authority in Congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as Congress may enact in relation to the officers so appointed. The head of a department has no constitutional prerogative of appointment to offices independently of the legislation of Congress, and by such legislation he must be governed, not only in making appointments, but in all that is incident thereto."

This language of the Court of Claims was approved by this court and the judgment was affirmed.

The power to remove inferior executive officers, like that to remove superior executive officers, is an incident of the power to appoint them, and is in its nature an executive power. The authority of Congress given by the excepting clause to vest the appointment of such inferior officers in the heads of departments carries with it authority incidentally to invest the heads of departments with power to remove. It has been the practice of Congress to do so and this court has recognized that power. The court also has recognized in the Perkins Case that Congress, in committing the appointment of such inferior officers to the heads of departments, may prescribe incidental regulations controlling and restricting the latter in the exercise of the power of removal. But the court never has held, nor reasonably could hold, although it is argued to the contrary on behalf of the appellant, that the excepting clause enables Congress to draw to itself, or to either branch of it, the power to remove or the right to participate in the exercise of that power. To do this would be to go beyond the words and implications of that clause, and to infringe the constitutional principle of the separation of governmental powers.

Assuming, then, the power of Congress to regulate removals as incidental to the exercise of its constitutional power to vest appoint-

ments of inferior officers in the heads of departments, certainly so long as Congress does not exercise that power, the power of removal must remain where the Constitution places it, with the President, as part of the executive power, in accordance with the legislative decision of 1789 which we have been considering. * * *

We come now to a period in the history of the government when both houses of Congress attempted to reverse this constitutional construction, and to subject the power of removing executive officers appointed by the President and confirmed by the Senate to the control of the Senate, indeed finally to the assumed power in Congress to place the removal of such officers anywhere in the government.

This reversal grew out of the serious political difference between the two houses of Congress and President Johnson. There was a two-thirds majority of the Republican party, in control of each house of Congress, which resented what it feared would be Mr. Johnson's obstructive course in the enforcement of the reconstruction measures in respect to the states whose people had lately been at war against the national government. This led the two houses to enact legislation to curtail the then acknowledged powers of the President. It is true that during the latter part of Mr. Lincoln's term two important voluminous acts were passed, each containing a section which seemed inconsistent with the legislative decision of 1789 (Act Feb. 25, 1863, 12 Stat. 665, c. 58, § 1; Act March 3, 1865, 13 Stat. 489, c. 79, § 12); but they were adopted without discussion of the inconsistency and were not tested by executive or judicial inquiry. * * *

But the chief legislation in support of the reconstruction policy of Congress was the Tenure of Office Act of March 2, 1867, 14 Stat. 430, c. 154, providing that all officers appointed by and with the consent of the Senate should hold their offices until their successors should have in like manner been appointed and qualified; that certain heads of departments, including the Secretary of War, should hold their offices during the term of the President by whom appointed and one month thereafter, subject to removal by consent of the Senate. The Tenure of Office Act was vetoed, but it was passed over the veto. The House of Representatives preferred articles of impeachment against President Johnson for refusal to comply with, and for conspiracy to defeat, the legislation above referred to, but he was acquitted for lack of a two-thirds vote for conviction in the Senate. * * *

The extreme provisions of all this legislation were a full justification for the considerations, so strongly advanced by Mr. Madison and his associates in the First Congress, for insisting that the power of removal of executive officers by the President alone was essential in the division of powers between the executive and the legislative bodies. It exhibited in a clear degree the paralysis to which a partisan Senate and Congress could subject the executive arm, and destroy the principle of executive responsibility, and separation of the powers sought for by the framers of our government, if the President had no power of re-

moval save by consent of the Senate. It was an attempt to redistribute the powers and minimize those of the President.

After President Johnson's term ended, the injury and invalidity of the Tenure of Office Act in its radical innovation were immediately recognized by the executive and objected to. General Grant, succeeding Mr. Johnson in the presidency, earnestly recommended in his first message the total repeal of the act, * * *

While in response to this a bill for repeal of that act passed the House, it failed in the Senate, and, though the law was changed, it still limited the presidential power of removal. The feeling growing out of the controversy with President Johnson retained the act on the statute book until 1887, when it was repealed. * * *

For the reasons given, we must therefore hold that the provision of the law of 1876 by which the unrestricted power of removal of first-class postmasters is denied to the President is in violation of the Constitution and invalid. This leads to an affirmance of the judgment of the Court of Claims. * * *

Judgment affirmed.

* * *

Mr. Justice HOLMES, dissenting.

My Brothers MCREYNOLDS and BRANDEIS have discussed the question before us with exhaustive research and I say a few words merely to emphasize my agreement with their conclusion.

The arguments drawn from the executive power of the President, and from his duty to appoint officers of the United States (when Congress does not vest the appointment elsewhere), to take care that the laws be faithfully executed, and to commission all officers of the United States, seem to me spiders' webs inadequate to control the dominant facts.

We have to deal with an office that owes its existence to Congress and that Congress may abolish to-morrow. Its duration and the pay attached to it while it lasts depend on Congress alone. Congress alone confers on the President the power to appoint to it and at any time may transfer the power to other hands. With such power over its own creation, I have no more trouble in believing that Congress has power to prescribe a term of life for it free from any interference than I have in accepting the undoubted power of Congress to decree its end. I have equally little trouble in accepting its power to prolong the tenure of an incumbent until Congress or the Senate shall have assented to his removal. The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power.

Mr. Justice BRANDEIS, dissenting.

In 1833 Mr. Justice Story, after discussing in sections 1537–1543 his Commentaries on the Constitution the much debated question concerning the President's power of removal, said in section 1544:

"If there has been any aberration from the true constitutional exposition of the power of removal (which the reader must decide for himself), it will be difficult, and perhaps impracticable, after forty years' experience, to recall the practice to the correct theory. But, at all events, it will be a consolation to those who love the Union, and honor a devotion to the patriotic discharge of duty, that in regard to 'inferior officers' (which appellation probably includes ninety-nine out of a hundred of the lucrative offices in the government), the remedy for any permanent abuse is still within the power of Congress, by the simple expedient of requiring the consent of the Senate to removals in such cases."

Postmasters are inferior officers. Congress might have vested their appointment in the head of the department.[1] The Act of July 12, 1876, cc. 176, 179, § 6, 19 Stat. 78, 80 (Comp.St. § 7190), re-enacted earlier legislation,[2] provided that:

"Postmasters of the first, second, and third classes shall be appointed and may be removed by the President by and with the advice and consent of the Senate, and shall hold their offices for four years unless sooner removed or suspended according to law."

That statute has been in force unmodified for half a century. Throughout the period, it has governed a large majority of all civil offices to which appointments are made by and with the advice and consent of the Senate.[3] May the President, having acted under the statute in so far as it creates the office and authorizes the appointment, ignore, while the Senate is in session, the provision which prescribes the condition under which a removal may take place?

It is this narrow question, and this only, which we are required to decide. We need not consider what power the President, being Commander-in-Chief, has over officers in the Army and the Navy. We need not determine whether the President, acting alone, may remove high political officers. We need not even determine whether, acting alone, he may remove inferior civil officers when the Senate is not in session. It was in session when the President purported to remove Myers, and for a long time thereafter. * * *

1 Prior to the Act of July 2, 1836, c. 270, § 33, 5 Stat. 80, 87, all postmasters were appointed by the Postmaster General. Fourth class postmasters are still appointed by him. See Acts of May 8, 1794, c. 23, § 3, 1 Stat. 354, 357; April 30, 1810, c. 37, §§ 1, 5, 28, 40, 42, 2 Stat. 592; March 3, 1825, c. 64, § 1, 4 Stat. 102; March 3, 1863, c. 71, § 1, 12 Stat. 701; July 1, 1864, c. 197, § 1, 13 Stat. 335.

2 The removal provision was introduced specifically into the postal legislation by Act Jan. 8, 1872, c. 335, § 63, 17 Stat. 283, 292, and re-enacted, in substance, in Act June 23, 1874, c. 456, § 11, 18 Stat. 231, 234 in the Revised Statutes, § 3830, and the Act of 1876.

3 During the year ending June 30, 1913, there were in the civil service 10,543 presidential appointees. Of these 8,423 were postmasters of the first, second and third classes. Report of U. S. Civil Service Commission for 1913, p. 8. During the year ending June 30, 1923, the number of presidential appointees was 16,148. The number of postmasters of the first, second and third classes was 14,261. Report for 1923, pp. xxxii, 100.

The separation of the powers of government did not make each branch completely autonomous. It left each in some measure, dependent upon the others, as it left to each power to exercise, in some respects, functions in their nature executive, legislative and judicial. Obviously the President cannot secure full execution of the laws, if Congress denies to him adequate means of doing so. Full execution may be defeated because Congress declines to create offices indispensable for that purpose; or because Congress, having created the office, declines to make the indispensable appropriation; or because Congress, having both created the office and made the appropriation, prevents, by restrictions which it imposes, the appointment of officials who in quality and character are indispensable to the efficient execution of the law. If, in any such way, adequate means are denied to the President, the fault will lie with Congress. The President performs his full constitutional duty, if, with the means and instruments provided by Congress and within the limitations prescribed by it, he uses his best endeavors to secure the faithful execution of the laws enacted. Compare Kendall v. United States, 12 Pet. 524, 613, 626, 9 L.Ed. 1181.

Checks and balances were established in order that this should be "a government of laws and not of men." As White said in the House in 1789, an uncontrollable power of removal in the Chief Executive "is a doctrine not to be learned in American governments." Such power had been denied in colonial charters,[82] and even under proprietary grants[83] and royal commissions.[84] It had been denied in the thirteen states before the framing of the federal Constitution.[85] The doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy. In order to prevent arbitrary executive action, the Constitution provided in terms that presidential appointments be made with the consent of the Senate, unless Congress should otherwise provide; and this clause was construed by Alexander Hamilton in The Federalist, No. 77, as requiring like consent to removals.[86] Limiting further executive preroga-

82 [Footnote omitted.—Ed.]

83 [Footnote omitted.—Ed.]

84 [Footnote omitted.—Ed.]

85 [Footnote omitted.—Ed.]

86 Hamilton's opinion is significant in view of the fact that it was he who on June 5, 1787, suggested the association of the Senate with the President in appointments, as a compromise measure for dealing with the appointment of judges. 1 Farrand, Records of the Federal Convention, 128. The proposition that such appointments should be made by and with the advice and consent of the Senate was first brought forward by Nathaniel Gorham of Massachusetts, "in the mode prescribed by the Constitution of Massachusetts." 2 Id. 41. Later this association of the President and the Senate was carried over generally to other appointments. The suggestion for the concurrence of the Senate in appointments of executive officials was advanced on May 29 by Pinckney in his "draught of a federal government" and by Hamilton in resolutions submitted by him on June 18, 1787. 1 Id. 292; 3 Id. 599.

tives customary in monarchies, the Constitution empowered Congress to vest the appointment of inferior officers, "as we think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." Nothing in support of the claim of uncontrollable power can be inferred from the silence of the convention of 1787 on the subject of removal. For the outstanding fact remains that every specific proposal to confer such uncontrollable power upon the President was rejected.[87] In America, as in England, the conviction prevailed then that the people must look to representative assemblies for the protection of their liberties. And protection of the individual, even if he be an official, from the arbitrary or capricious exercise of power was then believed to be an essential of free government.[b]

FEDERAL TRADE COMMISSION ACT,[c] § 1

15 U.S.C. § 41.

SEC. 1. CREATION AND ESTABLISHMENT OF THE COMMISSION.

* * * That a commission is hereby created and established, to be known as the Federal Trade Commission (hereinafter referred to as the commission), which shall be composed of five commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. Not more than three of the commissioners shall be members of the same political party. The first commissioners appointed shall continue in office for terms of three, four, five, six, and seven years, respectively, from the date of the taking effect of this Act, the term of each to be designated by the President, but their successors shall be appointed for terms of seven years, except that any person chosen to fill a vacancy shall be appointed only for the unex-

[87] Rogers, Executive Power of Removal, 11, 39. On August 6, 1787, the Committee of Five reported the draft of the Constitution that in article 10, § 2, provided for a single executive who "shall appoint officers in all cases not otherwise provided for by this Constitution." 2 Farrand, Records of the Federal Convention, 185. On August 20 propositions were submitted to the Committee of Five for the creation of a Council of State consisting of the Chief Justice, the Secretaries of domestic affairs, commerce and finance, foreign affairs, war, marine and state. All the Secretaries were to be appointed by the President and hold office during his pleasure. 2 Id. 335-337. That proposition was rejected, because "it was judged that the Presidt. by persuading his council—to concur in his wrong measures, would acquire their protection * * *" 2 Id. 542. The criticism of Wilson, who had proposed the Council of State, and Mason of the Senate's participation in appointments was based upon this rejection. The lack of such a council was the "fatal defect" from which "has arisen the improper power of the Senate in the appointment of public officers." 2 Id. 537, 639.

[b] The dissenting opinion of Mr. Justice McReynolds is omitted.

[c] Act of September 26, 1914, c. 311, 38 Stat. 717, as amended. *Cf.* Interstate Commerce Act, as amended, §§ 11, 18, 24 (49 U.S.C. §§ 11, 18); Securities Exchange Act of 1934, as amended, § 4 (15 U.S.C. § 78d); National Labor Relations Act, § 3 (29 U.S.C. § 153).

pired term of the commissioner whom he shall succeed: *Provided, however,* That upon the expiration of his term of office a Commissioner shall continue to serve until his successor shall have been appointed and shall have qualified. The commission shall choose a chairman from its own membership. No commissioner shall engage in any other business, vocation, or employment. Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office. A vacancy in the commission shall not impair the right of the remaining commissioners to exercise all the powers of the commission.

The commission shall have an official seal, which shall be judicially noticed.

HUMPHREY'S EXECUTOR (RATHBUN) v. UNITED STATES

Supreme Court of the United States.
295 U.S. 602, 55 S.Ct. 869, 79 L.Ed. 1611 (1935).

Mr. Justice SUTHERLAND delivered the opinion of the Court.

Plaintiff brought suit in the Court of Claims against the United States to recover a sum of money alleged to be due the deceased for salary as a Federal Trade Commissioner from October 8, 1933, when the President undertook to remove him from office, to the time of his death on February 14, 1934. The court below has certified to this court two questions (Act of February 13, 1925, § 3(a), c. 229, 43 Stat. 936, 939, 28 U.S.C. § 288 [28 U.S.C.A. § 288]), in respect of the power of the President to make the removal. The material facts which give rise to the questions are as follows:

William E. Humphrey, the decedent, on December 10, 1931, was nominated by President Hoover to succeed himself as a member of the Federal Trade Commission, and was confirmed by the United States Senate. He was duly commissioned for a term of seven years, expiring September 25, 1938; and, after taking the required oath of office, entered upon his duties. On July 25, 1933, President Roosevelt addressed a letter to the commissioner asking for his resignation, on the ground "that the aims and purposes of the Administration with respect to the work of the Commission can be carried out most effectively with personnel of my own selection," but disclaiming any reflection upon the commissioner personally or upon his services. The commissioner replied, asking time to consult his friends. After some further correspondence upon the subject, the President on August 31, 1933, wrote the commissioner expressing the hope that the resignation would be forthcoming, and saying: "You will, I know, realize that I do not feel that your mind and my mind go along together on either the policies or the administering of the Federal Trade Commission, and, frankly, I think it is best for the people of this country that I should have a full confidence."

The commissioner declined to resign; and on October 7, 1933, the President wrote him: "Effective as of this date you are hereby removed from the office of Commissioner of the Federal Trade Commission."

Humphrey never acquiesced in this action, but continued thereafter to insist that he was still a member of the commission, entitled to perform its duties and receive the compensation provided by law at the rate of $10,000 per annum. Upon these and other facts set forth in the certificate, which we deem it unnecessary to recite, the following questions are certified:

"1. Do the provisions of section 1 of the Federal Trade Commission Act, stating that 'any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office', restrict or limit the power of the President to remove a commissioner except upon one or more of the causes named?

"If the foregoing question is answered in the affirmative, then—

"2. If the power of the President to remove a commissioner is restricted or limited as shown by the foregoing interrogatory and the answer made thereto, is such a restriction or limitation valid under the Constitution of the United States?"

First. The question first to be considered is whether, by the provisions of section 1 of the Federal Trade Commission Act already quoted, the President's power is limited to removal for the specific causes enumerated therein. The negative contention of the government is based principally upon the decision of this court in Shurtleff v. United States, 189 U.S. 311, 23 S.Ct. 535, 537, 47 L.Ed. 828. That case involved the power of the President to remove a general appraiser of merchandise appointed under the Act of June 10, 1890, 26 Stat. 131. Section 12 of the act provided for the appointment by the President, by and with the advice and consent of the Senate, of nine general appraisers of merchandise, who "may be removed from office at any time by the President for inefficiency, neglect of duty, or malfeasance in office." The President removed Shurtleff without assigning any cause therefor. The Court of Claims dismissed plaintiff's petition to recover salary, upholding the President's power to remove for causes other than those stated. In this court Shurtleff relied upon the maxim expressio unius est exclusio alterius; but this court held that, while the rule expressed in the maxim was a very proper one and founded upon justifiable reasoning in many instances, it "should not be accorded controlling weight when to do so would involve the alteration of the universal practice of the government for over a century, and the consequent curtailment of the powers of the Executive in such an unusual manner." What the court meant by this expression appears from a reading of the opinion. That opinion, after saying that no term of office was fixed by the act and that, with the exception of judicial officers provided for by the Constitution, no civil officer had ever held office by life tenure since the foundation of the government, points out

that to construe the statute as contended for by Shurtleff would give the appraiser the right to hold office during his life or until found guilty of some act specified in the statute, the result of which would be a complete revolution in respect of the general tenure of office, effected by implication with regard to that particular office only.

"We think it quite inadmissible," the court said (189 U.S. 311, at pages 316, 318, 23 S.Ct. 535, 537, 47 L.Ed. 828), "to attribute an intention on the part of Congress to make such an extraordinary change in the usual rule governing the tenure of office, and one which is to be applied to this particular office only, without stating such intention in plain and explicit language, instead of leaving it to be implied from doubtful inferences. * * * We cannot bring ourselves to the belief that Congress ever intended this result while omitting to use language which would put that intention beyond doubt."

These circumstances, which led the court to reject the maxim as inapplicable, are exceptional. In the face of the unbroken precedent against life tenure, except in the case of the judiciary, the conclusion that Congress intended that, from among all other civil officers, appraisers alone should be selected to hold office for life was so extreme as to forbid, in the opinion of the court, any ruling which would produce that result if it reasonably could be avoided. The situation here presented is plainly and wholly different. The statute fixes a term of office, in accordance with many precedents. The first commissioners appointed are to continue in office for terms of three, four, five, six, and seven years, respectively; and their successors are to be appointed for terms of seven years—any commissioner being subject to removal by the President for inefficiency, neglect of duty, or malfeasance in office. The words of the act are definite and unambiguous.

The government says the phrase "continue in office" is of no legal significance and, moreover, applies only to the first Commissioners. We think it has significance. It may be that, literally, its application is restricted as suggested; but it, nevertheless, lends support to a view contrary to that of the government as to the meaning of the entire requirement in respect of tenure; for it is not easy to suppose that Congress intended to secure the first commissioners against removal except for the causes specified and deny like security to their successors. Putting this phrase aside, however, the fixing of a definite term subject to removal for cause, unless there be some countervailing provision or circumstance indicating the contrary, which here we are unable to find, is enough to establish the legislative intent that the term is not to be curtailed in the absence of such cause. But if the intention of Congress that no removal should be made during the specified term except for one or more of the enumerated causes were not clear upon the face of the statute, as we think it is, it would be made clear by a consideration of the character of the commission and the legislative history which accompanied and preceded the passage of the act.

The commission is to be nonpartisan; and it must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the law. Its duties are neither political nor executive, but predominantly quasi judicial and quasi legislative. Like the Interstate Commerce Commission, its members are called upon to exercise the trained judgment of a body of experts "appointed by law and informed by experience." Illinois Cent. & R. R. v. Inter. Com. Comm., 206 U.S. 441, 454, 27 S.Ct. 700, 704, 51 L.Ed. 1128; Standard Oil Co. v. United States, 283 U.S. 235, 238, 239, 51 S.Ct. 429, 75 L.Ed. 999.

The legislative reports in both houses of Congress clearly reflect the view that a fixed term was necessary to the effective and fair administration of the law. In the report to the Senate (No. 597, 63d Cong., 2d Sess., pp. 10, 11) the Senate Committee on Interstate Commerce, in support of the bill which afterwards became the act in question, after referring to the provision fixing the term of office at seven years, so arranged that the membership would not be subject to complete change at any one time, said: "The work of this commission will be of a most exacting and difficult character, demanding persons who have experience in the problems to be met—that is, a proper knowledge of both the public requirements and the practical affairs of industry. It is manifestly desirable that the terms of the commissioners shall be long enough to give them an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience."

The report declares that one advantage which the commission possessed over the Bureau of Corporations (an executive subdivision in the Department of Commerce which was abolished by the act) lay in the fact of its independence, and that it was essential that the commission should not be open to the suspicion of partisan direction. The report quotes (p. 22) a statement to the committee by Senator Newlands, who reported the bill, that the tribunal should be of high character and "independent of any department of the government. * * * a board or commission of dignity, permanence, and ability, independent of executive authority, except in its selection, and independent in character."

The debates in both houses demonstrate that the prevailing view was that the Commission was not to be "subject to anybody in the government but * * * only to the people of the United States"; free from "political domination or control" or the "probability or possibility of such a thing"; to be "separate and apart from any existing department of the government—not subject to the orders of the President."

More to the same effect appears in the debates, which were long and thorough and contain nothing to the contrary. While the general rule precludes the use of these debates to explain the meaning of the words of the statute, they may be considered as reflecting light upon its gen-

eral purposes and the evils which it sought to remedy. Federal Trade Commission v. Raladam Co., 283 U.S. 643, 650, 51 S.Ct. 587, 75 L.Ed. 1324, 79 A.L.R. 1191.

Thus, the language of the act, the legislative reports, and the general purposes of the legislation as reflected by the debates, all combine to demonstrate the congressional intent to create a body of experts who shall gain experience by length of service; a body which shall be independent of executive authority, *except in its selection,* and free to exercise its judgment without the leave or hindrance of any other official or any department of the government. To the accomplishment of these purposes, it is clear that Congress was of opinion that length and certainty of tenure would vitally contribute. And to hold that, nevertheless, the members of the commission continue in office at the mere will of the President, might be to thwart, in large measure, the very ends which Congress sought to realize by definitely fixing the term of office.

We conclude that the intent of the act is to limit the executive power of removal to the causes enumerated, the existence of none of which is claimed here; and we pass to the second question.

Second. To support its contention that the removal provision of section 1, as we have just construed it, is an unconstitutional interference with the executive power of the President, the government's chief reliance is Myers v. United States, 272 U.S. 52, 47 S.Ct. 21, 71 L.Ed. 160. That case has been so recently decided, and the prevailing and dissenting opinions so fully review the general subject of the power of executive removal, that further discussion would add little of value to the wealth of material there collected. These opinions examine at length the historical, legislative, and judicial data bearing upon the question, beginning with what is called "the decision of 1789" in the first Congress and coming down almost to the day when the opinions were delivered. They occupy 243 pages of the volume in which they are printed. Nevertheless, the narrow point actually decided was only that the President had power to remove a postmaster of the first class, without the advice and consent of the Senate as required by act of Congress. In the course of the opinion of the court, expressions occur which tend to sustain the government's contention, but these are beyond the point involved and, therefore, do not come within the rule of stare decisis. In so far as they are out of harmony with the views here set forth, these expressions are disapproved. * * *

The office of a postmaster is so essentially unlike the office now involved that the decision in the Myers Case cannot be accepted as controlling our decision here. A postmaster is an executive officer restricted to the performance of executive functions. He is charged with no duty at all related to either the legislative or judicial power. The actual decision in the Myers Case finds support in the theory that such an officer is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power

of removal by the Chief Executive, whose subordinate and aid he is. Putting aside dicta, which may be followed if sufficiently persuasive but which are not controlling, the necessary reach of the decision goes far enough to include all purely executive officers. It goes no farther; much less does it include an officer who occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President.

The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control. In administering the provisions of the statute in respect of "unfair methods of competition," that is to say, in filling in and administering the details embodied by that general standard, the commission acts in part quasi legislatively and in part quasi judicially. In making investigations and reports thereon for the information of Congress under section 6, in aid of the legislative power, it acts as a legislative agency. Under section 7, which authorizes the commission to act as a master in chancery under rules prescribed by the court, it acts as an agency of the judiciary. To the extent that it exercises any executive function, as distinguished from executive power in the constitutional sense, it does so in the discharge and effectuation of its quasi legislative or quasi judicial powers, or as an agency of the legislative or judicial departments of the government.[1]

If Congress is without authority to prescribe causes for removal of members of the trade commission and limit executive power of removal accordingly, that power at once becomes practically all-inclusive in respect of civil officers with the exception of the judiciary provided for by the Constitution. The Solicitor General, at the bar, apparently recognizing this to be true, with commendable candor, agreed that his view in respect of the removability of members of the Federal Trade Commission necessitated a like view in respect of the Interstate Commerce Commission and the Court of Claims. We are thus confronted with the serious question whether not only the members of these quasi legislative and quasi judicial bodies, but the judges of the legislative Court of Claims, exercising judicial power (Williams v. United States, 289 U.S. 553, 565–567, 53 S.Ct. 751, 77 L.Ed. 1372), continue in office only at the pleasure of the President.

[1] The provision of section 6(d) of the act (15 USCA § 46(d) which authorizes the President to direct an investigation and report by the commission in relation to alleged violations of the anti trust acts, is so obviously collateral to the main design of the act as not to detract from the force of this general statement as to the character of that body.

We think it plain under the Constitution that illimitable power of removal is not possessed by the President in respect of officers of the character of those just named. The authority of Congress, in creating quasi legislative or quasi judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue, and to forbid their removal except for cause in the meantime. For it is quite evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will.

The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution; and in the rule which recognizes their essential coequality. The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there. James Wilson, one of the framers of the Constitution and a former justice of this court, said that the independence of each department required that its proceedings "should be free from the remotest influence, direct or indirect, of either of the other two powers." Andrews, The Works of James Wilson (1896), vol. 1, p. 367. And Mr. Justice Story in the first volume of his work on the Constitution (4th Ed.) § 530, citing No. 48 of the Federalist, said that neither of the departments in reference to each other "ought to possess, directly or indirectly, an overruling influence in the administration of their respective powers." And see O'Donoghue v. United States, supra, 289 U.S. 516, at pages 530–531, 53 S.Ct. 740, 77 L.Ed. 1356.

The power of removal here claimed for the President falls within this principle, since its coercive influence threatens the independence of a commission, which is not only wholly disconnected from the executive department, but which, as already fully appears, was created by Congress as a means of carrying into operation legislative and judicial powers, and as an agency of the legislative and judicial departments.

In the light of the question now under consideration, we have reexamined the precedents referred to in the Myers Case, and find nothing in them to justify a conclusion contrary to that which we have reached. The so-called "decision of 1789" had relation to a bill proposed by Mr. Madison to establish an executive Department of Foreign Affairs. The bill provided that the principal officer was "to be removable from office by the President of the United States." This clause was changed to read "whenever the principal officer shall be removed from office by the President of the United States," certain things should follow, thereby, in connection with the debates, recognizing and

confirming, as the court thought in the Myers Case, the sole power of the President in the matter. We shall not discuss the subject further, since it is so fully covered by the opinions in the Myers Case, except to say that the office under consideration by Congress was not only purely executive, but the officer one who was responsible to the President, and to him alone, in a very definite sense. A reading of the debates shows that the President's illimitable power of removal was not considered in respect of other than executive officers. And it is pertinent to observe that when, at a later time, the tenure of office for the Comptroller of the Treasury was under consideration, Mr. Madison quite evidently thought that, since the duties of that office were not purely of an executive nature but partook of the judiciary quality as well, a different rule in respect of executive removal might well apply. 1 Annals of Congress, cols. 611–612.

In Marbury v. Madison, supra, 1 Cranch, 137, at pages 162, 165–166, 2 L.Ed. 60, it is made clear that Chief Justice Marshall was of opinion that a justice of the peace for the District of Columbia was not removable at the will of the President; and that there was a distinction between such an officer and officers appointed to aid the President in the performance of his constitutional duties. In the latter case, the distinction he saw was that "their acts are his acts" and his will, therefore, controls; and, by way of illustration, he adverted to the act establishing the Department of Foreign Affairs, which was the subject of the "decision of 1789."

The result of what we now have said is this: Whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause will depend upon the character of the office; the Myers decision, affirming the power of the President alone to make the removal, is confined to purely executive officers; and as to officers of the kind here under consideration, we hold that no removal can be made during the prescribed term for which the officer is appointed, except for one or more of the causes named in the applicable statute.

To the extent that, between the decision in the Myers Case, which sustains the unrestrictable power of the President to remove purely executive officers, and our present decision that such power does not extend to an office such as that here involved, there shall remain a field of doubt, we leave such cases as may fall within it for future consideration and determination as they may arise.

In accordance with the foregoing, the questions submitted are answered:

Question No. 1, Yes.

Question No. 2, Yes.

Mr. Justice McREYNOLDS agrees that both questions should be answered in the affirmative. A separate opinion in Myers v. United States, 272 U.S. 52, at page 178, 47 S.Ct. 21, at page 46, 71 L.Ed. 160, states his views concerning the power of the President to remove appointees.

MORGAN v. TENNESSEE VALLEY AUTHORITY

Circuit Court of Appeals of the United States, Sixth Circuit.
115 F.2d 990 (1940).

Action by Arthur E. Morgan against the Tennessee Valley Authority and others to determine whether the President of the United States had power to remove complainant from membership of the board of directors of defendant authority. From a judgment dismissing bill of complaint, 28 F.Supp. 732, the complainant appeals.

SIMONS, Circuit Judge. The appellant was removed by the President of the United States from his position as a member and chairman of the Board of Directors of the Tennessee Valley Authority, and denies the power of the President so to do. His suit for salary and for a declaratory judgment that his removal was unlawful, brought in a Tennessee court and transferred to the court below, was dismissed for failure to state a claim upon which relief could be granted. 28 F.Supp 732.

Prior to his removal, and since the organization of the Tennessee Valley Authority, the appellant was a duly qualified member of its Board of Directors, designated by the President as its chairman, and appointed for a stated term expiring nine years after the approval of the Act, as provided by Title 16, U.S.C.A., § 831a(b). He was removed prior to the expiration of the term, following conferences between the President and the directors, but not in pursuance of § 831e, which in mandatory phrasing hereinafter recited, provides for removal of a member of the Board by the President for violating a command to make all appointments and promotions on the basis of merit and efficiency without consideration of political tests or qualifications. The appellant has continuously objected to his removal, and has held himself out as ever ready and willing, if permitted, to continue in the performance of his duties as a member and chairman of the Board. He contends that, by its terms, the T.V.A. Act provides specifically for but two methods of removal, one by the President for causes not here involved, and the other by Congress with or without cause, and that the two methods are exclusive, notwithstanding the holding in Myers v. United States, 272 U.S. 52, 47 S.Ct. 21, 71 L.Ed. 160, that the power to remove executive officers appointed by the President, is conferred upon him by the Constitution and so may not be abrogated by statute, because the Tennessee Valley Authority is an independent agency of the government exercising quasi-legislative functions with the members of

its Board of Directors responsible to Congress and not to the President, and having been appointed for a fixed term, may not be removed prior to its expiration, as held in Humphrey's Executor v. United States, 295 U.S. 602, 55 S.Ct. 869, 79 L.Ed. 1611.

The appellant's contention requires consideration of the two provisions of the Act which deal with removal of directors from office, and of the nature and function of the Authority. Section 4(f), 16 U.S.C.A. § 831c(f), provides: "The board shall select a treasurer and as many assistant treasurers as it deems proper, which treasurer and assistant treasurers shall give such bonds for the safe-keeping of the securities and moneys of the said corporation as the board may require: Provided, That any member of said board may be removed from office at any time by a concurrent resolution of the Senate and the House of Representatives."

Section 6, 16 U.S.C.A. § 831e provides: "In the appointment of officials and the selection of employees for said Corporation, and in the promotion of any such employees or officials, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency. Any member of said board who is found by the President of the United States to be guilty of a violation of this section shall be removed from office by the President of the United States, and any appointee of said board who is found by the board to be guilty of a violation of this section shall be removed from office by said board."

Urging upon us his construction of § 4 (f), the appellant contends that Congress has thereby reserved to itself exclusive discretionary power to remove a director of the Tennessee Valley Authority, and has imposed upon the President only a mandatory duty to remove for stated causes by the provisions of § 6. He argues that in providing for removal by a concurrent resolution of both Houses of Congress, § 4(f) indicates a deliberate intention by the Congress to set up a mode of removal which expressly excludes the President, since if it had desired the President's participation in removal, it would have required a joint resolution, and that by reservation to itself of the power of removal without participation by the President it intended to provide the only method of removal, except insofar as a specific duty to remove was imposed on the President by § 6. The maxim, expressio unius, requires, he insists, a construction of § 4 that its reservation of the power of removal excludes all other powers to remove and likewise that the conferring of a mandatory authority upon the President by § 6 impliedly excludes the grant of discretionary authority. In addition, it is urged that the plain intent of the Congress, gathered from the Act as a whole, is completely to exclude any discretionary power of the President to remove, so that the Congress may implement its own policies thereby as distinct from any executive policy, and that in addition to relying upon a technical rule of statutory con-

struction, the appellant may properly rely upon the higher rule that a statute is to be interpreted by the meaning it has as a whole.

The indicia in the Act which demonstrate the intention of the Congress to reserve to itself exclusive power of discretionary removal, are asserted to include the provision of a fixed term of nine years for directors; § 3, 16 U.S.C.A. § 831b, making civil service laws inapplicable to officers and employees of the Authority, and permitting the board to remove appointees in its discretion and to base appointment and promotion on merit and efficiency; the creation by the Act of an independent corporation which would have the initiative of a private enterprise, thus negativing any idea of an organization within an executive department, and subject to executive control. The nine year term, it is asserted, was provided in order to prevent a political reorganization of the Authority in any one Presidential term, or a complete change of personnel within the normally expected incumbency of any single President.

The Myers case, however, notwithstanding vigorous dissent by three of the members of the court, recognized the inherent power of the President discretionarily to remove appointees confirmed by the Senate without the consent of the Senate, even though appointed for a fixed term, and even though the Act creating the office provided for removal but for stated causes. As interpreted in the Humphrey case, or as narrowed thereby, the illimitable power of discretionary removal is confined to purely executive officers. The court recognized, however, that between what was decided in the Humphrey case and what was held in the Myers case, there still remains a field of doubt, and that cases falling within it must be left for future consideration and determination as they arise.

The first question that confronts us then, in the interpretation of § 4(f), is whether it manifests an intent that the mode of removal there provided, excludes any other method of removal. If a reservation of exclusive power to remove is to be deduced therefrom, it must be by implication, for the section contains no express declaration that the method for removing members of the Board there provided, excludes any other mode of removal. It must be noted that the Act was passed subsequent to the Myers decision which sustained the discretionary power to remove, inherent in the President, and prior to the announcement of the Humphrey decision which set limits upon that power. It is not to be assumed that the Congress was in any doubt as to a power to remove residing in the President as a necessary incident to his power to appoint. Earlier cases had recognized the concept, Parsons v. United States, 167 U.S. 324, 17 S.Ct. 880, 42 L.Ed. 185; Shurtleff v. United States, 189 U.S. 311, 23 S.Ct. 535, 536, 47 L.Ed. 828. Sanctioning it, the court, in the latter of the two citations, had held, "To take away this power of removal in relation to an inferior office created by statute, although that statute provided for an appointment thereto by the President and confirma-

tion by the Senate, would require very clear and explicit language. It should not be held to be taken away by mere inference or implication." And again, "The right of removal would exist if the statute had not contained a word upon the subject. It does not exist by virtue of the grant, but it inheres in the right to appoint, unless limited by constitution or statute. It requires plain language to take it away."

Thus it may be observed that notwithstanding maxims of statutory construction which, in some circumstances, are helpful in arriving at the intent of the legislature, curtailment by the Congress of an inherent power of the President, assuming its constitutional validity, is not to be implied without clear indication of the legislative purpose. But were we to search for grounds of support for the implication now urged upon us, we should fail. The Congress was aware of the Myers decision and its rationalization, for it had aroused wide interest; the prevailing opinion had been an exhaustive review of the constitutional history of the government in relation to appointments and removal; and the three dissenting opinions had been vigorous and complete in urging an opposing view. Had it been the intention of the Congress to curtail the removal power of the President, it may be assumed that the Congress would not have been at a loss for a formula unequivocally expressing such purpose. When, in the enactment of the Budget and Accounting Act of 1921 (42 Stat. 20, 31 U.S.C.A. § 1 et seq.), it was designed to place the office of Comptroller General beyond the Presidential power of removal, it found no difficulty in expressing that intent. In providing for the removal of the Comptroller, or his assistant, if incapacitated, inefficient, guilty of neglect of duty, of malfeasance in office, or other stated grounds, it added to the provision the all-embracing clause, "and for no other cause and in no other manner except by impeachment." 31 U.S.C.A. § 43. While this case was still pending in the court below, the President sent to the Senate the nomination of James P. Pope as successor to the appellant as a member of the Board of Directors of the Authority. So one House of the Congress, at least, demonstrated lack of legislative purpose to reserve exclusive power of removal, by confirming the appointment, and this not inadvertently for the question was raised whether vacancy existed. 84 Cong.Rec., 76th Cong., 1st sess., 140–142, 236–238.

When we examine the entire T.V.A. Act, 16 U.S.C.A. § 831 et seq., for support of the construction urged upon us, the appellant has no better case. There are undoubtedly provisions, such as those requiring reports to the Congress (§ 4(j)), and for the accumulating of data useful to the formulation of subsequent legislative policy (§ 14, 16 U.S.C.A. § 831m), either for T.V.A. or other projects, which indicate the intent of the Congress to keep in close touch with the development of the activity entrusted to the Authority, yet they are no more determinative of the present problem than the many provisions in the Act which impose supervisory duties upon the President. He

was authorized in the first instance to appoint the members of the Board; to designate its chairman and to fix the original terms of office; to designate the dwelling houses to be used by the members of the Board; to approve of the disposal of real property; to direct other government agencies to render assistance; to lease nitrate plant No. 2 and Waco quarry; and to transfer governmental property to the Authority to enable it to execute its purposes. The Authority was required to file its annual report with the President and he was to approve the percentage of gross receipts from the sales of power to be paid to the states of Alabama and Tennessee, as well as the allocation of costs of the various dams to navigation, flood control, national defense, fertilizer production and power.

Not the least of the provisions indicating the imposition of duty upon the President to supervise the performance by the Authority of the powers entrusted to it, are § 6, hereinbefore considered, and § 17, 16 U.S.C.A. § 831p, wherein the President was expressly authorized to conduct investigations in respect to dams owned by the government in the Tennessee River Basin, as to whether "there has been any undue or unfair advantage given to private persons, partnerships, or corporations, by any officials or employees of the Government, or whether in any such matters the Government has been injured or unjustly deprived of any of its rights." It is in the performance of the requirements of § 17 that the President undertook the investigation which resulted in the appellant's removal.

Finally, it must be said that if § 4(f) is to be given the construction now urged for it, doubt exists as to its constitutional validity. Springer v. Philippine Islands, 277 U.S. 189, 48 S.Ct. 480, 72 L.Ed. 845; Myers v. United States, supra. We are not required to resolve the doubt since we do not read § 4(f) as reserving to the Congress the exclusive power to remove civil officers performing purely executive or administrative functions, and as will presently appear our conclusion is that the directors of the Tennessee Valley Authority are such officers. The clearly recognizable statutory scheme was to provide an alternative method of discretionary removal in § 4(f), and to direct the President, by clear mandate, to remove for the causes recited in § 6.

The final contention of the appellant is that even though § 4(f) does not reserve to the Congress exclusive right of removal, save only as qualified by § 6, the Authority exercises quasi-legislative powers, and the President is, therefore, without power to remove its members during the terms for which they were appointed, by reason of the decision in the Humphrey case. It requires little to demonstrate that the Tennessee Valley Authority exercises predominantly an executive or administrative function. To it has been entrusted the carrying out of the dictates of the statute to construct dams, generate electricity, manage and develop government property. Many of these activities, prior to the setting up of the T.V.A., have rested with the several di-

visions of the executive branch of the government. True, it is, that in executing these administrative functions, the Board of Directors is obliged to enact by-laws, which is a legislative function, and to make decisions, which is an exercise of function judicial in character. In this respect its duties are, in no wise, different, except perhaps in degree, from the duties of any other administrative officers or agencies, or the duties of any other Board of Directors, either private or public. Whatever their character, they are but incidental to the carrying out of a great administrative project. The Board does not sit in judgment upon private controversies, or controversies between private citizens and the government, and there is no judicial review of its decisions, except as it may sue or be sued as may other corporations. It is not to be aligned with the Federal Trade Commission, the Interstate Commerce Commission, or other administrative bodies mainly exercising clearly quasi-legislative or quasi-judicial functions—it is predominantly an administrative arm of the executive department. The rule of the Humphrey case does not apply.

The judgment of dismissal is affirmed.[d]

U. S. v. LOVETT

U. S. v. DODD

U. S. v. WATSON

Supreme Court of the United States.
328 U.S. 303, 66 S.Ct. 1073, — L.Ed. — (9146).

Mr. Justice BLACK delivered the opinion of the Court.

In 1943 the respondents, Lovett, Watson, and Dodd, were and had been for several years working for the Government. The Government agencies which had lawfully employed them were fully satisfied with the quality of their work and wished to keep them employed on their jobs. Over the protest of those employing agencies, Congress provided in Section 304 of the Urgent Deficiency Appropriation Act of 1943, by way of an amendment attached to the House bill, that after November 15, 1943, no salary or compensation should be paid respondents out of any monies then or thereafter appropriated except for services as jurors or members of the armed forces, unless they were prior to November 15, 1943 again appointed to jobs by the President with the advice and consent of the Senate.[1] 57 Stat.

[d] Certiorari denied, 312 U.S. 701, 61 S. Ct. 806, 85 L.Ed. 1135 (1941).

[1] Section 304 provides: "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 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

431, 450. Notwithstanding the Congressional enactment, and the failure of the President to reappoint respondents, the agencies kept all the respondents at work on their jobs for varying periods after November 15, 1943; but their compensation was discontinued after that date. To secure compensation for this post-November 15th work, respondents brought these actions in the Court of Claims. They urged that Section 304 is unconstitutional and void on the grounds that: (1) The Section, properly interpreted, shows a Congressional purpose to exercise the power to remove executive employees, a power not entrusted to Congress but to the Executive Branch of Government under Article II, Sections 1, 2, 3, and 4 of the Constitution; (2) the Section violates Article I, Section 9, Clause 3, of the Constitution which provides that "no bill of attainder or ex post facto law shall be passed"; (3) the Section violates the Fifth Amendment, in that it singles out these three respondents and deprives them of their liberty and property without due process of law. The Solicitor General, appearing for the Government, joined in the first two of respondents' contentions but took no position on the third. House Resolution 386, 89 Cong.Rec. 10882, and Public Law 249, 78th Congress, 58 Stat. 113, authorized a special counsel to appear on behalf of the Congress. This counsel denied all three of respondents' contentions. He urged that Section 304 was a valid exercise of Congressional power under Article I, Section 8, Clause 1; Section 8, Clause 18; and Section 9, Clause 7 of the Constitution, which Sections empower Congress "to lay and collect taxes * * * to pay the Debts and provide for the common Defence and general Welfare of the United States," and "to make all Laws which shall be necessary and proper for carrying into Execution * * * all * * * Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof," and provide that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." Counsel for Congress also urged that Section 304 did not purport to terminate respondents' employment. According to him, it merely cut off respondents' pay and deprived governmental agencies of any power to make enforceable contracts with respondents for any further compensation. The contention was that this involved simply an exercise of Congressional powers over

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: Provided further, That this section shall not operate to deprive any such person of payment for services performed as a member of a jury or as a member of the armed forces of the United States nor any benefit, pension, or emolument resulting therefrom."

As we shall point out, the President signed the bill because he had to do so since the appropriated funds were imperatively needed to carry on the war. He felt, however, that section 304 of the bill was unconstitutional, and failed to reappoint respondents.

appropriations, which according to the argument, are plenary and not subject to judicial review. On this premise counsel for Congress urged that the challenge of the constitutionality of Section 304 raised no justiciable controversy. The Court of Claims entered judgments in favor of respondents. Some of the judges were of the opinion that Section 304, properly interpreted, did not terminate respondents' employment, but only prohibited payment of compensation out of funds generally appropriated, and that, consequently, the continued employment of respondents was valid, and justified their bringing actions for pay in the Court of Claims. Other members of the Court thought Section 304 unconstitutional and void, either as a bill of attainder, an encroachment on exclusive executive authority, or a denial of due process. We granted certiorari because of the manifest importance of the questions involved. 327 U.S. 773, 66 S.Ct. 817.

In this Court the parties and counsel for Congress have urged the same points as they did in the Court of Claims. According to the view we take we need not decide whether Section 304 is an unconstitutional encroachment on executive power or a denial of due process of law, and the section is not challenged on the ground that it violates the First Amendment. Our inquiry is thus confined to whether the actions in the light of a proper construction of the Act present justiciable controversies and if so whether Section 304 is a bill of attainder against these respondents involving a use of power which the Constitution unequivocally declares Congress can never exercise. These questions require an interpretation of the meaning and purpose of the section, which in turn requires an understanding of the circumstances leading to its passage. We, consequently, find it necessary to set out these circumstances somewhat in detail.

In the background of the statute here challenged lies the House of Representatives' feeling in the late thirties that many "subversives" were occupying influential positions in the Government and elsewhere and that their influence must not remain unchallenged. As part of its program against "subversive" activities the House in May 1938 created a Committee on Un-American Activities, which became known as the Dies Committee after its Chairman, Congressman Martin Dies. H.R. 1282, 83 Cong.Rec. 7568–7587. This Committee conducted a series of investigations and made lists of people and organizations it thought "subversive." See e. g.: H. Rep. No. 1, 77th Cong., 1st Sess.; H.Rep.No.2748, 77th Cong., 2d Sess. The creation of the Dies Committee was followed by provisions such as Section 9A of the Hatch Act, 53 Stat. 1148, 1149, 18 U.S.C.A. § 61i, and Sections 15(f) and 17(b) of the Emergency Relief Appropriations Act of 1941, 54 Stat. 611, 15 U.S.C.A. §§ 721–728 note, which forbade the holding of a federal job by anyone who was a member of a political party or organization that advocated the overthrow of our Constitutional form of Government in the United States. It became the practice to include a similar prohibition in all appropriations acts, together with

criminal penalties for its violation. Under these provisions the Federal Bureau of Investigation began wholesale investigations of federal employees, which investigations were financed by special Congressional appropriations. 55 Stat. 292, 56 Stat. 468, 482. Thousands were investigated.

While all this was happening Mr. Dies on February 1, 1943, in a long speech on the floor of the House attacked thirty-nine named Government employees as "irresponsible, unrepresentative, crackpot, radical bureaucrats" and affiliates of "communist front organizations." Among these named individuals were the three respondents. Congressman Dies told the House that respondents, as well as the other thirty-six individuals he named were because of their beliefs and past associations unfit to "hold a government position" and urged Congress to refuse "to appropriate money for their salaries." In this connection he proposed that the Committee on Appropriations "take immediate and vigorous steps to eliminate these people from public office." 89 Cong.Rec. 474, 479, 486. Four days later an amendment was offered to the Treasury-Post Office Appropriation Bill which provided that "no part of any appropriation contained in this Act shall be used to pay the compensation of" the thirty-nine individuals Dies had attacked. 89 Cong.Rec. 645. The Congressional Record shows that this amendment precipitated a debate that continued for several days. Id. 645–742. All of those participating agreed that the "charges" against the thirty-nine individuals were serious. Some wanted to accept Congressman Dies' statements as sufficient proof of "guilt," while others referred to such proposed action as "legislative lynching," Id. at 651, smacking "of the procedure in the French Chamber of Deputies, during the Reign of Terror." Id. at 659. The Dies charges were referred to as "indictments," and many claimed this made it necessary that the named federal employees be given a hearing and a chance to prove themselves innocent. Id. at 771. Congressman Dies then suggested that the Appropriations Committee "weigh the evidence and * * * take immediate steps to dismiss these people from the federal service." Id. at 651. Eventually a resolution was proposed to defer action until the Appropriations Committee could investigate, so that accused federal employees would get a chance to prove themselves "innocent" of communism or disloyalty, and so that each "man would have his day in court," and "There would be no star chamber proceedings." Id. at 711 and 713; but see Id. at 715. The resolution which was finally passed authorized the Appropriations Committee acting through a special subcommittee "* * * to examine into any and all allegations or charges that certain persons in the employ of the several executive departments and other executive agencies are unfit to continue in such employment by reason of their present association or membership or past association or membership in or with organizations whose aims or purposes are or have been subversive to the Gov-

ernment of the United States." Id. at 734, 742. The Committee was to have full plenary powers, including the right to summon witnesses and papers, and was to report its "findings and determination" to the House. It was authorized to attach legislation recommended by it to any general or special appropriation measure, notwithstanding general House rules against such practice. Id. at 734. The purpose of the resolution was thus described by the Chairman of the Committee on Appropriations in his closing remarks in favor of its passage: "The third and the really important effect is that we will expedite adjudication and disposition of these cases and thereby serve both the accused and the Government. These men against whom charges are pending are faced with a serious situation. If they are not guilty they are entitled to prompt exoneration; on the other hand, if they are guilty, then the quicker the Government removes them the sooner and the more certainly will we protect the Nation against sabotage and fifth-column activity." Id. at 741.

After the resolution was passed a special subcommittee of the Appropriations Committee held hearings in secret executive session. Those charged with "subversive" beliefs and "subversive" associations were permitted to testify, but lawyers including those representing the agencies by which the accused were employed were not permitted to be present. At the hearings, committee members, the committee staff, and whatever witness was under examination were the only ones present. The evidence, aside from that given by the accused employees, appears to have been largely that of reports made by the Dies Committee, its investigators, and Federal Bureau of Investigation reports, the latter being treated as too confidential to be made public.

After this hearing the subcommittee's reports and recommendations were submitted to the House as part of the Appropriation Committee's report. The subcommittee stated that it had regarded the investigations "as in the nature of an inquest of office" with the ultimate purpose of purging the public service of anyone found guilty of "subversive activity." The committee, stating that "subversive activity" had not before been defined by Congress or by the courts formulated its own definition of "subversive activity" which we set out in the margin.[3] Respondents Watson, Dodd, and Lovett were, according to the subcommittee guilty of having engaged in "subversive activity within the definition adopted by the Committee." H. Rep. No. 448, 78th Cong., 1st Sess. 5-7, 9. The ultimate finding and recommendation as to respondent Watson, which was substantially

[3] "Subversive activity in this country derives from conduct intentionally destructive of or inimical to the Government of the United States—that which seeks to undermine its institutions, or to distort its functions, or to impede its projects, or to lessen its efforts, the ultimate end being to overturn it all. Such activity may be open and direct as by effort to overthrow, or subtle and indirect as by sabotage." H.Rep.No.448, 78th Cong., 1st Sess., p 5

similar to the findings with respect to Lovett and Dodd, read as follows: "Upon consideration of all the evidence, your committee finds that the membership and association of Dr. Goodwin B. Watson with the organizations mentioned, and his views and philosophies as expressed in various statements and writings, constitute subversive activity within the definition adopted by your committee, and that he is, therefore, unfit for the present to continue in Government employment." House Report No. 448, 78th Congress, 1st Session, 6. As to Lovett the Committee further reported that it had rejected a "strong appeal" from the Secretary of the Interior for permission to retain Lovett in Government service, because as the Committee stated, it could not "escape the conclusion that this official is unfit to hold a position with the Government by reason of his membership, association, and affiliation with organizations whose aims and purposes are subversive to the Government of the United States." Id. at 12.

Section 304 was submitted to the House along with the Committee Report. Congressman Kerr who was chairman of the subcommittee stated that the issue before the House was simply: "* * * whether or not the people of this country want men who are not in sympathy with the institutions of this country to run it." He said further: "* * * These people have no property rights in these offices. One Congress can take away their rights given them by another." 89 Cong.Rec. 4583. Other members of the House during several days of debate bitterly attacked the measure as unconstitutional and unwise. Id. at 4482–4487, 4546–4556, 4581–4605. Finally Section 304 was passed by the House.

The Senate Appropriation Committee eliminated Section 304 and its action was sustained by the Senate. 89 Cong.Rec. 5024. After the first conference report which left the matter still in disagreement the Senate voted 69 to 0 against the conference report which left Section 304 in the bill. The House however insisted on the amendment and indicated that it would not approve any appropriation bill without Section 304. Finally after the fifth conference report showed that the House would not yield the Senate adopted Section 304. When the President signed the bill he stated: "The Senate yielded, as I have been forced to yield, to avoid delaying our conduct of the war. But I cannot so yield without placing on record my view that this provision is not only unwise and discriminatory, but unconstitutional." H. Doc. 264, 78th Cong., 1st Sess.

I.

In view of the facts just set out we cannot agree with the two judges of the Court of Claims who held that Section 304 required "a mere stoppage of disbursing routine, nothing more," and left the employer governmental agencies free to continue employing respondents and to incur contractual obligations by virtue of such continued work which respondents could enforce in the Court of Claims. Nor can

we agree with counsel for Congress that the Section did not provide for the dismissal of respondents but merely forbade governmental agencies to compensate respondents for their work or to incur obligations for such compensation at any and all times. We therefore cannot conclude, as he urges, that Section 304 is a mere appropriation measure, and that since Congress under the Constitution has complete control over appropriations, a challenge to the measure's constitutionality does not present a justiciable question in the courts, but is merely a political issue over which Congress has final say.

We hold that the purpose of Section 304 was not merely to cut off respondents' compensation through regular disbursing channels but permanently to bar them from government service, and that the issue of whether it is constitutional is justiciable. The Section's language as well as the circumstances of its passage which we have just described show that no mere question of compensation procedure or of appropriations was involved, but that it was designed to force the employing agencies to discharge respondents and to bar their being hired by any other governmental agency. Cf. United States v. Dickerson, 310 U.S. 554, 60 S.Ct. 1034, 84 L.Ed. 1356. Any other interpretation of the Section would completely frustrate the purpose of all who sponsored Section 304, which 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. What was challenged therefore is a statute which, because of what Congress thought to be their political beliefs, prohibited respondents from ever engaging in any government work, except as jurors or soldiers. Respondents claimed that their discharge was unconstitutional; that they consequently rightfully continued to work for the Government and that the Government owes them compensation for services performed under contracts of employment. Congress has established the Court of Claims to try just such controversies. What is involved here is a Congressional proscription of Lovett, Watson, and Dodd, prohibiting their ever holding a Government job. Were this case to be not justiciable, Congressional action, aimed at three named individuals, which stigmatized their reputation and seriously impaired their chance to earn a living, could never be challenged in any court. Our Constitution did not contemplate such a result. To quote Alexander Hamilton, "* * * a limited constitution * * * [is] 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." Federalist Paper No. 78.

II.

We hold that Section 304 falls precisely within the category of Congressional actions which the Constitution barred by providing that "No Bill of Attainder or ex post facto Law shall be passed." In Cummings v. State of Missouri, 4 Wall. 277, 323, 18 L.Ed. 356, this Court said, "A bill of attainder is a legislative act which inflicts punishment without a judicial trial. If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties." The Cummings decision involved a provision of the Missouri Reconstruction Constitution which required persons to take an Oath of Loyalty as a prerequisite to practicing a profession. Cummings, a Catholic Priest, was convicted for teaching and preaching as a minister without taking the oath. The oath required an applicant to affirm that he had never given aid or comfort to persons engaged in hostility to the United States and had never "been a member of, or connected with, any order, society, or organization, inimical to the government of the United States * * *." In an illuminating opinion which gave the historical background of the Constitutional prohibition against bills of attainder, this Court invalidated the Missouri Constitutional provision both because it constituted a bill of attainder and because it had an ex post facto operation. On the same day the Cummings case was decided, the Court, in Ex parte Garland, 4 Wall. 333, 18 L.Ed. 366, also held invalid on the same grounds an Act of Congress which required attorneys practicing before this Court to take a similar oath. Neither of these cases has ever been overruled. They stand for the proposition that legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable 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. Adherence to this principle requires invalidation of Section 304. We do adhere to it.

Section 304 was designed to apply to particular individuals. Just as the statute in the two cases mentioned it "operates as a legislative decree of perpetual exclusion" from a chosen vocation. This permanent proscription from any opportunity to serve the Government is punishment, and of a most severe type. It is a type of punishment which Congress has only invoked for special types of odious and dangerous crimes, such as treason, 18 U.S.C. § 2, 18 U.S.C.A. § 2; acceptance of bribes by members of Congress, 18 U.S.C. §§ 199, 202, 203, 18 U.S.C.A. §§ 199, 202, 203; or by other government officials, 18 U.S.C. § 207, 18 U.S.C.A. § 207; and interference with elections by Army and Navy officers, 18 U.S.C. § 59, 18 U.S.C.A. § 59.

Section 304, thus, clearly accomplishes the punishment of named individuals without a judicial trial. The fact that the punishment is inflicted through the instrumentality of an Act specifically cutting off

the pay of certain named individuals found guilty of disloyalty, makes it no less galling or effective than if it had been done by an Act which designated the conduct as criminal. 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. The effect was to inflict punishment without the safeguards of a judicial trial and "determined by no previous law or fixed rule." The Constitution declares that that cannot be done either by a state or by the United States.

Those who wrote our Constitution well knew the danger inherent in special legislative acts which take away the life, liberty, or property of particular named persons, because the legislature thinks them guilty of conduct which deserves punishment. They intended to safeguard the people of this country from punishment without trial by duly constituted courts. See Duncan v. Kahanamoku, 66 S.Ct. 606. And even the courts to which this important function was entrusted, were commanded to stay their hands until and unless certain tested safeguards were observed. An accused in court must be tried by an impartial jury, has a right to be represented by counsel, he must be clearly informed of the charge against him, the law which he is charged with violating must have been passed before he committed the act charged, he must be confronted by the witnesses against him, he must not be compelled to incriminate himself, he cannot twice be put in jeopardy for the same offense, and even after conviction no cruel and unusual punishment can be inflicted upon him. See Chambers v. State of Florida, 309 U.S. 227, 235–238, 60 S.Ct. 472, 476–478, 84 L.Ed. 716. When our Constitution and Bill of Rights were written, our ancestors had ample reason to know that legislative trials and punishments were too dangerous to liberty to exist in the nation of free men they envisioned. And so they proscribed bills of attainder. Section 304 is one. Much as we regret to declare that an Act of Congress violates the Constitution, we have no alternative here.

Section 304 therefore does not stand as an obstacle to payment of compensation to Lovett, Watson, and Dodd. The judgment in their favor is affirmed.

Affirmed.

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

Mr. Justice FRANKFURTER, whom Mr. Justice REED joins, concurring.

* * *

Since it is apparent that grave constitutional doubts will arise if we adopt the construction the Court puts on § 304, we ought to follow

the practice which this Court has established from the time of Chief Justice Marshall. The approach appropriate to such a case as the one before us was thus summarized by Mr. Justice Holmes in a similar situation: "* * * the rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act. Even to avoid a serious doubt the rule is the same. United States v. Delaware & Hudson Co., 213 U.S. 366, 407, 408, 29 S.Ct. 527 [535, 536], 53 L.Ed. 836. United States v. Standard Brewery, 251 U.S. 210, 220, 40 S.Ct. 139 [141], 64 L.Ed. 229. State of Texas v. Eastern Texas R. R. Co., 258 U.S. 204, 217, 42 S.Ct. 281 [283], 66 L.Ed. 566; Bratton v. Chandler, 260 U.S. 110, 114, 43 S.Ct. 43 [44], 67 L.Ed. 157; Panama R. Co. v. Johnson, 264 U.S. 375, 390, 44 S.Ct. 391 [395], 68 L.Ed. 748. Words have been strained more than they need to be strained here in order to avoid that doubt. United States v. Jin Fuey Moy, 241 U.S. 394, 401, 402, 36 S.Ct. 658 [659], 60 L.Ed. 1061 [Ann.Cas.1917D, 854]." Blodgett v. Holden, 275 U.S. 142, 148, 276 U.S. 594, 48 S.Ct. 105, 107, 75 L.Ed. 206 (concurring). " 'When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.' Crowell v. Benson, 285 U.S. 22, 62, 52 S.Ct. 285, 296, 76 L.Ed. 598." Brandeis, J., concurring, in Ashwander v. Tennessee Valley Authority, supra, 297 U.S. at page 348, 56 S.Ct. at page 483, 80 L.Ed. 688.

We are not faced inescapably with the necessity of adjudicating these serious constitutional questions. The obvious, or at the least, the one certain construction of § 304 is that it forbids the disbursing agents of the Treasury to pay out of specifically appropriated moneys sums to compensate respondents for their services. We have noted the cloud cast upon this interpretation by manifestations by committees and members of the House of Representatives before the passage of this section. On the other hand, there is also much in the debates not only in the Senate but also in the House which supports the mere fiscal scope to be given to the statute. That such a construction is tenable settles our duty to adopt it and to avoid determination of constitutional questions of great seriousness.

Accordingly, I feel compelled to construe § 304 as did Mr. Chief Justice Whaley below, whereby it merely prevented the ordinary disbursal of money to pay respondents' salaries. It did not cut off the obligation of the Government to pay for services rendered and the respondents are, therefore, entitled to recover the judgment which they obtained from the Court of Claims.

SECTION 2. MONEY AND PERSONNEL: CONTROL BY THE EXECUTIVE AND LEGISLATURE

ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES

(1938) 57–59.

It is a well known fact, as has already been stated, that the anti-trust laws have been ineffective in preventing combinations in restraint of trade. There is probably no community, small or large, in America today, and no industry, which does not furnish some instances of such combination. Indeed, there is a current dispute among economists as to whether combinations between large organizations occur more frequently or entail more damaging economic effects than combinations between small units. We do not propose to enter into this dispute. It is sufficient for our purposes to recognize that the anti-trust laws have not been competent to prevent combinations in either area.

What are the reasons? The failure of the antitrust laws in this respect is often attributed to judicial interpretation which is inconsistent with the general policies and objectives of the laws. There is justification for this charge. However, this is not the primary cause of the ineffectiveness of antitrust administration. The outstanding reason has been the insufficiency of personnel and money for enforcement. A review of enforcement activities in the past shows clearly that regardless of what judicial interpretations might have been, no adequate results could have been obtained with the limited enforcement organization available. This has not been generally understood.

Indeed, the disproportion between the magnitude of the task of administration and the size of the available staff throughout the history of the antitrust laws has been little short of staggering. Consider the famous trust-busting campaign in the era of Theodore Roosevelt, which many historians have spoken of as "a failure." The reason for the lack of results is the simple fact that the entire personnel of the Antitrust Division during that famous crusade consisted of only five lawyers and four stenographers. This group was supposed to police the industrial activities of the United States. It was bound to fail. From 1914 to 1923, during which our system of mass production and vast corporate enterprise may almost be said to have become of age, the average number of attorneys in the Antitrust Division was only eighteen. With such a personnel, regardless of what the formula of the law might have been, no practical results were possible. Today, the legal personnel in the Antitrust Division has been increased to 97. This small group is not only charged with re-

sponsibility for enforcing the antitrust laws, but is also required to handle legal proceedings connected with some 30 major acts of Congress including:[a] * * *

The situation is impossible. This may be sharply illustrated by a comparison with the personnel of the Securities and Exchange Commission, the Federal Power Commission, the Interstate Commerce Commission, the Maritime Commission, the Civil Aeronautics Authority, The Federal Communications Commission, or the National Bituminous Coal Commission, each of which has responsibility for a regulatory program affecting only one or two industries. The Securities and Exchange Commission, for example, even prior to the recent enlargement of its functions by the Chandler and Maloney Acts, had a personnel of over 1,200, with regional offices in New York, Boston, Atlanta, Chicago, Fort Worth, Denver, San Francisco, and Seattle; the personnel of the Maritime Commission numbers about 1,200; and that of the new Civil Aeronautics Authority, about 2,800. If these agencies were limited to an available personnel of about 45 or 50 men, one can readily imagine to what a mockery the administration of the statutes for which they have responsibility would be reduced.

The pressure of the Antitrust Division for additional funds bore fruit. From a sum of $580,060 for the fiscal year ending June 30, 1939 [b], the appropriation rose to $2,325,000 for the fiscal year ending June 30, 1942.[c] It was this increase which made possible the invigoration of antitrust enforcement under Assistant Attorney General Thurman Arnold. In expanding the appropriation, however, the Congress asserted an increased measure of control, through senatorial confirmation, over the selection of the enlarged personnel.

APPROPRIATION FOR THE ENFORCEMENT OF ANTITRUST AND KINDRED LAWS FOR THE FISCAL YEAR 1942

55 Stat. 293.

Enforcement of antitrust and kindred laws: For the enforcement of antitrust and kindred laws, including traveling expenses, and experts at such rates of compensation as may be authorized or approved by the Attorney General, except that the compensation paid to any person employed hereunder shall not exceed the rate of $10,000 per annum, including personal services in the District of Columbia,

[a] The enumeration of the thirty statutes is omitted.

[b] *Act of April 27, 1938, c. 180, 52 Stat.* 248, 260.

[c] Act of June 28, 1941, c. 258, 55 Stat. 265, 293.

$2,325,000: *Provided,* That none of this appropriation shall be expended for the establishment and maintenance of permanent regional offices of the Antitrust Division: *Provided further,* That no part of this appropriation shall be used for the payment of any person hereafter appointed at a salary of $7,500 or more for the enforcement of antitrust and kindred laws unless such person is appointed by the President, by and with the advice and consent of the Senate.

BUDGET AND ACCOUNTING ACT, 1921,[d] AS AMENDED, §§ 201, 206, 207, 212, 214, 215

31 U.S.C. §§ 11, 15; 31 U.S.C.Supp. § 16; 31 U.S.C. §§ 20, 22, 23.

§ 201. The President shall transmit to Congress on the first day of each regular session, the Budget, which shall set forth in summary and in detail:

(a) Estimates of the expenditures and appropriations necessary in his judgment for the support of the Government for the ensuing fiscal year; except that the estimates for such year for the legislative branch of the Government and the Supreme Court of the United States shall be transmitted to the President on or before October 15 of each year, and shall be included by him in the Budget without revision;

(b) His estimates of the receipts of the Government during the ensuing fiscal year, under (1) laws existing at the time the Budget is transmitted and also (2) under the revenue proposals, if any, contained in the Budget;

(c) The expenditures and receipts of the Government during the last completed fiscal year;

(d) Estimates of the expenditures and receipts of the Government during the fiscal year in progress;

(e) The amount of annual, permanent, or other appropriations, including balances of appropriations for prior fiscal years, available for expenditure during the fiscal year in progress, as of November 1 of such year;

(f) Balanced statements of (1) the condition of the Treasury at the end of the last completed fiscal year, (2) the estimated condition of the Treasury at the end of the fiscal year in progress, and (3) the estimated condition of the Treasury at the end of the ensuing fiscal year if the financial proposals contained in the Budget are adopted;

(g) All essential facts regarding the bonded and other indebtedness of the Government; and

[d] Act of June 10, 1921, c. 18, 42 Stat. 20.

(h) Such other financial statements and data as in his opinion are necessary or desirable in order to make known in all practicable detail the financial condition of the Government.

§ 206. No estimate or request for an appropriation and no request for an increase in an item of any such estimate or request, and no recommendation as to how the revenue needs of the Government should be met, shall be submitted to Congress or any committee thereof by any officer or employee of any department or establishment, unless at the request of either House of Congress.

§ 207. There is created in the Executive Office of the President a bureau to be known as the Bureau of the Budget. There shall be in the bureau a director and an assistant director, who shall be appointed by the President and receive salaries of $10,000 a year each. The assistant director shall perform such duties as the director may designate, and during the absence or incapacity of the director or during a vacancy in the office of director he shall act as director. The bureau, under such rules and regulations as the President may prescribe, shall prepare for him the Budget, and any supplemental or deficiency estimates, and to this end shall have authority to assemble, correlate, revise, reduce, or increase the estimates of the several departments or establishments.

§ 212. The bureau shall, at the request of any committee of either House of Congress having jurisdiction over revenue or appropriations, furnish the committee such aid and information as it may request.

§ 214. (a) The head of each department and establishment shall designate an official thereof as Budget officer therefor, who, in each year under his direction and on or before a date fixed by him, shall prepare the departmental estimates.

(b) Such Budget officer shall also prepare, under the direction of the head of the department or establishment, such supplemental and deficiency estimates as may be required for its work.

§ 215. The head of each department and establishment shall revise the departmental estimates and submit them to the bureau on or before September 15 of each year. In case of his failure so to do, the President shall cause to be prepared such estimates and data as are necessary to enable him to include in the Budget estimates and statements in respect to the work of such department or establishment.

HEARING ON APPROPRIATIONS FOR SECURITIES AND EXCHANGE COMMISSION FOR FISCAL YEAR ENDING JUNE 30, 1936 [e]

Mr. Woodrum. We will take up this afternoon the items for the Securities and Exchange Commission.

Mr. Kennedy, I notice you have a justification for the 1936 estimate.

Mr. Kennedy. Yes, Mr. Chairman. We present this statement in justification of our estimate for 1936, as follows: * * *

And if I may be permitted to add here, at the President's suggestion and permission, he told me that I had authority to say to your committee that I originally presented a budget of $4,277,000. I talked to the Director of the Budget yesterday, so there would be no misunderstanding about what he said. He said that because the Commission was new, and because it was impossible at this time to state with any degree of accuracy how far it may be necessary to go into the over-the-counter situation, he was perfectly willing for me to say to this committee that that is what we had asked for, but that because he had adopted this policy of trying to get everything down as low as he could, it was necessary in the judgment of the Budget Director, to cut that amount to $2,370,000.

We feel that to carry on in that field would require such a tremendous amount of work and such a great number of people that we do not know exactly where it would finally land us, because there are approximately from four to five hundred thousand securities listed in over-the-counter transactions, and it would be impossible to say just how far we could get on that.

We feel that the first step on which we can make sufficient headway under the budget is the registration of approximately fourteen or fifteen thousand dealers, which is about the number of dealers that we think there are in the United States. That will have to be our first step. * * *

Mr. Woodrum. What is the total personnel of the Commission now?

Mr. Bane. The total personnel now—this estimate here before you that the Bureau of the Budget has approved provides for 653 employees. We now have 376 persons on the pay roll.

That, I think, takes in no branch offices, except 2 or 3 persons who have been detailed from Washington to the office we have very recently set up in New York. If I remember correctly, there are five persons already assigned to the New York office. We have not em-

[e] Hearings before Sub-committee of House Committee on Appropriations on Independent Offices Appropriation Bill for 1936, 74th Cong., 1st Sess. (1935), 322, 336, 340–41, 344, 346–7.

ployed any for or assigned any to any other branch office. There is no field force except in New York.

Mr. Kennedy. One of our difficulties in expanding to meet the demands of the situation is our very limited cash supply at the moment. We have a very limited appropriation, so it became necessary for practically the first 3 months of the Commission's work for the Commission itself, and 3 or 4 other gentlemen, to do all the work except the clerical work, so we would have some money to go through on.

Mr. Woodrum. Your personnel set-up for 1936, under this estimate of $2,340,000, contemplates 533 people?

Mr. Bane. No; it provides for 653 people.

Mr. Woodrum. That is 520 in the departmental service and 133 in the field?

Mr. Bane. Yes, sir.

Mr. Woodrum. That is about half of what you thought you ought to have?

Mr. Kennedy. Yes.

Mr. Bane. That is about 44½ percent less than we thought we should have.

Mr. Woodrum. I notice you have a large proportion of your personnel, departmental as compared with field—520 as against 133.

Mr. Kennedy. We have cut down very severely on the field, because there is where we felt the operations would naturally expand if we were going to do anything.

Mr. Bane. And, of course, a great many of the people in the office here will be available for and will be used in the field, instead of keeping them located in the different field offices. For instance, the Denver office this month might be able to get along with 20 people, but if a mining boom started up, and fake operations started there, we could send from this office the additional men required to make the investigations.

Mr. Kennedy. In addition to that, for instance, Washington will take care of this territory in through here; it will take care of Virginia and Maryland and the exchanges in this part of the country.

Mr. Woodrum. In the original set-up that you presented to the Bureau of the Budget, what was your total personnel?

Mr. Brassor. 1,137—719 departmental and 418 field.

Mr. Woodrum. You felt then, and feel now, that for the proper administration of the act it would require an organization that large?

Mr. Kennedy. Yes, sir.

Mr. Woodrum. What consideration has the Commission given, if you can answer, as to the possibility or probability of any very drastic

changes being made in this law that might very materially influence your personnel or your activities or the scope of your organization?

Mr. Kennedy. I think there is always that possibility. We regard that; but I doubt very much, on the basis that we have our present personnel here today that anything could be done that would not make that absolutely essential unless we were completely wiped out. In other words, the watching of the operations of the exchanges, the filing of the reports, the examination of registration for new securities, even assuming that there is no great new demand for new securities, which we sincerely hope there will be—all that would require a great part of this. Those seem to me to be the fundamentals of the act.

Mr. Woodrum. I am struck at the discrepancy between your field force and the force here in Washington. Your total departmental force is 520, while the total permanent field force is 133. I would expect that most of the work that the Commission has to do would be in the field. * * *

Mr. Woodrum. Just by way of comparison, which may not have any significance whatever, the Interstate Commerce Commission, which has regulatory jurisdiction, as you know, of interstate commerce, all the railroads, and has been given the authority to fix rates and everything, has a personnel of only 861, and an appropriation for administration—safety devices and everything—hardly as big as yours.

Mr. Bane. Yes; but their appropriation is $5,000,000, is it not?

Mr. Woodrum. That is regulation of accounts and everything.

Mr. Kennedy. That is a very proper question, and has been asked of us by the Budget; and I think we explained it very properly to them. They said that the Interstate Commerce Commission had over a period of 50 years risen to that, and therefore they thought that a new organization could not very well want that kind of money to get started. That is a very proper conclusion; but we in the first year have been given more duties by Congress than the Interstate Commerce Commission today has been given, after 50 years.

Mr. Bane. Our job is as big now as the Interstate Commerce Commission's.

Mr. Kennedy. We have got to do it for a while, until you change it. The things you have assigned us to do cannot properly be done even with the money we are asking for today. I understand that every Department says that it needs more money to do the things it is expected to do, but this is my first experience.

Mr. Woodrum. Is not the Commission, after it organizes, and after you have gotten a survey of the situation, going to suggest to the administration and to Congress some parts of this lay-out that we have laid before you that might well be laid aside in the interest of economy?

Mr. Kennedy. In the interest of economy I would say that some recommendations might be made, but I am sure you would not accept any of them yourself. * * *

Mr. Woodrum. What are the present activities of the Commission? What are you trying to do now?

Mr. Kennedy. At the minute we have registered the stock exchanges in the country, or we are making a decision as to whether they should be exempted or not. We have made an investigation of all of the exchanges requesting exemption. We are making a study of all the rules and regulations of every one of the stock exchanges to see that they comply with what we would consider fair and equitable trade practices. We are drawing up a draft of the accounting requirements and legal requirements for the registration of all the securities listed on the exchanges throughout the United States. We have temporarily registered all the securities there under a certain form of contract or agreement that we got out early in our life—about in the first month or 6 weeks—but it requires a permanent registration, which we hope to have out within a week or so.

We are revising and redrafting all the forms in connection with the issuance of new securities, attempting to classify new businesses, and going over the rulings and regulations made under the Federal Trade Commission to see how near or how completely they at least conform with what the present Commission feels is regular practice.

We are considering the question of the registration or regulation of over-the-counter dealers, and in that connection drawing regulations as affecting the whole over-the-counter business.

The legal department is drawing their concept of the requirements of the law on matters such as beneficial ownership and proxies, and while they do not sound very serious, nothing has ever been done on either of them before, and it is very difficult to try to define. "Beneficial ownership" has most of the legal department losing plenty of sleep.

The trading division is today examining and following the operations in the various exchanges throughout the country to see whether there are any violations in the nature of manipulative practices. At the minute we are conducting an examination in Pittsburgh, two in the New York Stock Exchange, two in the New York Curb, and we are investigating the entire activities of the Produce Exchange. Then there is the Boston Curb, the New York Mining Exchange, located in Jersey, the Hartford Stock Exchange, and the California Stock Exchange, all of which have closed as a result of the activities of the Commission. In all the cases an examination before the Commission showed that for the most part there were a great many operations taking place on these exchanges that were merely an advertising sign for the distribution of stocks throughout the country based on the quotations on these exchanges.

The examination division is scrutinizing every registration that comes in for new securities. At the same time it is examining what we call semipermanent registration applications. Under the law we cannot give new applicants temporary registration because they were not listed in October 1934. This division, with others, is making the final draft of the regulations for securities now being listed on the exchanges.

The reorganization committed is conducting an investigation into the Celotex Co., the Waldorf-Astoria Hotel, and another investigation in New York of a concern that is using a great many stockholders' lists. We want to see for what purpose.

The legal department is attempting to close a great many of the "switch-and-sell" rackets and bucket shops in various parts of the country.

That is a quick picture of what I see of the things that we are doing. There are other things that might occur to some of you here.

Mr. Bane. Those are the main things, but of course the Commission is engaged in making a whole lot of studies and investigations that are necessary for the formulation of further rules and regulations dealing with matters that the Commission is required to regulate under the act, like the segregation of brokers and dealers, if they should decide to do it, and over-the-counter regulations, rules as to proxies, and so forth. * * *

HEARINGS ON APPROPRIATIONS FOR NATIONAL LABOR RELATIONS BOARD FOR FISCAL YEAR ENDING JUNE 30, 1938 [f]

* * *

Mr. Fitzpatrick. Outside of those injunction suits, what is it that stands out that you have accomplished in the Board for the benefit of the people?

Mr. Madden. I should say that in the course of a year our principal accomplishment has been to go into communities and hold hearings, bringing to the light of day vicious industrial practices which were going on there, which there may have been rumors and suspicions about but which nobody could put his finger on and say, "Here it is, it actually happened." But we have it on the sworn statement of witnesses.

Mr. Fitzpatrick. Will you name some particular case that you had by means of which you believe you did *something for the benefit* of the community or the people?

[f] Hearings before Subcommittee of House Committee on Appropriations on Independent Offices Appropriation Bill for 1938, 75th Cong., 1st Sess. (1937) 182-5; 191 2.

Mr. Madden. I should say the case in which the hearing is just now being completed, against the Remington-Rand Manufacturing Co., is one instance in which hearings were held in three or four places in the State of New York, and in the State of Connecticut, and at one place in the State of Ohio.

Those hearings showed disclosures of employers' tactics, which resulted in the Connecticut newspapers in the neighborhood coming out and flatly condemning those kinds of practices on the part of that employer, as disclosed in those hearings.

Mr. Fitzpatrick. I am in sympathy with the work of your Board, but I wanted to give us some definite examples of what has been accomplished.

Mr. Madden. That particular community had no knowledge of that kind of thing.

Mr. Woodrum. What were some of the practices they were indulging in which you disclosed?

Mr. Madden. I suppose the most shocking one was the employment of disreputable strikebreakers brought out of New York agencies, having them come in and start riots so that injunctions against the strikers might be obtained.

Another practice which seemed rather shocking was to hire these people to come in as missionaries, both men and women, the men taking jobs and then going about among the strikers and acting as bellwethers, saying, "I am full up on this thing; I have had enough; let us go back to work. These strike leaders are a bunch of thugs and roughnecks", creating the impression that everybody was going back, and in that way—fraudulently, of course—deceiving the strikers into giving up their cause.

Mr. Woodrum. Was there a strike in progress at the Remington Rand factories?

Mr. Madden. Yes; a very destructive strike.

Mr. Fitzpatrick. It is still going on, is it not?

Mr. Madden. Yes; it has been going on for 5 months.

Mr. Woodrum. What is involved in it, briefly?

Mr. Madden. The principal cause of the strike, and of the continuance of it, was the arbitrary refusal of Mr. Rand, the chief of that big company, to negotiate with the unions involved.

Mr. Fitzpatrick. And not permitting the men to organize according to law, as they had a perfect right to do; he was against that.

NUMBER OF UNFAIR-PRACTICE CASES PRESENTED TO BOARD, NUMBER DISPOSED OF, AND NUMBER PENDING

Mr. Madden. Mr. Wolf has pointed out these figures to me. These are down to November 1.

We have had 1,059 cases before the Board, or before our regional offices, which have been closed, and of these 498 were closed by the agreement of both parties. In other words, we obtained, or our regional people obtained, in 498 of those cases, a compliance with the law.

Mr. Woodrum. When you say a thousand cases, you mean there were that many complaints?

Mr. Madden. Yes.

Mr. Woodrum. You call every complaint a case?

Mr. Madden. Where any unfair practice is reported.

Mr. Woodrum. You have something like 600 of those cases undisposed of now?

Mr. Madden. No. These are the rest of the figures about that.

Mr. Wigglesworth. That means the cases were somewhere in your regional offices?

Mr. Madden. That is right. There were 153 cases dismissed by the Board or by the regional directors before any formal action was taken. Those cases mostly were dismissed because, upon investigation, it was found they did not have merit or did not involve interstate commerce. Either one would be a ground for dismissal. Three hundred and forty-three cases were withdrawn by the petitioners before dismissal or any other formal disposition was made of them. I should say most of those cases were withdrawn upon the recommendation of our people. That is to say, our people said, informally, this does not involve interstate commerce or this does not seem to have merit; so the cases were withdrawn without having to be formally dismissed.

Mr. Woodrum. Does that account for the whole thousand?

Mr. Madden. No; there are a good many still pending. Sixty-five cases were closed in other ways, including compliance with the Board's decision, or in election cases, in certain cases after election, in election cases where there was a refusal by the Board to certify, by hearing and intermediate report of the trial examiner finding no violation, or by reference to other Government agencies, such as the Railway Mediation Board, if the case properly belonged to them rather than to us.

Mr. Fitzpatrick. Has your Board given any consideration to the making of a recommendation of some means that might be adopted to prevent such acts that have taken place in recent cases, as to how

we could prevent that, perhaps by enacting some law to keep those people out of the picture?

Mr. Madden. Of course, there is a committee of the Senate, the La Follette subcommittee of the Senate Committee on Education and Labor, which has been devoting itself to just that point. We have assisted them a great deal. Our regional people have done investigation for them. They have turned over to them a great deal of information that we have developed, and have advised with them.

The difficulty, of course, is the constitutional and legal difficulty as to the extent to which the Federal Government itself does have control over those things. I think that the decisions of the Supreme Court on our cases will throw some further light on the question of what the powers of Congress are. But I think it is only frank to say that if Congress wants effectively to handle those situations it has to have more power. It may be it will have to get that power by constitutional amendments, broadening its control over these really national industrial problems.

Mr. Wigglesworth. Do you still attempt mediation in the field; and if so, with what success in any cases where interstate commerce does not seem to be involved?

Mr. Madden. We do not engage in mediation unless it is a mere incident to our regular functions under the act.

I can think of a situation like this: Workers come into the office of one of our regional directors and they say, "Our employer has discharged so-and-so, we think, because he was prominent in the union." A charge is filed to that effect, and our regional director goes out and investigates. He may find that the employer is not engaged in interstate commerce, and that it is a local activity.

However, in the course of finding that out, in the course of interviewing the employer and finding out the nature and extent of his business, he calls the employer's attention to the fact that this charge has been filed against him. He may perfectly well and does say to him, "Regardless of whether we have jurisdiction over you or not, this law provides a good public policy, and if you have been violating it you ought to straighten it out and get on the right side of this." He may very well persuade that employer to reinstate the man and to go along as he should in the future.

He did not go out there to do mediation, but went out to find out whether he had jurisdiction, and whether he could officially act in that case. If he did straighten out the situation, he did not merely because he was there and it was convenient to do so.

In the situations where we do not have jurisdiction we use every effort to get compliance before we resort to any kind of formal hearing or procedure.

STATUS OF WORK OF BOARD

Mr. Woodrum. Am I to understand that your work is about current?

Mr. Madden. Do you mean whether we are up to date on our cases?

Mr. Woodrum. Yes.

Mr. Madden. We have a good many back cases, but I would say that at the present time they are behind schedule for a variety of reasons, one very large reason being the legal question as to our jurisdiction. That is, we have cases in which we would not be willing to say we do not have jurisdiction and dismiss the case, but, on the other hand, we are in the testing period, and we would be really wasting our limited funds and limited staff to go forward with those cases while other cases which will test the same points are pending and about to be decided. If we should get a legal clearance and go ahead on those cases we would have a very difficult time carrying them all forward promptly.

Mr. Woodrum. It would take you some time to clean them up?

Mr. Madden. Yes. * * *

Mr. Wigglesworth. Am I correct in saying that you are asking for an increase of $50,000 as compared with the appropriation for the present fiscal year?

Mr. Madden. No. Our new appropriation for the present fiscal year is $700,000. There was a carry-over of N.R.A. funds amounting to $38,000, so the increase is $12,000.

Mr. Wigglesworth. What does that increase represent?

Mr. Madden. You see, what happened is this, and I suppose it is quite frequent in the matter of budget making: We presented our own scheme of how this should be done to the Bureau of the Budget. The estimate requested was $865,000. They, without indicating that they were cutting this, that, or any other particular item, simply advised us that they approved our request for $750,000, and then, of course, we performed the rather Procrustean task of taking our set-up as it was and bringing it within the $750,000 which the Bureau of the Budget approved.

Mr. Fitzpatrick. Will that take care of all your personnel, without laying any of them off?

Mr. Madden. Yes.

Mr. Fitzpatrick. As to the increased amount you asked for, what did you intend to do with that—put more people to work?

Mr. Wolf. The difference is more than covered by the difference in administrative lapses in filling positions and administrative leaves.

Mr. Fitzpatrick. Assuming you got the amount you requested, would that mean you would put more people to work; that is, if you had gotten the $865,000 you asked for?

Mr. Wolf. Yes; because the $750,000 is based on many vacancies which have occurred and which the Board has not filled. People have actually left the staff and others have not been put on at the present time because of the budget limitation.

NUMBER OF DEPARTMENTAL AND FIELD PERSONNEL

Mr. Wigglesworth. What is the total of your departmental personnel?

Mr. Wolf. Ninety-five.

Mr. Wigglesworth. That is what you contemplate in the next fiscal year, is it not?

Mr. Wolf. Yes.

Mr. Wigglesworth. The total field personnel now is 80.2.

Mr. Wolf. Yes.

Mr. Wigglesworth. That is what you contemplate for the next fiscal year?

Mr. Wolf. That is right.

Mr. Wigglesworth. So there is no change in your personnel whatsoever?

Mr. Wolf. That is right.

Mr. Wigglesworth. Where does the $12,000 come in?

Mr. Madden. As Mr. Wolf pointed out, both in the year 1936 and in the year 1937, although not so much in the latter year as in the former, there were very considerable delays in filling the position. There was a great deal more saved in furloughs, vacancies, and so forth. The 80.2 personnel for the field, for example, does not mean that there were at all times during the year that many field people. It means that was the set-up which was made for that year.

Mr. Woodrum. And authorized?

Mr. Madden. Yes; and planned, at more or less what it should have been.

Mr. Smith. It is enough, because there will not be any such lapses in filling positions.

Mr. Madden. As to the year 1936, of course, the Board was appointed in August, and the fiscal year began on the 1st of July. The Board was appointed late in August, but it was not until the 1st of November that we had anything like a full staff. We did not go ahead and hire a lot of people before we had anything for them to do. We built up our staff as our work developed.

Mr. Woodrum. The cases have not come in as fast as was anticipated, have they?

Mr. Wolf. There were 1,550 up to November 1 of this year, out of which 1,059 have been disposed of.

Mr. Woodrum. Is that more or less than you thought you would have?

Mr. Wolf. As nearly as we could judge, that is the number.

Mr. Smith. How does that compare with the number under the old Board?

Mr. Madden. There were not so many. Back in the days of the old board they were taking everything.

Mr. Woodrum. Of course, if your authority and jurisdiction is well defined, it is reasonable to suppose they have more cases coming in.

Mr. Madden. I have not any doubt, for example, that if we win the bus case in the Supreme Court, and we have very expectation of winning it—I have no doubt that the publicity attendant upon that decision will bring in a considerable number of cases from that kind of bus people who perhaps up to now have not heard anything about the statute, or who were doubtful whether we could do anything for them. * * *

APPROPRIATION FOR THE INTERSTATE COMMERCE COMMISSION FOR THE FISCAL YEAR ENDING JUNE 30, 1940 [g]

53 Stat. 533.

INTERSTATE COMMERCE COMMISSION

SALARIES AND EXPENSES

General administrative expenses: For eleven Commissioners, secretary, and for all other authorized expenditures necessary in the execution of laws to regulate commerce, including one chief counsel, one director of finance, and one director of traffic at $10,000 each per annum, field hearings, traveling expenses, and contract stenographic reporting services, $2,522,000, of which amount not to exceed $2,328,000 may be expended for personal services in the District of Columbia, exclusive of special counsel, for which the expenditure shall not exceed $50,000; not exceeding $3,000 for purchase and exchange of necessary books, reports, and periodicals; not exceeding $100 in the open market for the purchase of office furniture similar in class or kind to that listed in the general supply schedule.

Regulating accounts: To enable the Interstate Commerce Commission to enforce compliance with section 20 and other sections of the Interstate Commerce Act as amended by the Act approved

[g] Act of March 16, 1939, c. 11, 53 Stat. 524, 533

June 29, 1906 (49 U.S.C. 20), and as amended by the Transportation Act, 1920 (49 U.S.C. 20), including the employment of necessary special accounting agents or examiners, and traveling expenses, $840,000, of which amount not to exceed $190,000 may be expended for personal services in the District of Columbia.

Safety of employees: To enable the Interstate Commerce Commission to keep informed regarding and to enforce compliance with Acts to promote the safety of employees and travelers upon railroads; the Act requiring common carriers to make reports of accidents and authorizing investigations thereof; and to enable the Interstate Commerce Commission to investigate and test appliances intended to promote the safety of railway operation, as authorized by the joint resolution approved June 30, 1906 (45 U.S.C. 35), and the provision of the Sundry Civil Act approved May 27, 1908 (45 U.S.C. 36, 37), to investigate, test experimentally, and report on the use and need of any appliances or systems intended to promote the safety of railway operation, inspectors, and for traveling expenses, $506,000, of which amount not to exceed $90,000 may be expended for personal services in the District of Columbia.

Signal safety systems: For all authorized expenditures under section 26 of the Interstate Commerce Act, as amended by the Transportation Act, 1920 (49 U.S.C. 26), and the Act of August 26, 1937 (50 Stat. 835), with respect to the provision thereof under which carriers by railroad subject to the Act may be required to install automatic train-stop, or train-control devices which comply with specifications and requirements prescribed by the Commission, including investigations and tests pertaining to block-signal and train-control systems, as authorized by the joint resolution approved June 30, 1906 (45 U.S.C. 35), and including the employment of the necessary engineers, and for traveling expenses, $102,000, of which amount not to exceed $40,000 may be expended for personal services in the District of Columbia.

Locomotive inspection: For all authorized expenditures under the provisions of the Act of February 17, 1911, entitled "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their locomotives with safe and suitable boilers and appurtenances thereto" (45 U.S.C. 22), as amended by the Act of March 4, 1915, extending "the same powers and duties with respect to all parts and appurtenances of the locomotive and tender" (45 U.S.C. 30), and amendment of June 7, 1924 (45 U.S.C. 27), providing for the appointment from time to time by the Interstate Commerce Commission of not more than fifteen inspectors in addition to the number authorized in the first paragraph of section 4 of the Act of 1911 (45 U.S.C. 26), and the amendment of June 27, 1930 (45 U.S.C. 24, 26), including such legal, technical, stenographic, and clerical help as the business of the offices of the chief inspector and his two assistants may require and

for traveling expenses $473,000, of which amount not to exceed $71,450 may be expended for personal services in the District of Columbia.

Valuation of property of carriers: To enable the Interstate Commerce Commission to carry out the objects of the Act entitled "An Act to amend an Act entitled 'An Act to regulate commerce', approved February 4, 1887, and all Acts amendatory thereof, by providing for a valuation of the several classes of property of carriers subject thereto and securing information concerning their stocks, bonds, and other securities", approved March 1, 1913, as amended by the Act of June 7, 1922 (49 U.S.C. 19a), and by the "Emergency Railroad Transportation Act, 1933" (49 U.S.C. 19a), including one director of valuation at $10,000 per annum, and traveling expenses, $640,000.

Motor transport regulation: For all authorized expenditures necessary to enable the Interstate Commerce Commission to carry out the provisions of the Motor Carrier Act, approved August 9, 1935 (49 U.S.C. 301–327), including one director at $10,000 per annum and other personal services in the District of Columbia and elsewhere; traveling expenses; supplies; services and equipment; not to exceed $1,000 for purchase and exchange of books, reports, newspapers, and periodicals; contract stenographic reporting services; purchase (not to exceed $20,000), exchange, maintenance, repair, and operation of motor-propelled passenger-carrying vehicles when necessary for official use in field work; not to exceed $5,000 for the purchase of evidence in connection with investigations of apparent violations of said Act, $3,650,000: *Provided,* That Joint Board members may use Government transportation requests when traveling in connection with the duties as Joint Board members.

Not to exceed $2,500 of the appropriations herein made for the Interstate Commerce Commission shall be available for expenses, except membership fees, for attendance at meetings concerned with the work of the Commission, and not to exceed $5,000 shall be available for expenses of packing, crating, drayage, and transportation of household and other personal effects (not to exceed 5,000 pounds in any one case) of officers and employees when transferred from one official station to another for permanent duty when specifically authorized by the Commission.

In all, salaries and expenses, Interstate Commerce Commission, $8,733,000: *Provided,* That the Commission may procure supplies and services without regard to section 3709 of the Revised Statutes (41 U.S.C. 5) when the aggregate amount involved does not exceed $50.

For all printing and binding for the Interstate Commerce Commission, including reports in all cases proposing general changes in transportation rates and not to exceed $17,000 to print and furnish to the States, at cost, report form blanks, and the receipts from such

reports and blanks shall be credited to this appropriation, $175,000: *Provided,* That no part of this sum shall be expended for printing the Schedule of Sailings required by section 25 of the Interstate Commerce Act.

Total, Interstate Commerce Commission, $8,908,000.

APPROPRIATION FOR THE FEDERAL TRADE COMMISSION FOR THE FISCAL YEAR ENDING JUNE 30, 1940 [h]

53 Stat. 532.

FEDERAL TRADE COMMISSION

For five Commissioners, and for all other authorized expenditures of the Federal Trade Commission in performing the duties imposed by law or in pursuance of law, including secretary to the Commission and other personal services, contract stenographic reporting services; supplies and equipment, law books, books of reference, periodicals, garage rentals, traveling expenses, including not to exceed $900 for expenses of attendance, when specifically authorized by the Commission, at meetings concerned with the work of the Federal Trade Commission, for newspapers and press clippings not to exceed $600, foreign postage, and witness fees and mileage in accordance with section 9 of the Federal Trade Commission Act; $2,264,000: *Provided,* That not to exceed $20,000 of this amount shall be available for transfer to the Bureau of Standards of the Department of Commerce for scientific investigations required by said Commission in connection with its enforcement of said Act: *Provided further,* That the Commission may procure supplies and services without regard to section 3709 of the Revised Statutes (41 U.S.C. 5) when the aggregate amount involved does not exceed $50.

For all printing and binding for the Federal Trade Commission, $60,000.

Total, Federal Trade Commission, $2,324,000.

[h] Act of March 16, 1939, c. 11, 53 Stat. 524, 532.

SECTION 3. LEGISLATIVE OVERSIGHT BY STANDING COMMITTEES

LEGISLATIVE REORGANIZATION ACT OF 1946, SECTION 136

60 Stat. 832.

Sec. 136. To assist the Congress in appraising the administration of the laws and in developing such amendments or related legislation as it may deem necessary, each standing committee of the Senate and the House of Representatives shall exercise continuous watchfulness of the execution by the administrative agencies concerned of any laws, the subject matter of which is within the jurisdiction of such committee; and, for that purpose, shall study all pertinent reports and data submitted to the Congress by the agencies in the executive branch of the Government.[1]

[1] See Nathanson, Some Comments on the Administrative Procedure Act, (1946) 41 Ill.L.Rev. 368, 421–2.

Chapter IV

THE DETERMINATION OF THE ADMINISTRATIVE PROGRAM

SECTION 1. CONTROLLING FACTORS: THE MEANING OF THE STATUTE

A. The Technique of Statutory Interpretation

UNITED STATES v. AMERICAN UNION TRANSPORT

Supreme Court of the United States.
327 U.S. 633, 66 S.Ct. 644, — L.Ed. — (1946).

Mr. Justice RUTLEDGE delivered the opinion of the Court.

The United States appeals from a decree entered by a District Court of three judges permanently enjoining enforcement of an order of the United States Maritime Commission. The order required the appellees and others to answer within thirty days a questionnaire concerning certain aspects of their business transacted during 1940, 1941 and 1942.[1] The central issue is whether appellees are within the coverage of the Shipping Act, 46 U.S.C. § 801, 46 U.S.C.A. § 801, for this purpose.

On August 21, 1942, the Commission, upon its own motion, ordered an investigation concerning the lawfulness of the rules, regulations, practices and operations of named persons and firms, described as carrying on "the business of forwarding in foreign commerce." The order stated that from information before the Commission it appeared that a certain forwarding firm was engaging in practices which seemed to be in violation of § 17 of the Shipping Act, 46 U.S.C. § 816, 46 U.S.C.A. § 816, and further "that the public interest requires a general inquiry to determine the extent of the said practices among all other forwarders in the port of New York subject to said Act, and the lawfulness of said practices under section 17 thereof. * * *"

Accordingly, the Commission sent to the persons and firms named a questionnaire containing the inquiry, among others, "Do you carry on the business of forwarding in connection with common carriers by water in foreign commerce?" [2] Each of the appellees answered this in the affirmative.[3] But negative answers were given to the question,

1 [Footnote omitted.—Ed.]
2 [Footnote omitted.—Ed.]
3 [Footnote omitted.—Ed.]

"Is your company owned or controlled by or affiliated with any shippers for whom you act as forwarder or with any common carrier?"

In December, 1942, the Commission held public hearings before a trial examiner pursuant to the investigation order. On the second day the hearings were adjourned *sine die* so that the Commission might obtain additional information. They have not been resumed.

On January 14, 1943, the Commission entered an order, pursuant to § 21 of the Shipping Act, 46 U.S.C. § 820, 46 U.S.C.A. § 820, directing appellees and others to answer a questionnaire relating to their forwarding operations in 1940, 1941 and 1942. The answers were to be filed within thirty days. Before this period expired appellees instituted this suit to enjoin the carrying out of that order and the general order of investigation. Thereafter the Commission extended the time for answering the questionnaire, and on May 18, 1943, withdrew its order of January 14, issuing instead another under § 21. This order, like the earlier one, required the appellees to answer a questionnaire concerning their forwarding operations. The only difference, apparently, was that the information sought was somewhat more extensive. The parties agreed that the suit should be continued as against the order of May 18 without formal amendment of the complaint.

On November 30, 1943, the District Court denied the Commission's motion for summary judgment and granted a temporary injunction restraining execution of the May 18, 1943, order. The injunction was made permanent on November 30, 1944.[4] The court held that the Maritime Commission had no jurisdiction over the appellees since, in its view, they did not come within the definition of the term "other [persons] subject to this Act" given in § 1 of the statute, 46 U.S.C. § 801, 46 U.S.C.A. § 801. It refused, however, to enjoin the order of August 21, 1942, on the ground that it had no jurisdiction to annul an order which itself did not adversely affect the complaining parties.

The question we are to review is whether the appellees are included within the designation "other person subject to this Act" as that phrase is defined in § 1 of the Shipping Act. The definition reads: "The term 'other person subject to this Act' means any person not included in the term 'common carrier by water,' carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities *in connection with* a common carrier by water." (Emphasis added.)

Substantially, the issue turns upon the meaning of "in connection with," that is, whether some relation of affiliation with the carrier is required, such as that exemplified in Railroad Retirement Board v. Duquesne Warehouse Co., 66 S.Ct. 238; or, on the other hand, the statutory phrasing is satisfied by the type of relationship illustrated

[4] [Footnote omitted—Ed.]

by the companion cases of State of California v. United States and City of Oakland v. United States, 320 U.S. 577,[5] 64 S.Ct. 352, 88 L.Ed. 322.

If, as appellees contend, "in connection with" covers only forwarding businesses actually affiliated with a common carrier by water in a corporate sense, or under the control of or pursuant to a continuing contract with such a carrier, then plainly the Maritime Commission is without jurisdiction over these appellees, since none of them is controlled by or affiliated with a common carrier by water in any such manner. All are so-called independent forwarders and the case comes down to whether such forwarders are covered by the Act.

There is little or no dispute as to the nature of their business. They are primarily forwarders of freight, as that term is generally understood,[6] for transshipment in foreign commerce. The foreign freight forwarding business is a medium used by almost all export shippers. An exporter, intending to send goods abroad, consigns the merchandise to a forwarder who then makes all the arrangements for dispatching it to a foreign port. The forwarder must arrange for necessary space with the steamship companies, procure and prepare the many documents, obtain permits for the acceptance of freight at piers, and at times must find available storage space for the shipment until steamers are available. If requested to do so, a forwarder will secure whatever insurance is needed.

Forwarders also have many other incidental duties. They check the marks on shipping papers and containers in order to be certain that they are in accordance with the regulations of the country of destination. They convert weights and measurements into the metric system when necessary. They keep records, for the convenience of the exporter, of all shipments dispatched. They also prosecute such claims as may be required by the exporter against carriers, insurance companies, and any other parties in interest.

By engaging in these many activities of the forwarding business, independent forwarders—and particularly the appellees—act as agents of the shipper. They assume no responsibility for the transportation of goods.

We think the appellees are within the coverage of § 1. This conclusion is required not only by the broad and literal wording of the definition but also to make effective the scheme of regulation the statute established and by considerations of policy implicit in that scheme, as well as by the legislative history and the decision in the California and Oakland cases, supra. In order to place the discussion of our reasons in statutory as well as factual setting, we sketch below some of the more pertinent statutory provisions. In doing so we shall emphasize the consequences of including or excluding so-called independent forwarders, like the appellees, for effective admin-

[5] [Footnote omitted.—Ed.]

[6] [Footnote omitted.—Ed.]

istration of the Act and achievement of its policy. But first we turn to the definition in § 1 itself.

The language is broad and general. No intent is suggested to classify forwarders, covering some but not others, just as none appears to divide persons "furnishing wharfage, dock, warehouse, or other terminal facilities" into regulated and unregulated groups. State of California v. United States; City of Oakland v. United States, supra. The absence of any such suggestion becomes highly significant by contrast with similar definitions of other statutes more or less related to the Shipping Act. In these Congress, when regulating carriers and "other persons," repeatedly has made plain the intent to cover only affiliates or other specially limited groups when this has been in fact its purpose.

Thus, in the legislation relating to railroads, forwarders were first covered expressly in 1942. 49 U.S.C. (Supp. IV) § 1002(a) (5), 49 U.S.C.A. § 1002(a) (5). The definition in shortened paraphrase is limited to any "person," other than a carrier, holding itself out "to transport or provide transportation" which "in the ordinary and usual course *of its undertaking*" (A) performs the usual functions of a forwarder, "*and* (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, *and* (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers * * *." (Emphasis added.) Not only would language so explicitly limited be difficult to apply to a person not performing any part of the "transportation service" proper, cf. Lehigh Valley R. Co. v. United States, 243 U.S. 444, 37 S.Ct. 434, 61 L.Ed. 839; but the very limitations, altogether absent from § 1 of the Shipping Act, forbid identical constructions of the two definitions. See also, in relation to the different treatment of rail forwarders, the correlated definition of "service subject to this chapter." 49 U.S.C. (Supp. IV) § 1002(a) (7), 49 U.S.C.A. § 1002(a) (7).

The same difference applies with reference to the definitions of the term "employer" in the Railroad Retirement Act of 1937, 45 U.S.C. § 228a, 45 U.S.C.A. § 228a, and the Railroad Unemployment Insurance Act of 1938, 45 U.S.C. § 351, 45 U.S.C.A. § 351, construed in Railroad Retirement Board v. Duquesne Warehouse Co., supra. In each instance the statute declares that "employer" shall mean "any carrier * * * and any company" carrier-owned or controlled "*and* which operates any equipment or facility or performs any service * * * in connection with the transportation of passengers or property * * *," thus plainly setting forth as to others covered than the carrier both the affiliation requirement and that of performing part of the transportation service.

In the face of such repeated demonstrations that Congress makes its purpose plain, when it actually intends to limit the coverage of others than carriers to affiliates or to persons performing part of

the transportation service, the conclusion hardly is tenable that it means the same thing when it employs more broadly inclusive language and wholly omits all such limitations. This view is further emphasized, as will appear, by the fact that to cut down the meaning of § 1 as appellees suggest would be to single out the term "forwarding" from all others in the definition and give to it a narrow application none of them possesses.

In view of these facts, it is doubtful that the wording of the definition is sufficiently ambiguous to acquire construction, more especially in view of the decisions in the California and Oakland cases. But if room for doubt remains, it is altogether removed by the considerations of policy and history to which we have referred. We turn accordingly to the statutory setting.

In several sections, for example, §§ 15, 16, 17, 20 and 21 (pursuant to which this proceeding began), "other persons" as well as common carriers by water either are made subject to affirmative duties or are prohibited from engaging in certain activities.

Section 15[7] requires filing of specified agreements or memoranda with the Commission and exempts from the operation of the antitrust

[7] "Every common carrier by water, *or other person subject to this Act*, shall file immediately with the board [commission] a true copy, or, if oral, a true and complete memorandum, of every agreement, with another such carrier *or other person subject to this Act*, or modification or cancellation thereof, *to which it may be a party or conform in whole or in part*, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; *controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports* or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; *or in any manner providing for an exclusive, preferential, or cooperative working arrangement.* The term 'agreement' in this section includes understandings, conferences, and other arrangements.

"The board [commission] may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations.

"Agreements existing at the time of the organization of the board [commission] shall be lawful until disapproved by the board [commission]. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the board [commission].

"All agreements, modifications, or cancellations made after the organization of the board [commission] *shall be lawful only when and as long as approved by the board [commission]*, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

"Every agreement, modification, or cancellation *lawful under this section* shall be excepted from the provisions of the Act approved July second, eighteen hundred and ninety, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' and

laws arrangements made by carriers and "other persons" among themselves or with one another which have been filed with *and approved by* the Commission.[8] The Commission is given the power to disapprove, cancel or modify, among others, any agreement which it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers or ports, or between United States exporters and their foreign competitors; or to operate to the detriment of the commerce of the United States; or to be in violation of the Act. Obviously agreements or understandings between forwarders or between forwarders and shippers or between forwarders and carriers may be discriminatory in such a way as to violate the provisions of § 15. Moreover, since forwarders arrange the terms of carriage for shippers with carriers, they may be the active agents who bring about the very types of agreement or arrangement the section contemplates the Commission shall have power and opportunity to outlaw. Consequently jurisdiction by the Commission over forwarders would seem essential to effectuate the policy of the Act and the absence of jurisdiction well might prevent giving full effect to that policy.

Section 16[9] forbids various forms of discrimination, as well as other

amendments and Acts supplementary thereto, and the provisions of sections seventy-three to seventy-seven, both inclusive, of the Act approved August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,' and amendments and Acts supplementary thereto.

"Whoever violates any provision of this section shall be liable to a penalty of $1,000 for each day such violation continues, to be recovered by the United States in a civil action." 39 Stat. 733, 46 U.S.C. § 814, 4 U.S.C.A. § 814. (Emphasis added.)

[8] [Footnote omitted.—Ed.]

[9] "That it shall be unlawful for any *shipper*, consignor, consignee, *forwarder*, broker, or other person, *or any officer, agent, or employee thereof*, knowingly and willfully, directly or indirectly, *by means of false billing, false classification, false weighing, false report of weight*, or by any other unjust or unfair device or means *to obtain or attempt to obtain transportation* by water for property *at less than the rates or charges* which would otherwise *be applicable*.

"That it shall be unlawful for any common carrier by water, *or other person subject to this Act*, either alone *or in conjunction with any other person*, directly *or indirectly*—

"First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

"Second. To allow any person to obtain transportation for property at less than the regular rates or charges then established and enforced on the line of such carrier *by means of false billing, false classification, false weighing, false report of weight*, or by any other unjust or unfair device or means.

"Third. To *induce, persuade*, or *otherwise influence any marine insurance company or underwriter*, or agent thereof, not to give a competing carrier by water as favorable a rate of insurance on vessel or cargo, having due regard to the class of vessel or cargo, as is granted to such carrier *or other person subject to this Act*.

"Whoever violates any provision of this section shall be guilty of a misdemeanor punishable by a fine of not more than $5,000 for each offense." 39 Stat. 734, as amended by 49 Stat. 1518, 46 U.S.C. § 815, 46 U.S.C.A. § 815. (Emphasis added.)

practices, on the part of any common carrier by water "or other person," which an independent forwarder readily may commit or induce. It is suggested, however, that whatever discriminations might be practiced necessarily would be in pursuance of an agreement between a carrier and a forwarder who, it is well to point out again, acts as agent of the shipper; and that since Congress has given the Commission jurisdiction over the carriers, it is to be presumed that such jurisdiction was thought to be sufficient.

Whether or not the premise is correct, the conclusion does not follow. That the Commission may have jurisdiction over one of the two parties to a discriminatory agreement or arrangement hardly means that it shall not have jurisdiction over both. Indeed, unless the jurisdiction includes both, it may be ineffective as to the one covered; for the Commission then might lack the necessary means of obtaining or checking upon information (cf. § 21) necessary to ascertain the existence of a discrimination or to take other action commanded by the statute. Morever, some of the practices forbidden appear to be peculiarly if exclusively susceptible of commission or inducement by forwarders, brokers and shippers' agents, all specifically mentioned in the section.

The purpose of § 17,[10] in relevant part, is to provide for the establishment, observance and enforcement of just and reasonable regulations and practices relating to or in connection with the receiving, handling, storing or delivering of property. By the nature of their business, independent forwarders are intimately connected with these various activities. Here again, unless the Commission has jurisdiction over them, it may not be able effectively to carry out the policy of the act.

Section 20,[11] which for the most part was copied from § 15(11) of the Interstate Commerce Act, forbids the disclosure of confidential

10 "* * * Every such carrier *and every other person subject to this Act shall* establish, *observe*, and enforce *just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property.* Whenever the board [commission] finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice." 39 Stat. 734, 46 U.S.C. § 816, 46 U.S.C.A. § 816. (Emphasis added.)

11 "That it shall be unlawful for any common carrier by water *or other person subject to this Act*, or any officer, receiver, trustee, lessee, agent, or employee of such carrier or person, *or for any other person authorized by such carrier or person to receive information, knowingly to disclose* to or permit to be acquired by any person other than the shipper or consignee, without the consent of such shipper or consignee, any information concerning the nature, kind, quantity, destination, consignee, or routing of any property tendered or delivered to such common carrier *or other person subject to this Act* for transportation in interstate or foreign commerce, which information may be used to the detriment or prejudice of such shipper or consignee, or which may improperly disclose his business transactions to a competitor, or which may be used to the detriment or prejudice of any carrier; and it shall also be unlawful for any person to solicit or knowingly receive any such information which may be so used." 39 Stat.

information by a common carrier by water or other person,[12] when the information might be used to the detriment or prejudice of a shipper or consignee, or of a carrier, or might improperly disclose his business transactions to a competitor.

Finally, § 21, which is immediately involved in this case, requires the filing of reports, records and documents relating to the business of persons subject to the Act.

The intimate relationship of the forwarder to both shipper and carrier, essentially that of go-between, gives him not only unique sources of information, perhaps in its totality available to no one else, but also unique opportunity to engage in practices which the Act contemplates shall be subject to regulation, some of which we have emphasized in quoting the statutory provisions. The statute throughout is drawn in very broad terms. It forbids direct or indirect accomplishment of the outlawed acts. It broadly covers specific practices, including false billing, classification, weighing, and the manner of placing insurance, § 16, as well as general practices resulting in forbidden evils, §§ 15, 17, which forwarders, affiliated or independent, are favorably placed to bring about. It mentions forwarders specifically, not only in § 1, but elsewhere, e. g., § 16, without suggestion of distinction between independent and affiliated operators. To include the latter but exclude the former would be incongruous, not only for want of any such explicit suggestion, but because inclusion of one without the other would create a statutory discrimination tending in time to force out the affiliated forwarder and, with that achieved, to remove forwarding entirely from the reach of the regulatory plan. We do not believe that Congress had in mind such a self-defeating scheme. Almost as well might it have exempted all forwarders in the first place. Nor do we think the design of the Act was merely by indirection to forbid carriers or their affiliates to act as forwarders.

The legislative history clearly supports this view, although for explicit statement it is scanty. No discussion concerning the meaning of "any person [not a carrier] carrying on the business of forwarding * * * in connection with a common carrier by water" appears except in the statement of the manager of the bill in the House of Representatives.[13] When dealing with the breadth of the term "other person subject to the act," he said: "Hence, if this board [the United States Shipping Board] effectually regulates water carriers, it must also have supervision of all those incidental facilities con-

735, 46 U.S.C. § 819, 46 U.S.C.A. § 819. (Emphasis added.) Exceptions are made for disclosure in response to legal process, etc.

[12] Section 15(11) of the Interstate Commerce Act, 49 U.S.C. § 15(11), 49 U.S.C.A. § 15(11), does not contain the "other person" provision. The coverage of the two sections, however, is so broad that it probably would include forwarders even though they were not within the coverage of other sections.

[13] Representative Alexander, then Chairman of the Committee on the Merchant Marine and Fisheries.

nected with the main carriers * * *." 53 Cong.Rec. 8276. Certainly this language is not indicative of intent to give a narrowly restricted scope to the definition's coverage. Quite the opposite is its effect.

The more significant legislative history, however, appears in the metamorphosis which this provision of § 1 underwent during the process of enactment. A predecessor bill (H.Rep. 14337, 64th Cong.) worded the definition as follows: "The term 'other person subject to this act' means any person not included in the term 'common carrier by water' and carrying on the business of forwarding, *ferrying, towing,* or furnishing *transfer, lighterage,* dock, warehouse, or other terminal facilities *in or in connection with the foreign or interstate commerce of the United States.*" (Emphasis added) As this was revised in the bill which was enacted (H.Rep. 15455, 64th Cong.), two changes occurred, apart from adding explicit mention of wharfage as among the terminal services. One was to eliminate the words "ferrying, towing, * * * transfer, lighterage." The other was to substitute *"in connection with* a common carrier by water" for *"in or in connection with* the foreign or interstate commerce of the United States."

Had this latter wording been retained there could not have been the remotest basis for suggestion that independent forwarders were not covered, as there could have been none with reference to any of the other businesses or services mentioned. But, for a reason wholly unrelated to narrowing the class of forwarders and others not carriers who had been included, the original concluding phraseology was changed. That language was obviously inexact when applied, as the Shipping Act did apply, to carriage by water and incidental activities. Taken literally, the broad wording would have included forwarders and others furnishing terminal facilities in connection with shipments by rail. Obviously it was to eliminate this incongruity, and not to constrict the classes of "other persons" previously enumerated, that this change was made.

That it had no other purpose appears, moreover, from the elimination of "ferrying, towing * * * transfer, lighterage," which shows that when Congress wished to cut down the classes originally covered it did so attentively and explicitly. These eliminated persons were included originally, along with forwarders and others, not simply to reach affiliates of carriers, but broadly to provide "for equal treatment to all shippers and water carriers by transfer and lighterage concerns *when forming a link in* interstate or foreign commerce."[14]

[14] H.Rep.No.659, 64th Cong., 1st Sess., 32. It is true that no comparable explicit statement appears concerning forwarding or terminal activities. But in the absence of distinguishing language, the original coverage of "ferrying, towing * * * transfer, lighterage" hardly can be taken to have been broader, as respects affiliation, than "forwarding, * * * or furnishing dock, warehouse, or other terminal service"; and the elimination of the former cannot be said to

(Emphasis added.) Nothing in the hearings, the committee reports, or the debates, upon the original or the substituted bills,[15] suggests either an original intention to restrict to carrier affiliates the coverage of forwarders or other furnishers of terminal or "link" service or a later intention to change the initial broad coverage by so restricting it. Silence so complete cannot be taken as the voice of change. The original congressional purpose clearly was to reach all who carry on the specified activities whether in or out of affiliation with a carrier. That purpose remained unaltered by anything which took place in the course of transition from the first to the final form in which the bill was enacted.

Indeed, we held as much in the cases of State of California v. United States and City of Oakland v. United States, supra. The decision was that the Commission has jurisdiction over state and municipally owned businesses furnishing terminal facilities. The ruling would include a fortiori privately owned independent businesses of the same type. It would be a strange reading of the "other person" provision if forwarders alone were required to be affiliated in order to come within its terms, all others covered in both the original and the final forms of the legislative proposals being either independent or affiliated. Yet this is, in effect, appellees' exact contention and the view taken by the District Court. As has been noted,[16] that court misconceived the facts in the Oakland case and thus perhaps, at the time of entry of its final order, the full scope and effect of our decision.[17] At any rate, since Congress has indicated no intention to single out forwarders for regulation only when they are affiliated with a carrier, while at the same time broadly covering terminal operators and others, we are not free to inject such a distinction.

What has been said disposes of the principal contentions and issues. Appellees however offer other arguments, founded chiefly in the absence of prior established administrative practice,[18] but also

have restricted the latter in this respect or, in view of the decision in the California and Oakland cases, to have singled out forwarding alone for such restriction.

15 [Footnote omitted.—Ed.]

16 [Footnote omitted.—Ed.]

17 [Footnote omitted.—Ed.]

18 It is pointed out that until the present proceeding neither the United States Maritime Commission nor its predecessor, the United States Shipping Board, attempted to exercise jurisdiction over forwarders such as the appellees. See, however, Fifth Annual Report of the United States Shipping Board, p. 10. It is not to be inferred however that either of those bodies held the view that they were without such jurisdiction or that, if either did, that fact would be conclusive. An administrative agency is not ordinarily under an obligation immediately to test the limits of its jurisdiction. It may await an appropriate opportunity or clear need for doing so. It may also be mistaken as to the scope of its authority. Cf. Social Security Board v.Nierotko, 326 U.S. 358, 66 S.Ct. 637, 90 L.Ed. —, 162 A.L.R. 1445.

Although failure to exercise power may be significant as a factor shedding light on whether it has been conferred, see Federal Trade Commission v. Bunte Bros., 312 U.S. 349, 61 S.Ct. 580, 85 L. Ed. 881, that fact alone neither extinguishes power granted nor establishes

in the history of interstate commerce legislation affecting nonwater transportation and in decisions relating to that legislation.[19] We regard these considerations as inapposite to the problem raised by this case in connection with the quite different wording, coverage, history and, to some extent, policy of the Shipping Act, for reasons already set forth in part and for others briefly indicated in the marginal notes attached to this paragraph.[20]

It remains only to notice the further objections that the case does not involve the use of forwarders by carriers to evade regulations applicable to carriers; and that to hold independent forwarders "subject to the Act" will bring them under its regulatory provisions, in other words, will make them "subject to the Act."

Needless to repeat, it is precisely because we think the latter effect is required by the considerations already set forth that our conclusion has been reached. Moreover, support for it is given by the very terms of the specific regulatory provisions cited to contradict it, as we have pointed out.[21] The ground need not be traversed again. The cited provisions, like § 1 are broad and general. They strike at evils as likely to be perpetrated by independent forwarders as by any of the "other persons" admittedly covered by the Act. They afford no suggestion of application narrowed to affiliated forwarders or of other distinction between them and independent forwarders, such as invariably and in the clearest terms Congress has stated whenever it has dealt with forwarders by land.

The common sense of all this, of course, is that Congress knew what it was about in both instances. We cannot ignore its repeated demonstrations of that fact. To do so would be to rewrite the statute, injecting limitations of affiliation no more rightfully within our function than inserting others of physical participation in the transportation

that the agency to which it is given regards itself as impotent. The present case, by virtue of differences from that of Bunte Bros. relating to the clarity and definiteness of the statute's terms, the policy of the Act, and the legislative history, is one which falls within the pronouncement: "Authority actually granted by Congress of course cannot evaporate through lack of administrative exercise." 312 U.S. at page 352, 61 S.Ct. at page 582, 85 L.Ed. 881.

19 Appellees strongly urge that this case is governed by the construction of the phrase "in connection with the transportation" in the Interstate Commerce Act, cited and discussed in the text above (see Lehigh Valley R. Co. v. United States, 243 U.S. 444, 37 S.Ct. 434, 61 L. Ed. 819), and for this view rely upon United States Navigation Co. v. Cunard S. S. Co., 284 U.S. 474, 481, 52 S.Ct. 247, 249, 76 L.Ed. 408, which held that the Shipping Act and the Interstate Commerce Act "each in its own field, should have like interpretation, application, and effect." As we have stated, the phrase "connected with transportation," in the entirely different setting of the Interstate Commerce Act, is so dissimilar in terms and setting to the phrase "in connection with a common carrier by water" as used in the Shipping Act that the interpretation of the former cannot be controlling in determining the meaning of the latter.

20 [Footnote omitted.—Ed.]

21 See notes 7, 9, 10, and discussion in the text.

service proper or of financial responsibility for it. These admittedly cannot go in, although there would be as much warrant for adding them as for putting in affiliation.

Statutes may be emasculated as readily and as much by unauthorized restricted reading as by one unduly expansive. And the wisdom of the regulation of forwarders with the corresponding restriction of competitive freedom in the business is the concern of Congress, not of this Court. We leave the statute as Congress enacted it.

It is inherent in the view we take of the statute that more is involved than merely a carrier's attempt to immunize itself against the Act's penalties by using a forwarder to evade the regulations made binding on carriers. In that respect forwarders are obviously no different from other persons, for the Act does not permit such evasion by a carrier whether through the use of forwarders or any other persons. What is more important is that the Act is designed and in terms undertakes not only to prevent such evasion by carriers through denying them immunity when they hide behind forwarders; it also denies immunity to the forwarders themselves when they commit the acts or practices carriers and others subject to the Act are forbidden to perform.

The judgment is reversed and the cause is remanded for further proceedings in conformity with this opinion.

Reversed and remanded.[a]

UNITED STATES v. AMERICAN TRUCKING ASSOCIATIONS, INC.

Supreme Court of the United States.
310 U.S. 534, 60 S.Ct. 1059, 84 L.Ed. 1345 (1940).

Mr. Justice REED delivered the opinion of the Court.

This appeal requires determination of the power of the Interstate Commerce Commission under the Motor Carrier Act, 1935, to establish reasonable requirements with respect to the qualifications and maximum hours of service of employees of motor carriers, other than employees whose duties affect safety of operation.

After detailed consideration, the Motor Carrier Act, 1935, was passed. It followed generally the suggestion of form made by the Federal Coordinator of Transportation. The difficulty and wide scope of the problems raised by the growth of the motor carrier industry were obvious. Congress sought to set out its purpose and the range of its action in a declaration of policy which covered the preservation and fostering of motor transportation in the public interest, tariffs,

[a] The dissenting opinion of Mr Justice Frankfurter, in which Mr Justice Black and Mr. Justice Douglas joined, is omitted.

the coordination of motor carriage with other forms of transportation and cooperation with the several states in their efforts to systematize the industry.

While efficient and economical movement in interstate commerce is obviously a major objective of the Act, there are numerous provisions which make it clear that Congress intended to exercise its powers in the non-transportation phases of motor carrier activity. Safety of operation was constantly before the committees and Congress in their study of the situation.

The pertinent portions of the section of the Act immediately under discussion read as follows:

"Sec. 204 [§ 304] (a). It shall be the duty of the Commission—

"(1) To regulate common carriers by motor vehicle as provided in this part [chapter], and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

"(2) To regulate contract carriers by motor vehicle as provided in this part [chapter], and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

"(3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment. * * *"

Shortly after the approval of the Act, the Commission on its own motion undertook to and did fix maximum hours of service for "employees whose functions in the operation of motor vehicles make such regulations desirable because of safety considerations." A few months after this determination, the Fair Labor Standards Act was enacted. Section 7 of this act limits the work week at the normal rate of pay of all employees subject to its terms and Section 18 makes the maximum hours of the Fair Labor Standards Act subject to further reduction by applicable federal or state law or municipal ordinances. There were certain employees excepted, however, from these regulations by Section 13(b). It reads as follows:

"Sec. 13 [§ 213.] * * * (b) The provisions of section 7 [207] shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 [304 of Title 49] of the Motor Carrier Act, 1935; * * *."

This exemption brought sharply into focus the coverage of employees by Motor Carrier Act, Section 204(a). Clerical, storage and other non-transportation workers are under this or the Fair Labor Standards Act, dependent upon the sweep of the word employee in this act. The Commission again examined the question of its jurisdiction and in Ex parte No. Mc-28 again reached the conclusion that its power under "section 204(a) (1) and (2) is limited to prescribing qualifications and maximum hours of service for those employees * * * whose activities affect the safety of operation." It added: "The provisions of section 202 evince a clear intent of Congress to limit our jurisdiction to regulating the motor-carrier industry as a part of the transportation system of the nation. To extend that regulation to features which are not characteristic of transportation nor inherent in that industry strikes us as an enlargement of our jurisdiction unwarranted by any express or implied provision in the act, which vests in us all the powers we have." The Wage and Hour Division of the Department of Labor arrived at the same result in an interpretation.

Shortly thereafter appellees, an association of truckmen and various common carriers by motor, filed a petition with the Commission in the present case seeking an exercise of the Commission's jurisdiction under Section 204(a) to fix reasonable requirements "with respect to qualifications and maximum hours of service of all employees of common and contract carriers, except employees whose duties are related to safety of operations; (3) to disregard its report and order in Ex parte MC-28." The Commission reaffirmed its position and denied the petition. The appellees petitioned a three-judge district court to compel the Commission to take jurisdiction and consider the establishment of qualifications and hours of service of all employees of common and contract carriers by motor vehicle. The Administrator of the Wage and Hour Division was permitted to intervene. The district court reversed the Commission, set aside its order and directed it to take jurisdiction of the appellees' petition. 31 F. Supp. 35. A direct appeal to this Court was granted.

In the broad domain of social legislation few problems are enmeshed with the difficulties that surround a determination of what qualifications an employee shall have and how long his hours of work may be. Upon the proper adjustment of these factors within an industry and in relation to competitive activities may well depend the economic success of the enterprises affected as well as the employment and efficiency of the workers. The Motor Carrier Act lays little emphasis upon the clause we are called upon now to construe, "qualifications and maximum hours of service of employees." None of the words are defined by the Section, 203, devoted to the explanation of the meaning of the words used in the Act. They are a part of an elaborate enactment drawn and passed in an attempt to adjust a new

and growing transportation service to the needs of the public. To find their content, they must be viewed in their setting.

In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress. There is no invariable rule for the discovery of that intention. To take a few words from their context and with them thus isolated to attempt to determine their meaning, certainly would not contribute greatly to the discovery of the purpose of the draftsmen of a statute, particularly in a law drawn to meet many needs of a major occupation.

There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one "plainly at variance with the policy of the legislation as a whole" this Court has followed that purpose, rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words may appear on "superficial examination." The interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function. This duty requires one body of public servants, the judges, to construe the meaning of what another body, the legislators, has said. Obviously there is danger that the courts' conclusion as to legislative purpose will be unconsciously influenced by the judges' own views or by factors not considered by the enacting body. A lively appreciation of the danger is the best assurance of escape from its threat but hardly justifies an acceptance of a literal interpretation dogma which withholds from the courts available information for reaching a correct conclusion. Emphasis should be laid, too, upon the necessity for appraisal of the purposes as a whole of Congress in analyzing the meaning of clauses or sections of general acts. A few words of general connotation appearing in the text of statutes should not be given a wide meaning, contrary to a settled policy, "excepting as a different purpose is plainly shown."

The language here under consideration, if construed as appellees contend, gives to the Commission a power of regulation as to qualifications and hours of employees quite distinct from the settled practice of Congress. That policy has been consistent in legislating for such regulation of transportation employees in matters of movement and safety only. The Hours of Service Act imposes restrictions on the hours of labor of employees "actually engaged in or connected with the movement of any train." The Seamen's Act limits employee regu-

lations under it to members of ships' crews. The Civil Aeronautics Authority has authority over hours of service of employees "in the interest of safety." It is stated by appellants in their brief with detailed citations, and the statement is uncontradicted, that at the time of the passage of the Motor Vehicle Act "forty states had regulatory measures relating to the hours of service of employees" and every one "applied exclusively to drivers or helpers on the vehicles." In the face of this course of legislation, coupled with the supporting interpretation of the two administrative agencies concerned with its interpretation, the Interstate Commerce Commission and the Wage and Hour Division, it cannot be said that the word "employee" as used in Section 204(a) is so clear as to the workmen it embraces that we would accept its broadest meaning. The word, of course, is not a word of art. It takes color from its surroundings and frequently is carefully defined by the statute where it appears.

We are especially hesitant to conclude that Congress intended to grant the Commission other than the customary power to secure safety in view of the absence in the legislative history of the Act of any discussion of the desirability of giving the Commission broad and unusual powers over all employees. The clause in question was not contained in the bill as introduced. Nor was it in the Coordinator's draft. It was presented on the Senate Floor as a committee amendment following a suggestion of the Chairman of the Legislative Committee of the Commission, Mr. McManamy. The committee reports and the debates contain no indication that a regulation of the qualifications and hours of service of all employees was contemplated; in fact the evidence points the other way. The Senate Committee's report explained the provisions of Section 204(a) (1), (2) as giving the Commission authority over common and contract carriers similar to that given over private carriers by Section 204(a) (3). The Chairman of the Senate Committee expressed the same thought while explaining the provisions on the floor of the Senate. When suggesting the addition of the clause, the Chairman of the Commission's Legislative Committee said: "* * * it relates to safety." In the House the member in charge of the bill characterized the provisions as tending "greatly to promote careful operation for safety on the highways," and spoke with assurance of the Commission's ability to "formulate a set of reasonable rules * * * including therein maximum labor-hours service on the highway." And in the report of the House Committee a member set out separate views criticizing the delegation of discretion to the Commission and proposing an amendment providing for an eight-hour day for "any employee engaged in the operation of such motor vehicle."

The Commission and the Wage and Hour Division, as we have said, have both interpreted Section 204(a) as relating solely to safety of operation. In any case such interpretations are entitled to great weight. This is peculiarly true here where the interpretations involve

"contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new." Furthermore, the Commission's interpretation gains much persuasiveness from the fact that it was the Commission which suggested the provisions' enactment to Congress.

It is important to remember that the Commission has three times concluded that its authority was limited to securing safety of operation. The first interpretation was made on December 29, 1937, when the Commission stated: "* * * until the Congress shall have given us a more particular and definite command in the premises, we shall limit our regulations concerning maximum hours of service to those employees whose functions in the operation of motor vehicles make such regulations desirable because of safety considerations." This expression was half a year old when Congress enacted the Fair Labor Standards Act with the exemption of Section 13(b) (1). Seemingly the Senate at least was aware of the Commission's investigation of its powers even before its interpretation was announced. Under the circumstances it is unlikely indeed that Congress would not have explicitly overruled the Commission's interpretation had it intended to exempt others than employees who affected safety from the Labor Standards Act.[b]

It is contended by appellees that the difference in language between subsections (1) and (2) and subsection (3) is indicative of a congressional purpose to restrict the regulation of employees of private carriers to "safety of operation" while inserting broader authority in (1) and (2) for employees of common and contract carriers. Appellants answer that the difference in language is explained by the difference in the powers. As (1) and (2) give powers beyond safety for service, goods, accounts and records, language limiting those subsections to safety would be inapt.

Appellees call our attention to certain pending legislation as sustaining their view of the congressional purpose in enacting the Motor Carrier Act. We do not think it can be said that the action of the Senate and House of Representatives on this pending transportation legislation throws much light on the policy of Congress or the meaning attributed by that body to Section 204(a). Aside from the very pertinent fact that the legislation is still unadopted, the legislative history up to now points only to a hesitation to determine a controversy as to the meaning of the present Motor Carrier Act, pending a judicial determination.

One amendment made to the then pending Motor Carrier Act has relevance to our inquiry. Section 203(b) reads as set out in the note

[b] But cf Girouard v. United States, 328 U.S. 61, 66 S.Ct. 826, — L.Ed. — (1946), infra at p. 137.

below.[43] The words, "except the provisions of section 204 [304] relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment," italicized in the note, were added by amendment in the House after the passage of S. 1629 in the Senate with the addition of the disputed clause to Section 204 (a) (1) and (2). It is evident that the exempted vehicles and operators include common, contract and private carriers. It seems equally evident that where these vehicles or operators were common or contract carriers, it was not intended by Congress to give the Commission power to regulate the qualifications and hours of service of employees, other than those concerned with the safety of operations.

Our conclusion, in view of the circumstances set out in this opinion, is that the meaning of employees in Section 204(a) (1) and (2) is limited to those employees whose activities affect the safety of opera-

[43] "(b) Nothing in this part, *except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment* shall be construed to include (1) motor vehicles employed solely in transporting school children and teachers to or from school; or (2) taxicabs, or other motor vehicles performing a bona fide taxicab service, having a capacity of not more than six passengers and not operated on a regular route or between fixed termini; or (3) motor vehicles owned or operated by or on behalf of hotels and used exclusively for the transportation of hotel patrons between hotels and local railroad or other common carrier stations; or (4) motor vehicles operated, under authorization, regulation, and control of the Secretary of the Interior, principally for the purpose of transporting persons in and about the national parks and national monuments; or (4a) motor vehicles controlled and operated by any farmer, and used in the transportation of his agricultural commodities and products thereof, or in the transportation of supplies to his farm; or (4b) motor vehicles controlled and operated by a co-operative association as defined in the Agricultural Marketing Act, approved June 15, 1929, as amended; or (5) trolley busses operated by electric power derived from a fixed overhead wire, furnishing local passenger transportation similar to street-railway service; or (6) motor vehicles used exclusively in carrying livestock, fish (including shell fish), or agricultural commodities (not including manufactured products thereof); or (7) motor vehicles used exclusively in the distribution of newspapers; nor, unless and to the extent that the Commission shall from time to time find that such application is necessary to carry out the policy of Congress enunciated in section 202, shall the provisions of this part, *except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment* apply to: (8) The transportation of passengers or property in interstate or foreign commerce wholly within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of any such municipality or municipalities, except when such transportation is under a common control, management, or arrangement for a continuous carriage or shipment to or from a point without such municipality, municipalities, or zone, and provided that the motor carrier engaged in such transportation of passengers over regular or irregular route or routes in interstate commerce is also lawfully engaged in the intrastate transportation of passengers over the entire length of such interstate route or routes in accordance with the laws of each State having jurisdiction; or (9) the casual, occasional, or reciprocal transportation of passengers or property in interstate or foreign commerce for compensation by any person not engaged in transportation by motor vehicle as a regular occupation or business."

tion. The Commission has no jurisdiction to regulate the qualifications or hours of service of any others. The decree of the district court is accordingly reversed and it is directed to dismiss the complaint of the appellees. It is so ordered.

Reversed with directions.

The CHIEF JUSTICE, Mr. Justice MCREYNOLDS, Mr. Justice STONE and Mr. Justice ROBERTS are of opinion that the decree should be affirmed for the reasons stated in the opinion of the district court, 31 F. Supp. 35.[c]

AGNEW v. BOARD OF GOVERNORS OF FEDERAL RESERVE SYSTEM

United States Court of Appeals for the District of Columbia.
153 F.2d 785, 80 App.D.C. 377 (1946).

Appeal from the District Court of the United States for the District of Columbia.

PRETTYMAN, Associate Justice. Appellants sought from the District Court a writ of certiorari to the Board of Governors of the Federal Reserve System (to which we shall refer as the Board) or, in the alternative, a mandatory injunction, seeking review of an order of the Board which had removed them from office as directors of the Paterson National Bank of Paterson, New Jersey. The District Court dismissed the complaint.

The substantive controversy revolves around the meaning of the words "primarily engaged" in the following statute:

"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."

The Board is empowered, upon certification by the Comptroller of the Currency, to remove from office a director of a member bank if it finds that he has continued to "violate any law" relating to the bank, after having been warned by the Comptroller. A director who participates in the management of a bank after having thus been

[c] All footnotes of the court, except footnote No. 43, have been omitted.

ordered removed from office, is liable to a fine of not more than $5,000 or imprisonment for not more than five years, or both.

Appellants were directors of the Paterson National Bank, one since November 27, 1934, and the other since January 13, 1925. Since March, 1941, they have been employees of Eastman, Dillon & Co., a New York concern engaged in the securities business.

After certification by the Comptroller of the Currency and after hearing, the Board made the following findings of fact in respect to Eastman, Dillon & Co.:

The company advertises its business as "Underwriters, Distributors, Dealers and Brokers in Industrial, Railroad, Public Utility and Municipal Securities." For the fiscal year 1943, its gross income from the "underwriting field" (meaning the issue, flotation, underwriting, public sale or distribution, at wholesale or retail or through syndicate participation, of stocks, bonds or other similar securities) amounted to 26 per cent of its gross income from all sources; and its gross income from the brokerage business (acting as agent in buying and selling for others) amounted to 42 per cent of its gross income from all sources. For the fiscal year ending February 29, 1944, its gross income from the "underwriting field" amounted to 32 per cent of its gross income from all sources; and its gross income from the brokerage business amounted to 47 per cent of its gross income from all sources. Considering the market value of the securities which were bought and sold by the firm as agent as well as those bought and sold by it for its own account during an indefinite period prior to September 20, 1943, that part lying within the "underwriting field" would represent about 15 per cent of the total market value. If one were to classify the total number of transactions during an indefinite period prior to September 20, 1943, it would be found that those in the "underwriting field" would amount to a similar percentage (15 per cent) of the total number. During the year 1943, the firm ranked ninth among 94 leading investment bankers of the country with respect to its total participations in underwritings of bonds. Excluding municipal and railroad bonds, its participations in underwritings during 1943 amounted to $14,657,000. For a period during 1943 it ranked first among the underwriters.

Upon the basis of the foregoing findings of fact, the Board reached the following "Conclusions of Law":

"The only substantial question, and the one upon which this matter turns, is whether Eastman, Dillon & Co. was, at the times stated in the certificate of the Comptroller of the Currency, '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' within the meaning of section 32 of the Act. The Respondents contend that the use of the word 'primarily' limits the application of the statute to those cases in which the underwriting business of the securities firm is first in volume in com-

parison with any other business or businesses in which it engages. It is true that, under one of its definitions, the word has a quantitative meaning. This, however, is not the only accepted meaning. The word 'primary' is frequently used in another sense. For instance, red is one of the 'primary' colors but it is not the only primary color; Saturn is one of the 'primary' planets but it is neither the only nor the largest one. Standard dictionaries cite as examples of the use of the word in the latter sense expressions such as 'the primary causes of a war' and 'a matter of primary importance.' (Merriam-Webster International Dictionary and Webster's Collegiate Dictionary) The Board is mindful of the rules of statutory construction that, while all of the words of a statute should be considered as having meaning, where a word used in a statute is susceptible of several meanings, that meaning should be adopted which best accords with the intention of the legislature in enacting the statute. Also, a word used in a statute should not be construed to produce an absurd consequence if it is susceptible of another construction in accord with the legislative intent. Section 32 is one of several measures enacted in 1933 designed to divorce commercial banking from investment banking. To say that a securities firm ranking ninth among the leading investment bankers of the country with respect to its total participations in underwritings of bonds, and for a period ranking first, should be held to be beyond the scope of the statute is to say that Congress enacted a statute with the intention that it would apply to no one. The construction for which the Respondents contend, which is based on one accepted definition of the word 'primarily', would lead to that result. The other construction, which is based on another accepted definition of that word, would conform to the Congressional intention as established by the legislative history. Accordingly, the Board finds as a matter of law that Eastman, Dillon & Co., at the times stated, was '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.'" * * *

We come now to consider the meaning of the statute. The facts in the case at bar are clear and clearly found. Thereby the alternative involved in the decision is made clear. Underwriting and brokerage, although both concerned with securities, are vastly different operations. By no quantitative test shown in this record can Eastman, Dillon & Co. be held to be principally or chiefly engaged in underwriting. Whether measured by volume, by income, or by number of transactions, its business is principally brokerage. On the other hand, its underwriting business is substantial, and it ranks high in the relative dollar amount of such business among concerns in the United States. So, if substantial business other than the chief or principal business be considered, the company is within the statute. Thus, the question narrows to this: Does "primarily engaged" mean chiefly,

or principally, engaged, or does it mean simply substantially, or importantly, engaged?

The Board says that the phrase "primarily engaged" has two possible meanings. Its premise is that the word "primary" has two possible meanings, one being a quantitative meaning and the other the meaning which the word has in expressions such as "the primary colors," "one of the primary planets," "the primary causes of war," and "a matter of primary importance." It says that the latter meaning accords with the legislative intent and, further, that the former leads to absurd results. It, therefore, adopts the latter meaning and concludes that, as a matter of law, Eastman, Dillon & Co. was primarily engaged in underwriting within the meaning of the statute.

It is true that the adjective "primary" has different shades of meaning, but always its basic idea is "first". It may refer to the first in order of time, and thus mean original or initial; or in order of importance, and thus mean chief or principal; or in order of derivation, and thus mean fundamental. Its synonyms are "prime" and "primeval". Its antonyms are "secondary" and "lesser". The difference which the Board senses, but does not state, is that "primary" is not restricted to the singular; it may refer to a plural. Thus, the primary colors are not one but several; and so with the planets and the causes of war. An activity may be either *a* primary activity or *the* primary activity of a given person. The adverb "primarily" has similar shades of meaning. The Board's interpretation is, in effect, that "primarily engaged" as it occurs in this statute encompasses all the important activities of a concern; that it means "a" primary activity, not merely "the" primary activity.

But "primary" when applied to a single subject always means first, or chief, or principal. A concern's "primary activity" is never one of several; it is always the first, or chief, or principal, activity. And so it is with "primarily". When applied to a single activity, as it is to underwriting in the case at bar, it always means the first, or chief, or principal, activity. One would never say that a person is "primarily concerned" or "primarily interested" or "primarily engaged" in a specified single activity, if the idea sought to be conveyed was that the named activity was a lesser among several important activities. To say that such an expression conveys that idea is, we think, clearly erroneous.

In its brief, the Board epitomizes its position by saying, "Undoubtedly, then, Eastman, Dillon & Co. are 'fundamentally' or 'primarily' engaged in both the brokerage business and the underwriting business. To put it otherwise, underwriting is one of the businesses in which the firm is 'primarily' engaged." The latter sentence makes plain the error of law of the Board. It is true that the word "primary" may be applied to a plurality of items in order to distinguish that group from still others as secondary. But this does not answer the question which is posed by the statute. That problem is to as-

certain whether the designated concern is primarily engaged in a single, named activity, i. e., underwriting. That problem is not solved by finding that the concern is primarily engaged in a group of several activities, in contradistinction to still other lesser activities, and then concluding that the concern is primarily engaged in each separate activity in the first group. That process would lead to the conclusion that an activity which, standing by itself, is by every standard less than another, is, nevertheless, primary. Such a conclusion is simply not true. The activity in which the concern is in fact secondarily engaged cannot be made its primary engagement by a process of reasoning which includes a fallacy of division.

The expression which Congress chose to use in this statute is an ordinary one, and in ordinary usage certainly refers to the chief or principal activity in which the company is engaged.[15] In dealing with practical matters, Congress does not consciously utilize obscure meanings of ordinary words to convey its intent. We should not impute to it either an ineptitude or a departure from its custom. So far as the ordinary and normal meaning of the words is concerned, the matter before us is clear and without difficulty. The sum of the matter is that we simply do not see how it can be said that a company is *primarily* engaged in underwriting, when underwriting is not, by any standard of measurement shown by the record, its chief or principal business. The Board strains at the language in order to achieve a result which it believes to be desirable.

It should be added that if Congress had meant to direct its prohibition to companies simply engaged in underwriting, or substantially engaged in underwriting (i. e., to companies whose underwriting activities are secondary although important among several activities), it could have said so, as it has said many times in statutory enactments, and did in fact, as we shall see, so say in another section of this same Act.

But the Board says, quite properly, that legislative intent must govern statutory construction. It says that Congress intended to separate as far as possible national and member banks from securities dealers. In support, it points in its brief to the Senate Committee Report on the bill which became the Act, and to Section 20 and Section 21 of the Act.

The section of the Committee Report upon which the Board relies reads:

[15] It is true, as the Board says in its brief, that some dictionaries give "fundamental" as a meaning of "primary"; and some also give "essential", which, however, the Board does not mention. But these words are not synonyms of "primary", and they overlap in meaning only when the implication of "fundamental" or "essential" is "first" or "principal". Other meanings of "fundamental" and "essential" cannot be ascribed to "primary" merely because the words are in part analogous. Certainly those words, in meanings other than "principal", are not apt as descriptive of business activity.

"The committee has, therefore, determined to present proposed legislation aimed at the following objects:

"(1) To separate as far as possible national and member banks from affiliates of all kinds."

But the bill upon which the Committee was reporting contained a definition of "affiliates". When the Committee said "affiliates", it was using a term defined, not a generality. The bill, and the consequent Act [19] defined an affiliate as any corporation, etc., of which a member bank owns or controls either a majority of the voting shares or more than 50 per cent of the shares voted for the election of directors, or controls in any manner the election of a majority of directors; or of which control is held by shareholders of a member bank who own or control either a majority of the shares of the bank or more than 50 per cent of the shares voted for the election of directors of the bank; or of which a majority of its directors are directors of any one member bank. It is thus clear that the separation about which the Senate Committee was speaking in the Report relied on by the Board, was based upon a majority of shares or a majority of directors. It was not a complete dissolution of intermingled personnel; it was a dissolution of control only. It applied a quantitative test. Such were the "affiliates" to which the Senate Committee referred.

Moreover, the full text of the Committee Report does not bear out the meaning attached by the Board to the single sentence quoted. The context is:

"(a) The greatest of such dangers is seen in the growth of 'bank affiliates' which devote themselves in many cases to perilous underwriting operations, stock speculation, and maintaining a market for the banks' own stock often largely with the resources of the parent bank. This situation was never contemplated by the National Banking Act, and it would, therefore, appear that the affiliate system calls for the establishment of some legislative provisions designed to deal with the situation. It has been suggested from many quarters that the affiliate

[19] 48 Stat. 162, 12 U.S.C.A. § 221a. The Act said:

"As used in this chapter—

* * * *

"(b) Except where otherwise specifically provided, the term 'affiliate' shall include any corporation, business trust, association, or other similar organization—

"(1) Of which a member bank, directly or indirectly, owns or controls either a majority of the voting shares or more than 50 per centum of the number of shares voted for the election of its directors, trustees, or other persons exercising similar functions at the preceding election, or controls in any manner the election of a majority of its directors, trustees, or other persons exercising similar functions; or

"(2) Of which control is held, directly or indirectly, through stock ownership or in any other manner, by the shareholders of a member bank who own or control either a majority of the shares of such bank or more than 50 per centum of the number of shares voted for the election of directors of such bank at the preceding election, or by trustees for the benefit of the shareholders of any such bank; or

"(3) Of which a majority of its directors, trustees, or other persons exercising similar functions are directors of any one member bank."

system be simply, 'abolished.' This suggestion has much authority behind it, but, in addition to the manifest difficulty of enforcement, owing to the existence of well-known subterfuges to maintain control, there remains the question whether it would be of much real service so long as State legislation permits the growth of affiliates in connection with State banks and trust companies. The committee has, therefore, determined to present proposed legislation aimed at the following objects:

"(1) To separate as far as possible national and member banks from affiliates of all kinds.

"(2) To limit the amount of advances or loans which can be obtained by affiliates from the parent institutions with which they are connected.

"(3) To install a satisfactory examination of affiliates, working simultaneously with the present system of examination applicable to the parent banks."

It is thus clear that the Committee, in this section of its Report, was concerned with the "bank affiliate" system, and, further, that it did not deem feasible the abolition of that system, dangerous though it was said to be. That the legislation was not designed to accomplish the total abolition of even the affiliate system, and was addressed to a described evil, lends weight to the idea that in using the word "primarily" in its description of the prohibited relationship in Section 32 of the Act, Congress intended a restricted scope rather than totality in the prescribed separation.

Referring to Section 20 of the Act, the Board says, in its brief in this court: "One of the principal sections designed to attain these purposes is section 20 of the Act, which provides that no member bank shall be affiliated 'in any manner' with any company 'engaged principally in the issue, flotation, underwriting, public sale, or distribution at wholesale or retail or through syndicate participation of stocks, bonds, debentures, notes, or other securities.' "

But the Act does not read as the Board quotes it. It does not say "that no member bank shall be affiliated 'in any manner' with any company," etc. It says, "no member bank shall be affiliated in any manner *described in subsection (b) of section 221a of this title* with any corporation," etc. (Italics supplied.) The subsection mentioned is the definition of affiliates which we have just discussed. Thus, Section 20, in full text, prescribes dissolution of control only, and not the complete divorcement indicated by the partial quotation relied on by the Board. There is a vast difference.

Thus, it is plain that the Committee Report and the section of the Act from which the Board says we must derive the intent of Congress, do not prescribe the complete divorcement which the Board urges, but, quite the contrary, direct only a dissolution of control. In each provision of the definition of the prohibited affiliation, the line is drawn at the majority. Forty-nine per cent is permissible. Fifty-one per-

cent is prohibited. This is a quantitative test. If, as the Board says, we are to ascertain the intent of Congress by these references, we reach the clear conclusion that Congress intended to apply a quantitative test in its prohibition.

As to Section 21 of the Act, the Board says, in its brief in this court: "Section 21 is complementary to section 20 and, among other things, prohibits any company which is engaged in the underwriting business from engaging 'at the same time to any extent whatever in the business of receiving deposits * * *.'"

This section of the Act, prohibiting dealers in securities from engaging in the banking business, contains two expressions pertinent to the present inquiry. Congress here used the phrase "engaged in the business"—not "primarily engaged," or "principally engaged," but simply "engaged". It added the emphatic phrase "to any extent whatever". These words prescribe complete separation. When Congress meant complete separation, it said so, in this same Act, in unmistakable terms. It knew what terms to use, and used them.

We do not know why Congress, in separating member banks from outside interests, went only so far as to prohibit control. We do not know why it rested its prohibition upon the precise line of majority. We only know that it did so. And the fact that it did so seems to indicate that when it used the term "primarily engaged" in Section 32 of the Act, as contrasted with "engaged" and "engage at the same time to any extent whatever" in Section 21, it had in mind a chief or principal business as measured by a quantitative test.

The Board says that if "primarily engaged" be construed to mean chiefly or principally engaged, absurd consequences would follow.[21] But we do not see that the consequences would be more absurd than those which ensue when Section 20 is applied. That a principality of business be requisite to a prohibition is no more absurd than that 51 per cent of stock ownership be requisite. The Board urges that to except one of the large and important concerns from this prohibition would be absurd. If the interrelationship were 49 per cent, it would be excepted from the prohibition of Section 20. One seems no more absurd than the other.

Research by the court has revealed one, and only one, previous reference by the Board to the provision here involved. Our idea that the connection is too remote to be helpful seems to have been shared by the Board as that ruling was neither cited nor mentioned by it in brief or argument. On the other hand, the same phrase in other statutes has been repeatedly interpreted. For example, by Section 2(a) (3) of the Public Utility Holding Company Act of 1935, the Securities and

[21] The Board remarks in its conclusions that if "primarily" be held to mean principally, the statute would apply to no one. So far as appears, this observation is a speculative generality, which on the record cannot be treated as a finding of fact.

Exchange Commission was authorized to declare a company without the Act if it found certain facts, including one that the company "is primarily engaged in one or more businesses other than the business of an electric utility company," and, in another clause, if it "is engaged primarily in manufacturing"; similar phrases appear in Section 3(a) (3) in relation to holding companies. The Commission has many times considered cases under the quoted language, and while we do not find that it ever defined the phrase, the findings of fact underlying its conclusions appear always to have been quantitative in nature and it uses the terms "principal business" and "principally engaged" as synonymous with "primarily engaged" (for example, The Cleveland-Cliffs Iron Company, 3 S.E.C. 326, 329, 330; Sloss-Sheffield Steel and Iron Company, 3 S.E.C. 460; Aluminum Company of America et al., 5 S.E.C. 640, 645; Fairbanks, Morse & Co., 8 S.E.C. 360, 361). In the International Paper Company case, 9 S.E.C. 937, 940, the Commission said:

"After having given consideration to the circumstances surrounding the sales of electric energy by applicant, particularly that the energy sold is generated by owned or leased facilities devoted primarily to applicant's own use, as well as to the quantum and relative percentage of such sales, it appears to the Commission that International Paper Company is primarily engaged in one or more businesses other than the business of an electric utility company within the meaning of the Public Utility Holding Company Act of 1935, * * *"

The full phrase in the Public Utility Holding Company Act relating to holding companies is "only incidentally a holding company, being primarily engaged or interested in one or more businesses other than the business of a public-utility company." The Commission held in the Cities Service Company case, 8 S.E.C. 318, 329, that the entire phrase must be read together and that while the scope of the qualification is explained by the latter portion of the language, the " 'incidentally' phrase" must also be given effect.

"Primarily engaged" also appears in the Bankruptcy Act, an exemption being granted a person "primarily bona fide personally engaged" in farming. The courts have had many cases involving this definition and uniformly recite quantitative tests. They have used such expressions as " 'Primarily' means basically, or in such manner as to be of first importance or of principal concern"; "The evidence does not support the conclusion that he was engaged chiefly in farming or tillage of the soil"; and "His farming activities did not, we think, ever become his primary business."

It is of some importance, in referring to the Public Utility Holding Company Act and the Bankruptcy Act as throwing some light upon the terminology of the Banking Act, that the three Acts were before Congress at the same time. The first was approved August 26, 1935, a reenactment of the second on May 15, 1935, and the third on August 23, 1935.

Further in respect to the Board's statement that "primarily" should not be construed to produce an absurd consequence (with which statement we, of course, agree), in the light of the Senate Committee Report on the Banking Act, which we have discussed, we see a possible reason why Congress went only so far as to prohibit interrelationship between a bank and a security concern when the business of the latter is chiefly or principally underwriting. The evil at which this section of the statute was aimed was the possible selling of securities to the bank by its directors. Congress may well have considered that such practice is much more likely to occur where underwriting is the principal or chief business of a concern, than where underwriting is a lesser or secondary interest. So it is not wholly unreasonable, in our view, that Congress laid the prohibition at that line.

At the same time, it may be, as the Board urges, that as a matter of policy, the national banking system should be divorced completely from concerns engaged in underwriting. But that question is not for the courts. Our function is merely to determine what Congress actually did in the statute before us. The Board could, and, if it so feels, should, present to the Congress its views on the problem of policy. * * *

Reversed.[a]

EDGERTON, Associate Justice (dissenting). I think the judgment should be affirmed. Eastman, Dillon & Co. are "Underwriters, Distributors, Dealers and Brokers in Industrial, Railroad, Public Utility and Municipal Securities." It seems to me a paradox to say that these underwriters are not primarily engaged in underwriting: are they, then, only incidentally engaged in underwriting? Everyone agrees that underwriting is one of the Eastman firm's primary businesses and brokerage another. I think it is equally true that they are "primarily engaged" in each, and not merely in both, of these businesses.

I think Congress used the word "primarily" in a sense which includes "essentially" or "fundamentally" and is not limited to "chiefly" or "principally." [1] These are all recognized senses of the word. The Oxford Dictionary includes "essentially", Webster's New International Dictionary includes "fundamentally", and Funk & Wagnalls' Standard Dictionary includes both "essentially" and "fundamentally", among the meanings of "primarily".

[a] All footnotes of the court, except Nos. 15, 19 and 21, have been omitted

[1] Since the meaning which words convey necessarily varies with their context, interpretations of the words "primarily engaged" in other statutes are only slight evidence of their meaning here. For example, it is a far cry from the premise that the International Paper Co. is "only incidentally a holding company" and is "primarily engaged" in the paper business, within the meaning of the Public Utility Holding Company Act, to the conclusion that the Eastman firm of underwriters is only incidentally and not primarily engaged in the underwriting business within the meaning of the Act before us.

The court argues that we should not impute obscure meanings of ordinary words to Congress. Highly obscure and even wholly unheard-of meanings of ordinary words have sometimes been imputed to Congress in order to avoid a result which Congress did not intend. Thus in Holy Trinity Church v. United States the Supreme Court, in order to shield a church from criminal liability, held that a clergyman does not perform any "labor or service". But there is nothing obscure or unusual about a meaning which is recognized, without the slightest suggestion of rarity or obsolescence, by most of the leading dictionaries. Unusual meanings of ordinary words, when they are recognized at all by these dictionaries, are marked "rare". Meanings which are recognized without qualification are ordinary meanings. By ruling that "primarily" has no ordinary meaning except chiefly or principally, this court overrules the editors of Webster's, the Standard, and the Oxford dictionaries on a question of fact in their field. I think the court errs in deciding that meanings which three leading dictionaries regard as ordinary are in fact so rare that they cannot have been intended by Congress. The contradiction is not reduced by the court's suggestion that the words "essentially" and "fundamentally" add nothing to the sense of the definitions in which they occur. A dictionary is not a book of synonyms. It purports to give meanings of terms, not to furnish alternative terms by which a given meaning may be expressed. "Essentially" and "fundamentally" mean what they say.

Choice between dictionary meanings is a normal process of statutory construction. It does not consist in deciding which meaning is the more usual. Its normal purpose and result are to give effect, as the Board did, to the probable intention of the legislature. This court's choice of a meaning for "primarily" is extraordinary in that its result is to defeat the intention of the legislature. It deprives § 32 of rational basis and of practical effect.

It is not disputed that what Congress aimed at in § 32 was the likelihood that if a bank director is interested, in the degree which Congress undertook to define as critical, in underwriting, the director may influence the bank or its customers to buy securities. This is made clear by the section itself.[5] In determining what interest in underwriting Congress undertook to define as critical, the question what interest might reasonably be thought critical is of great importance. Congress might reasonably think that if the director's employer is essentially engaged in underwriting, the director may be tempted to sell securities to the bank or its customers. Congress could not reasonably think that although the employer is so engaged, the fact that he is even more largely engaged in the related business of brokerage removes the temptation. The Board's interpretation attributes the ra-

[5] The section authorizes the Board to make regulations which permit men within the described class to serve as directors of a bank "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."

tional theory, and this court's interpretation the irrational one, to Congress.

The Board says, and its statement is not disputed, that restricting the application of § 32 to firms whose underwriting business is first in volume would make this section "apply to no one". The court does not suggest that this result, which is no result at all, is the one which Congress intended. If the court's position is correct, the Act of Congress requires us to defeat the purpose of Congress. This seems to me another paradox.

The court argues that if Congress meant essentially it could have said essentially. It is equally true that if Congress meant principally it could have said principally. And the court overlooks the fact that in a different section of the same Act, and with regard to engaging in exactly the same group of activities, Congress did say principally. The "affiliate" section of the Act provides that a bank shall not, through control of stock or of directors, control an organization "engaged principally in the issue, flotation, underwriting, public sale, or distribution at wholesale or retail or through syndicate participation of stocks, bonds, debentures, notes, or other securities." But § 32, which defines the degree of engagement in the underwriting business that disqualifies a man as a bank director, rejects the phrase "engaged principally" which had been used in the affiliate section and uses instead the phrase "primarily engaged." It is reasonable and conventional to suppose that Congress made this change with a purpose. If so, Congress did not intend that "primarily engaged" should be interpreted as meaning "principally engaged." [7]

From the fact that Congress made a "majority" of one sort critical in sections of the Act where it used the word "majority," the court infers that Congress meant to make a majority of another sort critical in § 32 where it did not use the word. To me the opposite inference, if either, would seem to be suggested. But the contexts are so different that no inference is suggested. They are so different that the court's argument comes to this; by recognizing that majorities of *votes* control corporations, Congress implied that a man's qualification to serve as a bank director should turn upon a majority of the *business activity* in which he is engaged. The sections on which the court relies concern affiliates of banks. The purpose of Congress, in those sections, was to prevent banks from controlling underwriting corporations. Since control of a corporation depends upon control of a majority of directors, or ownership or control of a majority of voting shares or of shares voted, Congress made such majority control the measure of

[7] The opinion of the court points out that in § 21 of the Act, in prohibiting underwriters from being engaged in banking, Congress used the phrase "engage * * * to any extent whatever." As the court points out, this makes it quite clear that when Congress, in § 32, prohibited bank directors from being "primarily engaged" in underwriting, Congress did not mean "engaged to any extent whatever". But no one contends that Congress meant that.

prohibited affiliation. In respect to the control of a corporation, 51 per cent of directors or of voting stock is a wholly different matter from 49 per cent. But in § 32 Congress did not aim at control, either of underwriters by banks or of banks by underwriters; and even if Congress had aimed at control, the question whether underwriting was or was not a majority of a *firm's business* would still have been irrelevant to its purpose. Section 32 is aimed only at the likelihood that a bank director who is interested in the underwriting business may exert influence upon his bank or its customers in favor of that business. The likelihood that he will do this does not depend in any degree upon the question whether the underwriting business is 51 per cent or 49 per cent of the business in which he is interested. The fact that Congress expressly treated a majority of voting power as critical where it makes sense to do so has no tendency to show that Congress meant to treat a majority of business activity as critical where it would not make sense to do so.

The Board interpreted "primarily" as meaning "essentially" or the like. This interpretation is in accordance with the Board's rulings in other cases and carries with it, as settled administrative practice always does, a strong presumption of correctness. If Congress intended to forbid this interpretation the Board made a mistake of law. But it seems to me clear that this is not the case. Accordingly I do not undertake to say whether the record would support a finding that the Eastman firm are *principally* engaged in underwriting.[e] [f]

GIROUARD v. UNITED STATES

Supreme Court of the United States.
328 U.S. 61, 66 S.Ct. 826, — L.Ed. — (1946).

On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

Proceedings by James Louis Girouard for naturalization, opposed by the United States of America. There was a judgment of the Circuit Court of Appeals, 149 F.2d 760, reversing an order admitting applicant to citizenship, and the applicant brings certiorari.

Reversed.

Mr. Justice DOUGLAS delivered the opinion of the Court.

In 1943 petitioner, a native of Canada, filed his petition for naturalization in the District Court of Massachusetts. He stated in his appli-

[e] All footnotes to the dissenting opinion, except Nos. 1, 5, and 7, have been omitted.

[f] The judgment of the court was reversed by the Supreme Court of the United States on the ground that "primarily engaged" meant "substantially engaged," in Board of Governors of Federal Reserve System v. Agnew, — U.S. —, 67 S.Ct. 411, — L.Ed. — (1947).

cation that he understood the principles of the government of the United States, believed in its form of government, and was willing to take the oath of allegiance (54 Stat. 1157, 8 U.S.C. § 735(b), 8 U.S.C.A. § 735(b), which reads as follows:

"I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely without any mental reservation or purpose of evasion: So help me God."

To the question in the application "If necessary, are you willing to take up arms in defense of this country?" he replied, "No (Non-combatant) Seventh Day Adventist." He explained that answer before the examiner by saying "it is a purely religious matter with me, I have no political or personal reasons other than that." He did not claim before his Selective Service board exemption from all military service, but only from combatant military duty. At the hearing in the District Court petitioner testified that he was a member of the Seventh Day Adventist denomination, of whom approximately 10,000 were then serving in the armed forces of the United States as non-combatants, especially in the medical corps; and that he was willing to serve in the army but would not bear arms. The District Court admitted him to citizenship. The Circuit Court of Appeals reversed, one judge dissenting. 1 Cir., 149 F.2d 760. It took that action on the authority of United States v. Schwimmer, 279 U.S. 644, 49 S.Ct. 448, 73 L.Ed. 889; United States v. Macintosh, 283 U.S. 605, 51 S.Ct. 570, 75 L.Ed. 1302, and United States v. Bland, 283 U.S. 636, 51 S.Ct. 569, 75 L.Ed. 1319, saying that the facts of the present case brought it squarely within the principles of those cases. The case is here on a petition for a writ of certiorari which we granted so that those authorities might be reexamined.

The Schwimmer, Macintosh and Bland cases involved, as does the present one, a question of statutory construction. At the time of those cases, Congress required an alien, before admission to citizenship, to declare on oath in open court that "he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same." It also required the court to be satisfied that the alien had during the five year period immediately preceding the date of his application "behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same." Those provisions were reenacted into the present law in substantially the same form.

While there are some factual distinctions between this case and the Schwimmer and Macintosh cases, the Bland case on its facts is indis-

tinguishable. But the principle emerging from the three cases obliterates any factual distinction among them. As we recognized in Re Summers, 325 U.S. 561, 572, 577, 65 S.Ct. 1307, 1313, 1316, they stand for the same general rule—that an alien who refuses to bear arms will not be admitted to citizenship. As an original proposition, we could not agree with that rule. The fallacies underlying it were, we think demonstrated in the dissents of Mr. Justice Holmes in the Schwimmer case and of Mr. Chief Justice Hughes in the Macintosh case. * * *

We conclude that the Schwimmer, Macintosh and Bland cases do not state the correct rule of law.

We are met, however, with the argument that even though those cases were wrongly decided, Congress has adopted the rule which they announced. The argument runs as follows: Many efforts were made to amend the law so as to change the rule announced by those cases; but in every instance the bill died in committee. Moreover, in 1940 when the new Naturalization Act was passed, Congress reenacted the oath in its pre-existing form, though at the same time it made extensive changes in the requirements and procedure for naturalization. From this it is argued that Congress adopted and reenacted the rule of the Schwimmer, Macintosh, and Bland cases. Cf. Apex Hosiery Co. v. Leader, 310 U.S. 469, 488, 489, 60 S.Ct. 982, 989, 990, 84 L.Ed. 1311, 128 A.L.R. 1044.

We stated in Helvering v. Hallock, 309 U.S. 106, 119, 60 S.Ct. 444, 451, 84 L.Ed. 604, 125 A.L.R. 1368, that "It would require very persuasive circumstances enveloping Congressional silence to debar this Court from re-examining its own doctrines." It is at best treacherous to find in Congressional silence alone the adoption of a controlling rule of law. We do not think under the circumstances of this legislative history that we can properly place on the shoulders of Congress the burden of the Court's own error. The history of the 1940 Act is at most equivocal. It contains no affirmative recognition of the rule of the Schwimmer, Macintosh and Bland cases. The silence of Congress and its inaction are as consistent with a desire to leave the problem fluid as they are with an adoption by silence of the rule of those cases. But for us, it is enough to say that since the date of those cases Congress never acted affirmatively on this question but once and that was in 1942. At that time, as we have noted, Congress specifically granted naturalization privileges to non-combatants who like petitioner were prevented from bearing arms by their religious scruples. That was affirmative recognition that one could be attached to the principles of our government and could support and defend it even though his religious convictions prevented him from bearing arms. And, as we have said, we cannot believe that the oath was designed to exact something more from one person than from another. Thus the affirmative action taken by Congress in 1942 negatives any inference that otherwise might be drawn from its silence when it reenacted the oath in 1940.

Reversed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

Mr. Chief Justice STONE dissenting.

I think the judgment should be affirmed, for the reason that the court below, in applying the controlling provisions of the naturalization statutes, correctly applied them as earlier construed by this Court, whose construction Congress has adopted and confirmed. * * *

With three other Justices of the Court I dissented in the Macintosh and Bland cases, for reasons which the Court now adopts as ground for overruling them. Since this Court in three considered earlier opinions has rejected the construction of the statute for which the dissenting Justices contended, the question, which for me is decisive of the present case, is whether Congress has likewise rejected that construction by its subsequent legislative action, and has adopted and confirmed the Court's earlier construction of the statutes in question. A study of Congressional action taken with respect to proposals for amendment of the naturalization laws since the decision in the Schwimmer case, leads me to conclude that Congress has adopted and confirmed this Court's earlier construction of the naturalization laws. For that reason alone I think that the judgment should be affirmed.

The construction of the naturalization statutes, adopted by this Court in the three cases mentioned, immediately became the target of an active, publicized legislative attack in Congress which persisted for a period of eleven years, until the adoption of the Nationality Act in 1940. Two days after the Schwimmer case was decided, a bill was introduced in the House, H.R. 3547, 71st Cong., 1st Sess., to give the Naturalization Act a construction contrary to that which had been given to it by this Court and which, if adopted, would have made the applicants rejected by this Court in the Schwimmer, Macintosh and Bland cases eligible for citizenship. This effort to establish by Congressional action that the construction which this Court had placed on the Naturalization Act was not one which Congress had adopted or intended, was renewed without success after the decision in the Macintosh and Bland cases, and was continued for a period of about ten years. All of these measures were of substantially the same pattern as H.R. 297, 72d Cong., 1st Sess., introduced December 8, 1931, at the first session of Congress, after the decision in the Macintosh case. It provided that no person otherwise qualified "shall be debarred from citizenship by reason of his or her religious views or philosophical opinions with respect to the lawfulness of war as a means of settling international disputes, but every alien admitted to citizenship shall be subject to the same obligation as the native-born citizen." H.R. 3547, 71st Cong., 1st Sess., introduced immediately after the decision in the Schwimmer case, had contained a like provision, but with the omission of the last clause beginning "but every alien." Hearings were had before the House Committee on Immigration and Naturalization on both

bills at which their proponents had stated clearly their purpose to set aside the interpretation placed on the oath of allegiance by the Schwimmer and Macintosh cases. There was opposition on each occasion. Bills identical with H.R. 297 were introduced in three later Congresses. None of these bills were reported out of Committee. The other proposals, all of which failed of passage (see footnote 2, ante), had the same purpose and differed only in phraseology.

Thus, for six successive Congresses, over a period of more than a decade, there were continuously pending before Congress in one form or another proposals to overturn the rulings in the three Supreme Court decisions in question.. Congress declined to adopt these proposals after full hearings and after speeches on the floor advocating the change. 72 Cong.Rec. 6966-7; 75th Cong.Rec. 15354-7. In the meantime the decisions of this Court had been followed in Clarke's Case, 301 Pa. 321, 152 A. 92; Beale v. United States, 8 Cir., 71 F.2d 737; In re Warkentin, 7 Cir., 93 F.2d 42. In Beale v. United States, supra, [71 F. 2d 739] the court pointed out that the proposed amendments affecting the provisions of the statutes relating to admission to citizenship had failed saying: "We must conclude, therefore, that these statutory requirements as construed by the Supreme Court have Congressional sanction and approval."

Any doubts that such were the purpose and will of Congress would seem to have been dissipated by the reenactment by Congress in 1940 of Paragraphs "Third" and "Fourth" of § 4 of the Naturalization Act of 1906, and by the incorporation in the Act of 1940 of the very form of oath which had been administratively prescribed for the applicants in the Schwimmer, Macintosh and Bland cases. See Rule 8(c), Naturalization Regulations of July 1, 1929.

The Nationality Act of 1940 was a comprehensive, slowly matured and carefully considered revision of the naturalization laws. The preparation of this measure was not only delegated to a Congressional Committee, but was considered by a committee of Cabinet members, one of whom was the Attorney General. Both were aware of our decisions in the Schwimmer and related cases and that no other question pertinent to the naturalization laws had been as persistently and continuously before Congress in the ten years following the decision in the Schwimmer case. The modifications in the provisions of Paragraphs "Third" and "Fourth" of § 4 of the 1906 Act show conclusively the careful attention which was given to them.

In the face of this legislative history the "failure of Congress to alter the Act after it had been judicially construed, and the enactment by Congress of legislation which implicitly recognizes the judicial construction as effective, is persuasive of legislative recognition that the judicial construction is the correct one. This is the more so where, as here, the application of the statute * * * has brought forth sharply conflicting views both on the Court and in Congress, and where after the matter has been fully brought to the attention of the public and

the Congress, the latter has not seen fit to change the statute." Apex Hosiery Co. v. Leader, 310 U.S. 469, 488, 489, 60 S.Ct. 982, 989, 84 L.Ed. 1311, 128 A.L.R. 1044. And see to like effect United States v. Ryan, 284 U.S. 167–175, 52 S.Ct. 65–68, 76 L.Ed. 224; United States v. Elgin, J. & E. R. Co., 298 U.S. 492, 500, 56 S.Ct. 841, 843, 80 L.Ed. 1300; State of Missouri v. Ross, 299 U.S. 72, 75, 57 S.Ct. 60, 62, 81 L.Ed. 46; cf. Helvering v. Winmill, 305 U.S. 79, 82, 83, 59 S.Ct. 45, 46, 47, 83 L.Ed. 52. It is the responsibility of Congress, in reenacting a statute, to make known its purpose in a controversial matter of interpretation of its former language, at least when the matter has, for over a decade, been persistently brought to its attention. In the light of this legislative history, it is abundantly clear that Congress has performed that duty. In any case it is not lightly to be implied that Congress has failed to perform it and has delegated to this Court the responsibility of giving new content to language deliberately readopted after this Court has construed it. For us to make such an assumption is to discourage, if not to deny, legislative responsibility. By thus adopting and confirming this Court's construction of what Congress had enacted in the Naturalization Act of 1906 Congress gave that construction the same legal significance as though it had written the very words into the Act of 1940. * * *

Mr. Justice REED and Mr. Justice FRANKFURTER join in this opinion.[g]

B. Effect of Administrative Practice in the Interpretation of Statutes

UNITED STATES v. AMERICAN TRUCKING ASSOCIATIONS, INC.

Supreme Court of the United States.
310 U.S. 534, 60 S.Ct. 1059, 84 L.Ed. 1345 (1940).

See *supra* at p. 118.

[g] Cf. Helvering v. N. Y. Trust Co., 292 U.S. 455, 54 S.Ct. 806, 78 L.Ed. 1361 (1934); see Biddle v. Commissioner of Internal Revenue, 302 U.S. 573, 582, 58 S.Ct. 379, 82 L.Ed. 431 (1938); Helvering v. Griffiths, 318 U.S. 371, 395–396, 63 S. Ct. 636, 649, 87 L.Ed. 843 (1943); Griswold, A Summary of the Regulations Problem (1941), 54 Harv.L.Rev. 398, 399–404.

Footnotes of the court have been omitted.

ESTATE OF SANFORD v. COMMISSIONER OF INTERNAL REVENUE

Supreme Court of the United States.
308 U.S. 39, 60 S.Ct. 51, 84 L.Ed. 20 (1939).

Mr. Justice STONE delivered the opinion of the Court.

This and its companion case, Rasquin v. Humphreys, 308 U.S. 54, 60 S.Ct. 60, 84 L.Ed. 77, present the single question of statutory construction whether in the case of an inter vivos transfer of property in trust, by a donor reserving to himself the power to designate new beneficiaries other than himself, the gift becomes complete and subject to the gift tax imposed by the federal revenue laws at the time of the relinquishment of the power. Co-relative questions, important only if a negative answer is given to the first one, are whether the gift becomes complete and taxable when the trust is created or in the case where the donor has reserved a power of revocation for his own benefit and has relinquished it before relinquishing the power to change beneficiaries, whether the gift first becomes complete and taxable at the time of relinquishing the power of revocation.

In 1913, before the enactment of the first gift tax statute of 1924, decedent created a trust of personal property for the benefit of named beneficiaries, reserving to himself the power to terminate the trust in whole or in part, or to modify it. In 1919 he surrendered the power to revoke the trust by an appropriate writing in which he reserved "the right to modify any or all of the trusts" but provided that this right "shall in no way be deemed or construed to include any right or privilege" in the donor "to withdraw principal or income from any trust." In August, 1924, after the effective date of the gift tax statute, 43 Stat. 313, § 319 et seq., 26 U.S.C.A. Int.Rev.Acts, page 79 et seq., decedent renounced his remaining power to modify the trust. After his death in 1928, the Commissioner following the decision in Hesslein v. Hoey, 2 Cir., 91 F.2d 954, in 1937, ruled that the gift became complete and taxable only upon decedent's final renunciation of his power to modify the trusts and gave notice of a tax deficiency accordingly.

The order of the Board of Tax Appeals sustaining the tax was affirmed by the Court of Appeals for the Third Circuit, 103 F.2d 81, which followed the decision of the Court of Appeals for the second circuit in Hesslein v. Hoey, supra, in which we had denied certiorari, 302 U.S. 756, 58 S.Ct. 284, 82 L.Ed. 585. In the Hesslein case, as in the Humphreys case now before us, a gift in trust with the reservation of a power in the donor to alter the disposition of the property in any way not beneficial to himself, was held to be incomplete and not subject to the gift tax under the 1932 Act so long as the donor retained that power.

We granted certiorari in this case May 15, 1939, 307 U.S. 618, 59 S. Ct. 836, 83 L.Ed. 1498, and in the Humphreys case May 22, 1939, 307

U.S. 619, 59 S.Ct. 1034, 83 L.Ed. 1499, upon the representation of the Government that it has taken inconsistent positions with respect to the question involved in the two cases and that because of this fact and of the doubt of the correctness of the decision in the Hesslein case decision of the question by this Court is desirable in order to remove the resultant confusion in the administration of the revenue laws.

It has continued to take these inconsistent positions here, stating that it is unable to determine which construction of the statute will be most advantageous to the Government in point of revenue collected. It argues in this case that the gift did not become complete and taxable until surrender by the donor of his reserved power to designate new beneficiaries of the trusts. In the Humphreys case it argues that the gift upon trust with power reserved to the donor, not afterward relinquished, to change the beneficiaries was complete and taxable when the trust was created. It concedes by its brief that "a decision favorable to the government in either case will necessarily preclude a favorable decision in the other."

In ascertaining the correct construction of the statutes taxing gifts, it is necessary to read them in the light of the closely related provisions of the revenue laws taxing transfers at death, as they have been interpreted by our decisions. Section 319 et seq. of the Revenue Act of 1924, 43 Stat. 253, 313, reenacted as Sec. 501 et seq. of the 1932 Act, 47 Stat. 169, 26 U.S.C.A. Int.Rev.Acts, page 580 et seq., imposed a graduated tax upon gifts. It supplemented that laid on transfers at death, which had long been a feature of the revenue laws. When the gift tax was enacted Congress was aware that the essence of a transfer is the passage of control over the economic benefits of property rather than any technical changes in its title. See Burnet v. Guggenheim, 288 U.S. 280, 287, 53 S.Ct. 369, 371, 77 L.Ed. 748. Following the enactment of the gift tax statute this Court in Reinecke v. Northern Trust Company, 1929, 278 U.S. 339, 49 S.Ct. 123, 73 L.Ed. 410, 66 A.L.R. 397, held that the relinquishment at death of a power of revocation of a trust for the benefit of its donor was a taxable transfer. Cf. Saltonstall v. Saltonstall, 276 U.S. 260, 48 S.Ct. 225, 72 L.Ed. 565; Chase National Bank v. United States, 278 U.S. 327, 49 S.Ct. 126, 73 L. Ed. 405, 63 A.L.R. 388, and similarly in Porter v. Commissioner, 1933, 288 U.S. 436, 53 S.Ct. 451, 77 L.Ed. 880, that the relinquishment by a donor at death of a reserved power to modify the trust except in his own favor is likewise a transfer of the property which could constitutionally be taxed under the provisions of § 302(d) of the 1926 Revenue Act, 26 U.S.C.A. Int.Rev.Acts, page 228, reenacting in substance 302 (d) of the 1924 Act, 26 U.S.C.A. Int.Rev.Acts, page 67, although enacted after the creation of the trust. Cf. Bullen v. Wisconsin, 240 U.S. 625, 36 S.Ct. 473, 60 L.Ed. 830; Curry v. McCanless, 307 U.S. 357, 59 S.Ct. 900, 83 L.Ed. 1339; Graves v. Elliott, 307 U.S. 383, 59 S.Ct. 913, 83 L.Ed. 1356. Since it was the relinquishment of the power which was taxed as a transfer and not the transfer in trust, the statute was

not retroactively applied. Cf. Nichols v. Coolidge, 274 U.S 531, 47 S. Ct. 710, 71 L.Ed. 1184, 52 A.L.R. 1081; Helvering v. Helmholz, 296 U. S. 93, 98, 56 S.Ct. 68, 70, 80 L.Ed. 76.

The rationale of decision in both cases is that "taxation is not so much concerned with the refinements of title as it is with the actual command over the property taxed." See Corliss v. Bowers, 281 U.S. 376, 378, 50 S.Ct. 336, 74 L.Ed. 916; Saltonstall v. Saltonstall, supra, 276 U.S. page 261, 48 S.Ct. page 225, 72 L.Ed. 565; Burnet v. Guggenheim, supra, 288 U.S. page 287, 53 S.Ct. page 371, 77 L.Ed. 748, and that a retention of control over the disposition of the trust property, whether for the benefit of the donor or others, renders the gift incomplete until the power is relinquished whether in life or at death. The rule was thus established, and has ever since been consistently followed by the Court, that a transfer of property upon trust, with power reserved to the donor either to revoke it and recapture the trust property or to modify its terms so as to designate new beneficiaries other than himself is incomplete, and becomes complete so as to subject the transfer to death taxes only on relinquishment of the power at death.

There is nothing in the language of the statute, and our attention has not been directed to anything in its legislative history to suggest that Congress had any purpose to tax gifts before the donor had fully parted with his interest in the property given, or that the test of the completeness of the taxed gift was to be any different from that to be applied in determining whether the donor has retained an interest such that it becomes subject to the estate tax upon its extinguishment at death. The gift tax was supplementary to the estate tax. The two are in pari materia and must be construed together. Burnet v. Guggenheim, supra, 288 U.S. page 286, 53 S.Ct. page 371, 77 L.Ed. 748. An important, if not the main purpose of the gift tax was to prevent or compensate for avoidance of death taxes by taxing the gifts of property inter vivos which, but for the gifts, would be subject in its original or converted form to the tax laid upon transfers at death. * * *

The question remains whether the construction of the statute which we conclude is to be derived from its language and history, should be modified because of the force of treasury regulations or administrative practice. Article I of Regulations 67, under the 1924 Act (adopted without any change of present significance in Article III, Regulations 79, under the 1932 Act) provides that the creation of a trust where the grantor retains the power to revest in himself title to the corpus of the trust does not constitute a gift subject to the tax and declares that "where the power retained by the grantor to revest in himself title to the corpus is not exercised a taxable transfer will be treated as taking place in the year in which such power is terminated". Petitioner urges that the regulation is in terms applicable to the trust presently involved because it was subject to a power of revocation in favor of the donor before the enactment of the gift tax which was later relin-

quished. But we think, as the court below thought, that the regulation was not directed to the case of the relinquishment of a reserved power to select new beneficiaries other than the donor and did not purport to lay down any rule for cases where there was a reserved power different from or in addition to the power to revest the title in the donor. At most the regulation is ambiguous and without persuasive force in determining the true construction of the statute. Burnet v. Chicago Portrait Co., 285 U.S. 1, 16, 20, 52 S.Ct. 275, 280, 282, 76 L.Ed. 587. The amended regulation of 1936 under the 1932 Act, Art. III, Reg. 79, removed the ambiguity by declaring that the gift is complete and subject to the tax when "the donor has so parted with dominion and control as to leave in him no power to cause the beneficial title to be revested in himself". But this regulation is by its terms applicable only to gifts made after June 6, 1932 and is of significance here only so far as it is declaratory of the correct construction of the 1924 Act.

Petitioner also insists that the construction of the statute for which he contends is sustained by the administrative practice. That practice is not disclosed by any published Treasury rulings or decisions and our only source of information on the subject is a stipulation appearing in the record. It states that in the administration of the gift tax under the 1924 and 1932 Acts and until the decision in the Hesslein case it was "the uniform practice of the Commissioner of Internal Revenue in adjusting cases of the character of that here involved to treat the taxable transfer subject to gift tax as occurring when the transferor relinquished all power to revest in himself title to the property constituting the subject of the transfer"; and that three hundred cases "of such character" have been closed or adjusted in conformity to this practice.

This definition of the practice appears as a part of a stipulation of facts setting forth in some 126 printed pages the original trust deed of December 24, 1913, and thirteen modifications of it between that date and the final relinquishment of the power of modification on August 20, 1924. They reveal a varied and extensive power of control by the donor over the disposition of the trust property which survived the relinquishment, in 1919, of the power of revocation for his own benefit, and with which he finally parted after enactment of the gift tax. The description of the practice as that resorted to in adjusting "cases of the character of that here involved", presupposes some knowledge on our part of what the signers of the stipulation regarded as the salient features of the present case which, although not specified by the stipulation, were necessarily embraced in the practice. Administrative practice, to be accepted as guiding or controlling judicial decision, must at least be defined with sufficient certainty to define the scope of the decision. If relinquishment of the power of revocation mentioned by the stipulation was of controlling significance in defining the practice, that circumstance was not present in the Hesslein case or in the Humphreys case. Whether in any of the three hundred cases mentioned in the stipulation the relinquishment of the power of revocation

was followed by the relinquishment inter vivos of a power of changing the beneficiaries like that in this case, does not appear.

Such a stipulated definition of the practice is too vague and indefinite to afford a proper basis for a judicial decision which undertakes to state the construction of the statute in terms of the practice. Moreover, if we regard the stipulation as agreeing merely that the legal questions involved in the present case have uniformly been settled administratively in favor of the contention now made by the petitioner, it involves conclusions of law of the stipulators, both with respect to the legal issues in the present case and those resolved by the practice. We are not bound to accept, as controlling, stipulations as to questions of law. Swift & Co. v. Hocking Valley Railway Co., 243 U.S. 281, 289, 37 S.Ct. 287, 289, 61 L.Ed. 722.

Without attempting to say what the administrative practice has actually been we may, for present purposes, make the assumption most favorable to the taxpayer in this case that the practice was as stated by the Government in its brief in the Humphreys case, viz., that until the decision in the Hesslein case "the Bureau consistently took the position that the gift tax applied to a transfer in trust where the grantor reserved the right to modify the trust but no right to revest title in himself."

But the record here shows that no such practice was recognized as controlling in 1935 when the present case first received the attention of the Bureau. On February 21, 1935, the Assistant General Counsel gave an opinion reviewing at length the facts of the present case and the applicable principles of law, and concluded on the reasoning and authority of the Guggenheim and Porter cases that the gift was not complete and taxable until the relinquishment in August, 1924 of the power to modify the trust by the selection of new beneficiaries. In April, 1935, the matter was reconsidered and a new opinion was given which was finally adopted by the assistant secretary who had intervened in the case. This opinion reversed the earlier one on the authority of the Guggenheim case. It was at pains to point out that in that case the Court had held that the relinquishment of the power of revocation was a taxable gift but it made no mention of the fact that there, unlike the present case, there was no power of modification which survived the relinquishment of the power of revocation, which was crucial in the Porter case. Neither opinion rested upon or made any mention of any practice affecting cases where such a power of modification is reserved. After the decision in the Hesslein case the ruling of the Bureau in this case was again reversed and notice of deficiency sent to the taxpayer.

From this record it is apparent that there was no established administrative practice before the opinion of April, 1935, and if the practice was adopted then it was because of a mistaken departmental ruling of law based on an obvious misinterpretation of the decisions in the Porter and Guggenheim cases.

Administrative practice may be of persuasive weight in determining the construction of a statute of doubtful meaning where the practice does not conflict with other provisions of the statute and is not so inconsistent with applicable decisions of the courts as to produce inconsistency and confusion in the administration of the law. Such a choice, in practice, of one of two possible constructions of a statute by those who are expert in the field and specially informed as to administrative needs and convenience, tends to the wise interpretation and just administration of the laws. This is the more so when reliance has been placed on the practice by those affected by it.

But courts are not bound to accept the administrative construction of a statute regardless of consequences, even when disclosed in the form of rulings. See Helvering v. New York Trust Co., 292 U.S. 455, 468, 54 S.Ct. 806, 810, 78 L.Ed. 1361. Here the practice has not been revealed by any published rulings or action of the Department on which taxpayers could have relied. The taxpayers in the present cases are contending for different rulings. In Harriet Rosenau v. Com'r, 1938, 37 B.T.A. 468, as in the Humphreys case, the taxpayer contended that the date when the power to change the beneficiary is renounced is controlling. The petitioner here, who contends that the date of relinquishment of the power of revocation is controlling, rather than the date of surrender of power of modification, set up his trust and relinquished the power of revocation before the gift tax was enacted. The reenactment of the gift tax statute by the 1932 Act can not be said to be a legislative approval of the practice which had not been disclosed by Treasury regulation, ruling or decision, and which does not appear to have been established before the adoption of the 1932 Act. Cf. McCaughn v. Hershey Chocolate Co., 283 U.S. 488, 492, 51 S.Ct. 510, 512, 75 L.Ed. 1183; Massachusetts Mutual Life Ins. Co. v. United States, 288 U.S. 269, 273, 53 S.Ct. 337, 339, 77 L.Ed. 739; Helvering v. New York Trust Co., 292 U.S. 455, 468, 54 S.Ct. 806, 810, 78 L.Ed. 1361.

The very purpose sought to be accomplished by judicial acceptance of an administrative practice would be defeated if we were to regard the present practice as controlling. If a practice is to be accepted because of the superior knowledge of administrative officers of the administrative needs and convenience, see Brewster v. Gage, 280 U.S. 327, 336, 50 S.Ct. 115, 117, 74 L.Ed. 457, there is no such reason for its acceptance here. The Government by taking no position confesses that it is unable to say how administrative need and convenience will best be served. If, as we have held, we may reject an established administrative practice when it conflicts with an earlier one and is not supported by valid reasons, see Burnet v. Chicago Portrait Co., 285 U. S. 1, 16, 52 S.Ct. 275, 280, 76 L.Ed. 587, we should be equally free to reject the practice when it conflicts with our own decisions. A change of practice to conform to judicial decision, such as has occurred since the decision in the Hesslein case, or to meet administrative exigencies,

will be accepted as controlling when consistent with our decisions. Morrissey v. Commissioner, 296 U.S. 344, 354, 56 S.Ct. 289, 293, 80 L. Ed. 263. Here we have an added, and we think conclusive reason for rejecting the earlier practice and accepting the later. The earlier, because in sharp conflict with our own decisions, as we have already indicated, cannot be continued without the perpetuation of inconsistency and confusion comparable to that of which the Government asks to be relieved by our decision.

Affirmed.[h]

Mr. Justice BUTLER took no part in the consideration or decision of this case.

SKIDMORE v. SWIFT & CO.

Supreme Court of the United States.
323 U.S. 134, 65 S.Ct. 161, 89 L.Ed. 124 (1944).

Mr. Justice JACKSON delivered the opinion of the Court.

Seven employees of the Swift and Company packing plant at Fort Worth, Texas, brought an action under the Fair Labor Standards Act, 29 U.S.C.A. § 201 et seq., to recover overtime, liquidated damages, and attorneys' fees, totalling approximately $77,000. The District Court rendered judgment denying this claim wholly, and the Circuit Court of Appeals for the Fifth Circuit affirmed. 136 F.2d 112.

It is not denied that the daytime employment of these persons was working time within the Act. Two were engaged in general fire hall duties and maintenance of fire-fighting equipment of the Swift plant. The others operated elevators or acted as relief men in fire duties. They worked from 7:00 a.m. to 3:30 p.m., with a half-hour lunch period, five days a week. They were paid weekly salaries.

Under their oral agreement of employment, however, petitioners undertook to stay in the fire hall on the Company premises, or within hailing distance, three and a half to four nights a week. This involved no task except to answer alarms, either because of fire or because the sprinkler was set off for some other reason. No fires occurred during the period in issue, the alarms were rare, and the time required for their answer rarely exceeded an hour. For each alarm answered the employees were paid in addition to their fixed compensation an agreed amount, fifty cents at first, and later sixty-four cents. The Company provided a brick fire hall equipped with steam heat and air-conditioned rooms. It provided sleeping quarters, a pool table, a domino table, and a radio. The men used their time in sleep or amusement as they saw fit, except that they were required to stay in or close by the fire hall and be ready to respond to alarms. It is stipulated that "they

[h] Footnotes of the court have been omitted.

agreed to remain in the fire hall and stay in it or within hailing distance, subject to call, in event of fire or other casualty, but were not required to perform any specific tasks during these periods of time, except in answering alarms." The trial court found the evidentiary facts as stipulated; it made no findings of fact as such as to whether under the arrangement of the parties and the circumstances of this case, which in some respects differ from those of the Armour case [Armour & Co. v. Wantock et al., 323 U.S. 126, 65 S.Ct. 165], the fire hall duty or any part thereof constituted working time. It said, however, as a "conclusion of law" that "the time plaintiffs spent in the fire hall subject to call to answer fire alarms does not constitute hours worked, for which overtime compensation is due them under the Fair Labor Standards Act, as interpreted by the Administrator and the Courts," and in its opinion [53 F.Supp. 1020, 1021] observed, "of course we know pursuing such pleasurable occupations or performing such personal chores does not constitute work." The Circuit Court of Appeals affirmed.

For reasons set forth in the Armour case, 323 U.S. 126, 65 S.Ct. 165, decided herewith we hold that no principle of law found either in the statute or in Court decisions precludes waiting time from also being working time. We have not attempted to, and we cannot, lay down a legal formula to resolve cases so varied in their facts as are the many situations in which employment involves waiting time. Whether in a concrete case such time falls within or without the Act is a question of fact to be resolved by appropriate findings of the trial court. Walling v. Jacksonville Paper Co., 317 U.S. 564, 572, 63 S.Ct. 332, 87 L.Ed. 460. This involves scrutiny and construction of the agreements between the particular parties, appraisal of their practical construction of the working agreement by conduct, consideration of the nature of the service, and its relation to the waiting time, and all of the surrounding circumstances. Facts may show that the employee was engaged to wait, or they may show that he waited to be engaged. His compensation may cover both waiting and task, or only performance of the task itself. Living quarters may in some situations be furnished as a facility of the task and in another as a part of its compensation. The law does not impose an arrangement upon the parties. It imposes upon the courts the task of finding what the arrangement was.

We do not minimize the difficulty of such an inquiry where the arrangements of the parties have not contemplated the problem posed by the statute. But it does not differ in nature or in the standards to guide judgment from that which frequently confronts courts where they must find retrospectively the effect of contracts as to matters which the parties failed to anticipate or explicitly to provide for.

Congress did not utilize the services of an administrative agency to find facts and to determine in the first instance whether particular cases fall within or without the Act. Instead, it put this responsibility on the courts. Kirschbaum v. Walling, 316 U.S. 517, 523, 62 S.Ct.

1116, 1120, 86 L.Ed. 1638. But it did create the office of Administrator, impose upon him a variety of duties, endow him with powers to inform himself of conditions in industries and employments subject to the Act, and put on him the duties of bringing injunction actions to restrain violations. Pursuit of his duties has accumulated a considerable experience in the problems of ascertaining working time in employments involving periods of inactivity and a knowledge of the customs prevailing in reference to their solution. From these he is obliged to reach conclusions as to conduct without the law, so that he should seek injunctions to stop it, and that within the law, so that he has no call to interfere. He has set forth his views of the application of the Act under different circumstances in an interpretative bulletin and in informal rulings. They provide a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it. Wage and Hour Division, Interpretative Bulletin No. 13.

The Administrator thinks the problems presented by inactive duty require a flexible solution, rather than the all-in or all-out rules respectively urged by the parties in this case, and his Bulletin endeavors to suggest standards and examples to guide in particular situations. In some occupations, it says, periods of inactivity are not properly counted as working time even though the employee is subject to call. Examples are an operator of a small telephone exchange where the switchboard is in her home and she ordinarily gets several hours of uninterrupted sleep each night; or a pumper of a stripper well or watchman of a lumber camp during the off season, who may be on duty twenty-four hours a day but ordinarily "has a normal night's sleep, has ample time in which to eat his meals, and has a certain amount of time for relaxation and entirely private pursuits." Exclusion of all such hours the Administrator thinks may be justified. In general, the answer depends "upon the degree to which the employee is free to engage in personal activities during periods of idleness when he is subject to call and the number of consecutive hours that the employee is subject to call without being required to perform active work." "Hours worked are not limited to the time spent in active labor but include time given by the employee to the employer. * * *"

The facts of this case do not fall within any of the specific examples given, but the conclusion of the Administrator, as expressed in the brief amicus curiae, is that the general tests which he has suggested point to the exclusion of sleeping and eating time of these employees from the work-week and the inclusion of all other on-call time: although the employees were required to remain on the premises during the entire time, the evidence shows that they were very rarely interrupted in their normal sleeping and eating time, and these are pursuits of a purely private nature which would presumably occupy the employees' time whether they were on duty or not and which ap-

parently could be pursued adequately and comfortably in the required circumstances; the rest of the time is different because there is nothing in the record to suggest that, even though pleasurably spent, it was spent in the ways the men would have chosen had they been free to do so.

There is no statutory provision as to what, if any, deference courts should pay to the Administrator's conclusions. And, while we have given them notice, we have had no occasion to try to prescribe their influence. The rulings of this Administrator are not reached as a result of hearing adversary proceedings in which he finds facts from evidence and reaches conclusions of law from findings of fact. They are not, of course, conclusive, even in the cases with which they directly deal, much less in those to which they apply only by analogy. They do not constitute an interpretation of the Act or a standard for judging factual situations which binds a district court's processes, as an authoritative pronouncement of a higher court might do. But the Administrator's policies are made in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge in a particular case. They do determine the policy which will guide applications for enforcement by injunction on behalf of the Government. Good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons. The fact that the Administrator's policies and standards are not reached by trial in adversary form does not mean that they are not entitled to respect. This Court has long given considerable and in some cases decisive weight to Treasury Decisions and to interpretative regulations of the Treasury and of other bodies that were not of adversary origin.

We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

The courts in the Armour case weighed the evidence in the particular case in the light of the Administrator's rulings and reached a result consistent therewith. The evidence in this case in some respects, such as the understanding as to separate compensation for answering alarms, is different. Each case must stand on its own facts. But in this case, although the District Court referred to the Administrator's Bulletin, its evaluation and inquiry were apparently restricted by its notion that waiting time may not be work, an under-

standing of the law which we hold to be erroneous. Accordingly, the judgment is reversed and the cause remanded for further proceedings consistent herewith.

Reversed.

SOCIAL SECURITY BOARD v. NIEROTKO

Supreme Court of the United States.
327 U.S. 358, 66 S.Ct. 637, 90 L.Ed. —, 162 A.L.R. 1445 (1946).

Mr. Justice REED delivered the opinion of the Court.

A problem as to whether "back pay," which is granted to an employee under the National Labor Relations Act, shall be treated as "wages" under the Social Security Act comes before us on this record. If such "back pay" is a wage payment, there is also at issue the proper allocation of such sums to the quarters of coverage for which the "back pay" was allowed.

The respondent, Joseph Nierotko, was found by the National Labor Relations Board to have been wrongfully discharged for union activity by his employer, the Ford Motor Company, and was reinstated by that Board in his employment with directions for "back pay" for the period February 2, 1937, to September 25, 1939. The "back pay" was paid by the employer on July 18, 1941. Thereafter Nierotko requested the Social Security Board to credit him in the sum of the "back pay" on his Old Age and Survivor's Insurance account with the Board. In conformity with its minute of formal general action of March 27, 1942, the Board refused to credit Nierotko's "back pay" as wages. On review of the Board's decision, the District Court upheld the Board. The Circuit Court of Appeals reversed. 149 F.2d 273. On account of the importance of the issues in the administration of the Social Security Act, we granted certiorari. 66 S.Ct. 55; Judicial Code § 240, 28 U.S.C.A. § 347.

During the period for which "back pay" was awarded respondent the Federal Old Age benefits were governed by Title II of the Social Security Act of 1935. 49 Stat. 622. As Title II of the Social Security Act Amendments of 1939 became effective January 1, 1940 (53 Stat. 1362, 42 U.S.C.A. § 401 et seq.), the actual payment of the "back wages" occurred thereafter. In our view the governing provisions which determine whether this "back pay" is wages are those of the earlier enactment.

Wages are the basis for the administration of Federal Old Age Benefits. 49 Stat. 622. Only those who earn wages are eligible for benefits. The periods of time during which wages were earned are important and may be crucial on eligibility under either the original act or the Amendments of 1939. See sec. 210(c) and compare sec. 209(g), 53 Stat. 1376, 42 U.S.C.A. § 409(g). The benefits are fi-

nanced by payments from employees and employers which are calculated on wages. The Act defines "wages" for Old Age benefits as follows:

"Sec. 210. When used in this title—

"(a) The term 'wages' means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash, * * *."

Employment is defined thus: "(b) The term 'employment' means any service, of whatever nature, performed within the United States by an employee for his employer, except—."

The tax titles of the Social Security Act have identical definitions of wages and employment. An employee under the Social Security Act is not specifically defined but the individual to whom the Act's benefits are to be paid is one receiving "wages" for "employment" in accordance with § 210(c) and employment is service by an "employee" to an "employer." Obviously a sharply defined line between payments to employees which are wages and which are not is essential to proper administration.

Under the National Labor Relations Act an employee is described as "any individual whose work has ceased * * * because of any unfair labor practice." Sec. 2(3), 49 Stat. 450, 29 U.S.C.A. § 152(3). The enforcement provisions of this Act under which Nierotko received his "back pay" allow the Labor Board to reinstate "employees with or without back pay." Sec. 10(c). The purpose of the "back pay" allowance is to effectuate the policies of the Labor Act for the preservation of industrial peace.

The purpose of the Federal Old Age Benefits of the Social Security Act is to provide funds through contributions by employer and employee for the decent support of elderly workmen who have ceased to labor. Eligibility for these benefits and their amount depends upon the total wages which the employee has received and the periods in which wages were paid. While the legislative history of the Social Security Act and its amendments or the language of the enactments themselves do not specifically deal with whether or not "back pay" under the Labor Act is to be treated as wages under the Social Security Act, we think it plain that an individual, who is an employee under the Labor Act and who receives "back pay" for a period of time during which he was wrongfully separated from his job, is entitled to have that award of back pay treated as wages under the Social Security Act definitions which define wages as "remuneration for employment" and employment as "any service * * * performed * * * by an employee for his employer."

Surely the "back pay" is "remuneration." Under Section 10(c) of the Labor Act, the Labor Board acts for the public to vindicate the prohibitions of the Labor Act against unfair labor practices (section 8, 29 U.S.C.A. § 158) and to protect the right of employees to self-

organization which is declared by section 7, 29 U.S.C.A. § 157. It is also true that in requiring reparation to the employee through "back pay" that reparation is based upon the loss of wages which the employee has suffered from the employer's wrong. "Back pay" is not a fine or penalty imposed upon the employer by the Board. Reinstatement and "back pay" are for the "protection of the employees and the redress of their grievances" to make them "whole." Republic Steel Corp. v. Labor Board, 311 U.S. 7, 11, 12, 61 S.Ct. 77, 79, 85 L.Ed. 6; "* * * a worker's loss, in wages and in general working conditions must be made whole." Phelps Dodge Corp. v. Labor Board, 313 U.S. 177, 196, 61 S.Ct. 845, 853, 85 L.Ed. 1271, 133 A.L.R. 1217. A worker is not given "back pay" by the Board equal to what he would have earned with the employer but for the unlawful discharge but is given that sum less any net earnings during the time between discharge and reinstatement.

Since Nierotko remained an employee under the definition of the Labor Act, although his employer had attempted to terminate the relationship, he had "employment" under that Act and we need further only consider whether under the Social Security Act its definition of employment, as "any service * * * performed * * * by an employee for his employer," covers what Nierotko did for the Ford Motor Company. The petitioner urges that Nierotko did not perform any service. It points out that Congress in considering the Social Security Act thought of benefits as related to "wages earned" for "work done." We are unable, however, to follow the Social Security Board in such a limited circumscription of the word "service." The very words "any service * * * performed * * * for his employer," with the purpose of the Social Security Act in mind import breadth of coverage. They admonish us against holding that "service" can be only productive activity. We think that "service" as used by Congress in this definitive phrase means not only work actually done but the entire employer-employee relationship for which compensation is paid to the employee by the employer.

An argument against the interpretation which we give to "service performed" is the contrary ruling of the governmental agencies which are charged with the administration of the Social Security Act. Their competence and experience in this field command us to reflect before we decide contrary to their conclusion. The first administrative determination was apparently made in 1939 by an Office Decision of the Bureau of Internal Revenue on the problem of whether "back pay" under a Labor Board order was wages subject to tax under Titles VIII and IX of the Social Security Act which the Bureau collects. The back pay was held not to be subject as wages to the tax because no service was performed, the employer had tried to terminate the employment relationship and the allowance of back pay was discretionary with the Labor Board. Reliance for the conclusions was placed

upon Agwilines, Inc. v. National Labor Relations Board, 5 Cir., 87 F.2d 146, which had held "back pay" a public reparation order and therefore not triable by jury as a private right for wages would have been.' This position is maintained by the Social Security Board by minute of March 27, 1942. It is followed by the National Labor Relations Board which at one time approved the retention by the employer of the tax on the employees' back pay for transmission to the Treasury Department as a tax on wages and later reversed its position on the authority of the Office Decision to which reference has just been made. Re Pennsylvania Furnace and Iron Co., 13 N.L.R.B. 49, 53(5), 54, 58.

The Office Decision seems to us unsound. The portion of the Agwilines decision, which the Office Decision relied upon, was directed at the constitutional claim to a right of trial by jury. It stated that "back pay" was not a penalty or damages which a private individual might claim. But there is nothing in the opinion which supports the idea that the "back pay" award differs from other pay. Indeed the opinion said that "Congress has the right to eradicate them [unfair practices] from the beginning." 87 F.2d loc. cit. 151. We think the true relation of awards of "back pay" to compensation appears in the Republic Steel and Phelps-Dodge cases, hereinbefore discussed.

But it is urged by petitioner that the administrative construction on the question of whether "back pay" is to be treated as wages should lead us to follow the agencies' determination. There is a suggestion that the Administrative decision should be treated as conclusive, and reliance for that argument is placed upon National Labor Relations Board v. Hearst Publications, 322 U.S. 111, 130, 64 S.Ct. 851, 860, 88 L.Ed. 1170, and Gray v. Powell, 314 U.S. 402, 411, 62 S.Ct. 326, 332, 86 L.Ed. 301. In the acts which were construed in the cases just cited, as in the Social Security Act, the administrators of those acts were given power to reach preliminary conclusions as to coverage in the application of the respective acts. Each act contains a standardized phrase that Board findings supported by substantial evidence shall be conclusive. The validity of regulations is specifically reserved for judicial determination by the Social Security Act Amendments of 1939, sec. 205(g).

The Social Security Board and the Treasury were compelled to decide, administratively, whether or not to treat "back pay" as wages and their expert judgment is entitled, as we have said, to great weight. The very fact that judicial review has been accorded, however, makes evident that such decisions are only conclusive as to properly supported findings of fact. Both N.L.R.B. v. Hearst Publications, page 131, of 322 U.S., page 860 of 64 S.Ct., 88 L.Ed. 1170, and Gray v. Powell, page 411 of 314 U.S., page 332 of 62 S.Ct., 86 L.Ed. 301, advert to the limitations of administrative interpretations. Administrative determinations must have a basis in law and must be within the granted authority. Administration when it interprets a

statute so as to make it apply to particular circumstances acts as a delegate to the legislative power. Congress might have declared that "back pay" awards under the Labor Act should or should not be treated as wages. Congress might have delegated to the Social Security Board to determine what compensation paid by employers to employees should be treated as wages. Except as such interpretive power may be included in the agencies' administrative functions, Congress did neither. An agency may not finally decide the limits of its statutory power. That is a judicial function. Congress used a well-understood word—"wages"—to indicate the receipts which were to govern taxes and benefits under the Social Security Act. There may be borderline payments to employees on which courts would follow administrative determination as to whether such payments were or were not wages under the act.

We conclude, however, that the Board's interpretation of this statute to exclude back pay goes beyond the boundaries of administrative routine and the statutory limits. This is a ruling which excludes from the ambit of the Social Security Act payments which we think were included by Congress. It is beyond the permissible limits of administrative interpretation.

Petitioner further questions the validity of the decision of the Circuit Court of Appeals on the ground that it must be inferred from the opinion that the "back pay" must be allocated as wages by the Board to the "calendar quarters" of the year in which the money would have been earned, if the employee had not been wrongfully discharged. We think this inference is correct. This conclusion, petitioner argues, tends to show that "back pay" cannot be wages because the Amendments of 1939 use "quarters" as the basis for eligibility as well as the measure of benefits and require "wages" to be "paid" in certain "quarters."

If, as we have held above, "back pay" is to be treated as wages, we have no doubt that it should be allocated to the periods when the regular wages were not paid as usual. Admittedly there are accounting difficulties which the Board will be called upon to solve but we do not believe they are insuperable.

Affirmed.[1]

[1] The concurring opinion of Mr. Justice Frankfurter, and all footnotes of the court, have been omitted.

GILLESPIE–ROGERS–PYATT CO. v. BOWLES

United States Emergency Court of Appeals.
144 F.2d 361 (1944).

See *infra* at p. 370.

The foregoing subsection 1B (pp. 142 to 158) is directed to a consideration of the weight given administrative interpretations upon which administrative orders or regulations are based, when such interpretations are supported by a settled administrative practice, with or without legislative "adoption" by implication in connection with subsequent legislation. For a consideration of the weight given administrative conclusions of law, apart from the effect of an established administrative practice or implied legislative "acquiescence", see Chapter VII, Part II, Section 2 (pp. 816ff.).

C. Interpretative Guidance by the Administrative Agency to the Persons Affected by the Statute

(1) Interpretative Regulations

SECURITIES ACT OF 1933, AS AMENDED, § 19(a)

15 U.S.C. § 77s(a).

Sec. 19. (a) The Commission shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this title, including rules and regulations governing registration statements and prospectuses for various classes of securities and issuers, *and defining accounting, technical, and trade terms used in this title.* Among other things, the Commission shall have authority, for the purposes of this title, to prescribe the form or forms in which required information shall be set forth, the items or details to be shown in the balance sheet and earning statement, and the methods to be followed in the preparation of accounts, in the appraisal or valuation of assets and liabilities, in the determination of depreciation and depletion, in the differentiation of recurring and nonrecurring income, in the differentiation of investment and operating income, and in the preparation, where the Commission deems it necessary or desirable, of consolidated balance sheets or income accounts of any person directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer; but insofar as they relate to any common carrier subject to the provisions of section 20 of the Interstate Commerce Act, as amended, the rules and regulations of the Commission with respect to accounts shall not be inconsistent with the requirements imposed by the Interstate Commerce Commission

under authority of such section 20. The rules and regulations of the Commission shall be effective upon publication in the manner which the Commission shall prescribe. No provision of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule or regulation of the Commission, notwithstanding that such rule or regulation may, after such act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason. [Italics supplied.]

REGULATION OF THE SECURITIES AND EXCHANGE COMMISSION DEFINING "DISTRIBUTION", AS USED IN SECTION 2(11) [j] OF THE SECURITIES ACT OF 1933

17 C.F.R. 230 140.

230.140 Definition of "distribution" in section 2(11), for certain transactions. A person, the chief part of the business of which consists in the purchase of the securities of any one issuer, its subsidiary and/or affiliate and in the sale of its own securities to furnish the proceeds with which to acquire the securities of such issuer, subsidiary and/or affiliate, is to be regarded as engaged in the distribution the securities of such issuer, subsidiary and/or affiliate within the meaning of section 2(11).

REGULATION OF THE SECURITIES AND EXCHANGE COMMISSION DEFINING "EXCHANGED", AS USED IN § 3(a) (9) [k] OF THE SECURITIES ACT OF 1933.

17 C F.R. 230.149.

230.149 Definition of "exchanged" in section 3(a) (9), for certain transactions. The term "exchanged" in section 3(a) (9) (sec. 202 (c), 48 Stat. 906; 15 U.S.C. 77c(9)) shall be deemed to include the issuance of a security in consideration of the surrender, by the existing security holders of the issuer, of outstanding securities of the issuer, notwithstanding the fact that the surrender of the outstanding securities may be required by the terms of the plan of exchange to be accompanied by such payment in cash by the security holder as may be necessary to effect an equitable adjustment, in respect of dividends or interest paid or payable on the securities involved in the exchange, as between such security holder and other security holders of the same class accepting the offer of exchange.

[j] 15 U.S.C. § 77b(11).

[k] 15 U.S C. § 77c(a) (9).

INTERNAL REVENUE CODE § 3791

26 U.S.C. § 3791.

§ 3791. Rules and regulations

(a) Authorization

(1) In general. Except as provided in section 1928(a), Cotton Futures, section 2599, Marihuana, section 2559, Narcotics, section 3176, Liquor, and section 1805, Silver, the Commissioner, with the approval of the Secretary, shall prescribe and publish all needful rules and regulations for the enforcement of this title.

(2) In case of change in law. The Commissioner may make all such regulations, not otherwise provided for, as may have become necessary by reason of any alteration of law in relation to internal revenue.

(b) Retroactivity of regulations or rulings. The Secretary, or the Commissioner with the approval of the Secretary, may prescribe the extent, if any, to which any ruling, regulation, or Treasury Decision, relating to the internal revenue laws, shall be applied without retroactive effect.[l]

TREASURY REGULATION DEFINING NET INCOME [m]

26 C.F.R. 3.21-1.

3.21-1 Meaning of net income. The tax imposed by title I of the Act is upon income. Neither income exempted by statute or fundamental law, nor expenses incurred in connection therewith, other than interest, enter into the computation of net income as defined by section 21. (See section 24(a) (5). In the computation of the tax various classes of income must be considered:

(a) Income (in the broad sense), meaning all wealth which flows into the taxpayer other than as a mere return of capital. It includes the forms of income specifically described as gains and profits, including gains derived from the sale or other disposition of capital assets. Cash receipts alone do not always accurately reflect income, for the Act recognizes as income-determining factors other items, among which are inventories, accounts receivable, property exhaus-

[l] Interpretative regulations may be issued under this section. See Morrissey v. Commissioner of Internal Revenue, 296 U.S. 344, 354-355, 56 S.Ct. 289, 294, 80 L.Ed. 263 (1935); Helvering v. N. Y. Trust Company, 292 U.S. 455, 465, 54 S. Ct. 806, 809, 78 L.Ed. 1361 (1934).

[m] As originally promulgated, this regulation, and the regulation defining "gross income" which is set forth below, defined "net income" and "gross income" as used in Title I of the Internal Revenue Act of 1936 (49 Stat. 1652), as amended by the Internal Revenue Act of 1937 (50 Stat. 813, 818ff.). They were made applicable to the Internal Revenue Code by T.D. 4884, February 11, 1939 and T.D. 4885, Feb. 11, 1939. See Note, 26 C.F.R. (Cum Supp.) pp. 5875-6.

tion, and accounts payable for expenses incurred. (See sections 22, 23, and 117 of the Act.)

(b) Gross income, meaning income (in the board sense) less income which is by statutory provision or otherwise exempt from the tax imposed by the Act. (See section 22 of the Act.)

(c) Net income, meaning gross income less statutory deductions. The statutory deductions are in general, though not exclusively, expenditures, other than capital expenditures, connected with the production of income. (See sections 23 and 24 of the Act.)

(d) Net income less credits. (See sections 25, 26, and 27 of the Act.)

The normal taxes and surtaxes imposed on individuals and on corporations are computed upon net income less certain credits. Although taxable net income is a statutory conception, it follows, subject to certain modifications as to exemptions and as to deductions for partial losses in some cases, the lines of commercial usage. Subject to these modifications statutory net income is commercial net income. This appears from the fact that ordinarily it is to be computed in accordance with the method of accounting regularly employed in keeping the books of the taxpayer. (See section 41 of the Act.)

The net income of corporations is determined in general in the same manner as the net income of individuals, but the deductions allowed corporations are not precisely the same as those allowed individuals (See sections 23, 24, 102, 118, 121, 203, 204, 207, 232, Title IA, and Title IA of the Act, as amended.)

TREASURY REGULATION DEFINING GROSS INCOME [n]

26 C.F.R. 3.22(a)–1.

3.22(a)–1 What is included in gross income. Gross income includes in general compensation for personal and professional services, business income, profits from sales of and dealings in property, interest, rent, dividends, and gains, profits, and income derived from any source whatever, unless exempt from tax by law. (See sections 22(b) and 116 of the Act.) In general, income is the gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets. Profits of citizens, residents, or domestic corporations derived from sales in foreign commerce must be included in their gross income; but special provisions are made for nonresident aliens and foreign corporations by sections 211–238 of the Act and, in certain cases, by section 251, for citizens and domestic corporations deriving income

[n] See note m, *supra*.

from sources within possessions of the United States. Income may be in the form of cash or of property. As to dividends, see sections 115 and 337(b) of the Act.

If property is transferred by a corporation to a shareholder, or by an employer to an employee, for an amount substantially less than its fair market value, such shareholder of the corporation or such employee shall include in gross income the difference between the amount paid for the property and the amount of its fair market value. In computing the gain or loss from the subsequent sale of such property its basis shall be the amount paid for the property, increased by the amount of such difference included in gross income. This paragraph does not apply, however, to the issuance by a corporation to its shareholders of the right to subscribe to its stock, as to which see § 3.22(a)–8.

The fact that a dividend is declared shortly after the sale of corporate stock and the sale price is influenced by the expectation of the payment of a dividend, does not make such dividend when paid taxable to the vendor as a dividend. The amount advanced by the vendee to the vendor in contemplation of the next dividend payment is an investment of capital and may not be claimed as a deduction from gross income. As to the amount of income tax paid for a bondholder by the obligor pursuant to a so-called tax-free covenant, see section 143(a) (3) of the Act. As to the determination of gain or loss from the sale or other disposition of property, see sections 111–113 of the Act.

As to insurance companies and foreign corporations, see sections 202, 204, 206, 207, and 231 of the Act.

Interpretative regulations bind the persons whom they purport to affect and the administrative agencies which promulgate them in the same manner and within the same limits as other types of regulations. For a consideration of the nature and effect of regulations generally, see *infra,* Chapter V, Part I, and particularly Section 5 thereof, pp. 312ff.

(2) Interpretative Announcements and Advice

(a) Trade Practice Conference Rules of the Federal Trade Commission

RULE XXVII

OF THE RULES OF PRACTICE OF THE FEDERAL TRADE COMMISSION

16 C.F.R. Part 2, as amended; 11 F R. 7069.

Rule XXVII. Trade Practice Conference Procedure

(a) Purpose.—The trade practice conference procedure has for its purpose the establishment, by the Commission, of trade practice rules in the interest of industry and the purchasing public. This procedure affords opportunity for voluntary participation by industry groups or other interested parties in the formulation of rules to provide for elimination or prevention of unfair methods of competition, unfair or deceptive acts or practices and other illegal trade practices. They may also include provisions to foster and promote fair competitive conditions and to establish standards of ethical business practices in harmony with public policy. No provision or rule, however, may be approved by the Commission which sanctions a practice contrary to law or which may aid or abet a practice contrary to law.

(b) When authorized.—Trade practice conference proceedings may be authorized by the Commission upon its own motion or upon application therefor whenever such proceedings appear to the Commission to be in the interest of the public. In authorizing proceedings, the Commission may consider whether such proceedings appear to have possibilities (1) of constructively advancing the best interests of industry on sound competitive principles in consonance with public policy, or (2) of bringing about more adequate or equitable observance of laws under which the Commission has jurisdiction, or (3) of otherwise protecting or advancing the public interest.

(c) Application.—Application for a trade practice conference may be filed with the Commission by any interested person, party or group. Such application shall be in writing and be signed by the applicant or the duly authorized representative of the applicant or group desiring such conference. The following information, to the extent known to the applicant, shall be furnished with such application or in a supplement thereto:

(1) A brief description of the industry, trade, or subject to be treated.

(2) The kind and character of the products involved.

(3) The size or extent and the divisions of the industry or trade groups concerned.

(4) The estimated total annual volume of production or sales of the commodities involved.

(5) List of membership of the industry or trade groups concerned in the matter.

(6) A brief statement of the acts, practices, methods of competition or other trade practices desired to be considered, or drafts of suggested trade practice rules.

(d) Informal Discussions with Members of the Commission's Staff.—Any interested person or group may, upon request, be granted opportunity to confer in respect to any proposed trade practice conference with the Commission's trade practice conference division, either prior or subsequent to the filing of any such application. They may also submit any pertinent data or information which they desire to have considered. Such submission shall be made during such period of time as the Commission or its duly authorized official may designate.

(e) Industry Conferences.—Reasonable public notice of the time and place of any such authorized conference shall be issued by the Commission. A member of the Commission or of its staff shall have charge of the conference and shall conduct the conference pursuant to direction of the Commission and in such manner as will facilitate the proceeding and afford appropriate consideration of matters properly coming before the conference. A transcript of the conference proceedings shall be made, which, together with all rules, resolutions, modifications, amendments or other matters offered, shall be filed in the office of the Commission and submitted for its consideration.

(f) Public Hearing on Proposed Rules.—Before final approval by the Commission of any rules for an industry, and upon such reasonable public notice as to the Commission seems appropriate, further opportunity shall be afforded by the Commission to all interested persons, corporations or other organizations, including consumers, to submit in writing relevant suggestions or objections and to appear and be heard at a designated time and place.

(g) Promulgation of Rules.—When trade practice rules shall have been finally approved and received by the Commission, they shall be promulgated by official order of the Commission and published, pursuant to law, in the Federal Register. Said rules shall become operative thirty (30) days from date of promulgation or at such other time as may be specified by the Commission. Copies of the final rules shall be made available at the office of the Commission. Under the procedure of the Commission a copy of the trade practice rules as promulgated by the Commission is sent to each member of the industry whose name and address is available, together with an acceptance form providing opportunity to such member to signify his intention to observe the rules in the conduct of his business.

(h) Violations.—Complaints as to the use, by any person, corporation or other organization, of any act, practice or method inhibited by the rules may be made to the Commission by any one having information thereof. Such complaints, if warranted by the facts and the law, will receive the attention of the Commission in accordance with the law. In addition, the Commission may act upon its own motion in proceeding against the use of any act, practice or method contrary to law.

Trade practice conference rules, though promulgated by official order of the Commission and published in the Federal Register, appear to constitute formal announcements of Commission practices and intentions rather than regulations of the Commission. In origin, they represented an effort by the Commission to find a means where "it could assist such an industry [one concerning which it had received many complaints of unfair practices] in eliminating alleged unfair practices before the Commission had made an investigation and had reason to believe that complaint should issue".[o] At that time, the Commission considered that its "organic act made no provision for such contingencies".[p] The procedure for the adoption of trade practice conference rules has since undergone a not inconsiderable development, and the responsibility of the Commission in connection therewith is more explicitly and formally acknowledged. But the basic character of the rules does not appear to have changed, and the Commission has continued to emphasize the element of voluntary participation and consent by the persons engaged in the industry.[q]

CLASSIFICATION OF TRADE PRACTICE CONFERENCE RULES

Federal Trade Commission, Trade Practice Rules (G.P.O. 1940) p. v.

Trade practice rules, as promulgated, are divided by the Commission into two classifications, namely, Group I and Group II. These two classes of trade practice rules are explained, as follows:

Group I rules.—The unfair trade practices which are embraced in Group I rules are considered to be unfair methods of competition, unfair or deceptive acts or practices, or other illegal practices, prohibited, within the purview of the Federal Government, by acts of Congress, as construed in the decisions of the Federal Trade Commission or the courts; and appropriate proceedings in the public interest will

[o] Federal Trade Commission Trade Practice Submittals (G P.O.1925), reprinted in C.C.H Federal Trade Regulation Service (7th Ed.) par. 2503

[p] Federal Trade Commission, Trade Practice Submittals (G P.O.1925), reprinted in C.C H Federal Trade Regulation Service (7th Ed.) par. 2503.

[q] See Ann Rep FTC (1926) 47–50; Ann. Rep FTC (1936) 98–101; Rule XXVII of FTC Rules of Practice, *supra*, pp. 163–165

be taken by the Commission to prevent the use, by any person, partnership, corporation, or other organization, of such unlawful practices in or directly affecting interstate commerce.

Group II rules.—Compliance with the trade practice provisions embraced in Group II rules is considered to be conducive to sound business methods and is to be encouraged and promoted individually or through voluntary cooperation exercised in accordance with existing law. Nonobservance of such rules does not, *per se*, constitute violation of law. Where, however, the practice of not complying with any such Group II rules is followed in such manner as to result in unfair methods of competition, or unfair or deceptive acts or practices, corrective proceedings may be instituted by the Commission as in the case of a violation of Group I rules.[r]

EXCERPT FROM TRADE PRACTICE RULES FOR THE WHOLESALE TOBACCO TRADE

Federal Trade Commission, Trade Practice Rules (G.P.O. 1940) 2–5.

RULE 1.

The practice of using a brand of cigars, cigarettes, tobacco products, or allied lines as a "loss leader" to induce the purchase of other merchandise, the sale of which merchandise is used to recoup the loss sustained on the said brand of cigars, cigarettes, tobacco products, or allied lines, with the tendency or capacity to deceive or mislead purchasers or prospective purchasers and which unfairly diverts trade from or otherwise injures competitors, is an unfair trade practice.

RULE 2.

The practice of selling below cost, with the intent and with the effect of injuring a competitor and where the effect may be to substantially lessen competition or tend to create a monopoly or unreasonably restrain trade, is an unfair trade practice, cost being determined by including all elements recognized by good accounting practices.

RULE 3.

Price discrimination as between purchasers of cigars, cigarettes, or other tobacco products, whether in the form of discounts, services, or otherwise, contrary to Section 2 of the Clayton Act, is an unfair trade practice.

RULE 7.

The practice of branding or marking or packing any products, or causing the same to be branded or marked or packed, in a manner which is calculated to or does deceive or mislead purchasers or pros-

[r] See also Ann Rep FTC (1936) 101.

pective purchasers with respect to the brand, grade, quality, quantity, origin, size, substance, character, nature, material, content, or preparation of such products, is an unfair trade practice.

RULE 8.

The defamation of competitors by falsely imputing to them dishonorable conduct, inability to perform contracts, questionable credit standing, or by other false representations, or the false disparagement of the grade or quality of their goods, with the tendency or capacity to mislead or deceive purchasers or prospective purchasers, is an unfair trade practice. * * *

GROUP II

RULE A.

The advertising or offering for sale by a wholesaler of any well-known or trade-marked tobacco product of the Wholesale Tobacco Industry at greatly reduced prices, when the quantity of said goods is entirely inadequate to supply the usual demand of customers of the said wholesaler, with the tendency or capacity to mislead or deceive purchasers or prospective purchasers, is condemned by the industry.

RULE B.

Where merchandise at wholesale and merchandise at retail are sold in the same establishment, the failure on the part of any member of the industry to properly differentiate between or identify the two types of transactions, where the result may be to create confusion and deception as to the character of the transaction in the minds of purchasers or prospective purchasers, is condemned by the industry.

RULE C.

The evasion of the payment of State taxes on cigars, cigarettes, or other tobacco products through interstate transactions is condemned by the industry.

(b) Advisory Interpretative Assistance by the Securities and Exchange Commission

FIRST ANNUAL REPORT OF
THE SECURITIES AND EXCHANGE COMMISSION (1935) 9–10

ADVISORY ASSISTANCE

Legislation of the character of the Securities Act of 1933 and the Securities Exchange Act of 1934 comprehends within its scope such variety of complex situations that innumerable questions necessarily arise during the early period of its administration as to the applicabil-

ity of the text of the law to situations which are not the object of specific provision but to which it is clear its mandates are intended to apply. The Commission found it necessary to arrive at determinations as to the applicability of the legislation to concrete problems presented and as to the manner of compliance therewith. The many problems presented in connection with the rendering of such assistance covered every aspect of the acts. * * *

In view of the volume and diversity of inquiries received, it was essential to provide for the coordination of this part of the work so as to effect uniformity in the opinions which were rendered. The letters and memoranda of conferences which contained opinions rendered were classified and indexed. In addition, a summary of interpretations of the Securities Act rendered by the Federal Trade Commission and by the Securities and Exchange Commission was prepared for the use of the Commission, in such form as to make practicable its periodic revision. The preparation of a similar summary was commenced of interpretations rendered of the Securities Exchange Act of 1934 and regulations promulgated thereunder.

As a result of the method described above, consistency was obtained in the interpretation of the acts and rules and regulations.

While for the most part advisory opinions rendered, in answer to inquiries received, were not published, a number of these opinions were publicly released in cases where the questions involved had been the subject of wide-spread interest and numerous inquiries.

The advisory assistance rendered by the Commission was of manifest importance to the public because of the newness of the acts and regulations and the resulting lack of precedents by which persons seeking to comply with the law in particular situations might be guided. Moreover, it is believed that the spirit of cooperation engendered between the public and the Commission through this interpretative service was of definite value. In addition, the Commission benefited greatly from the information obtained through the correspondence and conferences incidental to the rendering of such service. From these sources much valuable information was obtained on the basis of which existing regulations were improved and new regulations promulgated.[8]

[8] See also Third Ann.Rep. SEC (1937) 59:

". . . The Commission declines to answer hypothetical questions or problems arising otherwise than from sections of the Acts which it administers. The Commission does not feel at liberty to render interpretative opinions with respect to possible civil liabilities since it has no jurisdiction over these matters, nor are advisory opinions rendered unless the inquirer states all the relevant facts of an existing or proposed transaction and, in addition, discloses the names of the persons or corporations, as well as the amounts involved."

SECURITIES ACT OF 1933 RELEASE NO. 929 †

The Securities and Exchange Commission today made public an opinion of its General Counsel, John J. Burns, concerning the application of the registration requirements of the Securities Act of 1933 in the case of a dividend payable either in cash or securities at the election of the stockholder.

The General Counsel stated that in his opinion, if a corporation by single action of its board of directors declares a dividend payable either in cash or in securities at the election of the stockholder, neither the declaration of the dividend, nor the distribution of securities to stockholders who elect to take the dividend in that form, constitutes a sale within the meaning of the Act, and that consequently no registration of the securities so distributed is required under the Act.

The opinion indicates, however, that if a corporation should declare a cash dividend, and should thereafter offer to the stockholders securities in lieu of the cash to which they would be entitled under the previous declaration, the offering of such securities would be regarded as involving a sale, and such securities would therefore be subject to the registration requirements.

The opinion follows:

"As I understand the situation, the company proposes to declare a dividend upon its common stock in the amount of one dollar in cash or one-tenth of a share of common stock for each share of common stock held. Each stockholder will be entitled to elect whether to accept the dividend in cash or in stock. Your letter is silent as to the mechanics of the declaration and distribution, and as to the nature of the rights of stockholders who fail to take affirmative action to express their election. In the absence of information regarding these important details, I can answer your question only in a general manner.

"Whether or not registration is required in such a case is of course primarily dependent upon whether the offering of such a character as to constitute it a 'sale', as that term is defined in Section 2(3) of the Securities Act. As you are aware, this definition is extremely broad in its scope, and includes every 'attempt or offer to dispose of * * * a security * * * for value' The term 'value' is not defined in the Act, but should in my opinion be regarded as including not only such ordinary forms of consideration as the transfer of cash or property, but also the waiver or surrender of a right or claim.

"However, even though under ordinary circumstances the waiver of a right would in my opinion constitute 'value', I do not believe that that term should be regarded as comprehending within its mean-

† Issued July 29, 1936 Reprinted in SEC, Compilation of Releases under Securities Act of 1933 (G P O.1937) at 102.

ing the action of a stockholder, to whom alternative rights have been granted without consideration, in electing to exercise one such right, even though, under the terms of the grant, such election will have the effect of causing the lapse of the right not exercised. Consequently, if a corporation, by simultaneous action of its board of directors, declares a dividend payable at the election of the stockholder in cash or in securities, neither the declaration of the dividend, nor the distribution of securities to stockholders who elect to take the dividend in that form, would in my opinion constitute a sale within the meaning of the Securities Act, and no registration of the securities so distributed would be required under that Act.

"However, according to my understanding it is well settled in general law that upon the public declaration of a cash dividend out of surplus, the holders of the stock in respect of which the dividend is declared acquire immediately the rights of creditors of the corporation, and cannot be divested of these rights by subsequent action of the board of directors. If, therefore, there is declared a cash dividend payable to all stockholders, and if the board thereafter determines to grant to stockholders the opportunity to waive their pre-existing and vested right to payment of the dividend in cash, and to receive the dividend in the form of securities, the stockholders electing to take securities would in my opinion be regarded as giving value for the securities so received. Under these circumstances I believe that the securities might well be held to be the subject of a sale."

SECURITIES ACT OF 1933 RELEASE NO. 874 [11]

The Securities and Exchange Commission has authorized an opinion by Harold H. Neff, Director of the Division of Forms and Regulations, concerning the effect of the Commission's rule granting permission to condense and summarize in prospectuses. The text of the opinion follows:

"The rules as to the prospectus for Form A-2 provide as follows.

" 'The information set forth in the prospectus, except as to financial statements required to be furnished, may be expressed in condensed or summarized form.'

"The question has been raised as to what is the effect of this permission to condense or summarize.

"There must be first borne in mind the fact that the registration statement is a public document, open to inspection by any person, and that copies can be obtained by any interested person at little expense and small effort. The prospectus, on the other hand, is designed for general distribution. Plainly, the prospectus is intended to be a

[11] SEC, Compilation of Releases under Securities Act of 1933 (G P O.1937) at 101–102.

shorter and briefer document than the registration statement. This is further shown by the fact that, under authority granted by the Act, whole items may be omitted from the prospectus. The prospectus is meant to be an epitome or summary, and, obviously, cannot be as discursive as the longer registration statement. The rule clearly indicates that the prospectus is not to contain the same degree of particularity as the registration statement.

"It is patent, therefore, that condensation or summarization involves omission; for it is not to be assumed that surplusage is contained in the registration statement itself. Indeed, in most places in the registration statement, answers are required to be stated briefly. A summarization or condensation of matter which has already been stated briefly must, of necessity, involve a greater brevity and an increased terseness, which can be attained only by a reduction in word content. To repeat, this reduction can be achieved only by the omission of material.

"As an example of the proper method of condensing information for use in the prospectus, there may be cited the case where facts stated in the registration statement are reducible to a more general statement. In such case, all that is required in the prospectus is such general statement. In other words, a series of related facts may be set forth in the prospectus in terms of their net result. An instance of this principle may be given. Item 45 in Form A-2 calls for revaluations of property since 1922. In the registration statement the actual revaluations should be set forth. In the prospectus, however, it is not only permissible, but desirable, if such can be done in the specific case, to set forth the net result of the revaluations which were made. If, for example, there have been numerous write-ups and write-downs with a final return to original cost, it would suffice to state in the prospectus that numerous revaluations had been made with the net result of finally returning the property to original cost. If a particular person should desire to obtain more precise information, that is, the times, nature, and amounts of the respective revaluations, he should consult the registration statement."

EXCERPT FROM SEC ACCOUNTING SERIES RELEASE NO. 1 [v]

April 1, 1937.

Treatment of losses resulting from revaluation of assets.

The question under discussion concerns the propriety of a charge (representing a reduction from net cost values of plant and equipment to a valuation established by the executive officers of your company) to capital surplus instead of to earned surplus. The capital surplus to

[v] See generally SEC, Accounting Series Releases (G P O 1945), containing published opinions of the Chief Accountant of the Commission.

which this charge was made was created pursuant to resolutions of the stockholders and directors providing for the reduction of the par value of the issued and outstanding common stock for the specific purpose of taking care of this revaluation of plant and equipment.

It is my[2] understanding that the plant and equipment were originally built for, and have until a few years ago been operated in, the manufacture of a class of goods the production of which has been discontinued. Under these conditions, some of the buildings and equipment became useless or obsolete, several of the buildings have been razed prior to the write-off and others subsequently. Other portions of the plant were of unduly large capacity for planned future requirements. The write-downs in question were made in accordance with the instructions of the directors and stockholders as stated in their respective resolutions; namely, "to the degree considered proportionate to the condition of each such asset with respect to the state of being partially or wholly obsolete, of over-capacity, of lessened utility value, of too high book value in comparison with replacement cost, or unduly costly in operation."

To my mind, the revaluation of the assets involved was simply a recognition by the company, as of the date of the write-down, of an accumulation of depreciation in values incidental to the risks involved in the ordinary operation of its business. This depreciation did not occur as of a given date; it took place gradually over a period of years coincident with the evolution of the industry. Thus it was an element of production costs applicable to an indefinite period prior to the write-down and as such would have been charged against income had it been discerned and provided for currently.

It is my conviction that capital surplus should under no circumstances be used to write off losses which, if currently recognized, would have been chargeable against income. In case a deficit is thereby created, I see no objection to writing off such a deficit against capital surplus, provided appropriate stockholder approval has been obtained. In this event, subsequent statements of earned surplus should designate the point of time from which the new surplus dates.

Accordingly, in my opinion, the charge here in question should have been made against earned surplus. In view of the stockholder action that has been taken, I see no objection to the deficit in earned surplus resulting from this write-off being eliminated by a charge to the capital surplus created by the restatement of capital stock.

[2] Carman G. Blough, chief accountant.

(c) Advisory Interpretative Assistance by the Bureau of Internal Revenue

I. T.[w] 3799

1946 Int.Rev.Bull. No. 10 at 2.

Advice is requested whether payments made on account of actions instituted or proposed to be instituted by the Price Administrator under section 205(e) of the Emergency Price Control Act of 1942 (56 Stat., 23, 34), as amended by section 108(b) of the Stabilization Extension Act of 1944 (58 Stat., 632, 640), upon failure of buyers of commodities sold in violation of a regulation, order, or price schedule of the Office of Price Administration prescribing a maximum price or maximum prices to institute actions pursuant to such law, are deductible from gross income for Federal income tax purposes.

Section 205(e) of the Emergency Price Control Act of 1942, as amended, supra, provides in part as follows:

(e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, * * * bring an action against the seller on account of the overcharge. * * * If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within 30 days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. * * *

The action which the Price Administrator is authorized to institute whenever a buyer having a cause of action (under section 205(e) of the Emergency Price Control Act of 1942, as amended, supra) fails to institute such action is similar to the action which may be brought by the Administrator where the buyer has no cause of action. It has been held in cases in which the buyer is not entitled to bring a suit that amounts paid in satisfaction of a judgment as the result of a suit brought by the Price Administrator (other than as the ultimate consumer or lessee), under section 205(e) of the Emergency Price Control Act of 1942, or amounts paid by way of compromise or settlement of such a suit or contemplated suit, are not deductible for Federal income tax purposes. (See I. T. 3627, C. B. 1943, 111, and I. T. 3630, C. B. 1943, 113.)

In view of the foregoing, it is held that amounts paid to the United States on account of actions instituted or proposed to be instituted by

[w] Income Tax Office Decision.

the Price Administrator under section 205(e) of the Emergency Price Control Act of 1942, as amended, supra, upon failure of buyers of commodities sold in violation of a regulation, order, or price schedule of the Office of Price Administration to institute actions pursuant to such law, are not deductible from gross income for Federal income tax purposes. It is immaterial that the violations were not willful or the result of failure to take practicable precautions to prevent their occurrence.[x]

SECTION 2. CONTROLLING FACTORS: THE ACQUISITION OF INFORMATION AS A BASIS FOR THE FORMULATION OF ADMINISTRATIVE POLICIES

A. Introductory

Within the limits marked by its statutory powers and duties, the program of an administrative agency will be governed by its resources in personnel and money, the climate of public opinion, the broad policies and attitudes of the chief executive and the legislature, and its knowledge—or impressions—of the structure and dynamics of the industry or area of the economy to be regulated. In some degree, it will acquire its basic data informally, as legislators or the heads of executive departments may do, from the previous experience of the members of the agency, from the press or radio, or from general reading, conversation and day to day observation. In part, it will derive its information through its research and technical staffs, often large and highly organized. In part, it will seek the information through formal investigations.

This section deals with investigations to acquire data as a basis for the formulation of administrative policies, which may be given effect in the promulgation of rules and regulations, general announcements of policy, or reports and recommendations to the legislature. Such investigations are comparable to investigations by a committee of the legislature. They should be distinguished from investigations which constitute preliminary steps in the process of enforcement,[a] and from so-called "investigations" which are actually administrative hearings.[b]

[x] Income Tax Office Decisions, unlike Treasury Regulations (T.R.'s and T.D.'s), do not commit the Bureau to the interpretations therein set forth Helvering v. N. Y. Trust Co, 292 U.S. 455, 54 S.Ct. 806, 78 L.Ed. 1361 (1944); Oberwinder v. Commissioner of Internal Revenue, 147 F 2d 255 (C.C.A 8th, 1945).

[a] Investigations of this character are considered in Chapter VI, Part I, Section 2, *infra* at pp. 414ff.

[b] See *e.g.*, § 13(4) of the Interstate Commerce Act (49 U.S.C. § 13(4); "Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification,

B. Investigations to Acquire Data as a Basis for the Formulation of Policies

McGRAIN v. DAUGHERTY

Supreme Court of the United States.
273 U.S. 135, 47 S.Ct. 319, 71 L.Ed. 580, 50 A.L.R. 1 (1927).

Mr. Justice VAN DEVANTER delivered the opinion of the Court.

This is an appeal from the final order in a proceeding in habeas corpus discharging a recusant witness held in custody under process of attachment issued from the United States Senate in the course of an investigation which it was making of the administration of the Department of Justice. A full statement of the case is necessary.

The Department of Justice is one of the great executive departments established by congressional enactment, and has charge, among other things, of the initiation and prosecution of all suits, civil and criminal, which may be brought in the right and name of the United States to compel obedience or punish disobedience to its laws, to recover property obtained from it by unlawful or fraudulent means, or to safeguard its rights in other respects, and also of the assertion and protection of its interests, when it or its officers are sued by others. The Attorney General is the head of the department, and its functions are all to be exercised under his supervision and direction.

Harry M. Daugherty became the Attorney General March 5, 1921, and held that office until March 28, 1924, when he resigned. Late in that period various charges of misfeasance and nonfeasance in the Department of Justice after he became its supervising head were brought to the attention of the Senate by individual senators and made the basis of an insistent demand that the department be investigated to the end that the practices and deficiencies which, according to the charges, were operating to prevent or impair its right administration might be definitely ascertained and that appropriate and effective measures might be taken to remedy or eliminate the evil. The Senate regarded the charges as grave and requiring legislative attention and action. Accordingly it formulated, passed, and invited

regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination." See also § 9(c) of the National Labor Relations Act (29 U.S.C. § 159(c)). For a consideration of hearings, see *infra*, Chapter V, Part I, Section 3, B, p. 281ff, and Chapter VI, Part II, Section 2, p 460ff.

the House of Representatives to pass (and that body did pass) two measures taking important litigation then in immediate contemplation out of the control of the Department of Justice and placing the same in charge of special counsel to be appointed by the President, and also adopted a resolution authorizing and directing a select committee of five senators—"to investigate circumstances and facts, and report the same to the Senate, concerning the alleged failure of Harry M. Daugherty, Attorney General of the United States, to prosecute properly violators of the Sherman Anti-Trust Act and the Clayton Act against monopolies and unlawful restraint of trade; the alleged neglect and failure of the said Harry M. Daugherty, Attorney General of the United States, to arrest and prosecute Albert B. Fall, Harry F. Sinclair, E. L. Doheny, C. R. Forbes, and their co-conspirators in defrauding the government, as well as the alleged neglect and failure of the said Attorney General to arrest and prosecute many others for violations of federal statutes, and his alleged failure to prosecute properly, efficiently, and promptly, and to defend, all manner of civil and criminal actions wherein the government of the United States is interested as a party plaintiff or defendant. And said committee is further directed to inquire into, investigate and report to the Senate the activities of the said Harry M. Daugherty, Attorney General, and any of his assistants in the Department of Justice which would in any manner tend to impair their efficiency or influence as representatives of the government of the United States."

The resolution also authorized the committee to send for books and papers, to subpœna witnesses, to administer oaths, and to sit at such times and places as it might deem advisable.

In the course of the investigation the committee issued and caused to be duly served on Mally S. Daugherty—who was a brother of Harry M. Daugherty and president of the Midland National Bank of Washington Court House, Ohio—a subpœna commanding him to appear before the committee for the purpose of giving testimony bearing on the subject under investigation, and to bring with him the "deposit ledgers of the Midland National Bank since November 1, 1920; also note files and transcript of owners of every safety vault; also records of income drafts; also records of any individual account or accounts showing withdrawals of amounts of $25,000 or over during above period." The witness failed to appear.

A little later in the course of the investigation the committee issued and caused to be duly served on the same witness another subpœna, commanding him to appear before it for the purpose of giving testimony relating to the subject under consideration; nothing being said in this subpœna about bringing records, books, or papers. The witness again failed to appear, and no excuse was offered by him for either failure.

The committee then made a report to the Senate stating that the subpœnas had been issued, that according to the officer's returns—

copies in which accompanied the report— the witness was personally served, and that he had failed and refused to appear. After a reading of the report, the Senate adopted a resolution following these facts and proceedings as follows:

"Whereas, the appearance and testimony of the said M. S. Daugherty is material and necessary in order that the committee may properly execute the functions imposed upon it and may obtain information necessary as a basis for such legislative and other action as the Senate may deem necessary and proper: Therefore be it

"Resolved, that the president of the Senate pro tempore issue his warrant commanding the sergeant at arms or his deputy to take into custody the body of the said M. S. Daugherty wherever found, and to bring the said M. S. Daugherty before the bar of the Senate, then and there to answer such questions pertinent to the matter under inquiry as the Senate may order the President of the Senate pro tempore to propound, and to keep the said M. S. Daugherty in custody to await the further order of the Senate."

It will be observed from the terms of the resolution that the warrant was to be issued in furtherance of the effort to obtain the personal testimony of the witness, and, like the second subpœna, was not intended to exact from him the production of the various records, books, and papers named in the first subpœna.

The warrant was issued agreeably to the resolution and was addressed simply to the sergeant at arms. That officer, on receiving the warrant, indorsed thereon a direction that it be executed by John J. McGrain, already his deputy, and delivered it to him for execution.

The deputy, proceeding under the warrant, took the witness into custody at Cincinnati, Ohio, with the purpose of bringing him before the bar of the Senate as commanded, whereupon the witness petitioned the federal District Court in Cincinnati for a writ of habeas corpus. The writ was granted and the deputy made due return, setting forth the warrant and the cause of the detention. After a hearing the court held the attachment and detention unlawful and discharged the witness, the decision being put on the ground that the Senate, in directing the investigation and in ordering the attachment, exceeded its powers under the Constitution. 299 F. 620. The deputy prayed and was allowed a direct appeal to this court under section 238 of the Judicial Code (Comp.St. § 1215) as then existing.

We have given the case earnest and prolonged consideration because the principal questions involved are of unusual importance and delicacy. They are (a) whether the Senate—or the House of Representatives, both being on the same plane in this regard—has power, through its own process, to compel a private individual to appear before it or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution; and (b) whether it sufficiently appears that the

process was being employed in this instance to obtain testimony for that purpose.

Other questions are presented, which in regular course should be taken up first.

The witness challenges the authority of the deputy to execute the warrant on two grounds—that there was no provision of law for a deputy, and that, even if there were such a provision, a deputy could not execute the warrant because it was addressed simply to the sergeant at arms. We are of opinion that neither ground is tenable.

The Senate adopted in 1889 and has retained ever since a standing order declaring that the sergeant at arms may appoint deputies "to serve process or perform other duties" in his stead, that they shall be "officers of the Senate," and that acts done and returns made by them "shall have like effect and be of the same validity as if performed or made by the sergeant at arms in person." In actual practice the Senate has given full effect to the order, and Congress has sanctioned the practice under it by recognizing the deputies—sometimes called assistants—as officers of the Senate, by fixing their compensation, and by making appropriations to pay them. Thus there was ample provision of law for a deputy.

The fact that the warrant was addressed simply to the sergeant at arms is not of special significance. His authority was not to be tested by the warrant alone. Other criteria were to be considered. The standing order and the resolution under which the warrant was issued plainly contemplated that he was to be free to execute the warrant in person or to direct a deputy to execute it. They expressed the intention of the Senate, and the words of the warrant were to be taken, as they well could be, in a sense which would give effect to that intention. Thus understood, the warrant admissibly could be executed by a deputy, if the sergeant at arms so directed, which he did. * * *

The witness points to the provision in the Fourth Amendment to the Constitution declaring "no warrants shall issue, but upon probable cause, supported by oath or affirmation," and contends that the warrant was void because the report of the committee on which it was based was unsworn. We think the contention overlooks the relation of the committee to the Senate and to the matters reported, and puts aside the accepted interpretation of the constitutional provision.

The committee was a part of the Senate, and its members were acting under their oath of office as senators. The matters reported pertained to their proceedings and were within their own knowledge. They had issued the subpœnas, had received and examined the officer's returns thereon (copies of which accompanied the report), and knew the witness had not obeyed either subpœna, or offered any excuse for his failure to do so.

The constitutional provision was not intended to establish a new principle but to affirm and preserve a cherished rule of the common

law, designed to prevent the issue of groundless warrants. In legislative practice, committee reports are regarded as made under the sanction of the oath of office of its members, and where the matters reported are within the committee's knowledge and constitute probable cause for an attachment, such reports are acted on and given effect, without requiring that they be supported by further oath or affirmation. This is not a new practice, but one which has come down from an early period. It was well recognized before the constitutional provision was adopted, has been followed ever since, and appears never to have been challenged until now. Thus it amounts to a practical interpretation, long continued, of both the original common-law rule and the affirming constitutional provision, and should be given effect accordingly.

The principle underlying the legislative practice has also been recognized and applied in judicial proceedings. This is illustrated by the settled rulings that courts, in dealing with contempts committed in their presence, may order commitments without other proof than their own knowledge of the occurrence, and that they may issue attachments, based on their own knowledge of the default, where intended witnesses or jurors fail to appear in obedience to process shown by the officer's return to have been duly served. A further illustration is found in the rulings that grand jurors, acting under the sanction of their oath as such, may find and return indictments based solely on their own knowledge of the particular offenses, and that warrants may be issued on such indictments without further oath or affirmation, and still another is found in the practice which recognizes that, where grand jurors, under their oath as such, report to the court that a witness brought before them has refused to testify, the court may act on that report, although otherwise unsworn, and order the witness brought before it by attachment.

We think the legislative practice, fortified as it is by the judicial practice, shows that the report of the committee—which was based on the committee's own knowledge and made under the sanction of the oath of office of its members—was sufficiently supported by oath to satisfy the constitutional requirement.

The witness also points to the provision in the warrant, and in the resolution under which it was issued, requiring that he be "brought before the bar of the Senate, then and there" to give testimony "pertinent to the subject under inquiry," and contends that an essential prerequisite to such an attachment was wanting, because he neither had been subpœnaed to appear and testify before the Senate nor had refused to do so. The argument in support of the contention proceeds on the assumption that the warrant of attachment "is to be treated precisely the same as if no subpœna had been issued by the committee, and the same as if the witness had not refused to testify before the committee." In our opinion the contention and the assumption are both untenable. The committee was acting for the Senate and under its au-

thorization, and therefore the subpœnas which the committee issued and the witness refused to obey are to be treated as if issued by the Senate. The warrant was issued as an auxiliary process to compel him to give the testimony sought by the subpœnas; and its nature in this respect is not affected by the direction that his testimony be given at the bar of the Senate, instead of before the committee. If the Senate deemed it proper, in view of his contumacy, to give that direction, it was at liberty to do so. * * *

In approaching the principal questions, which remain to be considered, two observations are in order. One is that we are not now concerned with the direction in the first subpœna that the witness produce various records, books, and papers of the Midland National Bank. That direction was not repeated in the second subpœna, and is not sought to be enforced by the attachment. This was recognized by the court below (299 F. 623), and is conceded by counsel for the appellant. The other is that we are not now concerned with the right of the Senate to propound or the duty of the witness to answer specific questions, for as yet no questions have been propounded to him. He is asserting—and is standing on his assertion—that the Senate is without power to interrogate him, even if the questions propounded be pertinent and otherwise legitimate, which for present purposes must be assumed.

The first of the principal questions, the one which the witness particularly presses on our attention, is, as before shown, whether the Senate—or the House of Representatives, both being on the same plane in this regard—has power, through its own process, to compel a private individual to appear before it or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution.

The Constitution provides for a Congress, consisting of a Senate and House of Representatives, and invests it with "all legislative powers" granted to the United States, and with power "to make all laws which shall be necessary and proper" for carrying into execution these powers and "all other powers" vested by the Constitution in the United Stafes or in any department or officer thereof. Article 1, §§ 1, 8. Other provisions show that, while bills can become laws only after being considered and passed by both houses of Congress, each house is to be distinct from the other, to have its own officers and rules, and to exercise its legislative function independently. Article 1, §§ 2, 3, 5, 7. But there is no provision expressly investing either house with power to make investigations and exact testimony, to the end that it may exercise its legislative function advisedly and effectively. So the question arises whether this power is so far incidental to the legislative function as to be implied.

In actual legislative practice, power to secure needed information by such means has long been treated as an attribute of the power to legislate. It was so regarded in the British Parliament and in the

colonial Legislatures before the American Revolution, and a like view has prevailed and been carried into effect in both houses of Congress and in most of the state Legislatures. * * *

The state courts quite generally have held that the power to legislate carries with it by necessary implication ample authority to obtain information needed in the rightful exercise of that power, and to employ compulsory process for the purpose. * * *

We have referred to the practice of the two houses of Congress, and we now shall notice some significant congressional enactments. May 3, 1798 (1 Stat. 554, c. 36), Congress provided that oaths or affirmations might be administered to witnesses by the President of the Senate, the Speaker of the House of Representatives, the chairman of a committee of the whole, or the chairman of a select committee, "in any case under their examination." February 8, 1817 (3 Stat. 345, c. 10), it enlarged that provision so as to include the chairman of a standing committee. January 24, 1857 (11 Stat. 155, c. 19), it passed "An act more effectually to enforce the attendance of witnesses on the summons of either house of Congress, and to compel them to discover testimony." This act provided, first, that any person summoned as a witness to give testimony or produce papers in any matter under inquiry before either house of Congress, or any committee of either house, who should wilfully make default, or, if appearing, should refuse to answer any question pertinent to the inquiry, should, in addition to the pains and penalties then existing, be deemed guilty of a misdemeanor and be subject to indictment as there prescribed; and, secondly, that no person should be excused from giving evidence in such an inquiry on the ground that it might tend to incriminate or disgrace him, nor be held to answer criminally, or be subjected to any penalty or forfeiture, for any fact or act as to which he was required to testify excepting that he might be subjected to prosecution for perjury committed while so testifying. January 24, 1862, c. 11, 12 Stat. 333, Congress modified the immunity provision in particulars not material here. These enactments are now embodied in sections 101–104 and 859 of Revised Statutes (Comp.St. §§ 155, 157–159, 1467). They show very plainly that Congress intended thereby (a) to recognize the power of either house to institute inquiries and exact evidence touching subjects within its jurisdiction and on which it was disposed to act; (b) to recognize that such inquiries may be conducted through committees; (c) to subject defaulting and contumacious witnesses to indictment and punishment in the courts, and thereby to enable either house to exert the power of inquiry "more effectually"; and (d) to open the way for obtaining evidence in such an inquiry, which otherwise could not be obtained, by exempting witnesses required to give evidence therein from criminal and penal prosecutions in respect of matters disclosed by their evidence. * * *

While these cases are not decisive of the question we are considering, they definitely settle two propositions which we recognize as entirely

sound and having a bearing on its solution: One, that the two houses of Congress, in their separate relations, possess, not only such powers as are expressly granted to them by the Constitution, but such auxiliary powers as are necessary and appropriate to make the express powers effective; and the other, that neither house is invested with "general" power to inquire into private affairs and compel disclosures, but only with such limited power of inquiry as is shown to exist when the rule of constitutional interpretation just stated is rightly applied. The latter proposition has further support in Harriman v. Interstate Commerce Commission, 211 U.S. 407, 417–419, 29 S.Ct. 115, 53 L.Ed. 253, and Federal Trade Commission v. American Tobacco Co., 264 U.S. 298, 305, 306, 44 S.Ct. 336, 68 L.Ed. 696, 32 A.L.R. 786.

With this review of the legislative practice, congressional enactments, and court decisions, we proceed to a statement of our conclusions on the question.

We are of opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function. It was so regarded and employed in American Legislatures before the Constitution was framed and ratified. Both houses of Congress took this view of it early in their history—the House of Representatives with the approving votes of Mr. Madison and other members whose service in the convention which framed the Constitution gives special significance to their action—and both houses have employed the power accordingly up to the present time. The acts of 1798 and 1857, judged by their comprehensive terms, were intended to recognize the existence of this power in both houses and to enable them to employ it "more effectually" than before. So, when their practice in the matter is appraised according to the circumstances in which it was begun and to those in which it has been continued, it falls nothing short of a practical construction, long continued, of the constitutional provisions respecting their powers, and therefore should be taken as fixing the meaning of those provisions, if otherwise doubtful.

We are further of opinion that the provisions are not of doubtful meaning, but, as was held by this court in the cases we have reviewed, are intended to be effectively exercised, and therefore to carry with them such auxiliary powers as are necessary and appropriate to that end. While the power to exact information in aid of the legislative function was not involved in those cases, the rule of interpretation applied there is applicable here. A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some

means of compulsion are essential to obtain what is needed. All this was true before and when the Constitution was framed and adopted. In that period the power of inquiry, with enforcing process, was regarded and employed as a necessary and appropriate attribute of the power to legislate—indeed, was treated as inhering in it. Thus there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may be effectively exercised.

The contention is earnestly made on behalf of the witness that this power of inquiry, if sustained, may be abusively and oppressively exerted. If this be so, it affords no ground for denying the power. The same contention might be directed against the power to legislate, and of course would be unavailing. We must assume, for present purposes, that neither house will be disposed to exert the power beyond its proper bounds, or without due regard to the rights of witnesses. But if, contrary to this assumption, controlling limitations or restrictions are disregarded, the decisions in Kilbourn v. Thompson and Marshall v. Gordon point to admissible measures of relief. And it is a necessary deduction from the decisions in Kilbourn v. Thompson and In re Chapman that a witness rightfully may refuse to answer where the bounds of the power are exceeded or the questions are not pertinent to the matter under inquiry.

We come now to the question whether it sufficiently appears that the purpose for which the witness' testimony was sought was to obtain information in aid of the legislative function. The court below answered the question in the negative and put its decision largely on this ground, as is shown by the following excerpts from its opinion (299 F. 638–640):

"It will be noted that in the second resolution the Senate has expressly avowed that the investigation is in aid of other action than legislation. Its purpose is to 'obtain information necessary as a basis for such legislative and other action as the Senate may deem necessary and proper.' This indicates that the Senate is contemplating the taking of action other than legislative, as the outcome of the investigation, at least the possibility of so doing. * * *

We are of opinion that the court's ruling on this question was wrong, and that it sufficiently appears, when the proceedings are rightly interpreted, that the object of the investigation and of the effort to secure the witness' testimony was to obtain information for legislative purposes.

It is quite true that the resolution directing the investigation does not in terms avow that it is intended to be in aid of legislation; but it does show that the subject to be investigated was the administration of the Department of Justice—whether its functions were being properly discharged or were being neglected or misdirected, and particularly whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and prosecu-

tion of proceedings to punish crimes and enforce appropriate remedies against the wrongdoers; specific instances of alleged neglect being recited. Plainly the subject was one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit. This becomes manifest when it is reflected that the functions of the Department of Justice, the powers and duties of the Attorney General, and the duties of his assistants are all subject to regulation by congressional legislation, and that the department is maintained and its activities are carried on under such appropriations as in the judgment of Congress are needed from year to year.

The only legitimate object the Senate could have in ordering the investigation was to aid it in legislating, and we think the subject-matter was such that the presumption should be indulged that this was the real object. An express avowal of the object would have been better; but in view of the particular subject-matter was not indispensable. * * *

The second resolution—the one directing that the witness be attached—declares that his testimony is sought with the purpose of obtaining "information necessary as a basis for such legislative and other action as the Senate may deem necessary and proper." This avowal of contemplated legislation is in accord with what we think is the right interpretation of the earlier resolution directing the investigation. The suggested possibility of "other action" if deemed "necessary or proper" is, of course, open to criticism in that there is no other action in the matter which would be within the power of the Senate. But we do not assent to the view that this indefinite and untenable suggestion invalidates the entire proceeding. The right view in our opinion is that it takes nothing from the lawful object avowed in the same resolution and rightly inferable from the earlier one. It is not as if an inadmissible or unlawful object were affirmatively and definitely avowed.

We conclude that the investigation was ordered for a legitimate object; that the witness wrongfully refused to appear and testify before the committee and was lawfully attached; that the Senate is entitled to have him give testimony pertinent to the inquiry, either at its bar or before the committee; and that the district court erred in discharging him from custody under the attachment.

Another question has arisen which should be noticed. It is whether the case has become moot. The investigation was ordered and the committee appointed during the Sixty-Eighth Congress. That Congress expired March 4, 1925. The resolution ordering the investigation in terms limited the committee's authority to the period of the Sixty-Eighth Congress; but this apparently was changed by a later and amendatory resolution authorizing the committee to sit at such times and places as it might deem advisable or necessary. It is said in Jefferson's Manual:

"Neither house can continue any portion of itself in any parliamentary function beyond the end of the session without the consent of the other two branches. When done, it is by a bill constituting them commissioners for the particular purpose."

But the context shows that the reference is to the two houses of Parliament when adjourned by prorogation or dissolution by the king. The rule may be the same with the House of Representatives whose members are all elected for the period of a single Congress; but it cannot well be the same with the Senate, which is a continuing body whose members are elected for a term of six years and so divided into classes that the seats of one-third only become vacant at the end of each Congress, two-thirds always continuing into the next Congress, save as vacancies may occur through death or resignation.

Mr. Hinds in his collection of precedents says:

"The Senate, as a continuing body, may continue its committees through the recess following the expiration of a Congress."

And, after quoting the above statement from Jefferson's Manual, he says:

"The Senate, however, being a continuing body, gives authority to its committees during the recess after the expiration of a Congress."

So far as we are advised the select committee having this investigation in charge has neither made a final report nor been discharged; nor has it been continued by an affirmative order. Apparently its activities have been suspended pending the decision of this case. But, be this as it may, it is certain that the committee may be continued or revived now by motion to that effect, and, if continued or revived, will have all its original powers. This being so, and the Senate being a continuing body, the case cannot be said to have become moot in the ordinary sense. The situation is measurably like that in Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498, 514–516, 31 S.Ct. 279, 55 L.Ed. 310, where it was held that a suit to enjoin the enforcement of an order of the Interstate Commerce Commission did not become moot through the expiration of the order, where it was capable of repetition by the commission and was a matter of public interest. Our judgment may yet be carried into effect, and the investigation proceeded with from the point at which it apparently was interrupted by reason of the habeas corpus proceedings. In these circumstances we think a judgment should be rendered as was done in the case cited.

What has been said requires that the final order in the district court discharging the witness from custody be reversed.

Final order reversed.[c]

[c] *Cf* Kilbourn v Thompson, 103 U.S. 168, 190, 26 L.Ed. 377 (1880) (Power of House to compel attendance and testimony of witnesses in impeachment proceedings or proceedings to judge election or qualification of its members); Anderson v. Dunn, 6 Wheat. (U.S.) 204, 5 L.Ed. 242 (1821) (power of House to punish for

JURNEY v. MacCRACKEN

Supreme Court of the United States.
294 U.S. 125, 55 S.Ct. 375, 79 L.Ed. 802 (1935).

Mr. Justice BRANDEIS delivered the opinion of the Court.

This petition for a writ of habeas corpus was brought in the Supreme Court of the District of Columbia by William P. MacCracken, Jr., against Chesley W. Jurney, the Sergeant at Arms of the Senate of the United States. The writ issued; the body of the petitioner was produced before that court; and the case was then heard on demurrer to the petition. The trial court discharged the writ and dismissed the petition. The Court of Appeals, two justices dissenting, reversed that judgment and remanded the case to the Supreme Court of the District, with directions to discharge the prisoner from custody. 63 App.D.C. 342, 72 F.2d 560. This Court granted certiorari because of the importance of the question presented. 293 U.S. 543, 55 S.Ct. 113, 79 L.Ed. 648.

The petition alleges that MacCracken was, on February 12, 1934, arrested, and is held, under a warrant issued on February 9, 1934, after MacCracken had respectfully declined to appear before the bar of the Senate in response to a citation served upon him pursuant to Resolution 172, adopted by the Senate on February 5, 1934. The resolution provides:

"Resolved, That the President of the Senate issue a citation directing William P. MacCracken, Jr., L. H. Brittin, Gilbert Givven, and Harris M. Hanshue to show cause why they should not be punished for contempt of the Senate, on account of the destruction and removal of certain papers, files, and memorandums from the files of William P. MacCracken, Jr., after a subpœna had been served upon William P. MacCracken, Jr., as shown by the report of the Special Senate Committee Investigating Ocean and Air Mail Contracts."

It is conceded that the Senate was engaged in an inquiry which it had the constitutional power to make; that the committee had authority to require the production of papers as a necessary incident of the power of legislation; and that the Senate had the power to coerce their production by means of arrest. McGrain v. Daugherty, 273 U.S. 135, 47 S.Ct. 319, 71 L.Ed. 580, 50 A.L.R. 1. No question is raised as to the propriety of the scope of the subpœna duces tecum, or as to the regularity of any of the proceedings which preceded the arrest. The claim of privilege hereinafter referred to is no longer an

contempt for attempt to bribe one of its members.) But cf. Marshall v. Gordon, 243 U.S. 521, 37 S.Ct. 448, 61 L.Ed. 881 L.R.A.1917F, 279, Ann.Cas.1918B, 371 (1917) (sending of ill-tempered and insulting letter to chairman of a sub-committee of the House, and simultaneous publication thereof, not such an obstruction to performance of legislative duty as to warrant punishment of sender by House for contempt).

Footnotes of the court have been omitted.

issue. MacCracken's sole contention is that the Senate was without power to arrest him with a view to punishing him, because the act complained of—the alleged destruction and removal of the papers after service of the subpœna—was "the past commission of a completed act which prior to the arrest and the proceedings to punish had reached such a stage of finality that it could not longer affect the proceedings of the Senate or any Committee thereof, and which, and the effects of which, had been undone long before the arrest."

The petition occupies, with exhibits, 100 pages of the printed record in this Court; but the only additional averments essential to the decision of the question presented are, in substance, these: The Senate had appointed the special committee to make "a full, complete and detailed inquiry into all existing contracts entered into by the Postmaster General for the carriage of air mail and ocean mail." MacCracken had been served, on January 31, 1934, with a subpœna duces tecum to appear "instanter" before the committee and to bring all books of account and papers "relating to air mail and ocean mail contracts." The witness appeared on that day; stated that he is a lawyer, member of the firm of MacCracken & Lee, with offices in the District; that he was ready to produce all papers which he lawfully could; but that many of those in his possession were privileged communications between himself and corporations or individuals for whom he had acted as attorney; that he could not lawfully produce such papers without the client first having waived the privilege; and that, unless he secured such a waiver, he must exercise his own judgment as to what papers were within the privilege. He gave, however, to the committee the names of these clients; stated the character of services rendered for each; and, at the suggestion of the committee, telegraphed to each asking whether consent to disclose confidential communications would be given. From some of the clients he secured immediately unconditional consent; and on February 1 produced all the papers relating to the business of the clients who had so consented.

On February 2, before the committee had decided whether the production of all the papers should be compelled despite the claims of privilege, MacCracken again appeared and testified as follows: On February 1 he personally permitted Givven, a representative of Western Air Express, to examine, without supervision, the files containing papers concerning that company; and authorized him to take therefrom papers which did not relate to air mail contracts. Givven, in fact, took some papers which did relate to air mail contracts. On the same day, Brittin, vice president of Northwest Airways, Inc., without MacCracken's knowledge, requested and received from his partner Lee permission to examine the files relating to that company's business and to remove therefrom some papers stated by Brittin to have been dictated by him in Lee's office and to be wholly personal and unrelated to matters under investigation by the committee. Brittin removed from the files some papers; took them to his office;

and, with a view to destroying them, tore them into pieces and threw the pieces into a waste paper basket.

Upon the conclusion of MacCracken's testimony on February 2, the committee decided that none of the papers in his possession could be withheld under the claim of privilege. Later that day MacCracken received from the rest of his clients waivers of their privilege; and thereupon promptly made available to the committee all the papers then remaining in the files. On February 3 (after a request therefor by MacCracken), Givven restored to the files what he stated were all the papers taken by him. The petition does not allege that any of the papers taken by Brittin were later produced. It avers that, prior to the adoption of the citation for contempt under Resolution 172, MacCracken had produced and delivered to the Senate of the United States, "to the best of his ability, knowledge and belief, every paper of every kind and description in his possession or under his control, relating in any way to air mail and ocean mail contracts; [and that] on February 5, 1934 * * * all of said papers were turned over and delivered to said Senate Committee and since that date they have been, and they now are, in the possession of said Committee."

First. The main contention of MacCracken is that the so-called power to punish for contempt may never be exerted, in the case of a private citizen, solely qua punishment. The argument is that the power may be used by the legislative body merely as a means of removing an existing obstruction to the performance of its duties; that the power to punish ceases as soon as the obstruction has been removed, or its removal has become impossible; and hence that there is no power to punish a witness who, having been requested to produce papers, destroys them after service of the subpœna. The contention rests upon a misconception of the limitations upon the power of the Houses of Congress to punish for contempt. It is true that the scope of the power is narrow. No act is so punishable unless it is of a nature to obstruct the performance of the duties of the Legislature. There may be lack of power, because, as in Kilbourn v. Thompson, 103 U.S. 168, 26 L.Ed. 377, there was no legislative duty to be performed, or because, as in Marshall v. Gordon, 243 U.S. 521, 37 S.Ct. 448, 61 L.Ed. 881, L.R.A.1917F, 279, Ann.Cas.1918B, 371, the act complained of is deemed not to be of a character to obstruct the legislative process. But, where the offending act was of a nature to obstruct the legislative process, the fact that the obstruction has since been removed, or that its removal has become impossible, is without legal significance.

The power to punish a private citizen for a past and completed act was exerted by Congress as early as 1795; and since then it has been exercised on several occasions. It was asserted, before the Revolution, by the colonial assemblies, in imitation of the British House of Commons; and afterwards by the Continental Congress and by state legislative bodies. In Anderson v. Dunn, 6 Wheat. 204, 5 L.Ed. 242, de-

cided in 1821, it was held that the House had power to punish a private citizen for an attempt to bribe a member. No case has been found in which an exertion of the power to punish for contempt has been successfully challenged on the ground that, before punishment, the offending act had been consummated or that the obstruction suffered was irremediable. The statements in the opinion in Marshall v. Gordon, supra, upon which MacCracken relies, must be read in the light of the particular facts. It was there recognized that the only jurisdictional test to be applied by the court is the character of the offense; and that the continuance of the obstruction, or the likelihood of its repetition, are considerations for the discretion of the legislators in meting out the punishment.

Here, we are concerned, not with an extension of congressional privilege, but with vindication of the established and essential privilege of requiring the production of evidence. For this purpose, the power to punish for a past contempt is an appropriate means. Compare Ex parte Nugent, Fed.Cas.No. 10,375; Stewart v. Blaine, 1 MacArthur (8 D.C.) 453. The apprehensions expressed from time to time in congressional debates, in opposition to particular exercises of the contempt power, concerned, not the power to punish, as such, but the broad, undefined privileges which it was believed might find sanction in that power. The ground for such fears has since been effectively removed by the decisions of this Court which hold that assertions of congressional privilege are subject to judicial review, Kilbourn v. Thompson, supra; and that the power to punish for contempt may not be extended to slanderous attacks which present no immediate obstruction to legislative processes, Marshall v. Gordon, supra.

Second. The power of either House of Congress to punish for contempt was not impaired by the enactment in 1857 of the statute, Rev.St. § 102 [d] (2 USCA § 192), making refusal to answer or to produce papers before either House, or one of its committees, a misdemeanor. Compare Sinclair v. United States, 279 U.S. 263, 49 S.Ct. 268, 73 L.Ed. 692. The statute was enacted, not because the power of the Houses to punish for a past contempt was doubted, but because imprisonment limited to the duration of the session was not considered sufficiently drastic a punishment for contumacious witnesses. That the purpose of the statute was merely to supplement the power of contempt by providing for additional punishment was recognized in In re Chapman, 166 U.S. 661, 671, 672, 17 S.Ct. 677, 681, 41 L.Ed. 1154: "We grant that congress could not divest itself, or either of its houses, of the essential and inherent power to punish for contempt, in cases to which the power of either house properly extended; but because congress, by the act of 1857, sought to aid each of the houses in the discharge of its constitutional functions, it does not follow that

[d] 2 U.S.C. § 192, derived from the Act of January 24, 1857, c. 19, 11 Stat. 155 Constitutional validity sustained in In Re Chapman, 166 U.S. 661, 17 S.Ct. 677, 41 L.Ed. 1154 (1897).

any delegation of the power in each to punish for contempt was involved, and the statute is not open to objection on that account." Punishment, purely as such, through contempt proceedings, legislative or judicial, is not precluded because punishment may also be inflicted for the same act as a statutory offense. Compart Ex parte Hudgings, 249 U.S. 378, 382, 39 S.Ct. 337, 63 L.Ed. 656, 11 A.L.R. 333. As was said in In re Chapman, supra, "the same act may be an offense against one jurisdiction and also an offense against another; and indictable statutory offenses may be punished as such, while the offenders may likewise be subjected to punishment for the same acts as contempts, the two being diverso intuitu, and capable of standing together."

Third. MacCracken contends that he is not punishable for contempt, because the obstruction, if any, which he caused to legislative processes, had been entirely removed and its evil effects undone before the contempt proceedings were instituted. He points to the allegations in the petition for habeas corpus that he had surrendered all papers in his possession; that he was ready and willing to give any additional testimony which the committee might require; that he had secured the return of the papers taken from the files by Givven, with his permission; and that he was in no way responsible for the removal and destruction of the papers by Brittin. This contention goes to the question of guilt, not to that of the jurisdiction of the Senate. The contempt with which MacCracken is charged is "the destruction and removal of certain papers." Whether he is guilty, and whether he has so far purged himself of contempt that he does not now deserve punishment, are the questions which the Senate proposes to try. The respondent to the petition did not, by demurring, transfer to the court the decision of those questions. The sole function of the writ of habeas corpus is to have the court decide whether the Senate has jurisdiction to make the determination which it proposes. Compare Barry v. United States ex rel. Cunningham, 279 U.S. 597, 49 S.Ct. 452, 73 L.Ed. 867; Henry v. Henkel, 235 U.S. 219, 35 S.Ct. 54, 59 L.Ed. 203; In re Gregory, 219 U.S. 210, 31 S.Ct. 143, 55 L.Ed. 184.

The judgment of the Court of Appeals should be reversed; and that of the Supreme Court of the District should be affirmed.

Reversed.*

* Footnotes of the court have been omitted.

INTERSTATE COMMERCE COMMISSION v. BRIMSON

Supreme Court of the United States.
154 U.S. 447, 14 S.Ct. 1125, 38 L.Ed. 1047 (1894).

Mr. Justice HARLAN. This appeal brings up for review a judgment rendered December 7, 1892, dismissing a petition filed in the circuit court of the United States on the 15th day of July, 1892, by the interstate commerce commission, under the act of congress entitled "An act to regulate commerce," approved February 4, 1887, and amended by the acts of March 2, 1889, and February 10, 1891. 24 Stat. 379, c. 104; 25 Stat. 855, c. 382; 26 Stat. 743, c. 128; 1 Supp. Rev.St. 529, 684, 891.

The petition was based on the twelfth section of the act authorizing the commission to invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses, and the production of documents, books, and papers.

The circuit court held that section to be unconstitutional and void, as imposing on the judicial tribunals of the United States duties that were not judicial in their nature. In the judgment of that court, this proceeding was not a case to which the judicial power of the United States extended. 53 Fed. 476, 480. * * *

The twelfth section (26 Stat. 743, c. 128), the validity of certain parts of which is involved in this proceeding, provides as follows:

"That the commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the commission to perform the duties and carry out the objects for which it was created; and the commission is hereby authorized and required to execute and enforce the provisions of this act; and, upon the request of the commission, it shall be the duty of any district attorney of the United States to whom the commission may apply to institute in the proper court and to prosecute under the direction of the attorney general of the United States all necessary proceedings for the enforcement of the provisions of this act and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this act the commission shall have power to require, by subpœna, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation. . . ." * * *

The nature of the present proceeding, instituted pursuant to the authority conferred by that section, will appear from the following summary of the pleadings and orders in the cause:

Prior to the 14th of June, 1892, informal complaint was made to the interstate commerce commission, under the provisions of the interstate commerce act, that the Illinois Steel Company, a corporation of Illinois, had caused to be incorporated under the laws of that state the Calumet & Blue Island Railroad Company, the Chicago & Southeastern Railway Company of Illinois, the Joliet & Blue Island Railway Company, and the Chicago & Kenosha Railway Company, for the purpose of operating its switches and side tracks at South Chicago, Chicago, and Joliet, respectively, and engaging in traffic by a continuous shipment from cities and places without to cities and places within Illinois, * * * that it had also caused to be incorporated, under the laws of Wisconsin, the Milwaukee, Bay View & Chicago Railroad Company, for the purpose of operating its switches and side tracks at or near Milwaukee, in that state, and engaging in traffic by a continuous shipment from places and cities without to cities and places within Wisconsin, * * * and that said Illinois Steel Company owned and controlled the above-named companies, which it caused to be incorporated under the laws of Illinois, and operated them in connection with the other companies named, "as a device for the purpose of evading the provisions of the act to regulate commerce, and obtaining special, illegal, unjust, and unreasonable rates for the transportation of interstate traffic," and, by the connivance and consent of said other connecting railroad companies, in such a manner as to give to the Illinois Steel Company an illegal, undue, and unreasonable preference and advantage, subjecting other persons, firms, and companies to undue and unreasonable prejudice and discrimination in the transportation of property from divers cities and places without the states of Illinois and Wisconsin to divers cities and towns within those states.

It was made to appear to the commission that the companies so owned, controlled, and operated by the Illinois Steel Company for more than the six months then last past had been and were still engaged in the transportation of property by railroad in connection with the other companies named, "under a common control, management, and arrangement for a continuous carriage or shipment" from divers cities and towns without to divers cities and towns within the states of Illinois and Wisconsin, and that none of the companies so owned, controlled, and operated had filed with the commission copies of their contracts, agreements, and common arrangements with the other companies, nor their tariffs nor schedules of rates, fares, and charges, as required by the act of congress.

The commission, of its own motion, decided to investigate the matters set forth in said informal complaint by inquiring into the business of all of said railroad companies and the management thereof with reference as well to the alleged making of illegal, unjust, and unreasonable rates as to the alleged unjust and illegal discrimination in favor of the Illinois Steel Company, and the failure, as above stated,

to file with the commission the above contracts, agreements, and tariffs.

An order was thereupon made by the commission, which recited the facts of the informal complaint made to it, and required each of the above-mentioned companies to make and file in its office in Washington a full, complete, perfect, and specific, verified answer, setting forth all the facts in regard to the matters complained of, and responding to the following questions:

"(1) Does any contract, agreement, or arrangement in writing or otherwise exist between the companies above alleged to be under the control [of] and operated by the said Illinois Steel Company and any of the other companies with reference to interstate traffic? If so, state the contract, agreement, or arrangement.

"(2) Or [are] any tariffs of rates and charges for the transportation of interstate property in effect between said companies above alleged to be under the control of and operated by the Illinois Steel Company and said other railroad companies? If so, what are they, and what are the divisions thereof between the several carriers?

"(3) Have the companies above alleged to be under the control of and operated by the Illinois Steel Company received interstate traffic from any of the other carriers above mentioned during the six months last past, or have they delivered any such traffic to such other carriers during that time, for any person, firm, or company other than the Illinois Steel Company, and, if so, to what amount?"

The order further required all of the companies named to appear before the commission at a named time and place in Chicago, when that body would proceed to make inquiry into and investigate the management of the said business by the carriers so ordered to appear.

Each of the companies which, according to the allegations of the petition, the Illinois Steel Company had caused to be incorporated, filed its answer with the commission, and averred that it had in all respects complied with the obligations imposed upon it by the laws of the state and of the United States; that it was not engaged in interstate commerce within six months preceding the filing of the complaint against them; and it answered "No" to each of the above specific questions. * * *

The commission, notwithstanding these denials, conceived it to be their duty to proceed with the investigation by the examination of witnesses and the books and papers of the corporations involved, and especially to ascertain whether the Illinois Steel Company was the owner in fact of the railroads which it was alleged to have caused to be incorporated, and whether such incorporations were for the purpose of giving to that company an undue and illegal preference in the transportation of its property and freight.

Among the witnesses subpœnaed to testify before the commission was William G. Brimson, the president and manager of the five roads

so incorporated in Illinois. Being asked what constituted the principal traffic of the roads, he said: "The business of these roads, except as indicated in the answers, is that of switching,—switching business. We do a switching and terminal business, in that we are open to any business, for anybody's property, or persons who may locate at such place where we can go to them. Mainly our business is with the Illinois Steel Company. This is the great proportion of our business." In reply to the question whether his company engaged in transportation business other than as stated by him, he said that they did not, "except the Calumet & Blue Island, as stated in our reply. On that we do engage in other business to a certain extent." Having stated that his companies did not engage in the transportation business for everybody and anybody having occasion to employ them, and that their business was limited to the above companies, with which they had traffic arrangements, he was asked whether the companies of which he was president and manager were owned by the Illinois Steel Company. The witness, under the advice of counsel, refused to answer this question. * * *

On the succeeding day the commission issued a subpœna duces tecum, directed to J. S. Keefe, secretary and auditor of the five railroads in question, commanding him to appear before that body, and bring with him the stock books of those companies. A like subpœna was issued to William R. Sterling, as first vice president of the steel company, commanding him to appear before the commission and produce the stock books of that company. Keefe and Sterling appeared in answer to the subpœnas, but refused to produce the books, or either of them, so ordered to be produced.

The commission thereupon, on the 15th day of July, 1892, presented to and filed in the court below its petition, embodying the above facts, and prayed that an order be made requiring and commanding Brimson, Keefe, and Sterling to appear before that body and answer the several questions propounded by them, and which they had respectively refused to answer, and requiring Keefe and Sterling to appear and produce before the commission the stock books above referred to as in their possession.

The answers of Brimson, Keefe, and Sterling in the present proceeding, besides insisting that the questions propounded to them, respectively, were immaterial and irrelevant, were based mainly upon the ground that so much of the interstate commerce act as empowered the commission to require the attendance and testimony of witnesses and the production of books, papers, and documents, and authorizes the circuit court of the United States to order common carriers or persons to appear before the commission and produce books and papers and give evidence, and to punish by process for contempt any failure to obey such order of the court, was repugnant to the constitution of the United States.

Is the twelfth section of the act unconstitutional and void, so far as it authorizes or requires the circuit courts of the United States to use their process in aid of inquiries before the commission? The court recognizes the importance of this question, and has bestowed upon it the most careful consideration.

As the constitution extends the judicial power of the United States to all cases in law and equity arising under that instrument or under the laws of the United States, as well as to all controversies to which the United States shall be a party (article 3, § 2), and as the circuit courts of the United States are capable, under the statutes defining and regulating their jurisdiction, of exerting such power in cases or controversies of that character, within the limits prescribed by congress (25 Stat. 434, c. 866), the fundamental inquiry on this appeal is whether the present proceeding is a "case" or "controversy," within the meaning of the constitution. The circuit court, as we have seen, regarded the petition of the interstate commerce commission as nothing more than an application by an administrative body to a judicial tribunal for the exercise of its functions in aid of the execution of duties not of a judicial nature, and accordingly adjudged that this proceeding did not constitute a case or controversy to which the judicial power of the United States could be extended.

At the same time the learned court said: "Undoubtedly, congress may confer upon a nonjudicial body authority to obtain information necessary for legitimate governmental purposes, and make refusal to appear and testify before it touching matters pertinent to any authorized inquiry an offense punishable by the courts, subject, however, to the privilege of witnesses to make no disclosures which might tend to criminate them or subject them to penalties or forfeitures. A prosecution or an action for violation of such a statute would clearly be an original suit or controversy between parties, within the meaning of the constitution, and not a mere application, like the present one, for the exercise of the judicial power in aid of a nonjudicial body." In re Interstate Commerce Commission, 53 Fed. 476, 480.

In other words, if the interstate commerce act made the refusal of a witness duly summoned to appear and testify before the commission, in respect to a matter rightfully committed by congress to that body for examination, an offense against the United States, punishable by fine or imprisonment, or both, a criminal prosecution or an information for the violation of such a statute would be a case or controversy to which the judicial power of the United States extended; while a direct civil proceeding, expressly authorized by an act of congress, in the name of the commission, and under the direction of the attorney general of the United States, against the witness so refusing to testify, to compel him to give evidence before the commission touching the same matter, would not be a case or controversy of which cognizance could be taken by any court established by congress to receive the judicial power of the United States.

This interpretation of the constitution would restrict the employment of means to carry into effect powers granted to congress within much narrower limits than, in our judgment, are warranted by that instrument. * * *

An adjudication that congress could not establish an administrative body with authority to investigate the subject of interstate commerce, and with power to call witnesses before it, and to require the production of books, documents, and papers relating to that subject, would go far towards defeating the object for which the people of the United States placed commerce among the states under national control. All must recognize the fact that the full information necessary as a basis of intelligent legislation by congress from time to time upon the subject of interstate commerce cannot be obtained, nor can the rules established for the regulation of such commerce be efficiently enforced, otherwise than through the instrumentality of an administrative body, representing the whole country, always watchful of the general interests, and charged with the duty, not only of obtaining the required information, but of compelling, by all lawful methods, obedience to such rules.

It is to be observed that, independently of any question concerning the nature of the matter under investigation by the commission,—however legitimate or however vital to the public interest the inquiry being conducted by that body,—the judgment below rests upon the broad ground that no direct proceeding to compel the attendance of a witness before the commission, or to require him to answer questions put to him, or to compel the production of books, documents, or papers in his possession relating to the subject under examination, can be deemed a case or controversy of which, under the constitution, a court of the United States may take cognizance, even if such proceeding be in form judicial; and the theory upon which the judgment proceeded is applicable alike to corporations and individuals, although, by the established doctrine of the courts, a railroad corporation may, under legislative sanction and upon making compensation, appropriate private property for the purposes of its right of way, because, and only because, its road is a public highway, established primarily for the convenience of the people and to subserve public objects, and therefore subject to governmental control. Cherokee Nation v. Southern Kan. R. Co., 135 U.S. 641, 657, 10 S.Ct. 965.

What is a case or controversy to which, under the constitution, the judicial power of the United States extends? Referring to the clause of that instrument which extends the judicial power of the United States to all cases in law and equity arising under the constitution, the laws of the United States, and treaties made or that shall be made under their authority, this court, speaking by Chief Justice Marshall, has said: "This clause enables the judicial department to receive jurisdiction to the full extent of the constitution, laws, and treaties of the United States when any question respecting them shall assume such a form

that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the constitution declares that the judicial power shall extend to all cases arising under the constitution, laws, and treaties of the United States." Osborn v. Bank, 9 Wheat. 738, 819. And in Den ex dem. Murray v. Improvement Co., 18 How. 272, 284, Mr. Justice Curtis, after observing that congress cannot withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity or admiralty, nor, on the other hand, bring under judicial power a matter which, from its nature, is not a subject for judicial determination, said: "At the same time there are matters involving public rights which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." So, in Smith v. Adams, 130 U.S. 173, 9 S.Ct. 566, Mr. Justice Field, speaking for the court, said that the terms "cases" and "controversies," in the constitution, embraced "the claims or contentions of litigants brought before the courts for adjudication by regular proceedings established for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs."

Testing the present proceeding by these principles, we are of opinion that it is one that can properly be brought under judicial cognizance.

We have before us an act of congress authorizing the interstate commerce commission to summon witnesses, and to require the production of books, papers, tariffs, contracts, agreements, and documents relating to the matter under investigation. The constitutionality of this provision—assuming it to be applicable to a matter that may be legally intrusted to an administrative body for investigation—is, we repeat, not disputed, and is beyond dispute. Upon every one, therefore, who owes allegiance to the United States, or who is within its jurisdiction, enjoying the protection that its government affords, rests an obligation to respect the national will as thus expressed, in conformity with the constitution. As every citizen is bound to obey the law and to yield obedience to the constituted authorities acting within the law, this power conferred upon the commission imposes upon any one summoned by that body to appear and to testify the duty of appearing and testifying, and upon any one required to produce such books, papers, tariffs, contracts, agreements, and documents the duty of producing them, if the testimony sought, and the books, papers, etc., called for, relate to the matter under investigation, if such matter is one which the commission is legally entitled to investigate, and if the witness is not excused, on some personal ground, from doing what the commission requires at his hands. These propositions seem to be so clear and indisputable that any attempt to sustain them by argument

would be of no value in the discussion. Whether the commission is entitled to the evidence it seeks, and whether the refusal of the witness to testify or to produce books, papers, etc., in his possession, is or is not in violation of his duty or in derogation of the rights of the United States, seeking to execute a power expressly granted to congress, are the distinct issues between that body and the witness. They are issues between the United States and those who dispute the validity of an act of congress and seek to obstruct its enforcement; and those issues, made in the form prescribed by the act of congress, are so presented that the judicial power is capable of acting on them.

The question so presented is substantially, if not precisely, that which would arise if the witness was proceeded against by an indictment under an act of congress declaring it to be an offense against the United States for any one to refuse to testify before the commission after being duly summoned, or to produce books, papers, etc., in his possession upon notice to do so, or imposing penalties for such refusal to testify or to produce the required books, papers, and documents. A prosecution for such offense, or a proceeding by information to recover such penalties, would have as its real and ultimate object to compel obedience to the rightful orders of the commission, while it was exerting the powers given to it by congress; and such is the sole object of the present direct proceeding. The United States asserts its right, under the constitution and laws, to have these appellees answer the questions propounded to them by the commission, and to produce specified books, papers, etc., in their possession or under their control. It insists that the evidence called for is material in the matter under investigation; that the subject of investigation is within legislative cognizance, and may be inquired of by any tribunal constituted by congress for that purpose. The appellees deny that any such rights exist in the general government, or that they are under a legal duty, even if such evidence be important or vital in the enforcement of the interstate commerce act, to do what is required of them by the commission. Thus has arisen a dispute involving rights or claims asserted by the respective parties to it; and the power to determine it directly, and, as between the parties, finally, must reside somewhere. It cannot be that the general government, with all the power conferred upon it by the people of the United States, is helpless in such an emergency, and is unable to provide some method, judicial in form and direct in its operation, for the prompt and conclusive determination of this dispute.

As the circuit court is competent, under the law by which it was ordained and established, to take jurisdiction of the parties, and as a case arises under the constitution or laws of the United States when its decision depends upon either, why is not this proceeding, judicial in form and instituted for the determination of distinct issues between the parties, as defined by formal pleadings, a case or controversy for judicial cognizance, within the meaning of the constitution? It must be so re-

garded, unless, as is contended, congress is without power to provide any method for enforcing the statute or compelling obedience to the lawful orders of the commission, except through criminal prosecutions or by civil actions to recover penalties imposed for noncompliance with such orders. But no limitation of that kind upon the power of congress to regulate commerce among the states is justified either by the letter or the spirit of the constitution. * * *

For the reasons stated the judgment is reversed, and the cause is remanded for further proceedings in conformity with this opinion. Reversed.

Mr. Justice FIELD was not present at the argument, and took no part in the consideration or decision of this case. Mr. Chief Justice FULLER, Mr. Justice BREWER, and Mr. Justice JACKSON dissented.

HARRIMAN v. INTERSTATE COMMERCE COMMISSION

Supreme Court of the United States.
211 U.S. 407, 29 S.Ct. 115, 53 L.Ed. 253 (1908).

Mr. Justice HOLMES delivered the opinion of the court.

These are appeals; on the one side, from an order of the circuit court directing the appellants, Harriman and Kahn, to answer certain questions put during an investigation by the Interstate Commerce Commission, and, on the other, from a denial of a like order as to two other questions, answers to which the Commission had required.

In November, 1906, the Interstate Commerce Commission, of its own motion, and not upon complaint, made an order reciting the authority and requirements of the act to regulate commerce (Feb. 4, 1887, chap. 104, 24 Stat. at L. 379, U.S.Comp.Stat. 1901, p. 3154), and proceeding as follows: "And whereas it appears to the Commission that consolidations and combinations of carriers subject to the act, and the relations now and heretofore existing between such carriers, including community of interests therein, and the practices and methods of such carriers affecting the movement of interstate commerce, the rates received and facilities furnished therefor, should be made the subject of investigation by the Commission to the end that it may be fully informed in respect thereof, and to the further end that it may be ascertained whether such consolidations, combinations, relations, community of interests, practices, or methods result in violations of said act or tend to defeat its purposes,—it is ordered that a proceeding of investigation and inquiry into and concerning the matters above stated be, and the same is hereby, instituted." A time and place was set for the first hearing, and the inquiry thus begun was continued for about two months, resulting in the report of July, 1907, entitled "Consolidations and Combinations of Carriers," etc. 12 Inters.Com.Rep. 277.

In the course of the inquiry the appellant Harriman was called by the Commission and testified as a witness. At the time of the transactions referred to he was a director and also the president and the chairman of the executive committee of the Union Pacific Railroad Company. The relations between the Union Pacific and other connecting roads, parallel or not, were under investigation and are set forth in the Commission's report. It is enough to say that the Union Pacific Railroad Company is incorporated under the laws of Utah, and, as has been asserted and assumed, has power under the state laws to purchase the stock of other railroads,—a power that it has exercised on a large scale. Among other things, it bought 103,401 shares of the preferred stock of the Chicago & Alton Railway Company. These shares had been deposited with bankers, Kuhn, Loeb, & Company, by their owners, under an agreement authorizing the bankers to sell them to any purchaser at such price and upon such terms as should be approved by Messrs. Stewart, Mitchell, and the witness, Harriman. He was asked whether he owned any of the stock so deposited, and how much, if any. These questions, under the advice of counsel, he declined to answer.

Next he was asked with regard to stock of the Atchison, Topeka, & Santa Fé Railroad Company, bought by the Oregon Short Line Railroad Company, another Utah corporation, the stock of which was owned by the Union Pacific, whether it was a part of the stock that had been acquired previously by him and two others, and whether it or any part of it was owned by any of the three. After answering the first question, "I think not," he was stopped by his counsel and refused to answer further. Again, it appearing that the Union Pacific, in July, 1906, purchased 90,000 shares of Illinois Central Railroad stock from Messrs. Rogers, Stillman, and the witness, he was asked whether that stock was acquired by a pool of the three, whether it was acquired with a view of selling it to the Union Pacific, and whether it or any part of it was bought at a much lower price than $175 a share with the intent just mentioned. These questions the witness declined to answer. It appearing further that Kuhn, Loeb, & Company, who were the fiscal agents of the Union Pacific, had sold to it 105,000 shares of the Illinois Central stock on the same date, he was asked if he had any interest in these shares, and whether they were acquired by a pool for the purpose of selling them to the Union Pacific. These questions the witness declined to answer. Again, it appearing that the Union Pacific had purchased stock of the St. Joseph & Grand Island Railroad Company from the witness since the last-mentioned date, he was asked when he acquired the stock and what he paid for it, and again declined to answer. Finally, after it had been shown that since July, 1906, the Union Pacific had bought a large amount of New York Central Railroad stock, the witness was asked whether any of the directors of the Union Pacific were interested, directly or indirectly, in this stock at the time when it was sold. An answer to this question also was declined. All these refusals to answer were persisted in after

a direction to answer from the Commission. The circuit court ordered them to be answered and Harriman appealed.

The petition of the Interstate Commerce Commission set forth two other questions which the witness refused to answer, and on which it asked the order of the circuit court. One was a general one, whether he was interested in any stocks bought between the 19th of July and the 17th of August that appreciated, and another, more specific, was whether he or any director bought any Union and [or] Southern Pacific in anticipation of a certain dividend, the suggestion being that announcement of the dividend was delayed for the directors to profit by their secret knowledge and that they did so. With regard to these the petition was denied, and the Interstate Commerce Commission appealed.

The appellant Kahn was a member of the firm of Kuhn, Loeb, & Company. He also was asked whether any of the directors of the Union Pacific were the real owners of any of the shares of the Chicago & Alton Railroad deposited, as has been stated, with Kuhn, Loeb, & Company, and sold to the Union Pacific. He was asked further in various forms whether the before-mentioned 105,000 shares of Illinois Central stock, or any part of them, really belonged to or were held for any of the directors of the Union Pacific. And again, whether, at the same time that he bought these shares, he bought for Messrs. Harriman, Rogers, and Stillman the stocks they sold at the same time that he sold his. Finally he was asked whether the 105,000 shares, and the 90,000 shares turned in by Stillman Rogers, and Harriman, were all bought through his instrumentality for a pool of which they and he were members, that was operating in Illinois Central stocks for some months before July, 1906. All these questions he was directed by the Commission to answer, but refused. The circuit court ordered him to answer, and he appealed.

Many broad questions were discussed in the argument before us, but we shall confine ourselves to comparatively narrow ground. The contention of the Commission is that it may make any investigation that it deems proper, not merely to discover any facts tending to defeat the purposes of the act of February 4, 1887, but to aid it in recommending any additional legislation relating to the regulation of commerce that it may conceive to be within the power of Congress to enact; and that in such an investigation it has power, with the aid of the courts, to require any witness to answer any question that may have a bearing upon any part of what it has in mind. The contention necessarily takes this extreme form, because this was a general inquiry started by the Commission of its own motion, not an investigation upon complaint, or of some specific matter that might be made the object of a complaint. To answer this claim it will be sufficient to construe the act creating the Commission, upon which its powers depend.

Before taking up the words of the statute the enormous scope of the power asserted for the Commission should be emphasized and dwelt

upon. The legislation that the Commission may recommend embraces, according to the arguments before us, anything and everything that may be conceived to be within the power of Congress to regulate, if it relates to commerce with foreign nations or among the several states. And the result of the arguments is that whatever might influence the mind of the Commission in its recommendations is a subject upon which it may summon witnesses before it and require them to disclose any facts, no matter how private, no matter what their tendency to disgrace the person whose attendance has been compelled. If we qualify the statement and say only legitimately influence the mind of the Commission in the opinion of the court called in aid, still it will be seen that the power, if it exists, is unparalleled in its vague extent. Its territorial sweep also should be noticed. By § 12 of the act of 1887, the Commission has authority to require the attendance of witnesses "from any place in the United States, at any designated place of hearing." No such unlimited command over the liberty of all citizens ever was given, so far as we know, in constitutional times, to any commission or court.

How far Congress could legislate on the subject-matter of the questions put to the witnesses was one of the subjects of discussion, but we pass it by. Whether Congress itself has the unlimited power claimed by the Commission, we also leave on one side. It was intimated that there was a limit in Interstate Commerce Commission v. Brimson, 154 U.S. 447, 478, 479, 38 L.Ed. 1047, 1057, 1058, 4 Inters.Com.Rep. 545, 14 S.Ct. 1125. Whether it could delegate the power, if it possesses it, we also leave untouched, beyond remarking that so unqualified a delegation would present the constitutional difficulty in most acute form. It is enough for us to say that we find no attempt to make such a delegation anywhere in the act.

Whatever may be the power of Congress, it did not attempt, in the act of February 4, 1887, chap. 104, 24 Stat. at L. 379, U.S.Comp.Stat. 1901, p. 3154, to do more than to regulate the interstate business of common carriers, and the primary purpose for which the Commission was established was to enforce the regulations which Congress had imposed. The earlier sections of the statute require that charges shall be reasonable, prohibit discrimination and pooling of freights, require the publication of rates, and so forth, in well-known provisions. Then, by § 11, the Interstate Commerce Commission is created, and by § 12, as amended by later acts, the Commission has "authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and the Commission is hereby authorized and required to execute and enforce the provisions of this act." District attorneys to whom the Commission may apply

are to institute and prosecute all necessary proceedings for the enforcement of the act and for the punishment of violations of it; and "for the purposes of this act the Commission shall have power to require, by subpœna, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation." [26 Stat. at L. 743, chap. 128, U.S.Comp.Stat.1901, p. 3162.] Then comes the provision to which we already have called attention, by which a witness could be summoned from Maine to Texas, and then follow clauses for enforcing obedience to the subpœna by an order of court and for taking depositions, which do not need statement.

The Commission, it will be seen, is given power to require the testimony of witnesses "for the purposes of this act." The argument for the Commission is that the purposes of the act embrace all the duties that the act imposes and the powers that it gives the Commission; that one of the purposes is that the Commission shall keep itself informed as to the manner and method in which the business of the carriers is conducted, as required by § 12; that another is that it shall recommend additional legislation under § 21, to which we shall refer again, and that for either of these general objects it may call on the courts to require anyone whom it may point out to attend and testify if he would avoid the penalties for contempt.

We are of opinion, on the contrary, that the purposes of the act for which the Commission may exact evidence embrace only complaints for violation of the act, and investigations by the Commission upon matters that might have been made the object of the complaint. As we already have implied, the main purpose of the act was to regulate the interstate business of carriers, and the secondary purpose, that for which the Commission was established, was to enforce the regulations enacted. These, in our opinion, are the purposes referred to; in other words, the power to require testimony is limited, as it usually is in English-speaking countries, at least, to the only cases where the sacrifice of privacy is necessary,—those where the investigations concern a specific breach of the law.

That this is the true view appears, we think, sufficiently from the original form of § 14. That section made it the duty of the Commission, "whenever an investigation shall be made," to make a report in writing, which was to "include the findings of fact upon which the conclusions of the Commission are based, together with its recommendation as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured; and such findings so made shall thereafter, in all judicial proceedings, be deemed prima facie evidence as to each and every fact found." As this applied, in terms, to all investigations, it is plain that at that time there was no thought of allowing witnesses to be summoned except in connection with a complaint for contraventions of the act, such as the Commission was directed to "investigate" by § 13, or in connection

with an inquiry instituted by the Commission, authorized by the same section, "in the same manner and to the same effect as though complaint had been made." Obviously such an inquiry is limited to matters that might have been the object of a complaint.

The plain limit to the authority to institute an inquiry given by § 13, and the duty to make a report with findings of facts, etc., in the section next following, with hardly a word between, hang together, and show the purposes for which it was intended that witnesses should be summoned. They quite exclude the inference of broader power from the general words in § 12, as to inquiring into the management of the business of common carriers subject to the provisions of the act, the Commission keeping itself informed, etc. They equally exclude such an inference from § 21, the other section on which most reliance is placed. That, as it now stands, requires an annual report, containing "such information and *data* collected by the Commission as may be considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation relating thereto as the Commission may deem necessary." Act of March 2, 1889, chap. 382, § 8. 25 Stat. at L. 855, 862, U.S. Comp.Stat.1901, pp. 3158, 3170.

It is true that, in the latest amendment of § 14, findings of fact are required only in case damages are awarded. Act of June 29, 1906, chap. 3591, § 3, 34 Stat. at L. 584, 589, U.S.Comp.Stat.Supp.1907, pp. 892, 899. But there is no change sufficient to affect the meaning of the words in § 12, as already fixed. If, by virtue of § 21, the power exists to summon witnesses for the purpose of recommending legislation, we hardly see why, under the same section, it should not extend to summoning them for the still vaguer reason that their testimony might furnish *data* considered by the Commission of value in the determination of questions connected with the regulation of commerce. If we did not think, as we do, that the act clearly showed that the power to compel the attendance of witnesses was to be exercised only in connection with the quasi judicial duties of the Commission, we still should be unable to suppose that such an unprecedented grant was to be drawn from the counsels of perfection that have been quoted from §§ 12 and 21. We could not believe, on the strength of other than explicit and unmistakable words, that such autocratic power was given for any less specific object of inquiry than a breach of existing law, in which, and in which alone, as we have said, there is any need that personal matters should be revealed.

In §§ 15 and 16 are further provisions for the enforcement of the act, not otherwise material than as showing the main purpose that Congress had in mind. The only other section that is thought to sustain the argument for the Commission is § 20, amended by act of June 29, 1906, chap. 3591, § 7, 34 Stat. at L. 584, 593, U.S.Comp.Stat.Supp. 1907, pp. 892, 906. This authorizes the Commission to require annual reports from all the carriers concerned, with details of what is to be

shown, to which the Commission may add in certain particulars, and further, "to require from such carriers specific answers to all questions upon which the Commission may need information." The Commission may require certain other reports, and is to have access to all accounts, records, and memoranda. The section now deals at length with this matter and how accounts shall be kept and the like. It seems to us plain that it is directed solely to accounts and returns, and is imposing a duty on the common carrier only from whom the returns come.

All that we are considering is the power, under the act to regulate commerce and its amendments, to extort evidence from a witness by compulsion. What reports or investigations the Commission may make without that aid, but with the help of such returns or special reports as it may require from the carrier, we need not decide. Upon the point before us we should infer from the later action of Congress with regard to its resolution of March 7, 1906 (34 Stat. at L. 823), directing the Commission to investigate and report as to railroad discrimination and monopolies in coal and oil, that it took the same view that we do. For it thought it advisable to amend that resolution on March 21 by adding a section giving the Commission the same power it then had to compel the attendance of witnesses in the investigation ordered. 34 Stat. at L. 824. The mention of the power then possessed obviously is intended simply to define the nature and extent of the power by reference to § 12 of the original act. The passage of the amendment indicates that without it the power would be wanting. The case is not affected by the provision of § 9 of the act of June 29, 1906, chap. 3591, 34 Stat. at L. 595, U.S.Comp.Stat.Supp.1907, p. 910, extending the former acts relating to the attendance of witnesses and the compelling of testimony to "all proceedings and hearings under this act." If we felt more hesitation than we do, we still should feel bound to construe the statute not merely so as to sustain its constitutionality, but so as to avoid a succession of constitutional doubts, so far as candor permits. Knights Templars' & M. Life Indemnity Co. v. Jarman, 187 U.S. 197, 205, 47 L.Ed. 139, 145, 23 S.Ct. 108.

Order in 315 and 316 reversed.

Order in 317 affirmed.

Petition denied.

Mr. Justice MOODY, not having been present at the argument, took no part in the decision.

Mr. Justice DAY, dissenting.

I am constrained to dissent from the opinion of the court in this case. It seems to me that too narrow a construction has been given to the act of Congress conferring power upon the Interstate Commerce Commission to conduct investigations into the affairs of corporations engaged in interstate commerce.

The court, in the prevailing opinion, has not placed its decision upon the want of power in Congress to legislate concerning the subject-matter of investigation in this case. The decision is based wholly upon the construction of the act of Congress; and, as I am unable to concur in the view taken in the opinion, I will state the grounds upon which my dissent rests. * * *

The plain reading of this section is that, for the purposes of the act, the Commission shall have power to require, by subpœna, the attendance and testimony of witnesses, and the production of books, papers, contracts, tariffs, agreements, and documents relating to any matter under investigation. Notwithstanding the broad language used by Congress, it is now held that the power of the Commission to require testimony embraces only subjects stated in complaints for the violation of the act, or investigations by the Commission upon matters which might have been the subject of complaint. I am unable to follow the reasoning which thus cuts down the expressed words of the act, which enables the Commission to require testimony for all purposes of the act. The complaints under the act may relate to unreasonable rates, to discriminating practices, to the management of the affairs of the carrier as involved in or connected with the conduct of interstate commerce, to the relations of interstate carriers with each other, and the like matters, directly affecting corporations and individuals engaged in interstate commerce. These things are within the purposes of the act, but no more so, in my judgment, than the declared purpose of the act to endow the Commission with investigating powers, having in view the ascertainment of the manner in which interstate commerce business is conducted and managed, with a view to intelligent action upon these important subjects. * * *

Mr. Justice HARLAN and Mr. Justice MCKENNA concur in this dissent.

INTERSTATE COMMERCE ACT, §§ 12, 20(1) (2) (5), 21

49 U.S.C. §§ 12, 20(1) (2) (5), 21.

Sec. 12. (1) The Commission shall have authority, in order to perform the duties and carry out the objects for which it was created, to inquire into and report on the management of the business of all common carriers subject to the provisions of this part, and to inquire into and report on the management of the business of persons controlling, controlled by, or under a common control with, such carriers, to the extent that the business of such persons is related to the management of the business of one or more such carriers, and the Commission shall keep itself informed as to the manner and method in which the same are conducted. The Commission may obtain from such carriers and persons such information as the Commission deems necessary to carry out the provisions of this part; and may transmit to Congress from

time to time such recommendations (including recommendations as to additional legislation) as the Commission may deem necessary. The Commission is hereby authorized and required to execute and enforce the provisions of this part; and, upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney-General of the United States all necessary proceedings for the enforcement of the provisions of this part and for the punishment of all violations thereof, and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; and for the purposes of this part the Commission shall have power to require, by subpœna, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

(2) Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the Commission, or any party to a proceeding before the Commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section.

(3) And any of the circuit courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any common carrier subject to the provisions of this part, or other person, issue an order requiring such common carrier or other person to appear before said Commission (and produce books and papers if so ordered) and give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. The claim that any such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such witness from testifying; but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding.

(4) The testimony of any witness may be taken, at the instance of a party, in any proceeding or investigation depending before the Commission, by deposition, at any time after a cause or proceeding is at issue on petition and answer. The Commission may also order testimony to be taken by deposition in any proceeding or investigation pending before it, at any stage of such proceeding or investigation. Such depositions may be taken before any judge of any court of the United States, or any commissioner of a circuit, or any clerk of a district or circuit court, or any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city, judge of a county court, or court of common pleas of any of the United States, or any notary public, not being of counsel or attorney to either of the parties,

nor interested in the event of the proceeding or investigation. Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition to the opposite party or his attorney of record, as either may be nearest, which notice shall state the name of the witness and the time and place of the taking of his deposition. Any person may be compelled to appear and depose, and to produce documentary evidence, in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the Commission as hereinbefore provided.

(5) Every person deposing as herein provided shall be cautioned and sworn (or affirm, if he so request) to testify the whole truth, and shall be carefully examined. His testimony shall be reduced to writing by the magistrate taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent.

(6) If a witness whose testimony may be desired to be taken by deposition be in a foreign country, the deposition may be taken before an officer or person designated by the Commission, or agreed upon by the parties by stipulation in writing to be filed with the Commission. All depositions must be promptly filed with the Commission.

(7) Witnesses whose depositions are taken pursuant to this part, and the magistrate or other officer taking the same, shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

Sec. 20. (1) The Commission is hereby authorized to require annual, periodical, or special reports from carriers (as defined in this section) and from lessors (as defined in this section), to prescribe the manner and form in which such reports shall be made, and to require from such carriers and lessors specific and full, true, and correct answers to all questions upon which the Commission may deem information to be necessary, classifying such carriers and lessors as it may deem proper for any of these purposes. Such annual reports shall give an account of the affairs of the carrier or lessor in such form and detail as may be prescribed by the Commission.

(2) Said annual reports shall contain all the required information for the period of twelve months ending on the 31st day of December in each year, unless the Commission shall specify a different date, and shall be made out under oath and filed with the Commission at its office in Washington within three months after the close of the year for which the report is made, unless additional time be granted in any case by the Commission. Such periodical or special reports as may be required by the Commission under paragraph (1) hereof, shall also be under oath whenever the Commission so requires.

(5) The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers and their lessors, including the accounts, records, and memoranda of

the movement of traffic, as well as of the receipts and expenditures of moneys, and it shall be unlawful for such carriers or lessors to keep any accounts, records, and memoranda contrary to any rules, regulations, or orders of the Commission with respect thereto. The Commission or any duly authorized special agent, accountant, or examiner thereof shall at all times have authority to inspect and copy any and all accounts, books, records, memoranda, correspondence, and other documents, of such carriers and lessors, and such accounts, books, records, memoranda, correspondence, and other documents, of any person controlling, controlled by, or under common control with any such carrier, as the Commission deems relevant to such person's relation to or transactions with such carrier. The Commission or its duly authorized special agents, accountants, or examiners shall at all times have access to all lands, buildings, or equipment of such carriers or lessors, and shall have authority under its order to inspect and examine any and all such lands, buildings, and equipment. Such carriers, lessors, and other persons shall submit their accounts, books, records, memoranda, correspondence, and other documents for the inspection and copying authorized by this paragraph, and such carriers and lessors shall submit their lands, buildings, and equipment to inspection and examination, to any duly authorized special agent, accountant, or examiner of the Commission, upon demand and the display of proper credentials.

* * *

Sec. 21. The Commission shall, on or before the 3d day of January of each year, make a report which shall be transmitted to Congress and copies of which shall be distributed as are the other reports transmitted to Congress. This report shall contain such information and data collected by the Commission as may be considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation relating thereto as the Commission may deem necessary; and the names and compensation of the persons employed by said Commission.

SMITH v. INTERSTATE COMMERCE COMMISSION

Supreme Court of the United States
245 U S 33, 38 S Ct 30, 62 L Ed 135 (1917).

Petition of the Interstate Commerce Commission to require the attendance before it of appellant, president of the Louisville & Nashville Railroad Company, an interstate carrier, to answer certain questions theretofore asked him in a proceeding then pending before the Commission.

The petition described the Commission as an administrative tribunal and recited the powers conferred upon it by sections 1, 15, 12, 13, 20 and 21 of the Act of Congress to regulate commerce, approved February 4, 1887, as subsequently amended (Comp.St.1916, §§ 8563, 8576,

8581, 8583, 8592, 8594). That by a resolution of the United States Senate of November 6, 1913, the Commission was directed to investigate, take proof and report to the Senate as soon as practicable upon certain practices and financial relations of the Louisville & Nashville Railroad, the Nashville, Chattanooga & St. Louis Railway and other carriers. The resolution was set out. Its twelfth paragraph is as follows:

"What amount, if any, the Louisville & Nashville Railroad, the Nashville, Chattanooga & St. Louis Railway, the Nashville & Decatur Railroad, and the Lewisburg & Northern Railroad, all or any of them, have subscribed, expended or contributed for the purpose of preventing other railroads from entering any of the territory served by any of these railroads, for maintaining political or legislative agents, for contributing to political campaigns, for creating sentiment in favor of any of the plans of any of said railroads."

The other paragraphs concern the relation of the railroads to one another, the control, if any, exercised by the Louisville & Nashville over the others, by stock ownership, leases or arrangements, and whether but for these the roads would be competitive and if through such means rates were fixed and maintained. The resolution is set out in full in United States v. Louisville & Nashville Railroad Co., 236 U.S. 318, 324, 35 S.Ct. 363, 59 L.Ed. 598.

That thereafter the Commission instituted a proceeding in pursuance of such resolution. * * *

At such hearings appellant appeared in response to a subpœna and certain questions were addressed to him.

He testified that there was no connection between the reckless dissipation of the funds of a railroad in political campaigns and the adjustment of reasonable rates, even if the contribution was of the sum of $500,000, or $20,000,000, as the adjustment of rates is governed by conditions entirely independent of the revenues of a railroad. In illustration he adduced the adjustment of rates of bankrupt roads operated by receivers of courts which he testified are handled in the same way and arrived at in the same manner as they are by solvent roads.

The following questions were then asked him by counsel for the Commission, omitting those not now relevant. We number them for convenience of reference:

1. "I will ask you, Mr. Smith, if you know of any funds of the Louisville & Nashville Railroad expended in Tennessee for political campaign purposes during the year 1915 and charged upon the books of that carrier to operating expenses."

2. "Can you tell us what funds of the Louisville & Nashville Railroad Company were expended in the state of Alabama during the years 1912 and 1913 for political campaign purposes and charged on the books of that carrier to operating expenses or to construction account?"

3. "Can you tell us of your own knowledge whether these expenditures of the funds of the Louisville & Nashville Railroad Company for political purposes were charged in the operating expense account or construction account of either the Louisville & Nashville Railroad Company or the Nashville, Chattanooga & St. Louis Railway? Can you tell us whether these expenditures were charged on the books of the Louisville & Nashville Railroad to legal expenses?" [f]

All of the questions the witness declined to answer upon the advice of counsel. * * *

That the proceeding is a consolidation of two proceedings, Nos. 6319 and 8488, that Luke Lea is the open and sole complainant in the latter and the instigator and real complainant in the other, which was instituted by the Commission without there being a nominal complainant, but pursuant to a resolution of the United States Senate introduced by Lea, then a member of the Senate and the complainant in No. 8488, which is confined to an alleged improper issue of free passes.

Certain activities of Lea are stated and certain resentments and motives of his are urged as having actuated him and a want of power upon the part of the Commission is repeated and the refusal to answer the questions hence asserted to be justified. * * *

The court required appellant to answer the questions, and from its order this appeal is prosecuted.

Mr. Justice McKENNA, after stating the case as above, delivered the opinion of the Court.

The fundamental contention of appellant is that the Interstate Commerce Commission has no power to ask the questions in controversy and in emphasis of this he asserts "the inquiry was confined exclusively to supposed political activities and efforts to suppress competition." And these, it is further asserted, "are not matters which the Commission 'is legally entitled to investigate.' " The contention is attempted to be supported by the insistence that the investigation was provoked and prosecuted solely in obedience to the Senate resolution and neither in exercise of the judgment of the Commission nor in pursuance of a complaint made to it. And the twelfth paragraph of the resolution is dwelt upon as directing and controlling the inquiry as to what amount, if any, the railroads "have subscribed, expended or contributed for the purpose of preventing other railroads from entering any of the territory served by any of these railroads, for maintaining political or legislative agents, for contributing to political campaigns, for creating sentiment in favor of any of the plans of any of said railroads."

If, however, we advert to the questions we observe that the matters dwelt on by appellant are incidents only, having the purpose, it may be, in one sense to ascertain the "amount, if any," subscribed or expend-

[f] There were six additional questions, of similar tenor.

ed, but not having the purpose in the sense of the questions, which is: whether the amount subscribed or expended was charged to operating or legal expenses. The latter purpose is more special than the other, and, we may say in passing, does not necessarily involve even a criticism of the other, involves only the display in the accounts of the carriers of the amount expended and its allocation. To this limitation the investigation is reduced, and the question is, being so reduced, Is it within the powers of the Commission?

The Interstate Commerce Act confers upon the Commission powers of investigation in very broad language and this court has refused by construction to limit it so far as the business of the carriers is concerned and their relation to the public.[1] And it would seem to be a necessary deduction from the cases that the investigating and supervising powers of the Commission extend to all of the activities of carriers and to all sums expended by them which could affect in any way their benefit or burden as agents of the public. If it be grasped thoroughly and kept in attention that they are public agents, we have at least the principle which should determine judgment in particular instances of regulation or investigation; and it is not far from true—it may be it is entirely true, as said by the Commission—that "there can be nothing private or confidential in the activities and expenditures of a carrier engaged in interstate commerce."

Turning to the specialties of the Interstate Commerce Act we find there that all charges and treatment of all passengers and property shall be just and reasonable, and there is a specific prohibition of preferences and discriminations in all the ways that they can be executed, with corresponding regulatory power in the Commission. And authority and means are given to enable it to perform its duty. By section 12 it is authorized to inquire into the management of the business of carriers and keep itself informed as to the manner and method in which the same is conducted, and has the right to obtain from the carriers full and complete information. It may (section 13) institute an inquiry of its own motion, and may (section 20) require detailed accounts of all the expenditures and revenues of carriers and a complete exhibit of their financial operations and prescribe the forms of accounts, records and memoranda to be kept. And it is required to report to Congress all data collected by it.

It would seem to be an idle work to point out the complete comprehensiveness of the language of these sections and we are not disposed to spend any time to argue that it necessarily includes the power to inquire into expenditures and their proper assignment in the accounts, and the questions under review, we have seen, go no further. They are incidental to an investigation as to the "manner and method" (section 12) in which the business of the carriers is conducted; they are in requisition of a detailed account of their expenditures and revenues

[1] [Footnote omitted.—Ed.]

and an exhibit of their financial operations (section 20), and the answers to them may be valuable as information to Congress (section 21).

A limitation, however, is deduced from section 13. It is said to be confined to cases where an inquiry is instituted "as to any matter or thing concerning which a complaint is authorized to be made, or concerning which any question may arise under any provisions" of the act "or relating to the enforcement of any of the provisions" of the act. In other words, that the inquiry is determined by the manner of procedure. The objection overlooks the practical and vigilant function of the Commission. To sustain it appellant seems to urge that there must be put into words by some complainant or by the Commission, if it move of itself, some definite charge of evil or abuse, and put into expression some definite remedy, and that an inquiry must not transcend either charge or remedy. To so transcend, appellant urges, would be an exercise of autocratic power and is condemned in Harriman v. Interstate Commerce Commission, 211 U.S. 407, 29 S.Ct. 115, 53 L.Ed. 253.

Appellant presses that case beyond its principle. And we may observe that section 13 has been amended and broadened since the decision of that case.[2] The inquiry in the present case is more immediate to the function of the Commission than the inquiry in that * * *

We find it difficult to treat counsel's argument as seriously as they urge it. The expenditures of the carriers essentially concern their business. Section 20 declares it and gives the Commission power to require a detail of them, and necessarily not only of their amount but purpose and how charged. And the Commission must have power to prevent evasion of its orders and detect in any formal compliance or in the assignment of expenses a "possible concealment of forbidden practices."

It may be said that our comments are not applicable to questions numbered 7 and 8, which relate to the expenditure of money in Alabama "in a campaign against rate reduction." That is, those questions are not directed to "political activities" strictly so called, nor to the suppression of competition. They are directed, however, to the use of funds in a campaign against state legislative action. But this, appel-

[2] Prior to the decision section 13 read as follows: "Said Commission shall in like manner investigate any complaint forwarded by the railroad commissioner or Railroad Commission of any state or territory, at the request of such commissioner or Commission, and may institute any inquiry on its own motion in the same manner and to the same effect as though complaint had been made."

After the decision the section was amended to read as follows: "* * * And the Interstate Commerce 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 a complaint is authorized to be made, to or before said 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." Comp.St.1916, § 8581.

lant asserts, is at the farthest an attempt to "influence legislation or to mold public opinion" and that there is nothing in the Interstate Commerce Act "which forbids it or gives to the Commission any power to investigate the subject." And it is besides urged, as it is urged against the other questions, that they do not relate to "the subject under investigation," which is strictly defined by the Senate resolution, to which, it is contended, the order of the Commission was responsive and subservient, and was to be and is confined to the efforts simply "of the railroad companies in political matters and in attempts to suppress competition." Indeed, the servility of the Commission to the Senate's resolution is the basic and insistent contention of appellant and taints, he further contends, all that the Commission did.

The contention ascribes too much dominance to the resolution and puts out of view or unduly subordinates the invocation of the powers of the Commission by the complaint of Lea and the interval of two years between it and the resolution, and puts out of view besides the independent and inherent powers of the Commission to which we have adverted.

Abstractly speaking, we are not disposed to say that a carrier may not attempt to mold or enlighten public opinion, but we are quite clear that its conduct and the expenditures of its funds are open to inquiry. If it may not rest inactive and suffer injustice, it may not on the other hand use its funds and its power in opposition to the policies of government. Beyond this generality it is not necessary to go. The questions in the case are not of broad extent. They are quite special, and we regard them, as the learned judge of the court below regarded them, as but incident to the amount of expenditures and to the manner of their charge upon the books of the companies. This, we repeat, is within the power of the Commission. The purpose of an investigation is the penetration of disguises or to form a definite estimate of any conduct of the carriers that may in any way affect their relation to the public. We cannot assume that an investigation will be instituted or conducted for any other purpose or in mere wanton meddling.

Order affirmed.[g]

[g] Cf. United States v. Louisville & Nashville R. R., 236 U.S. 318, 35 S.Ct. 363, 59 L.Ed. 598 (1915) (I.C.C. had authority to inspect accounts, records and memoranda under § 20 of the Interstate Commerce Act; no additional power derived from Senate Resolution, since this is an action of only one branch of the Congress.) See also Federal Trade Commission v. Baltimore Grain Co., 284 F. 886 (D.Md.1922), aff'd sub nomine F.T.C. v. Hammond, Snyder & Co., 267 U.S. 586, 45 S.Ct. 461, 69 L.Ed. 800 (1925) (memorandum opinion).

FEDERAL TRADE COMMISSION ACT, §§ 6, 9, 10

15 U.S.C. §§ 46, 49, 50.

Sec. 6. That the commission shall also have power—

(a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships.

(b) To require, by general or special orders, corporations engaged in commerce, excepting banks, and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission.

(c) Whenever a final decree has been entered against any defendant corporation in any suit brought by the United States to prevent and restrain any violation of the antitrust Acts, to make investigation, upon its own initiative, of the manner in which the decree has been or is being carried out, and upon the application of the Attorney General it shall be its duty to make such investigation. It shall transmit to the Attorney General a report embodying its findings and recommendations as a result of any such investigation, and the report shall be made public in the discretion of the commission.

(d) Upon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the antitrust Acts by any corporation.

(e) Upon the application of the Attorney General to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the antitrust Acts in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with law.

(f) To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the

publication of its reports and decisions in such form and manner as may be best adapted for public information and use.

* * *

(h) To investigate, from time to time, trade conditions in and with foreign countries where associations, combinations, or practices of manufacturers, merchants, or traders, or other conditions, may affect the foreign trade of the United States, and to report to Congress thereon, with such recommendations as it deems advisable.

Sec. 9. That for the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this Act or any order of the commission made in pursuance thereof.

The commission may order testimony to be taken by deposition in any proceeding or investigation pending under this Act at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the commission and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall then be subscribed by the deponent. Any person may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the commission as hereinbefore provided.

Witnesses summoned before the commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken, and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

No person shall be excused from attending and testifying or from producing documentary evidence before the commission or in obedience to the subpœna of the commission on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to criminate him or subject him to a penalty or forfeiture. But no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify, or produce evidence, documentary or otherwise, before the commission in obedience to a subpœna issued by it: *Provided,* That no natural person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

Sec. 10. That any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce documentary evidence, if in his power to do so, in obedience to the subpœna or lawful requirement of the commission, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $1,000 nor more than $5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment.

Any person who shall willfully make, or cause to be made, any false entry or statement of fact in any report required to be made under this Act, or who shall willfully make, or cause to be made, any false entry in any account, record, or memorandum kept by any corporation subject to this Act, or who shall willfully neglect or fail to make, or cause to be made, full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of such corporation, or who shall willfully remove out of the jurisdiction of the United States, or willfully mutilate, alter, or by any other means falsify any documentary evidence of such corporation, or who shall willfully refuse to submit to the commission or to any of its authorized agents, for the purpose of inspection and taking copies, any documentary evidence of such corporation in his possession or within his control, shall be deemed guilty of an offense against the United States, and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than $1,000 nor more than $5,000 or to imprisonment for a term of not more than three years, or to both such fine and imprisonment.

If any corporation required by this Act to file any annual or special report shall fail so to do within the time fixed by the commission for filing the same, and such failure shall continue for thirty days after notice of such default, the corporation shall forfeit to the United

States the sum of $100 for each and every day of the continuance of such failure, which forfeiture shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States brought in the district where the corporation has its principal office or in any district in which it shall do business. It shall be the duty of the various district attorneys, under the direction of the Attorney General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

FEDERAL TRADE COMMISSION v. AMERICAN TOBACCO COMPANY

Supreme Court of the United States.
264 U.S. 298, 44 S.Ct. 336, 68 L.Ed. 696, 32 A.L.R. 786 (1923).

Mr. Justice HOLMES delivered the opinion of the Court.

These are two petitions for writs of mandamus to the respective corporations respondent, manufacturers and sellers of tobacco, brought by the Federal Trade Commission under the Act of September 26, 1914, c. 311, § 9, 38 Stat. 717, 722 (Comp.St. § 8836i), and in alleged pursuance of a resolution of the Senate passed on August 9, 1921. The purpose of the petitions is to require production of records, contracts, memoranda and correspondence for inspection and making copies. They were denied by the District Court. 283 Fed. 999. The resolution directs the Commission to investigate the tobacco situation as to domestic and export trade with particular reference to market price to producers, etc. The act directs the Commission to prevent the use of unfair methods of competition in commerce and provides for a complaint by the Commission, a hearing and a report, with an order to desist if it deems the use of a prohibited method proved. The Commission and the party concerned are both given a resort to the Circuit Court of Appeals. Section 5 * * *

Upon application of the Attorney General the District Courts are given jurisdiction to issue writs of mandamus to require compliance with the act or any order of the commission made in pursuance thereof. The petitions are filed under this clause and the question is whether orders of the Commission to allow inspection and copies of the documents and correspondence referred to were authorized by the act.

The petitions allege that complaints have been filed with the Commission charging the respondents severally with unfair competition by regulating the prices at which their commodities should be resold, set forth the Senate resolution, and the resolutions of the Commission to conduct an investigation under the authority of sections 5 and 6(a), being Comp.St. §§ 8836e, 8836f, and in pursuance of the Senate resolution, and for the further purpose of gathering and compiling in-

formation concerning the business, conduct and practices, etc., of each of the respondent companies. There are the necessary formal allegations and a prayer that unless the accounts, books, records, documents, memoranda, contracts, papers and correspondence of the respondents are immediately submitted for inspection and examination and for the purpose of making copies thereof, a mandamus issue requiring in the case of the American Tobacco Company, the exhibition during business hours when the Commission's agent requests it, of all letters and telegrams received by the Company from, or sent by it to all of its jobber customers, between January 1, 1921 to December 31, 1921, inclusive. In the case of the P. Lorillard Company the same requirement is made and also all letters, telegrams or reports from or to its salesmen, or from or to all tobacco jobbers' or wholesale grocers' associations, all contracts or arrangements with such associations, and correspondence and agreements with a list of corporations named.

The Senate resolution may be laid on one side as it is not based on any alleged violation of the Anti-Trust acts, within the requirement of section 6(d) of the act. United States v. Louisville & Nashville R. R. Co., 236 U.S. 318, 329, 35 Sup.Ct. 363, 59 L.Ed. 598. The complaints, as to which the Commission refused definite information to the respondents, and one at least of which, we understand, has been dismissed, also may be disregarded for the moment, since the Commission claims an unlimited right of access to the respondents' papers with reference to the possible existence of practices in violation of section 5.

The mere facts of carrying on a commerce not confined within State lines and of being organized as a corporation do not make men's affairs public, as those of a railroad company now may be. Smith v. Interstate Commerce Commission, 245 U.S. 33, 43, 38 Sup.Ct. 30, 62 L.Ed. 135. Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire (Interstate Commerce Commission v. Brimson, 154 U.S. 447, 479, 14 Sup.Ct. 1125, 38 L.Ed. 1047), and to direct fishing expeditions into private papers on the possibility that they may disclose evidence of crime. We do not discuss the question whether it could do so if it tried, as nothing short of the most explicit language would induce us to attribute to Congress that intent. The interruption of business, the possible revelation of trade secrets, and the expense that compliance with the Commission's wholesale demand would cause are the least considerations. It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up. The unwillingness of this Court to sustain such a claim is shown in Harriman v. Interstate Commerce Commission, 211 U.S. 407, 29 Sup.Ct. 115, 53 L.Ed. 253, and as to correspondence, even in

the case of a common carrier, in United States v. Louisville & Nashville R. R. Co., 236 U.S. 318, 335, 35 Sup.Ct. 363, 59 L.Ed. 598. The question is a different one where the State granting the charter gives its Commission power to inspect.

The right of access given by the statute is to documentary evidence —not to all documents but to such documents as are evidence. The analogies of the law do not allow the party wanting evidence to call for all documents in order to see if they do not contain it. Some ground must be shown for supposing that the documents called for do contain it. Formerly in equity the ground must be found in admissions in the answer. Wigram, Discovery (2d Ed.) § 293. We assume that the rule to be applied here is more liberal but still a ground must be laid and the ground and the demand must be reasonable. Essgee Co. v. United States, 262 U.S. 151, 156, 157, 43 Sup.Ct. 514, 67 L.Ed. 917. A general subpœna in the form of these petitions would be bad. Some evidence of the materiality of the papers demanded must be produced. Hale v. Henkel, 201 U.S. 43, 77, 26 Sup.Ct. 370, 50 L.Ed. 652. In the state case relied on by the Government, the requirement was only to produce books and papers that were relevant to the inquiry. Consolidated Rendering Co. v. Vermont, 207 U.S. 541, 28 Sup.Ct. 178, 52 L.Ed. 327, 12 Ann.Cas. 658. The form of the subpœna was not the question in Wheeler v. United States, 226 U.S. 478, 488, 33 Sup.Ct. 158, 57 L.Ed. 309.

The demand was not only general but extended to the records and correspondence concerning business done wholly within the State. This is made a distinct ground of objection. We assume for present purposes that even some part of the presumably large mass of papers relating only to intrastate business may be so connected with charges of unfair competition in interstate matters as to be relevant, Stafford v. Wallace, 258 U.S. 495, 520, 521, 42 Sup Ct. 397, 66 L.Ed. 735, 23 A.L.R. 229, but that possibility does not warrant a demand for the whole. For all that appears the corporations would have been willing to produce such papers are they conceived to be relevant to the matter in hand. See Terminal Taxicab Co. v. District of Columbia, 241 U.S. 252, 256, 36 Sup.Ct. 583, 60 L.Ed. 984, Ann.Cas.1916D, 765. If their judgment upon that matter was not final, at least some evidence must be offered to show that it was wrong. No such evidence is shown.

We have considered this case on the general claim of authority put forward by the Commission. The argument for the Government attaches some force to the investigations and proceedings upon which the Commission had entered. The investigations and complaints seem to have been only on hearsay or suspicion—but even if they were induced by substantial evidence under oath the rudimentary principles of justice that we have laid down would apply. We cannot attribute to Congress an intent to defy the Fourth Amendment or even to come so near to doing so as to raise a serious question of constitutional law. United States v. Delaware & Hudson Co., 213 U.S. 366, 408, 29 Sup.

Ct. 527, 53 L.Ed. 836. United States v. Jin Fuey Moy, 241 U.S. 394, 401, 36 Sup.Ct. 658, 60 L.Ed. 1061, Ann.Cas.1917D, 854.

Judgments affirmed.[h]

SECURITIES AND EXCHANGE ACT OF 1934, §§ 21(a)(b)(c)(d), 17(a), 23(b)

15 U.S.C. § 78u(a) (b) (c) (d), 78q(a), 78w(b).

Sec. 21. (a) The Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated or is about to violate any provision of this title or any rule or regulation thereunder, and may require or permit any person to file with it a statement in writing, under oath or otherwise as the Commission shall determine, as to all the facts and circumstances concerning the matter to be investigated. The Commission is authorized, in its discretion, to publish information concerning any such violations, and to investigate any facts, conditions, practices, or matters which it may deem necessary or proper to aid in the enforcement of the provisions of this title, in the prescribing of rules and regulations thereunder, or in securing information to serve as a basis for recommending further legislation concerning the matters to which this title relates.

(b) For the purpose of any such investigation, or any other proceeding under this title, any member of the Commission or any officer designated by it is empowered to administer oaths and affirmations, subpœna witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the United States or any State at any designated place of hearing.

(c) In case of contumacy by, or refusal to obey a subpœna issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records. And such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by

[h] Cf. Federal Trade Commission v. Smith, 34 F.2d 323 (S.D.N.Y.1929); Federal Trade Commission v. Smith, 1 Fed. Supp. 247 (S.D.N.Y.1932) (investigation of Electric Bond and Share Company in course of Commission's broad investigation of public utility holding companies.)

such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found. Any person who shall, without just cause, fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, and other records, if in his power so to do, in obedience to the subpœna of the Commission, shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine of not more than $1,000 or to imprisonment for a term of not more than one year, or both.

(d) No person shall be excused from attending and testifying or from producing books, papers, contracts, agreements, and other records and documents before the Commission, or in obedience to the subpena of the Commission or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

Sec. 17. (a) Every national securities exchange, every member thereof, every broker or dealer who transacts a business in securities through the medium of any such member, *every registered securities association,* and every broker or dealer registered pursuant to section 15 of this title, shall make, keep, and preserve for such periods, such accounts, correspondence, memoranda, papers, books, and other records, and make such reports, as the Commission by its rules and regulations may prescribe as necessary or appropriate in the public interest or for the protection of investors. Such accounts, correspondence, memoranda, papers, books, and other records shall be subject at any time or from time to time to such reasonable periodic, special, or other examinations by examiners, or other representatives of the Commission as the Commission may deem necessary or appropriate in the public interest or for the protection of investors.

Sec. 23. * * *

(b) The Commission and the Federal Reserve Board, respectively, shall incude in their annual reports to Congress such information, data, and recommendation for further legislation as they may deem advisable with regard to matters within their respective jurisdictions under this title.

Chapter V

THE PROMULGATION OF THE ADMINISTRATIVE PROGRAM

PART I. RULES, REGULATIONS AND ORDERS OF GENERAL APPLICABILITY PRESCRIBING FUTURE CONDUCT

SECTION 1. INTRODUCTORY: TYPES OF STATUTORY GRANT OF THE RULE-MAKING POWER

A. General Authorizations

SECURITIES EXCHANGE ACT OF 1934, AS AMENDED, § 23(a)

15 U.S.C. § 78w(a).

Sec. 23. (a) The Commission and the Board of Governors of the Federal Reserve System shall each have power to make such rules and regulations as may be necessary for the execution of the functions vested in them by this title, and may for such purpose classify issuers, securities, exchanges, and other persons or matters within their respective jurisdictions. No provision of this title imposing any liability shall apply to any act done or omitted in good faith in conformity with any rule or regulation of the Commission or the Board of Governors of the Federal Reserve System, notwithstanding that such rule or regulation may, after such act or omission, be amended or rescinded or be determined by judicial or other authority to be invalid for any reason.[a]

FEDERAL TRADE COMMISSION ACT, AS AMENDED, § 6(g)

15 U S C. § 46(g).

Sec. 6. That the commission shall also have power. * * *

(g) From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this Act.

[a] See also § 19(a) of the Securities Act of 1933, as amended, 15 U.S.C. § 77s(a), *supra* at p. 158–9.

INTERNAL REVENUE CODE, § 3791

26 U.S.C. § 3791.

See at p. 160, *supra*.

B. Specific Authorizations

INTERSTATE COMMERCE ACT, AS AMENDED, §§ 1(14) (a), 20(3), 204(a) (1)

49 U.S.C.Supp. §§ 1(14) (a), 20(3), 304(a) (1).

Sec. 1. * * *

(14) (a) The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this part, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobservance of such rules, regulations, or practices.

Sec. 20. * * *

(3) The Commission may, in its discretion, for the purpose of enabling it the better to carry out the purposes of this part, prescribe a uniform system of accounts applicable to any class of carriers subject thereto, and a period of time within which such class shall have such uniform system of accounts, and the manner in which such accounts shall be kept.

Sec. 204. (a) It shall be the duty of the Commission—

(1) To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation or baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

SECURITIES EXCHANGE ACT OF 1934, AS AMENDED, §§ 9(a) (6), 10(a), 15(c) (2)

15 U.S.C. §§ 78i(a) (6), 78j(a), 78o(c) (2).

Sec. 9. (a) It shall be unlawful for any person, directly or indirectly, by the use of the mails or any means or instrumentality of interstate commerce, or of any facility of any national securities exchange, or for any member of a national securities exchange—

* * *

(6) To effect either alone or with one or more other persons any series of transactions for the purchase and/or sale of any security registered on a national securities exchange for the purpose of pegging, fixing, or stabilizing the price of such security in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Sec. 10. It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

(a) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Sec. 15. (c) * * *

(2) No broker or dealer shall make use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange, in connection with which such broker or dealer engages in any fraudulent, deceptive, or manipulative act or practice, or makes any fictitious quotation. The Commission shall, for the purposes of this paragraph, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative and such quotations as are fictitious.

SECTION 2. SCOPE OF THE RULE-MAKING POWER: THE PROBLEM OF DELEGATION

HAMPTON & CO. v. UNITED STATES

Supreme Court of the United States.
276 U.S. 394, 48 S.Ct. 348, 72 L.Ed. 624 (1928).

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

J. W. Hampton, Jr., & Co. made an importation into New York of barium dioxide which the collector of customs assessed at the dutiable rate of six cents per pound. This was two cents per pound more than that fixed by statute. Paragraph 12, c. 356, 42 Stat. 858, 860 (19 US CA § 121, par. 12). The rate was raised by the collector by virtue of the proclamation of the President, 45 Treas.Dec. 669, T.D. 40216, issued under, and by authority of, section 315 of title 3 of the Tariff Act of September 21, 1922 (c. 356, 42 Stat. 858, 941 [19 USCA §§ 154–159]), which is the so-called flexible tariff provision. Protest was made and an appeal was taken under section 514, part 3, title 4 (chapter 356, 42 Stat. 969–970 [19 USCA § 398]). The case came on for hearing before the United States Customs Court, 49 Treas.Dec. 593, T.D. 41478. A majority held the act constitutional. Thereafter the case was appealed to the United States Court of Customs Appeals. On the 16th day of October, 1926, the Attorney General certified that in his opinion the case was of such importance as to render expedient its review by this Court. Thereafter the judgment of the United States Customs Court, was affirmed. 14 Ct.Cust.App. 350. On a petition to this Court for certiorari, filed May 10, 1927, the writ was granted June 6, 1927. 274 U.S. 735, 47 S.Ct. 769, 71 L.Ed. 1336. The pertinent parts of section 315 of title 3 of the Tariff Act (chapter 356, 42 Stat. 858, 941, U.S.C. tit. 19, §§ 154, 156 [19 USCA §§ 154, 156]) are as follows:

"Section 315(a). That in order to regulate the foreign commerce of the United States and to put into force and effect the policy of the Congress by this act intended, whenever the President, upon investigation of the differences in costs of production of articles wholly or in part the growth or product of the United States and of like or similar articles wholly or in part the growth or product of competing foreign countries, shall find it thereby shown that the duties fixed in this act do not equalize the said differences in costs of production in the United States and the principal competing country he shall, by such investigation, ascertain said differences and determine and proclaim the changes in classifications or increases or decreases in any rate of duty provided in this act shown by said ascertained differences in such costs of production necessary to equalize the same. Thirty days after the date of such proclamation or proclamations such changes in classification shall take effect, and such increased or decreased duties

shall be levied, collected, and paid on such articles when imported from any foreign country into the United States or into any of its possessions (except the Philippine Islands, the Virgin Islands, and the islands of Guam and Tutuila): Provided, That the total increase or decrease of such rates of duty shall not exceed 50 per centum of the rates specified in title 1 of this act, or in any amendatory act. * * *

"(c) That in ascertaining the differences in costs of production, under the provisions of subdivisions (a) and (b) of this section, the President, in so far as he finds it practicable, shall take into consideration (1) the differences in conditions in production, including wages, costs of material, and other items in costs of production of such or similar articles in the United States and in competing foreign countries; (2) the differences in the wholesale selling prices of domestic and foreign articles in the principal markets of the United States; (3) advantages granted to a foreign producer by a foreign government, or by a person, partnership, corporation, or association in a foreign country; and (4) any other advantages or disadvantages in competition.

"Investigations to assist the President in ascertaining differences in costs of production under this section shall be made by the United States Tariff Commission, and no proclamation shall be issued under this section until such investigation shall have been made. The commission shall give reasonable public notice of its hearings and shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard. The commission is authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary.

"The President, proceeding as hereinbefore provided for in proclaiming rates of duty, shall when he determines that it is shown that the differences in costs of production have changed or no longer exist which led to such proclamation, accordingly as so shown, modify or terminate the same. Nothing in this section shall be construed to authorize a transfer of an article from the dutiable list to the free list or from the free list to the dutiable list, nor a change in form of duty. Whenever it is provided in any paragraph of title 1 of this act, that the duty or duties shall not exceed a specified ad valorem rate upon the articles provided for in such paragraph, no rate determined under the provision of this section upon such articles shall exceed the maximum ad valorem rate so specified."

The President issued his proclamation May 19, 1924 (43 Stat. 1951). After reciting part of the foregoing from section 315, the proclamation continued as follows:

"Whereas, under and by virtue of said section of said act, the United States Tariff Commission has made an investigation to assist the President in ascertaining the differences in costs of production of and of all other facts and conditions enumerated in said section with respect to * * * barium dioxide, * * *

"Whereas in the course of said investigation a hearing was held, of which reasonable public notice was given and at which parties interested were given a reasonable opportunity to be present, to produce evidence, and to be heard;

"And whereas the President upon said investigation * * * has thereby found that the said principal competing country is Germany and that the duty fixed in said title and act does not equalize the differences in costs of production in the United States and in * * * Germany, and has ascertained and determined the increased rate of duty necessary to equalize the same.

"Now, therefore, I, Calvin Coolidge, President of the United States of America, do hereby determine and proclaim that the increase in rate of duty provided in said act shown by said ascertained differences in said costs of production necessary to equalize the same is as follows:

" 'An increase in said duty on barium dioxide (within the limit of total increase provided for in said act) from 4 cents per pound to 6 cents per pound. * * *

The issue here is as to the constitutionality of section 315, upon which depends the authority for the proclamation of the President and for two of the six cents per pound duty collected from the petitioner. The contention of the taxpayers is twofold—first, they argue that the section is invalid in that it is a delegation to the President of the legislative power, which by article 1, § 1 of the Constitution, is vested in Congress, the power being that declared in section 8 of article 1, that the Congress shall have power to lay and collect taxes, duties, imposts and excises. Their second objection is that, as section 315 was enacted with the avowed intent and for the purpose of protecting the industries of the United States, it is invalid because the Constitution gives power to lay such taxes only for revenue.

First. It seems clear what Congress intended by section 315. Its plan was to secure by law the imposition of customs duties on articles of imported merchandise which should equal the difference between the cost of producing in a foreign country the articles in question and laying them down for sale in the United States, and the cost of producing and selling like or similar articles in the United States, so that the duties not only secure revenue, but at the same time enable domestic producers to compete on terms of equality with foreign producers in the markets of the United States. It may be that it is difficult to fix with exactness this difference, but the difference which is sought in the statute is perfectly clear and perfectly intelligible. Because of the difficulty in practically determining what that difference is, Congress seems to have doubted that the information in its possession was such as to enable it to make the adjustment accurately, and also to have apprehended that with changing conditions the difference might vary in such a way that some readjustments would be necessary to give effect to the principle on which the statute proceeds. To avoid such difficulties, Congress adopted in section 315 the

method of describing with clearness what its policy and plan was and then authorizing a member of the executive branch to carry out its policy and plan and to find the changing difference from time to time and to make the adjustments necessary to conform the duties to the standard underlying that policy and plan. As it was a matter of great importance, it concluded to give by statute to the President, the chief of the executive branch, the function of determining the difference as it might vary. He was provided with a body of investigators who were to assist him in obtaining needed data and ascertaining the facts justifying readjustments. There was no specific provision by which action by the President might be invoked under this act, but it was presumed that the President would through this body of advisers keep himself advised of the necessity for investigation or change and then would proceed to pursue his duties under the act and reach such conclusion as he might find justified by the investigation and proclaim the same, if necessary.

The Tariff Commission does not itself fix duties, but, before the President reaches a conclusion on the subject of investigation, the Tariff Commission must make an investigation, and in doing so must give notice to all parties interested and an opportunity to adduce evidence and to be heard.

The well-known maxim "Delegata potestas non potest delegari," applicable to the law of agency in the general and common law, is well understood and has had wider application in the construction of our federal and state Constitutions than it has in private law. Our Federal Constitution and state Constitutions of this country divide the governmental power into three branches. The first is the legislative, the second is the executive, and the third is the judicial, and the rule is that in the actual administration of the government Congress or the Legislature should exercise the legislative power, the President or the state executive, the Governor, the executive power, and the courts or the judiciary the judicial power, and in carrying out that constitutional division into three branches it is a breach of the national fundamental law if Congress gives up its legislative power and transfers it to the President, or to the judicial branch, or if by law it attempts to invest itself or its members with either executive power or judicial power. This is not to say that the three branches are not coordinate parts of one government and that each in the field of its duties may not invoke the action of the two other branches in so far as the action invoked shall not be an assumption of the constitutional field of action of another branch. In determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental coordination.

The field of Congress involves all and many varieties of legislative action, and Congress has found it frequently necessary to use officers of the executive branch within defined limits, to secure the exact ef-

fect intended by its acts of legislation, by vesting discretion in such officers to make public regulations interpreting a statute and directing the details of its execution, even to the extent of providing for penalizing a breach of such regulations. United States v. Grimaud, 220 U.S. 506, 518, 31 S.Ct. 480, 55 L.Ed. 563; Union Bridge Co. v. United States, 204 U.S. 364, 27 S.Ct. 367, 51 L.Ed. 523; Buttfield v. Stranahan, 192 U.S. 470, 24 S.Ct. 349, 48 L.Ed. 525; In re Kollock, 165 U.S. 526, 17 S.Ct. 444, 41 L.Ed. 813; Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 29 S.Ct. 671, 53 L.Ed. 1013.

Congress may feel itself unable conveniently to determine exactly when its exercise of the legislative power should become effective, because dependent on future conditions, and it may leave the determination of such time to the decision of an executive, or, as often happens in matters of state legislation, it may be left to a popular vote of the residents of a district to be affected by the legislation. While in a sense one may say that such residents are exercising legislative power, it is not an exact statement, because the power has already been exercised legislatively by the body vested with that power under the Constitution, the condition of its legislation going into effect being made dependent by the Legislature on the expression of the voters of a certain district. As Judge Ranney of the Ohio Supreme Court in Cincinnati, Wilmington & Zanesville Railroad Co. v. Commissioners, 1 Ohio St. 77, 88, said in such a case:

"The true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made."

See, also, Moers v. Reading, 21 Pa. 188, 202; Locke's Appeal, 72 Pa. 491, 498, 13 Am.Rep. 716.

Again, one of the great functions conferred on Congress by the Federal Constitution is the regulation of interstate commerce and rates to be exacted by interstate carriers for the passenger and merchandise traffic. The rates to be fixed are myriad. If Congress were to be required to fix every rate, it would be impossible to exercise the power at all. Therefore, common sense requires that in the fixing of such rates Congress may provide a Commission, as it does, called the Interstate Commerce Commission, to fix those rates, after hearing evidence and argument concerning them from interested parties, all in accord with a general rule that Congress first lays down that rates shall be just and reasonable considering the service given and not discriminatory. As said by this Court in Interstate Commerce Commission v. Goodrich Transit Co., 224 U.S. 194, 214, 32 S.Ct. 436, 441 (56 L.Ed. 729):

"The Congress may not delegate its purely legislative power to a commission, but, having laid down the general rules of action under which a commission shall proceed, it may require of that commission

the application of such rules to particular situations and the investigation of facts, with a view to making orders in a particular matter within the rules laid down by the Congress."

The principle upon which such a power is upheld in state legislation as to fixing railway rates is admirably stated by Judge Mitchell in the case of State v. Chicago, Milwaukee & St. Paul Railway Co., 38 Minn. 281, 298 to 302, 37 N.W. 782. The learned judge says on page 301 (37 N.W. 788):

"If such a power is to be exercised at all, it can only be satisfactorily done by a board or commission, constantly in session, whose time is exclusively given to the subject, and who, after investigation of the facts, can fix rates with reference to the peculiar circumstances of each road, and each particular kind of business, and who can change or modify these rates to suit the ever-varying conditions of traffic. * * * Our Legislature has gone a step further than most others, and vested our commission with full power to determine what rates are equal and reasonable in each particular case. Whether this was wise or not is not for us to say; but in doing so we cannot see that they have transcended their constitutional authority. They have not delegated to the commission any authority or discretion as to what the law shall be—which would not be allowable—but have merely conferred upon it an authority and discretion, to be exercised in the execution of the law, and under and in pursuance of it, which is entirely permissible. The Legislature itself has passed upon the expediency of the law, and what it shall be. The commission is intrusted with no authority or discretion upon these questions."

See, also, the language of Justices Miller and Bradley in the same case in this Court. Chicago, M. & St. P. R. Co. v. Minnesota ex rel. Railroad & W. Commission, 134 U.S. 418, 459, 461, 464, 10 S.Ct. 462, 702, 33 L.Ed. 970.

It is conceded by counsel that Congress may use executive officers in the application and enforcement of a policy declared in law by Congress and authorize such officers in the application of the congressional declaration to enforce it by regulation equivalent to law. But it is said that this never has been permitted to be done where Congress has exercised the power to levy taxes and fix customs duties. The authorities make no such distinction. The same principle that permits Congress to exercise its rate-making power in interstate commerce by declaring the rule which shall prevail in the legislative fixing of rates, and enables it to remit to a rate-making body created in accordance with its provisions the fixing of such rates, justifies a similar provision for the fixing of customs duties on imported merchandise. If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power. If it is thought wise to vary the customs duties according to changing conditions of production at home

and abroad, it may authorize the Chief Executive to carry out this purpose, with the advisory assistance of a Tariff Commission appointed under congressional authority. * * *

The judgment of the Court of Customs Appeals is affirmed.

PANAMA REFINING COMPANY v. RYAN

Supreme Court of the United States.
293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446 (1935).

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

On July 11, 1933, the President, by Executive Order No. 6199 (15 USCA § 709 note), prohibited "the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any State law or valid regulation or order prescribed thereunder, by any board, commission officer, or other duly authorized agency of a State." This action was based on section 9(c) of title 1 of the National Industrial Recovery Act of June 16, 1933, 48 Stat. 195, 200, 15 U.S.C. tit. 1, § 709(c), 15 USCA § 709(c). That section provides:

"Sec. 9. * * *

"(c) The President is authorized to prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any State law or valid regulation or order prescribed thereunder, by any board, commission, officer, or other duly authorized agency of a State. Any violation of any order of the President issued under the provisions of this subsection shall be punishable by fine of not to exceed $1,000, or imprisonment for not to exceed six months, or both."

On July 14, 1933, the President, by Executive Order No. 6204 (15 U.S.C.A. § 709 note), authorized the Secretary of the Interior to exercise all the powers vested in the President "for the purpose of enforcing Section 9(c) of said act and said order" of July 11, 1933, "including full authority to designate and appoint such agents and to set up such boards and agencies as he may see fit, and to promulgate such rules and regulations as he may deem necessary." That order was made under section 10(a) of the National Industrial Recovery Act, 48 Stat. 200, 15 U.S.C. § 710(a), 15 USCA § 710(a), authorizing the President "to prescribe such rules and regulations as may be necessary to carry out the purposes" of title 1 of the National Industrial Recovery Act and providing that "any violation of any such rule or regulation shall be punishable by fine of not to exceed $500, or imprisonment for not to exceed six months, or both."

On July 15, 1933, the Secretary of the Interior issued regulations to carry out the President's orders of July 11 and 14, 1933. These

regulations were amended by orders of July 25, 1933, and August 21, 1933, prior to the commencement of these suits. Regulation IV provided, in substance, that every producer of petroleum should file a monthly statement under oath, beginning August 15, 1933, with the Division of Investigations of the Department of the Interior giving information with respect to the residence and post office address of the producer, the location of his producing properties and wells, the allowable production as prescribed by state authority, the amount of daily production, all deliveries of petroleum, and declaring that no part of the petroleum or products produced and shipped had been produced or withdrawn from storage in excess of the amount permitted by state authority. Regulation V required every purchaser, shipper (other than a producer), and refiner of petroleum, including processors, similarly to file a monthly statement under oath, giving information as to residence and post office address, the place and date of receipt, the parties from whom and the amount of petroleum received and the amount held in storage, the disposition of the petroleum, particulars as to deliveries, and declaring, to the best of the affiant's information and belief, that none of the petroleum so handled had been produced or withdrawn from storage in excess of that allowed by state authority. Regulation VII provided that all persons embraced within the terms of section 9(c) of the act, 15 USCA § 709(a) and the executive orders and regulations issued thereunder, should keep "available for inspection by the Division of Investigations of the Department of the Interior adequate books and records of all transactions involving the production and transportation of petroleum and the products thereof."

On August 19, 1933, the President, by Executive Order No. 6256, stating that his action was taken under title 1 of the National Industrial Recovery Act, approved a "Code of Fair Competition for the Petroleum Industry." By a further Executive Order of August 28, 1933, the President designated the Secretary of the Interior as Administrator, and the Department of the Interior as the federal agency, to exercise on behalf of the President all the powers vested in him under that act and code. Section 3(f) of title 1 of the National Industrial Recovery Act, 15 USCA § 703(f), provides that, when a code of fair competition has been approved or prescribed by the President under that title, "any violation of any provision thereof in any transaction in or affecting interstate or foreign commerce shall be a misdemeanor and upon conviction thereof an offender shall be fined not more than $500 for each offense, and each day such violation continues shall be deemed a separate offense."

This "Petroleum Code" (in its original form and as officially printed) provided in section 3 of article III relating to "Production" for estimates of "required production of crude oil to balance consumer demand for petroleum products" to be made at intervals by the federal agency. This "required production" was to be "equitably al-

located" among the several states. These estimates and allocations, when approved by the President, were to be deemed to be "the net reasonable market demand," and the allocations were to be recommended "as the operating schedules for the producing States and for the industry." By section 4 of article III, the subdivision, with respect to producing properties, of the production allocated to each state, was to be made within the state. The second paragraph of that section further provided:

"If any subdivision into quotas of production allocated to any State shall be made within a State any production by any person, as person is defined in Article I, Section 3 of this code in excess of any such quota assigned to him, shall be deemed an unfair trade practice and in violation of this code."

By an Executive Order of September 13, 1933, No. 6284-a, modifying certain provisions of the Petroleum Code, this second paragraph of section 4 of article III was eliminated. It was reinstated by Executive Order of September 25, 1934, No. 6855.

These suits were brought in October, 1933.

In No. 135, the Panama Refining Company, as owner of an oil refining plant in Texas, and its coplaintiff, a producer having oil and gas leases in Texas, sued to restrain the defendants, who were federal officials, from enforcing Regulations IV, V, and VII prescribed by the Secretary of the Interior under section 9(c) of the National Industrial Recovery Act. Plaintiffs attacked the validity of section 9 (c) as an unconstitutional delegation to the President of legislative power and as transcending the authority of the Congress under the commerce clause. The regulations, and the attempts to enforce them by coming upon the properties of the plaintiffs, gauging their tanks, digging up pipe lines, and otherwise, were also assailed under the Fourth and Fifth Amendments of the Constitution.

In No. 260, the Amazon Petroleum Corporation and its coplaintiffs, all being oil producers in Texas and owning separate properties, sued to enjoin the Railroad Commission of that state, its members and other state officers, and the other defendants who were federal officials, from enforcing the state and federal restrictions upon the production and disposition of oil. The bill alleged that the legislation of the state and the orders of its commission in curtailing production violated the Fourteenth Amendment of the Federal Constitution. As to the federal requirements, the bill not only attacked section 9(c) of the National Industrial Recovery Act, and the regulations of the Secretary of the Interior thereunder, upon substantially the same grounds as those set forth in the bill of the Panama Refining Company, but also challenged the validity of provisions of the Petroleum Code. While a number of these provisions were set out in the bill, the contest on the trial related to the limitation of production through the allocation of quotas pursuant to section 4 of article III of the code.

As the case involved the constitutional validity of orders of the state commission and an interlocutory injunction was sought, a court of three judges was convened under section 266 of the Judicial Code (28 U.S.C. § 380 [28 USCA § 380]). That court decided that the cause of action against the federal officials was not one within section 266, but was for the consideration of the District Judge alone. The parties agreed that the causes of action should be severed and that each cause should be submitted to the tribunal having jurisdiction of it. Hearing was had both on the applications for interlocutory injunction and upon the merits. The court of three judges, sustaining the state orders, denied injunction, and dismissed the bill as against the state authorities. Amazon Petroleum Corp. v. Railroad Comm. (D.C.) 5 F.Supp. 633, 634, 639.

In both cases against the federal officials, that of the Panama Refining Company and that of the Amazon Petroleum Corporation, heard by the District Judge, a permanent injunction was granted. 5 F.Supp. 639. In the case of the Amazon Petroleum Corporation, the court specifically enjoined the defendants from enforcing section 4 of article III of the Petroleum Code; both plaintiffs and defendants and the court being unaware of the amendment of September 13, 1933.

The Circuit Court of Appeals reversed the decrees against the federal officials and directed that the bills be dismissed. Ryan v. Amazon Petroleum Corp., 71 F.2d 1; Ryan v. Panama Refining Co., 71 F.2d 8. The cases come here on writs of certiorari granted on October 8, 1934, 293 U.S. 539, 55 S.Ct. 102, 79 L.Ed. 645; 293 U.S. 539, 55 S.Ct. 83, 79 L.Ed. 645.

First. The controversy with respect to the provision of section 4 of article III of the Petroleum Code was initiated and proceeded in the courts below upon a false assumption. That assumption was that this section still contained the paragraph (eliminated by the Executive Order of September 13, 1933) by which production in excess of assigned quotas was made an unfair practice and a violation of the code. Whatever the cause of the failure to give appropriate public notice of the change in the section, with the result that the persons affected, the prosecuting authorities, and the courts were alike ignorant of the alteration, the fact is that the attack in this respect was upon a provision which did not exist.[a] The government's announcement that, by reason of the elimination of this paragraph, the government "cannot, and therefore it does not intend to, prosecute petitioners or other producers of oil in Texas, criminally or otherwise, for exceeding, at any time prior to September 25, 1934, the quotas of production assigned to them under the laws of Texas," but that, if "petitioners, or other producers, produce in excess of such

[a] See the excerpts from the Federal Register Act, and footnote k thereunder, *infra*, at pp 278–81.

quotas after September 25, 1934, the government intends to prosecute them," cannot avail to import into the present case the amended provision of that date. The case is not one where a subsequent law is applicable to a pending suit and controls its disposition. When this suit was brought and when it was heard, there was no cause of action for the injunction sought with respect to the provision of section 4 of article III of the code; as to that, there was no basis for real controversy. See California v. San Pablo & T. R. Co., 149 U.S. 308, 314, 13 S.Ct. 876, 37 L.Ed. 747; United States v. Alaska Steamship Co., 253 U.S. 113, 116, 40 S.Ct. 448, 64 L.Ed. 808; Barker Painting Co. v. Local No. 734, Brotherhood of Painters, etc., 281 U.S. 462, 50 S.Ct. 356, 74 L.Ed. 967. If the government undertakes to enforce the new provision, the petitioners, as well as others, will have an opportunity to present their grievance, which can then be considered, as it should be, in the light of the facts as they will then appear.

For this reason, we pass to the other questions presented, and we express no opinion as to the interpretation or validity of the provisions of the Petroleum Code.

Second. Regulations IV, V, and VII, issued by the Secretary of the Interior prior to these suits, have since been amended. But the amended regulations continue substantially the earlier requirements and expand them. They present the same constitutional questions, and the cases as to these are not moot. Southern Pacific Company v. Interstate Commerce Commission, 219 U.S. 433, 452, 31 S.Ct. 288, 55 L.Ed. 283; Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498, 514–516, 31 S.Ct. 279, 55 L.Ed. 310; McGrain v. Daugherty, 273 U.S. 135, 181, 182, 47 S.Ct. 319, 71 L.Ed. 580, 50 A.L.R. 1.

The original regulations of July 15, 1933, as amended July 25, 1933, and August 21, 1933, were issued to enforce the Executive Orders of July 11 and July 14, 1933. The Executive Order of July 11, 1933, was made under section 9(c) of the National Industrial Recovery Act, and the Executive Order of July 14, 1933, under section 10(a) of that act, authorizing the Secretary of the Interior to promulgate regulations, was for the purpose of enforcing section 9(c) and the Executive Order of July 11, 1933. The amended regulations have been issued for the same purpose. The fundamental question as to these regulations thus turns upon the validity of section 9(c) and the executive orders to carry it out.

Third. The statute provides that any violation of any order of the President issued under section 9(c) shall be punishable by fine of not to exceed $1,000, or imprisonment for not to exceed six months, or both. We think that these penalties would attach to each violation, and in this view the plaintiffs were entitled to invoke the equitable jurisdiction to restrain enforcement, if the statute and the executive orders were found to be invalid. Philadelphia Company v. Stimson, 223 U.S. 605, 620, 621, 32 S.Ct. 340, 56 L.Ed. 570; Terrace v. Thomp-

son, 263 U.S. 197, 214–216, 44 S.Ct. 15, 68 L.Ed. 255; Hygrade Provision Company v. Sherman, 266 U.S. 497, 499, 500, 45 S.Ct. 141, 69 L.Ed. 402.

Fourth. Section 9(c) is assailed upon the ground that it is an unconstitutional delegation of legislative power. The section purports to authorize the President to pass a prohibitory law. The subject to which this authority relates is defined. It is the transportation in interstate and foreign commerce of petroleum and petroleum products which are produced or withdrawn from storage in excess of the amount permitted by state authority. Assuming for the present purpose, without deciding, that the Congress has power to interdict the transportation of that excess in interstate and foreign commerce, the question whether that transportation shall be prohibited by law is obviously one of legislative policy. Accordingly, we look to the statute to see whether the Congress has declared a policy with respect to that subject; whether the Congress has set up a standard for the President's action; whether the Congress has required any finding by the President in the exercise of the authority to enact the prohibition.

Section 9(c) is brief and unambiguous. It does not attempt to control the production of petroleum and petroleum products within a state. It does not seek to lay down rules for the guidance of state Legislatures or state officers. It leaves to the states and to their constituted authorities the determination of what production shall be permitted. It does not qualify the President's authority by reference to the basis or extent of the state's limitation of production. Section 9(c) does not state whether or in what circumstances or under what conditions the President is to prohibit the transportation of the amount of petroleum or petroleum products produced in excess of the state's permission. It establishes no criterion to govern the President's course. It does not require any finding by the President as a condition of his action. The Congress in section 9(c) thus declares no policy as to the transportation of the excess production. So far as this section is concerned, it gives to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit. And disobedience to his order is made a crime punishable by fine and imprisonment.

We examine the context to ascertain if it furnishes a declaration of policy or a standard of action, which can be deemed to relate to the subject of section 9(c) and thus to imply what is not there expressed. It is important to note that section 9 (15 USCA § 709) is headed "Oil Regulation"—that is, section 9 is the part of the National Industrial Recovery Act which particularly deals with that subject-matter. But the other provisions of section 9 afford no ground for implying a limitation of the broad grant of authority in section 9(c). Thus section 9(a) authorizes the President to initiate before the Interstate Commerce Commission "proceedings necessary to prescribe regulations to

control the operations of oil pipe lines and to fix reasonable, compensatory rates for the transportation of petroleum and its products by pipe lines," and the Interstate Commerce Commission is to grant preference "to the hearings and determination of such cases." Section 9(b) authorizes the President to institute proceedings "to divorce from any holding company any pipe-line company controlled by such holding company which pipe-line company by unfair practices or by exorbitant rates in the transportation of petroleum or its products tends to create a monopoly." It will be observed that each of these provisions contains restrictive clauses as to their respective subjects. Neither relates to the subject of section 9(c).

We turn to the other provisions of title 1 of the act. The first section (15 USCA § 701) is a "declaration of policy." It declares that a national emergency exists which is "productive of widespread unemployment and disorganization of industry, which burdens interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people." It is declared to be the policy of Congress "to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof;" "to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups;" "to induce and maintain united action of labor and management under adequate governmental sanctions and supervision;" "to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources."

This general outline of policy contains nothing as to the circumstances or conditions in which transportation of petroleum or petroleum products should be prohibited—nothing as to the policy of prohibiting or not prohibiting the transportation of production exceeding what the states allow. The general policy declared is "to remove obstructions to the free flow of interstate and foreign commerce." As to production, the section lays down no policy of limitation. It favors the fullest possible utilization of the present productive capacity of industries. It speaks, parenthetically, of a possible temporary restriction of production, but of what, or in what circumstances, it gives no suggestion. The section also speaks in general terms of the conservation of natural resources, but it prescribes no policy for the achievement of that end. It is manifest that this broad outline is simply an introduction of the act, leaving the legislative policy as to particular subjects to be declared and defined, if at all, by the subsequent sections.

It is no answer to insist that deleterious consequences follow the transportation of "hot oil"—oil exceeding state allowances. The Congress did not prohibit that transportation. The Congress did not undertake to say that the transportation of "hot oil" was injurious. The Congress did not say that transportation of that oil was "unfair competition." The Congress did not declare in what circumstances that transportation should be forbidden, or require the President to make any determination as to any facts or circumstances. Among the numerous and diverse objectives broadly stated, the President was not required to choose. The President was not required to ascertain and proclaim the conditions prevailing in the industry which made the prohibition necessary. The Congress left the matter to the President without standard or rule, to be dealt with as he pleased. The effort by ingenious and diligent construction to supply a criterion still permits such a breadth of authorized action as essentially to commit to the President the functions of a Legislature rather than those of an executive or administrative officer executing a declared legislative policy. We find nothing in section 1 which limits or controls the authority conferred by section 9(c).

We pass to the other sections of the act. Section 2 (15 USCA § 702) relates to administrative agencies which may be constituted. Section 3 (15 USCA § 703) provides for the approval by the President of "codes" for trades or industries. These are to be codes of "fair competition" and the authority is based upon certain express conditions which require findings by the President. Action under section 9(c) is not made to depend on the formulation of a code under section 3. In fact, the President's action under section 9(c) was taken more than a month before a Petroleum Code was approved. Subdivision (e) of section 3 (15 USCA § 703(e) authorizes the President, on his own motion or upon complaint, as stated, in case any article is being imported into the United States "in substantial quantities or increasing ratio to domestic production of any competitive article," under such conditions as to endanger the maintenance of a code or agreement under title 1, to cause an immediate investigation by the Tariff Commission. The authority of the President to act, after such investigation, is conditioned upon a finding by him of the existence of the underlying facts, and he may permit entry of the articles concerned upon such conditions and with such limitations as he shall find it necessary to prescribe in order that the entry shall not tend to render the code or agreement ineffective. Section 4 (15 USCA § 704) relates to agreements and licenses for the purposes stated. Section 5 (15 USCA § 705) refers to the application of the anti-trust laws. Sections 6 and 7 (15 USCA §§ 706, 707) impose limitations upon the application of title 1, bearing upon trade associations and other organizations and upon the relations between employers and employees. Section 8 (15 USCA § 708), contains provisions with re-

spect to the application of the Agricultural Adjustment Act of May 12, 1933 (7 USCA § 601 et seq.)

None of these provisions can be deemed to prescribe any limitation of the grant of authority in section 9(c).

Fifth. The question whether such a delegation of legislative power is permitted by the Constitution is not answered by the argument that it should be assumed that the President has acted, and will act, for what he believes to be the public good. The point is not one of motives, but of constitutional authority, for which the best of motives is not a substitute. While the present controversy relates to a delegation to the President, the basic question has a much wider application. If the Congress can make a grant of legislative authority of the sort attempted by section 9 (c), we find nothing in the Constitution which restricts the Congress to the selection of the President as grantee. The Congress may vest the power in the officer of its choice or in a board or commission such as it may select or create for the purpose. Nor, with respect to such a delegation, is the question concerned merely with the transportation of oil, or of oil produced in excess of what the state may allow. If legislative power may thus be vested in the President or other grantee as to that excess of production, we see no reason to doubt that it may similarly be vested with respect to the transportation of oil without reference to the state's requirements. That reference simply defines the subject of the prohibition which the President is authorized to enact or not to enact as he pleases. And, if that legislative power may be given to the President or other grantee, it would seem to follow that such power may similarly be conferred with respect to the transportation of other commodities in interstate commerce with or without reference to state action, thus giving to the grantee of the power the determination of what is a wise policy as to that transportation, and authority to permit or prohibit it, as the person or board or commission so chosen may think desirable. In that view, there would appear to be no ground for denying a similar prerogative of delegation with respect to other subjects of legislation.

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." Article 1, § 1. And the Congress is empowered "To make all Laws which shall be necessary and proper for carrying into Execution" its general powers. Article 1, § 8, par. 18. The Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested. Undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the national Legislature cannot deal directly. The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within

prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply. Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility. But the constant recognition of the necessity and validity of such provisions and the wide range of administrative authority which has been developed by means of them cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained. * * *

Thus, in every case in which the question has been raised, the Court has recognized that there are limits of delegation which there is no constitutional authority to transcend. We think that section 9 (c) goes beyond those limits. As to the transportation of oil production in excess of state permission, the Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement, no definition of circumstances and conditions in which the transportation is to be allowed or prohibited.

If section 9 (c) were held valid, it would be idle to pretend that anything would be left of limitations upon the power of the Congress to delegate its lawmaking function. The reasoning of the many decisions we have reviewed would be made vacuous and their distinctions nugatory. Instead of performing its lawmaking function, the Congress could at will and as to such subjects as it chooses transfer that function to the President or other officer or to an administrative body. The question is not of the intrinsic importance of the particular statute before us, but of the constitutional processes of legislation which are an essential part of our system of government.

Sixth. There is another objection to the validity of the prohibition laid down by the executive order under section 9 (c). The executive order contains no finding, no statement of the grounds of the President's action in enacting the prohibition. Both section 9 (c) and the executive order are in notable contrast with historic practice (as shown by many statutes and proclamations we have cited in the margin) by which declarations of policy are made by the Congress and delegations are within the framework of that policy and have relation to facts and conditions to be found and stated by the President in the appropriate exercise of the delegated authority. If it could be said that from the four corners of the statute any possible inference could be drawn of particular circumstances or conditions which were to govern the exercise of the authority conferred, the President could not act validly without having regard to those circumstances and conditions. And findings by him as to the existence of the required basis of his action would be necessary to sustain that action, for otherwise the case would still be one of an unfettered discretion as the qualification of authority would be ineffectual. The point is pertinent in relation to the first section of the National Industrial Recovery Act. We have said that the first section is but a general introduction, that it declares no

policy and defines no standard with respect to the transportation which is the subject of section 9 (c). But if from the extremely broad description contained in that section and the widely different matters to which the section refers, it were possible to derive a statement of prerequisites to the President's action under section 9 (c), it would still be necessary for the President to comply with those conditions and to show that compliance as the ground of his prohibition. To hold that he is free to select as he chooses from the many and various objects generally described in the first section, and then to act without making any finding with respect to any object that he does select, and the circumstances properly related to that object, would be in effect to make the conditions inoperative and to invest him with an uncontrolled legislative power.

We are not dealing with action which, appropriately belonging to the executive province, is not the subject of judicial review or with the presumptions attaching to executive action. To repeat, we are concerned with the question of the delegation of legislative power. If the citizen is to be punished for the crime of violating a legislative order of an executive officer, or of a board or commission, due process of law requires that it shall appear that the order is within the authority of the officer, board, or commission, and, if that authority depends on determinations of fact, those determinations must be shown. As the Court said in Wichita Railroad & Light Co. v. Public Utilities Commission, 260 U.S. 48, 59, 43 S.Ct. 51, 55, 67 L.Ed. 124: "In creating such an administrative agency, the Legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined, and show a substantial compliance therewith to give validity to its action. When, therefore, such an administrative agency is required as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective. It is pressed on us that the lack of an express finding may be supplied by implication and by reference to the averments of the petition invoking the action of the Commission. We cannot agree to this." Referring to the ruling in the Wichita Case, the Court said in Mahler v. Eby, 264 U.S. 32, 44, 44 S.Ct. 283, 288, 68 L.Ed. 549: "We held that the order in that case, made after a hearing and ordering a reduction, was void for lack of the express finding in the order. We put this conclusion, not only on the language of the statute, but also on general principles of constitutional government." We cannot regard the President as immune from the application of these constitutional principles. When the President is invested with legislative authority as the delegate of Congress in carrying out a declared policy, he necessarily acts under the constitutional restriction applicable to such a delegation.

We see no escape from the conclusion that the Executive Orders of July 11, 1933, and July 14, 1933, Nos. 6199, 6204 (15 U.S.C.A. § 709 note), and the regulations issued by the Secretary of the Interior thereunder, are without constitutional authority.

The decrees of the Circuit Court of Appeals are reversed, and the causes are remanded to the District Court, with direction to modify its decrees in conformity with this opinion so as to grant permanent injunctions, restraining the defendants from enforcing those orders and regulations.

It is so ordered.

Mr. Justice CARDOZO (dissenting). * * *

I am persuaded that a reference, express or implied, to the policy of Congress as declared in section 1, is a sufficient definition of a standard to make the statute valid. Discretion is not unconfined and vagrant. It is canalized within banks that keep it from overflowing. Field v. Clark, 143 U.S. 649, 12 S.Ct. 495, 36 L.Ed. 294, United States v. Grimaud, 220 U.S. 506, 31 S.Ct. 480, 55 L.Ed. 563, and Hampton, Jr., & Co. v. United States, 276 U.S. 394, 48 S.Ct. 348, 72 L.Ed. 624, state the applicable principle. Under these decisions the separation of powers between the Executive and Congress is not a doctrinaire concept to be made use of with pedantic rigor. There must be sensible approximation, there must be elasticity of adjustment, in response to the practical necessities of government, which cannot foresee to-day the developments of tomorrow in their nearly infinite variety. The Interstate Commerce Commission, probing the economic situation of the railroads of the country, consolidating them into systems, shaping in numberless ways their capacities and duties, and even making or unmaking the prosperity of great communities (Texas & Pacific R. Co. v. United States, 289 U.S. 627, 53 S.Ct. 768, 77 L.Ed. 1410), is a conspicuous illustration. See, e. g., 41 Stat. 479–482, c. 91, §§ 405, 406, 407, 408, 42 Stat. 27, c. 20, 49 U.S.C. §§ 3, 4, 5 (49 U.S.C.A. §§ 3–5). Cf. Inter-Mountain Rate Case (U. S. v. Atchison, T. & S. F. R. Co.), 234 U.S. 476, 34 S.Ct. 986, 58 L.Ed. 1408; N. Y. Central Securities Co. v. United States, 287 U.S. 12, 24, 25, 53 S.Ct. 45, 77 L.Ed. 138; Sharfman, The Interstate Commerce Commission, vol. 2, pp. 357, 365. There could surely be no question as to the validity of an act whereby carriers would be prohibited from transporting oil produced in contravention of a statute if in the judgment of the Commission the practice was demoralizing the market and bringing disorder and insecurity into the national economy. What may be delegated to a commission may be delegated to the President. "Congress may feel itself unable conveniently to determine exactly when its exercise of the legislative power should become effective, because dependent on future conditions, and it may leave the determination of such time to the decision of an executive." Hampton, Jr., & Co. v. United States, supra, at page 407 of 276 U.S., 48 S.Ct. 348, 351. Only recently (1932) the whole subject was discussed with much enlightenment in the Report by the Commit-

tee on Ministers' Powers to the Lord Chancellor of Great Britain. See, especially, pages 23, 51. In the complex life of to-day, the business of government could not go on without the delegation, in greater or less degree, of the power to adapt the rule to the swiftly moving facts.

A striking illustration of this need is found in the very industry affected by this section, the production of petroleum and its transportation between the states. At the passage of the National Recovery Act (48 Stat. 195) no one could be certain how many of the states would adopt valid quota laws, or how generally the laws would be observed when adopted, or to what extent illegal practices would affect honest competitors or the stability of prices or the conservation of natural resources or the return of industrial prosperity. Much would depend upon conditions as they shaped themselves thereafter. Violations of the state laws might turn out to be so infrequent that the honest competitor would suffer little, if any, damage. The demand for oil might be so reduced that there would be no serious risk of waste, depleting or imperiling the resources of the nation. Apart from these possibilities, the business might become stabilized through voluntary co-operation or the adoption of a code or otherwise. Congress not unnaturally was unwilling to attach to the state laws a sanction so extreme as the cutting off of the privilege of interstate commerce unless the need for such action had unmistakably developed. What was left to the President was to ascertain the conditions prevailing in the industry, and prohibit or fail to prohibit according to the effect of those conditions upon the phases of the national policy relevant thereto.[b] * * *

A.L.A. SCHECHTER POULTRY CORP. v. UNITED STATES

Supreme Court of the United States.
295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570, 97 A.L.R. 947 (1935).

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

Petitioners in No. 854 were convicted in the District Court of the United States for the Eastern District of New York on eighteen counts of an indictment charging violations of what is known as the "Live Poultry Code," and on an additional count for conspiracy to commit such violations. By demurrer to the indictment and appropriate motions on the trial, the defendants contended (1) that the code had been adopted pursuant to an unconstitutional delegation by Congress of legislative power; (2) that it attempted to regulate intrastate transactions which lay outside the authority of Congress; and (3) that in

[b] See the "Connally Hot Oil Act", 49 Stat. 30, 15 U.S.C., Ch. 15A, enacted following the decision in Panama Refining Co. v. Ryan, and sustained in Hurley v. Federal Tender Board No. 1, 108 F.2d 574 (C.C.A. 5th, 1939); Genecov v. Federal Petroleum Board, 146 F.2d 596 (C.C.A.5th, 1944), cert. denied, 324 U.S. 865, 65 S.Ct. 913, 89 L.Ed. 1420 (1945).

Footnotes of the court have been omitted.

certain provisions it was repugnant to the due process clause of the Fifth Amendment.

The Circuit Court of Appeals sustained the conviction on the conspiracy count and on sixteen counts for violation of the code, but reversed the conviction on two counts which charged violation of requirements as to minimum wages and maximum hours of labor, as these were not deemed to be within the congressional power of regulation. 76 F.2d 617. On the respective applications of the defendants (No. 854) and of the government (No. 864), this Court granted writs of certiorari April 15, 1935. 295 U.S. 723, 55 S.Ct. 651, 79 L.Ed. 1676.

New York City is the largest live poultry market in the United States. Ninety-six per cent. of the live poultry there marketed comes from other states. Three-fourths of this amount arrives by rail and is consigned to commission men or receivers. Most of these freight shipments (about 75 per cent.) come in at the Manhattan Terminal of the New York Central Railroad, and the remainder at one of the four terminals in New Jersey serving New York City. The commission men transact by far the greater part of the business on a commission basis, representing the shippers as agents, and remitting to them the proceeds of sale, less commissions, freight, and handling charges. Otherwise, they buy for their own account. They sell to slaughterhouse operators who are also called marketmen.

The defendants are slaughterhouse operators of the latter class. A. L. A. Schechter Poultry Corporation and Schechter Live Poultry Market are corporations conducting wholesale poultry slaughterhouse markets in Brooklyn, New York City. Joseph Schechter operated the latter corporation and also guaranteed the credits of the former corporation, which was operated by Martin, Alex, and Aaron Schechter. Defendants ordinarily purchase their live poultry from commission men at the West Washington Market in New York City or at the railroad terminals serving the city, but occasionally they purchase from commission men in Philadelphia. They buy the poultry for slaughter and resale. After the poultry is trucked to their slaughterhouse markets in Brooklyn, it is there sold, usually within twenty-four hours, to retail poultry dealers and butchers who sell directly to consumers. The poultry purchased from defendants is immediately slaughtered, prior to delivery, by shochtim in defendants' employ. Defendants do not sell poultry in interstate commerce.

The "Live Poultry Code" was promulgated under section 3 of the National Industrial Recovery Act. That section, the pertinent provisions of which are set forth in the margin, authorizes the President to approve "codes of fair competition." Such a code may be approved for a trade or industry, upon application by one or more trade or industrial associations or groups, if the President finds (1) that such associations or groups "impose no inequitable restrictions on admission to membership therein and are truly representative," and (2) that such codes are not designed "to promote monopolies or to eliminate or

oppress small enterprises and will not operate to discriminate against them, and will tend to effectuate the policy" of title 1 of the act (15 U. S.C.A. § 701 et seq.). Such codes "shall not permit monopolies or monopolistic practices." As a condition of his approval, the President may "impose such conditions (including requirements for the making of reports and the keeping of accounts) for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest, and may provide such exceptions to and exemptions from the provisions of such code as the President in his discretion deems necessary to effectuate the policy herein declared." Where such a code has not been approved, the President may prescribe one, either on his own motion or on complaint. Violation of any provision of a code (so approved or prescribed) "in any transaction in or affecting interstate or foreign commerce" is made a misdemeanor punishable by a fine of not more than $500 for each offense, and each day the violation continues is to be deemed a separate offense.

The "Live Poultry Code" was approved by the President on April 13, 1934. Its divisions indicate its nature and scope. The code has eight articles entitled (1) "purposes," (2) "definitions," (3) "hours," (4) "wages," (5) "general labor provisions," (6) "administration," (7) "trade practice provisions," and (8) "general."

The declared purpose is "To effect the policies of title I of the National Industrial Recovery Act." The code is established as "a code for fair competition for the live poultry industry of the metropolitan area in and about the City of New York." That area is described as embracing the five boroughs of New York City, the counties of Rockland, Westchester, Nassau, and Suffolk in the state of New York, the counties of Hudson and Bergen in the state of New Jersey, and the county of Fairfield in the state of Connecticut.

The "industry" is defined as including "every person engaged in the business of selling, purchasing for resale, transporting, or handling and/or slaughtering live poultry, from the time such poultry comes into the New York metropolitan area to the time it is first sold in slaughtered form," and such "related branches" as may from time to time be included by amendment. Employers are styled "members of the industry," and the term "employee" is defined to embrace "any and all persons engaged in the industry, however compensated," except "members."

The code fixes the number of hours for workdays. It provides that no employee, with certain exceptions, shall be permitted to work in excess of forty hours in any one week, and that no employee, save as stated, "shall be paid in any pay period less than at the rate of fifty (50) cents per hour." The article containing "general labor provisions" prohibits the employment of any person under 16 years of age, and declares that employees shall have the right of "collective bargaining" and freedom of choice with respect to labor organizations, in the terms of section 7 (a) of the act (15 U.S.C.A. § 707 (a). The mini-

mum number of employees, who shall be employed by slaughterhouse operators, is fixed; the number being graduated according to the average volume of weekly sales.

Provision is made for administration through an "industry advisory committee," to be selected by trade associations and members of the industry, and a "code supervisor," to be appointed, with the approval of the committee, by agreement between the Secretary of Agriculture and the Administrator for Industrial Recovery. The expenses of administration are to be borne by the members of the industry proportionately upon the basis of volume of business, or such other factors as the advisory committee may deem equitable, "subject to the disapproval of the Secretary and/or Administrator."

The seventh article, containing "trade practice provisions," prohibits various practices which are said to constitute "unfair methods of competition." The final article provides for verified reports, such as the Secretary or Administrator may require, "(1) for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest, and (2) for the determination by the Secretary or Administrator of the extent to which the declared policy of the act is being effectuated by this code." The members of the industry are also required to keep books and records which "will clearly reflect all financial transactions of their respective businesses and the financial condition thereof," and to submit weekly reports showing the range of daily prices and volume of sales" for each kind of produce.

The President approved the code by an executive order (No. 6675-A) in which he found that the application for his approval had been duly made in accordance with the provisions of title 1 of the National Industrial Recovery Act; that there had been due notice and hearings; that the code constituted "a code of fair competition" as contemplated by the act and complied with its pertinent provisions, including clauses (1) and (2) of subsection (a) of section 3 of title 1 (15 U.S.C.A. § 703 (a) (1, 2); and that the code would tend "to effectuate the policy of Congress as declared in section 1 of Title I." The executive order also recited that the Secretary of Agriculture and the Administrator of the National Industrial Recovery Act had rendered separate reports as to the provisions within their respective jurisdictions. The Secretary of Agriculture reported that the provisions of the code "establishing standards of fair competition (a) are regulations of transactions in or affecting the current of interstate and/or foreign commerce and (b) are reasonable," and also that the code would tend to effectuate the policy declared in title 1 of the act, as set forth in section 1 (15 U.S.C. A. § 701). The report of the Administrator for Industrial Recovery dealt with wages, hours of labor, and other labor provisions.

Of the eighteen counts of the indictment upon which the defendants were convicted, aside from the count for conspiracy, two counts charged violation of the minimum wage and maximum hour provisions of the code, and ten counts were for violation of the require-

ment (found in the "trade practice provisions") of "straight killing." This requirement was really one of "straight" selling. The term "straight killing" was defined in the code as "the practice of requiring persons purchasing poultry for resale to accept the run of any half coop, coop, or coops, as purchased by slaughterhouse operators, except for culls." The charges in the ten counts, respectively, were that the defendants in selling to retail dealers and butchers had permitted "selections of individual chickens taken from particular coops and half coops."

Of the other six counts, one charged the sale to a butcher of an unfit chicken; two counts charged the making of sales without having the poultry inspected or approved in accordance with regulations or ordinances of the city of New York; two counts charged the making of false reports or the failure to make reports relating to the range of daily prices and volume of sales for certain periods; and the remaining count was for sales to slaughterers or dealers who were without licenses required by the ordinances and regulations of the city of New York.

First. Two preliminary points are stressed by the government with respect to the appropriate approach to the important questions presented. We are told that the provision of the statute authorizing the adoption of codes must be viewed in the light of the grave national crisis with which Congress was confronted. Undoubtedly, the conditions to which power is addressed are always to be considered when the exercise of power is challenged. Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power. The Constitution established a national government with powers deemed to be adequate, as they have proved to be both in war and peace, but these powers of the national government are limited by the constitutional grants. Those who act under these grants are not at liberty to transcend the imposed limits because they believe that more or different power is necessary. Such assertions of extraconstitutional authority were anticipated and precluded by the explicit terms of the Tenth Amendment—"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."

The further point is urged that the national crisis demanded a broad and intensive co-operative effort by those engaged in trade and industry, and that this necessary co-operation was sought to be fostered by permitting them to initiate the adoption of codes. But the statutory plan is not simply one for voluntary effort. It does not seek merely to endow voluntary trade or industrial associations or groups with privileges or immunities. It involves the coercive exercise of the lawmaking power. The codes of fair competition which the statute attempts to authorize are codes of laws. If valid, they place all persons within

their reach under the obligation of positive law, binding equally those who assent and those who do not assent. Violations of the provisions of the codes are punishable as crimes.

Second. *The Question of the Delegation of Legislative Power.*—We recently had occasion to review the pertinent decisions and the general principles which govern the determination of this question. Panama Refining Company v. Ryan, 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446. 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." Article 1, § 1. And the Congress is authorized "To make all Laws which shall be necessary and proper for carrying into Execution" its general powers. Article 1, § 8, par. 18. The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested. We have repeatedly recognized the necessity of adapting legislation to complex conditions involving a host of details with which the national Legislature cannot deal directly. We pointed out in the Panama Refining Company Case that the Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply. But we said that the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained. Id., 293 U.S. 388, page 421, 55 S.Ct. 241, 79 L.Ed. 446.

Accordingly, we look to the statute to see whether Congress has overstepped these limitations—whether Congress in authorizing "codes of fair competition" has itself established the standards of legal obligation, thus performing its essential legislative function, or, by the failure to enact such standards, has attempted to transfer that function to others.

The aspect in which the question is now presented is distinct from that which was before us in the case of the Panama Refining Company. There the subject of the statutory prohibition was defined. National Industrial Recovery Act, § 9 (c), 15 U.S.C.A. § 709 (c). That subject was the transportation in interstate and foreign commerce of petroleum and petroleum products which are produced or withdrawn from storage in excess of the amount permitted by state authority. The question was with respect to the range of discretion given to the President in prohibiting that transportation. Id., 293 U.S. 388, pages 414, 415, 430, 55 S.Ct. 241, 79 L.Ed. 446. As to the "codes of fair competition," under section 3 of the act, the question is more fundamental.

It is whether there is any adequate definition of the subject to which the codes are to be addressed.

What is meant by "fair competition" as the term is used in the act? Does it refer to a category established in the law, and is the authority to make codes limited accordingly? Or is it used as a convenient designation for whatever set of laws the formulators of a code for a particular trade or industry may propose and the President may approve (subject to certain restrictions), or the President may himself prescribe, as being wise and beneficent provisions for the government of the trade or industry in order to accomplish the broad purposes of rehabilitation, correction, and expansion which are stated in the first section of title 1?

The act does not define "fair competition." "Unfair competition," as known to the common law, is a limited concept. Primarily, and strictly, it relates to the palming off of one's goods as those of a rival trader. Goodyear's Rubber Manufacturing Co. v. Goodyear Rubber Co., 128 U.S. 598, 604, 9 S.Ct. 166, 32 L.Ed. 535; Howe Scale Co. v. Wyckoff, Seamans & Benedict, 198 U.S. 118, 140, 25 S.Ct. 609, 49 L. Ed. 972; Hanover Star Milling Co. v. Metcalf, 240 U.S. 403, 413, 36 S. Ct. 357, 60 L.Ed. 713. In recent years, its scope has been extended. It has been held to apply to misappropriation as well as misrepresentation, to the selling of another's goods as one's own—to misappropriation of what equitably belongs to a competitor. International News Service v. Associated Press, 248 U.S. 215, 241, 242, 39 S.Ct. 68, 63 L. Ed. 211, 2 A.L.R. 293. Unfairness in competition has been predicated of acts which lie outside the ordinary course of business and are tainted by fraud or coercion or conduct otherwise prohibited by law. Id., 248 U.S. 215, page 258, 39 S.Ct. 68, 63 L.Ed. 211, 2 A.L.R. 293. But it is evident that in its widest range, "unfair competition," as it has been understood in the law, does not reach the objectives of the codes which are authorized by the National Industrial Recovery Act. The codes may, indeed, cover conduct which existing law condemns, but they are not limited to conduct of that sort. The government does not contend that the act contemplates such a limitation. It would be opposed both to the declared purposes of the act and to its administrative construction.

The Federal Trade Commission Act (section 5 [15 U.S.C.A. § 45]) introduced the expression "unfair methods of competition," which were declared to be unlawful. That was an expression new in the law. Debate apparently convinced the sponsors of the legislation that the words "unfair competition," in the light of their meaning at common law, were too narrow. We have said that the substituted phrase has a broader meaning, that it does not admit of precise definition; its scope being left to judicial determination as controversies arise. Federal Trade Commission v. Raladam Co., 283 U.S. 643, 648, 649, 51 S.Ct. 587, 75 L.Ed. 1324, 79 A.L.R. 1191; Federal Trade Commission v. R. F. Keppel, 291 U.S. 304, 310–312, 54 S.Ct. 423, 78 L.Ed. 814. What

are "unfair methods of competition" are thus to be determined in particular instances, upon evidence, in the light of particular competitive conditions and of what is found to be a specific and substantial public interest. Federal Trade Commission v. Beech-Nut Packing Co., 257 U.S. 441, 453, 42 S.Ct. 150, 66 L.Ed. 307, 19 A.L.R. 882; Federal Trade Commission v. Klesner, 280 U.S. 19, 27, 28, 50 S.Ct. 1, 74 L.Ed. 138, 68 A.L.R. 838; Federal Trade Commission v. Raladam Co., supra; Federal Trade Commission v. R. F. Keppel, supra; Federal Trade Commission v. Algoma Lumber Co., 291 U.S. 67, 73, 54 S.Ct. 315, 78 L.Ed. 655. To make this possible, Congress set up a special procedure. A commission, a quasi judicial body, was created. Provision was made for formal complaint, for notice and hearing, for appropriate findings of fact supported by adequate evidence, and for judicial review to give assurance that the action of the commission is taken within its statutory authority. Federal Trade Commission v. Raladam Co., supra; Federal Trade Commission v. Klesner, supra.

In providing for codes, the National Industrial Recovery Act dispenses with this administrative procedure and with any administrative procedure of an analogous character. But the difference between the code plan of the Recovery Act and the scheme of the Federal Trade Commission Act lies not only in procedure but in subject-matter. We cannot regard the "fair competition" of the codes as antithetical to the "unfair methods of competition" of the Federal Trade Commission Act. The "fair competition" of the codes has a much broader range and a new significance. The Recovery Act provides that it shall not be construed to impair the powers of the Federal Trade Commission, but, when a code is approved, its provisions are to be the "standards of fair competition" for the trade or industry concerned, and any violation of such standards in any transaction in or affecting interstate or foreign commerce is to be deemed "an unfair method of competition" within the meaning of the Federal Trade Commission Act. Section 3 (b) of the act, 15 U.S.C.A. § 703 (b).

For a statement of the authorized objectives and content of the "codes of fair competition," we are referred repeatedly to the "Declaration of Policy" in section 1 of title 1 of the Recovery Act (15 U.S.C. A. § 701). Thus the approval of a code by the President is conditioned on his finding that it "will tend to effectuate the policy of this title." Section 3 (a) of the act, 15 U.S.C.A. § 703 (a). The President is authorized to impose such conditions "for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest, and may provide such exceptions to and exemptions from the provisions of such code, as the President in his discretion deems necessary to effectuate the policy herein declared." Id. The "policy herein declared" is manifestly that set forth in section 1. That declaration embraces a broad range of objectives. Among them we find the elimination of "unfair competitive practices." But, even if this clause were to be taken to relate to practices which fall under the ban of existing

law, either common law or statute, it is still only one of the authorized aims described in section 1. It is there declared to be "the policy of Congress"—

"to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor, and otherwise to rehabilitate industry and to conserve natural resources."

Under section 3, whatever "may tend to effectuate" these general purposes may be included in the "codes of fair competition." We think the conclusion is inescapable that the authority sought to be conferred by section 3 was not merely to deal with "unfair competitive practices" which offend against existing law, and could be the subject of judicial condemnation without further legislation, or to create administrative machinery for the application of established principles of law to particular instances of violation. Rather, the purpose is clearly disclosed to authorize new and controlling prohibitions through codes of laws which would embrace what the formulators would propose, and what the President would approve or prescribe, as wise and beneficent measures for the government of trades and industries in order to bring about their rehabilitation, correction, and development, according to the general declaration of policy in section 1. Codes of laws of this sort are styled "codes of fair competition."

We find no real controversy upon this point, and we must determine the validity of the code in question in this aspect. As the government candidly says in its brief: "The words 'policy of this title' clearly refer to the 'policy' which Congress declared in the section entitled 'Declaration of Policy'—Section 1. All of the policies there set forth point toward a single goal—the rehabilitation of industry and the industrial recovery which unquestionably was the major policy of Congress in adopting the National Industrial Recovery Act." And that this is the controlling purpose of the code now before us appears both from its repeated declarations to that effect and from the scope of its requirements. It will be observed that its provisions as to the hours and wages of employees and its "general labor provisions" were placed in separate articles, and these were not included in the article on "trade practice provisions" declaring what should be deemed to constitute "unfair methods of competition." The Secretary of Agriculture thus

stated the objectives of the Live Poultry Code in his report to the President, which was recited in the executive order of approval:

"That said code will tend to effectuate the declared policy of title I of the National Industrial Recovery Act as set forth in section 1 of said act in that the terms and provisions of such code tend to: (a) Remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof: (b) to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups; (c) to eliminate unfair competitive practices; (d) to promote the fullest possible utilization of the present productive capacity of industries; (e) to avoid undue restriction of production (except as may be temporarily required); (f) to increase the consumption of industrial and agricultural products by increasing purchasing power; and (g) otherwise to rehabilitate industry and to conserve natural resources."

The government urges that the codes will "consist of rules of competition deemed fair for each industry by representative members of that industry—by the persons most vitally concerned and most familiar with its problems." Instances are cited in which Congress has availed itself of such assistance; as, e. g., in the exercise of its authority over the public domain, with respect to the recognition of local customs or rules of miners as to mining claims, or, in matters of a more or less technical nature, as in designating the standard height of drawbars. But would it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries? Could trade or industrial associations or groups be constituted legislative bodies for that purpose because such associations or groups are familiar with the problems of their enterprises? And could an effort of that sort be made valid by such a preface of generalities as to permissible aims as we find in section 1 of title 1? The answer is obvious. Such a delegation of legislative power is unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress.

The question, then, turns upon the authority which section 3 of the Recovery Act vests in the President to approve or prescribe. If the codes have standing as penal statutes, this must be due to the effect of the executive action. But Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry. See Panama Refining Company v. Ryan, supra, and cases there reviewed.

Accordingly we turn to the Recovery Act to ascertain what limits have been set to the exercise of the President's discretion: First, the President, as a condition of approval, is required to find that the trade or industrial associations or groups which purpose a code "impose no

inequitable restrictions on admission to membership" and are "truly representative." That condition, however, relates only to the status of the initiators of the new laws and not to the permissible scope of such laws. Second, the President is required to find that the code is not "designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them." And to this is added a proviso that the code "shall not permit monopolies or monopolistic practices." But these restrictions leave virtually untouched the field of policy envisaged by section 1, and, in that wide field of legislative possibilities, the proponents of a code, refraining from monopolistic designs, may roam at will, and the President may approve or disapprove their proposals as he may see fit. That is the precise effect of the further finding that the President is to make—that the code "will tend to effectuate the policy of this title." While this is called a finding, it is really but a statement of an opinion as to the general effect upon the promotion of trade or industry of a scheme of laws. These are the only findings which Congress has made essential in order to put into operation a legislative code having the aims described in the "Declaration of Policy."

Nor is the breadth of the President's discretion left to the necessary implications of this limited requirement as to his findings. As already noted, the President in approving a code may impose his own conditions, adding to or taking from what is proposed, as "in his discretion" he thinks necessary "to effectuate the policy" declared by the act. Of course, he has no less liberty when he prescribes a code on his own motion or on complaint, and he is free to prescribe one if a code has not been approved. The act provides for the creation by the President of Administrative agencies to assist him, but the action or reports of such agencies, or of his other assistants—their recommendations and findings in relation to the making of codes—have no sanction beyond the will of the President, who may accept, modify, or reject them as he pleases. Such recommendations or findings in no way limit the authority which section 3 undertakes to vest in the President with no other conditions than those there specified. And this authority relates to a host of different trades and industries, thus extending the President's discretion to all the varieties of laws which he may deem to be beneficial in dealing with the vast array of commercial and industrial activities throughout the country. * * *

To summarize and conclude upon this point: Section 3 of the Recovery Act (15 USCA § 703) is without precedent. It supplies no standards for any trade, industry, or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking, section 3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction, and expansion described in section 1. In view of the

scope of that broad declaration and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power. * * *

On both the grounds we have discussed, the attempted delegation of legislative power and the attempted regulation of intrastate transactions which affect interstate commerce only indirectly, we hold the code provisions here in question to be invalid and that the judgment of conviction must be reversed.[c]

[Reversed.]

In UNITED STATES v. ROCK ROYAL COOPERATIVE, INC., 307 U.S. 533, 574–8, 59 S.Ct. 993, 1013–15, 83 L.Ed. 1446 (1939), the court, through Mr. Justice REED, said:

C. *Delegation.* There are three issues of delegation presented: (1) the delegation of authority to the Secretary of Agriculture to establish marketing areas; (2) the delegation of authority to producers to approve a marketing order without an agreement of handlers; and (3) the delegation of authority to cooperatives to cast the votes of producer patrons.

From the earliest days the Congress has been compelled to leave to the administrative officers of the Government authority to determine facts which were to put legislation into effect and the details of regulations which would implement the more general enactments. It is well settled, therefore, that it is no argument against the constitutionality of an act to say that it delegates broad powers to executives to determine the details of any legislative scheme. This necessary authority has never been denied. In dealing with legislation involving questions of economic adjustment, each enactment must be considered to determine whether it states the purpose which the Congress seeks to accomplish and the standards by which that purpose is to be worked out with sufficient exactness to enable those affected to understand these limits. Within these tests the Congress needs specify only so far as is reasonably practicable. The present Act, we believe, satisfies these tests.

1. *Delegation to the Secretary of Agriculture.* The purpose of the Act[d] is "to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish prices to farmers at a level that will give agricultural commodi-

[c] The concurring opinion of Mr. Justice Cardozo, with whom Mr. Justice Stone joined, is omitted.

Footnotes of the court have been omitted.

[d] The Agricultural Marketing Agreement Act of 1937, June 3, 1937, c. 296, 50 Stat. 246; see Historical Note following 7 U.S.C.A. § 601.

ties a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period." To accomplish this, the Secretary of Agriculture is directed to issue orders, whenever he has reason to believe the issuance of an order will tend to effectuate the declared policy of the act. Unlike the language of the National Industrial Recovery Act condemned in the Schechter case, 295 U.S. page 538, 55 S.Ct. page 846, 79 L.Ed. 1570, 97 A.L.R. 947, the tests here to determine the purpose and the powers dependent upon that conclusion are defined. In the Recovery Act the Declaration of Policy was couched in most general terms. In this Act it is to restore parity prices, Section 2. Under the Recovery Act, general welfare might be sought through codes of any industry, formulated to express standards of fair competition for the businesses covered. Here the terms of orders are limited to the specific provisions, minutely set out in 8c(5) and (7). While considerable flexibility is provided by 8c(7) (D), it gives opportunity only to include provisions auxiliary to those definitely specified.

The Secretary is not permitted freedom of choice as to the commodities which he may attempt to aid by an order. The Act, Section 8c(2), limits him to milk, fresh fruits except apples, tobacco, fresh vegetables, soybeans and naval stores. The Act authorizes a marketing agreement and order to be issued for such production or marketing regions or areas as are practicable. A city milkshed seems homogeneous. This standard of practicality is a limit on the power to issue orders. It determines when an order may be promulgated.

It is further to be observed that the Order could not be and was not issued until after the hearing and findings as required by Section 8(c)4. Public hearings were held at Albany, Malone, Syracuse, Elmira, and New York from May 16 to June 7, 1938, with four days' recess. Nearly three thousand pages of testimony were introduced, eighty-eight documentary exhibits and some twenty briefs by interested parties were filed. On July 23, 1938, the Secretary in the Federal Register, notified the public of his findings and the terms of the Order and again invited comment. Numerous parties again filed briefs. A right by statute is given handlers to object to the Secretary to any provision of an order as not "in accordance with law," with the privilege of appeal to the courts. Section 8c(15) (A) and (B). Even though procedural safeguards cannot validate an unconstitutional delegation, they do furnish protection against an arbitrary use of properly delegated authority.

A further provision of the Act is to be noted as it was employed as a standard to determine the minimum price. This is Section 8c(18). Acting under this section, the Secretary fixed a fluctuating minimum price based upon wholesale butter prices in New York. While it is true that the determination of price under this section has a less definite standard than the parity tests of Sections 2 and 8e, we cannot say that it is beyond the power of the Congress to leave this determi-

nation to a designated administrator, with the standards named. The Secretary must have first determined the prices in accordance with Section 2 and Section 8e, that is, the prices that will give the commodity a purchasing power equivalent to that of the base period, considering the price and supply of feed and other pertinent economic conditions affecting the milk market in the area. If he finds the price so determined unreasonable, it is to be fixed at a level which will reflect such factors, provide adequate quantities of wholesome milk and be in the public interest. This price cannot be determined by mathematical formula but the standards give ample indications of the various factors to be considered by the Secretary.

2. *Delegation to Producers.* Under Section 8c(9) (B) of the Act it is provided that any order shall become effective notwithstanding the failure of 50 percent of the handlers to approve a similar agreement, if the Secretary of Agriculture with the approval of the President determines, among other things, that the issuance of the order is approved by two-thirds of the producers interested or by interested producers of two-thirds of the volume produced for the market of the specified production area. By subsection (19) it is provided that for the purpose of ascertaining whether the issuance of such order is approved "the Secretary may conduct a referendum among producers." The objection is made that this is an unlawful delegation to producers of the legislative power to put an order into effect in a market. In considering this question, we must assume that the Congress had the power to put this Order into effect without the approval of anyone. Whether producer approval by election is necessary or not, a question we reserve, a requirement of such approval would not be an invalid delegation.[e]

YAKUS v. UNITED STATES

Supreme Court of the United States.
321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834 (1944).

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

The questions for our decision are: (1) Whether the Emergency Price Control Act of January 30, 1942, 56 Stat. 23, 50 U.S.C.App.Supp. II, § 901 et seq., 50 U.S.C.A.Appendix, § 901 et seq., as amended by the Inflation Control Act of October 2, 1942, 56 Stat. 765, 50 U.S.C. App.Supp. II, § 961 et seq., 50 U.S.C.A.Appendix, § 961 et seq., involves an unconstitutional delegation to the Price Administrator of the legislative power of Congress to control prices; (2) whether § 204(d) of the Act was intended to preclude consideration by a dis-

[e] *Cf.* Opp Cotton Mills v. Administrator, 312 U.S. 126, 61 S.Ct. 524, 85 L.Ed. 624 (1941) (Fair Labor Standards Act of 1938 sustained against attack as unconstitutional delegation).

Footnotes of the court have been omitted.

trict court of the validity of a maximum price regulation promulgated by the Administrator, as a defense to a criminal prosecution for its violation; (3) whether the exclusive statutory procedure set up by §§ 203 and 204 of the Act for administrative and judicial review of regulations, with the accompanying stay provisions, provide a sufficiently adequate means of determining the validity of a price regulation to meet the demands of due process; and (4) whether, in view of this available method of review, § 204(d) of the Act, if construed to preclude consideration of the validity of the regulation as a defense to a prosecution for violating it, contravenes the Sixth Amendment, or works an unconstitutional legislative interference with the judicial power.

Petitioners in both of these cases were tried and convicted by the District Court for Massachusetts upon several counts of indictments charging violation of §§ 4(a) and 205(b) of the Act by the willful sale of wholesale cuts of beef at prices above the maximum prices prescribed by §§ 1364.451–1364.455 of Revised Maximum Price Regulation No. 169, 7 Fed.Reg. 10381 et seq. Petitioners have not availed themselves of the procedure set up by §§ 203 and 204 by which any person subject to a maximum price regulation may test its validity by protest to and hearing before the Administrator, whose determination may be reviewed on complaint to the Emergency Court of Appeals and by this Court on certiorari, see Lockerty v. Phillips, 319 U.S. 182, 63 S.Ct. 1019, 87 L.Ed. 1339. When the indictments were found the 60 days period allowed by the statute for filing protests had expired.

In the course of the trial the District Court overruled or denied offers of proof, motions and requests for rulings, raising various questions as to the validity of the Act and Regulation, including those presented by the petitions for certiorari. In particular petitioners offered evidence, which the District Court excluded as irrelevant, for the purpose of showing that the Regulation did not conform to the standards prescribed by the Act and that it deprived petitioners of property without the due process of law guaranteed by the Fifth Amendment. They specifically raised the question reserved in Lockerty v. Phillips, supra, whether the validity of a regulation may be challenged in defense of a prosecution for its violation although it had not been tested by the prescribed administrative procedure and complaint to the Emergency Court of Appeals. The District Court convicted petitioners upon verdicts of guilty. The Circuit Court of Appeals for the First Circuit affirmed, 137 F.2d 850, and we granted certiorari, 320 U.S. 730, 64 S.Ct. 190.

I.

The Emergency Price Control Act provides for the establishment of the Office of Price Administration under the direction of a Price Administrator appointed by the President, and sets up a comprehensive scheme for the promulgation by the Administrator of regu-

lations or orders fixing such maximum prices of commodities and rents as will effectuate the purposes of the Act and conform to the standards which it prescribes. The Act was adopted as a temporary wartime measure, and provides in § 1(b) for its termination on June 30, 1943, unless sooner terminated by Presidential proclamation or concurrent resolution of Congress. By the amendatory act of October 2, 1942, it was extended to June 30, 1944.

Section 1(a) declares that the Act is "in the interest of the national defense and security and necessary to the effective prosecution of the present war", and that its purposes are:

"to stabilize prices and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices resulting from abnormal market conditions or scarcities caused by or contributing to the national emergency; to assure that defense appropriations are not dissipated by excessive prices; to protect persons with relatively fixed and limited incomes, consumers, wage earners, investors, and persons dependent on life insurance, annuities, and pensions, from undue impairment of their standard of living; to prevent hardships to persons engaged in business, * * * and to the Federal, State, and local governments, which would result from abnormal increases in prices; to assist in securing adequate production of commodities and facilities; to prevent a post emergency collapse of values; * * *."

The standards which are to guide the Administrator's exercise of his authority to fix prices, so far as now relevant, are prescribed by § 2(a) and by § 1 of the amendatory Act of October 2, 1942, and Executive Order 9250, 50 U.S.C.A.Appendix, § 901 note, promulgated under it. 7 Fed.Reg. 7871. By § 2(a) the Administrator is authorized, after consultation with representative members of the industry so far as practicable, to promulgate regulations fixing prices of commodities which "in his judgment will be generally fair and equitable and will effectuate the purposes of this Act" when, in his judgment, their prices "have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act."

The section also directs that

"So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are generally representative) * * * and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including * * *. Specu-

lative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941."

By the Act of October 2, 1942, the President is directed to stabilize prices, wages and salaries "so far as practicable" on the basis of the levels which existed on September 15, 1942, except as otherwise provided in the Act. By Title I, § 4 of Executive Order No. 9250, he has directed "all departments and agencies of the Government" "to stabilize the cost of living in accordance with the Act of October 2, 1942." [1]

Revised Maximum Price Regulation No. 169 was issued December 10, 1942, under authority of the Emergency Price Control Act as amended and Executive Order No. 9250. The Regulation established specific maximum prices for the sale at wholesale of specified cuts of beef and veal. As is required by § 2(a) of the Act, it was accompanied by a "statement of the considerations involved" in prescribing it. From the preamble to the Regulation and from the Statement of Considerations accompanying it, it appears that the prices fixed for sales at wholesale were slightly in excess of those prevailing between March 16 and March 28, 1942,[2] and approximated those prevailing on September 15, 1942. Findings that the Regulation was necessary, that the prices which it fixed were fair and equitable, and that it otherwise conformed to the standards prescribed by the Act, appear in the Statement of Considerations.

That Congress has constitutional authority to prescribe commodity prices as a war emergency measure, and that the Act was adopted by Congress in the exercise of that power, are not questioned here, and need not now be considered save as they have a bearing on the procedural features of the Act later to be considered which are challenged on constitutional grounds.

Congress enacted the Emergency Price Control Act in pursuance of a defined policy and required that the prices fixed by the Administrator should further that policy and conform to standards prescribed by the Act. The boundaries of the field of the Administrator's permissible action are marked by the statute. It directs that the prices fixed shall effectuate the declared policy of the Act to stabilize commodity prices so as to prevent war-time inflation and its enumerated disruptive causes and effects. In addition the prices established must be fair and equitable, and in fixing them the Administrator is directed to give due consideration, so far as practicable, to prevailing prices during the designated base period, with prescribed administrative adjustments to compensate for enumerated disturbing factors affecting prices. In short the purposes of the Act specified in § 1 denote the objective to be sought by the Administrator in fixing

[1] [Footnote omitted.—Ed.]

[2] [Footnote omitted.—Ed.]

prices—the prevention of inflation and its enumerated consequences. The standards set out in § 2 define the boundaries within which prices having that purpose must be fixed. It is enough to satisfy the statutory requirements that the Administrator finds that the prices fixed will tend to achieve that objective and will conform to those standards, and that the courts in an appropriate proceeding can see that substantial basis for those findings is not wanting.

The Act is thus an exercise by Congress of its legislative power. In it Congress has stated the legislative objective, has prescribed the method of achieving that objective—maximum price fixing—and has laid down standards to guide the administrative determination of both the occasions for the exercise of the price-fixing power, and the particular prices to be established. Compare Field v. Clark, 143 U.S. 649, 12 S.Ct. 495, 36 L.Ed. 294; Hampton Jr. & Co. v. United States, 276 U.S. 394, 48 S.Ct. 348, 72 L.Ed. 624; Currin v. Wallace, 306 U.S. 1, 59 S.Ct. 379, 83 L.Ed. 441; Mulford v. Smith, 307 U.S. 38, 59 S.Ct. 648, 83 L.Ed. 1092; United States v. Rock Royal Co-op., 307 U.S. 533, 59 S.Ct. 993, 83 L.Ed. 1446; Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 60 S.Ct. 907, 84 L.Ed. 1263; Opp Cotton Mills v. Administrator, 312 U.S. 126, 657, 61 S.Ct. 524, 85 L.Ed. 624; National Broadcasting Co. v. United States, 319 U.S. 190, 63 S.Ct. 997, 87 L. Ed. 1344; Kiyoshi Hirabayashi v. United States, 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774.

The Act is unlike the National Industrial Recovery Act of June 16, 1933, 48 Stat. 195, considered in Schechter Poultry Corp. v. United States, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570, 97 A.L.R. 947, which proclaimed in the broadest terms its purpose "to rehabilitate industry and to conserve natural resources." It prescribed no method of attaining that end save by the establishment of codes of fair competition, the nature of whose permissible provisions was left undefined. It provided no standards to which those codes were to conform. The function of formulating the codes was delegated, not to a public official responsible to Congress or the Executive, but to private individuals engaged in the industries to be regulated. Compare Sunshine Anthracite Coal Co. v. Adkins, supra, 310 U.S. at page 399, 60 S.Ct. at page 915, 84 L.Ed. 1263.

The Constitution as a continuously operative charter of government does not demand the impossible or the impracticable. It does not require that Congress find for itself every fact upon which it desires to base legislative action or that it make for itself detailed determinations which it has declared to be prerequisite to the application of the legislative policy to particular facts and circumstances impossible for Congress itself properly to investigate. The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct—here the rule, with penal sanctions that prices shall not be greater than those fixed by maximum price regulations which

conform to standards and will tend to further the policy which Congress has established. These essentials are preserved when Congress has specified the basic conditions of fact upon whose existence or occurrence, ascertained from relevant data by a designated administrative agency, it directs that its statutory command shall be effective. It is no objection that the determination of facts and the inferences to be drawn from them in the light of the statutory standards and declaration of policy call for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed statutory framework. See Opp Cotton Mills v. Administrator, supra, 312 U.S. at pages 145, 146, 61 S.Ct. at pages 532, 533, 85 L.Ed. 624, and cases cited.

Nor does the doctrine of separation of powers deny to Congress power to direct that an administrative officer properly designated for that purpose have ample latitude within which he is to ascertain the conditions which Congress has made prerequisite to the operation of its legislative command. Acting within its constitutional power to fix prices it is for Congress to say whether the data on the basis of which prices are to be fixed are to be confined within a narrow or a broad range. In either case the only concern of courts is to ascertain whether the will of Congress has been obeyed. This depends not upon the breadth of the definition of the facts or conditions which the administrative officer is to find but upon the determination whether the definition sufficiently marks the field within which the Administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will.

As we have said: "The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality * * * to perform its function." Currin v. Wallace, supra, 306 U.S. at page 15, 59 S.Ct. at page 387, 83 L.Ed. 441. Hence it is irrelevant that Congress might itself have prescribed the maximum prices or have provided a more rigid standard by which they are to be fixed; for example, that all prices should be frozen at the levels obtaining during a certain period or on a certain date. See Union Bridge Co. v. United States, 204 U.S. 364, 386, 27 S.Ct. 367, 374, 51 L.Ed. 523. Congress is not confined to that method of executing its policy which involves the least possible delegation of discretion to administrative officers. Compare McCulloch v. Maryland, 4 Wheat. 316, 413 et seq., 4 L.Ed. 579. It is free to avoid the rigidity of such a system, which might well result in serious hardship, and to choose instead the flexibility attainable by the use of less restrictive standards. Cf. Hampton v. United States, supra, 276 U.S. at pages 408, 409, 48 S.Ct. at pages 351, 352, 72 L.Ed. 624. Only if we could say that there is an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed,

would we be justified in overriding its choice of means for effecting its declared purpose of preventing inflation.

The standards prescribed by the present Act, with the aid of the "statement of the considerations" required to be made by the Administrator, are sufficiently definite and precise to enable Congress, the courts and the public to ascertain whether the Administrator, in fixing the designated prices, has conformed to those standards. Compare Kiyoshi Hirabayashi v. United States, supra, 320 U.S. at page 104, 63 S.Ct. at page 1387, 87 L.Ed. 1774. Hence we are unable to find in them an unauthorized delegation of legislative power. The authority to fix prices only when prices have risen or threaten to rise to an extent or in a manner inconsistent with the purpose of the Act to prevent inflation is no broader than the authority to fix maximum prices when deemed necessary to protect consumers against unreasonably high prices, sustained in Sunshine Anthracite Coal Co. v. Adkins, supra, or the authority to take possession of and operate telegraph lines whenever deemed necessary for the national security or defense, upheld in Dakota Cent. Tel. Co. v. State of South Dakota, 250 U.S. 163, 39 S.Ct. 507, 63 L.Ed. 910, 4 A.L.R. 1623; or the authority to suspend tariff provisions upon findings that the duties imposed by a foreign state are "reciprocally unequal and unreasonable", held valid in Field v. Clark, supra [143 U.S. 649, 12 S.Ct. 504, 36 L.Ed. 294].

The directions that the prices fixed shall be fair and equitable, that in addition they shall tend to promote the purposes of the Act, and that in promulgating them consideration shall be given to prices prevailing in a stated base period, confer no greater reach for administrative determination than the power to fix just and reasonable rates, see Sunshine Anthracite Coal Co. v. Adkins, supra, and cases cited; or the power to approve consolidations in the "public interest", sustained in New York Cent. Securities Corp. v. United States, 287 U.S. 12, 24, 25, 53 S.Ct. 45, 48, 77 L.Ed. 138 (Compare United States v. Lowden, 308 U.S. 225, 60 S.Ct. 248, 84 L.Ed. 208); or the power to regulate radio stations engaged in chain broadcasting "as public interest, convenience or necessity requires", upheld in National Broadcasting Co. v. United States, supra, 319 U.S. at page 225, 63 S.Ct. at pages 1013, 1014, 87 L.Ed. 1344; or the power to prohibit "unfair methods of competition" not defined or forbidden by the common law, Federal Trade Commission v. R. F. Keppel & Bro., 291 U.S. 304, 54 S.Ct. 423, 426, 78 L.Ed. 814; or the direction that in allotting marketing quotas among states and producers due consideration be given to a variety of economic factors, sustained in Mulford v. Smith, supra, 307 U.S. at pages 48, 49, 59 S.Ct. at page 652, 653, 83 L.Ed. 1092; or the similar direction that in adjusting tariffs to meet differences in costs of production the President "take into consideration" "in so far as he finds it practicable" a variety of economic matters, sustained in Hampton Jr. & Co. v. United States, supra [276 U.S. 394, 48 S.Ct.

349, 36 L.Ed. 294]; or the similar authority, in making classifications within an industry, to consider various named and unnamed "relevant factors" and determine the respective weights attributable to each, held valid in Opp Cotton Mills v. Administrator, supra.[f]

Affirmed.[g]

SECTION 3. PROCEDURE FOR THE ISSUANCE OF RULES, REGULATIONS AND ORDERS OF GENERAL APPLICABILITY PRESCRIBING FUTURE CONDUCT

A. In General

(1) *The Practice of the Securities and Exchange Commission*[a]

PROPOSED ADOPTION OF RULE X-11A1-1

SEC., Securities Exchange Act of 1934 Release No. 3640, Jan. 16, 1945.

The Commission announced today that its Trading and Exchange Division had recommended the adoption of a rule which would prohibit floor trading in stocks on the New York Stock Exchange and New York Curb Exchange. In releasing the text of the proposed rule, the Commission also made public the Trading and Exchange Division's "Report on Floor Trading," setting forth the facts and considerations which had led the Division to make the recommendation.

The proposed rule provides that no member of the New York Stock Exchange or New York Curb Exchange while on the floor of the exchange shall effect any transaction in a stock traded on the exchange for an account in which he has an interest or pursuant to any order in which he is vested with more than the usual floor broker's discretion. The proposed rule would exempt transactions of specialists and odd-lot dealers to the extent reasonably necessary to permit them to perform their respective functions. Certain transactions effected in connection with the distribution of securities or for error accounts also would be exempted.

[f] Cf. Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 60 S.Ct. 907, 84 L.Ed. 1263 (1940) (Bituminous Coal Act of 1937 upheld against attack as unconstitutional delegation.)

[g] The balance of the opinion, dealing with the statutory procedure for testing the validity of the Administrator's regulations, is set forth below at p. 1066. The dissenting opinions of Mr. Justice Roberts and of Mr. Justice Rutledge (the latter directed to the Act's procedural provisions) are omitted.

[a] See Monograph on Securities and Exchange Commission (Atty. General's Committee on Administrative Procedure) 284-94.

In releasing the proposed rule and the Division's report, the Commission invited the comments of the two New York exchanges and those of any other interested groups or persons. Comments should be in the hands of the Commission not later than January 27, 1945. The Commission also stated that if anyone submitting comments should request an opportunity to discuss the rule with the Commission it would give consideration to the advisability of calling a public conference on the matter. * * *

The text of the proposed rule follows:

January 15, 1945

PROPOSED RULE X-11A1-1

Prohibition of Floor Trading

(a) No member of the New York Stock Exchange or New York Curb Exchange, while on the floor of such exchange or the premises immediately adjoining, shall execute or cause to be executed, in any security listed or admitted to unlisted trading privileges upon such exchange, any transaction for an account in which he has an interest or any transaction with respect to which such member is vested with discretion as to the choice of security to be bought or sold, the total amount of any security to be bought or sold, or whether any such transaction shall be one of purchase or sale.[b]

PROPOSED ADOPTION OF RULES REGULATING THE OVER-THE-COUNTER MARKETS

SEC., Securities Exchange Act of 1934 Release No. 1265, June 25, 1937.

The Securities and Exchange Commission today announced that it had sent a tentative and preliminary draft of proposed rules for the regulation of the over-the-counter markets to state securities commissions, organizations of brokers and dealers and representatives of other interested groups, for their comments prior to final adoption.

The proposed rules define practices considered to be manipulative, deceptive, or fraudulent within the meaning of sections 15(c) and 10 (b) of the Securities Exchange Act of 1934, as amended. They supplement the provisions of subsections (a) and (b) of section 15 of the Act which require the registration of brokers and dealers who use the mails or any means or instrumentality of interstate commerce to effect transactions in over-the-counter markets.

These proposed rules would apply to brokers and dealers in exempted securities such as government, state and municipal bonds as well as

[b] Paragraph (b) of the proposed rule, exempting certain classes of transactions from paragraph (a), is omitted.

to brokers and dealers effecting transactions in non-exempted securities.

The rules would prohibit a broker or dealer from inducing the purchase or sale of any security by any act, practice or course of business which would operate as a fraud or deceit upon any person, or by any untrue statement of a material fact or any omission to state a material fact necessary to make other statements, in the light of the circumstances under which they were made, not misleading. Misrepresentation as to the effect and meaning of registration of a broker or dealer would be prohibited. * * *

ANNOUNCEMENT OF ADOPTION OF RULES DESIGNED TO PROHIBIT SHORT SELLING IN A DECLINING MARKET

SEC., Securities Exchange Act of 1934 Release No 1548, January 24, 1938

The Securities and Exchange Commission has adopted a set of rules designed to prohibit short selling in a declining market. These rules, which become effective February 8, 1938, supplement short-selling rules now in effect on national securities exchanges and adopted at the suggestion of the Commission in 1935. The Commission feels that these exchange rules have not proven effective.

The rules adopted by the Commission define a short sale as a sale of a security which the seller does not own or any sale which is consummated by the delivery of a borrowed security.

The principal effect of the new rules is to require that any "short sale" of a security must be made at a price above the price at which the last transaction in the security took place. Following the practice of leading exchanges, the rules further provide that every order for the sale of a security on a national securities exchange must be marked either "long" or "short" to indicate whether or not the security being sold is owned and deliverable by the seller. If the order has been marked "long", the broker may not, except in special circumstances, make delivery with a borrowed security, nor may delivery be delayed. * * *

Following the declines in the stock market last Fall, the Commission announced that it would extend its continuing studies of the market to determine what, if any, action should be taken. The Commission has now completed a study of certain phases of short selling in the recent market decline. A detailed report on this subject will be available in the near future. Meanwhile, in response to a large volume of inquiries received by the Commission during the past four months with respect to short selling, the Commission is now making public certain pertinent data derived in part from its study and in part from other sources.

The study of short selling by the Commission's staff will, of course, be a continuing one. The Commission is also aware that other studies of short selling are in progress, notably that of the Twentieth Century Fund being conducted for the New York Stock Exchange. If, as the result of these studies and the experience under these new rules alterations in them prove necessary or desirable, the Commission is prepared to make them. While the rules are designed to curb certain harmful uses of the short sale, the Commission pointed out that these rules, of course, cannot affect the underlying economic causes of market movement.

The data on short selling and the text of the Commission's short-selling rules are attached.[c]

In its FOURTH ANNUAL REPORT,[d] the Securities and Exchange Commission said, at pp. 87–8:

Short Selling.

Although the problems relating to short selling have received continuous attention from the Commission since its creation in 1934, market conditions, until the past fiscal year, did not present an opportunity for first-hand current observation of short selling in severely declining markets. The Commission used the opportunity afforded by the sharp drop in prices in September and October of 1937 to make a detailed study of transactions in 20 selected stocks listed on the New York Stock Exchange during the period of September 7 to 13, inclusive, and October 18 to 23, inclusive.

As a result of this study the Commission issued Rules X–10A–1, X–10A–2 and X–3B–3 on January 24, 1938, effective on February 8, 1938. The principal effect of these rules is to require that any short sale of a security must be made at a price above the last preceding sale price. Since the issuance of Rule X–10A–1, two exemptions from its provisions have been adopted. On February 10, 1938, the Commission allowed an exemption applicable to equalizing transactions on domestic exchanges; on April 8, 1938, certain arbitrage transactions were exempted.

Subsequently, the Commission called for data similar to that which provided the bases for its study of the market in September and October of 1937. The same stocks which had been used at that time were again subjected to detailed scrutiny for the period of March 21 to April 2, 1938, inclusive. This re-check of its data will permit the Commission to judge the adequacy and effectiveness of its regulations.

[c] Attachments omitted.

[d] Fourth Ann.Rep. SEC (G.P.O.1938).

In its FIFTH ANNUAL REPORT,[e] the Securities and Exchange Commission, said, at pp. 44–5:

Short Selling Rules.

During the past year, upon the recommendation of the New York Stock Exchange and following conferences with its President, William McC. Martin, Jr., and other officials, the Commission modified its rules governing short selling on national securities exchanges. It was the view of the Exchange that the amendment would provide greater freedom of market action in accumulating short positions when market trends were generally upward, but nevertheless would retain effective restraints on short selling.

The Commission's short selling rules originally in effect had permitted a short sale of security at a price *above* its last sale price. The amendment, however, permits short sales at the price of the sale, provided that the last sale price was itself higher than the last *different* price which preceded it.

In order to determine whether international arbitrage transactions should be exempted from the Commission's short selling rule, a study of international arbitrage operations in their relation to short selling was undertaken during the course of the year. After considering the report submitted as a result of this study, the Commission also added an exemption applicable to certain short sales made in the course of international arbitrage which are of a true arbitrage nature, that is, transactions in which a short position is taken on one exchange which is to be immediately covered on a foreign market. Thus the exemption is available only where the market effect of a domestic short sale is intended to be immediately neutralized by the covering purchase on a different market.

From time to time, members of the Commission's staff have discussed with representatives of the exchanges rumors that the Commission's short selling rules were being evaded by persons placing their orders through European correspondents of domestic brokers. As a result of these discussions, the New York Stock Exchange presently requires its members to report periodically any transactions of this nature which come to their attention.

The Commission also created an exemption applicable in certain types of situations where a short sale was made because of a *bona fide* error.

[e] Fifth Ann.Rep. SEC (G.P.O.1938).

(2) The Practice of the Interstate Commerce Commission

EXCERPT FROM MONOGRAPH ON INTERSTATE COMMERCE COMMISSION, 185-9

Attorney General's Committee on Administrative Procedure, Monograph No. 24 [f]

Rule-making. Perhaps the best opportunity to observe the Commission's methods and attitudes with respect to rule-making is afforded by the regulations affecting motor carriers. Since the enactment of the Motor Carrier Act in 1935 the Commission has issued a dozen or more sets of such regulations, some of them elaborate and extensive. These regulations, being of diverse character, have evoked various procedural devices, ranging all the way from mere studies conducted by the staff to formal and adversary hearings which closely resemble proceedings in court.

One set of regulations governs the preservation of records by motor carriers. The Commission had already promulgated similar regulations for railroads, electric railways, water lines, pipe lines, and telephone companies. On the basis of a study of these regulations it was easy to ascertain what changes should be made to fit the needs of the motor carrier industry and even consultation with motor carriers was thought to be unnecessary. Accordingly, Division 5 of the Commission in 1936, on the basis of recommendations made by the staff, promulgated the set of regulations. That the regulations were wholly satisfactory and that no consultation, conference, or hearing was necessary is proved by the fact that during the four years these regulations have been in effect no need for change has been brought to the attention of the Commission.

Similarly, the regulations governing the form and issuance of passes called for neither conferences nor hearings. The Commission had had considerable experience with respect to passes issued by railroads and the problem was essentially the same for motor carriers. Accordingly, the staff studied the railroad regulations and submitted its recommendations to Division 5, which, without further proceeding of any kind, promulgated the regulations.[108]

Section 218 of the Motor Carrier Act requires each contract carrier to file with the Commission schedules, or in the discretion of the Commission, copies of contracts, containing the minimum charges for transportation of property. The carriers were permitted at first only to file schedules of minima bearing no relation to the actual rates. Upon receipt of many complaints from common carriers by motor ve-

[f] See p. 50, n. a, *supra*.

[108] In 1936 the Commission, after conferences with various members of the staff, issued regulations requiring motor carriers to show certain data on bills of lading, receipts, and freight and expense bills.

hicles that they were unable to ascertain rates of contract carriers from an examination of the schedules of minimum charges, members of the Bureau's staff studied the questions and made a recommendation to Division 5 that it should require contract carriers to file copies of contracts instead of schedules of minimum rates. Accordingly, in July 1936, Division 5 issued an order requiring all contract carriers subject to the Act to file copies of all contracts with the Commission. This order was to become effective October 1, 1936, but before the effective date of the order many complaints were received from contract carriers and shippers and the effective date of the order was twice postponed. In January 1937, Division 5 issued an order without previous hearing or formal conference requiring certain classes of contract carriers to file copies of contracts, but exempting contract carriers engaged in local cartage. Before the effective date of this order petitions were filed by the National Industrial Traffic League and by individual shippers and carriers requesting cancellation of the order. Division 5 then postponed the effective date of the order and submitted the matter to the entire Commission with the recommendation that the petition be denied. The Commission, however, granted the petition and the case was argued before the entire Commission. The Commission then issued a report and order requiring all contract carriers to file copies of all transportation contracts, but upon receipt of numerous protests and petitions for reconsideration the case was reopened to determine whether or not the contracts filed with the Commission should be open to public inspection. This question was orally argued before the entire Commission, and an order was then issued providing that with certain narrow exceptions the contracts should be open to public inspection. The effective date has again been postponed indefinitely, however, pending consideration of numerous petitions for further reconsideration.[109]

Another example of the preparation of rules without consultation with the regulated parties is the set of regulations governing the transfer of operating authorities under the Motor Carrier Act. Many conferences were conducted within the Commission among various of the Commission's officers and employees and a tentative draft of the regulations was submitted to Division 5. One Commissioner disapproved the tentative regulations and another draft was prepared under his supervision. After numerous further conferences and exchanges of memoranda another revised draft was prepared and submitted to Division 5, which issued the regulations on July 1, 1938.

An example of the preparation of regulations through the use of conferences but without formal hearing is the set of rules prescribing a uniform system of accounts for class I motor carriers. In 1935 the Section of Accounts of the Bureau prepared a tentative draft of the

[109] 2 M.C.C. 55, 20 M.C.C. 80. In 11 M.C.C. 693 a special order was entered, after hearing, affecting bullion, currency, jewels and other precious and very valuable articles.

uniform system of accounts, copies of which were mailed to typical representatives of the motor carrier industry for comments, criticisms and suggestions. The National Association of Motor Bus Operators and the American Transit Association were requested to appoint a committee to represent motor carriers of passengers, and the Commission held a conference with this committee. Similarly, the Commission held conferences with committees appointed by the American Trucking Association and by the National Association of Railroad Public Utility Commissioners. Various revisions were made as a result of these conferences, and finally a joint conference was held with the several committees and a further revised draft was prepared. Without formal hearing Division 5 then approved and issued the regulations.

EX PARTE NO. MC–4
MOTOR CARRIER SAFETY REGULATIONS

1 M.C.C. 1 (1936).

REPORT OF THE COMMISSION

DIVISION 5, COMMISSIONERS EASTMAN, LEE, AND CASKIE

BY DIVISION 5:

This is an investigation, instituted upon our own motion, by order dated August 21, 1936, in the matter of qualification of employees and safety of operation and equipment of common and contract carriers by motor vehicle, pursuant to the provisions of sections 204 (a) (1) and (2) of the Motor Carrier Act, 1935, hereinafter called the act.

Because of the wide public interest in the subject of highway safety, and the importance of the step now being taken by the Commission in entering this field, we shall discuss at some length in this report various questions of policy and shall attempt to indicate the background of fact and reflection which has impelled our conclusions on various points.

PRESENT ACCIDENT SITUATION AND VALUE OF UNIFORMITY

Little need be said here of the gravity of the highway-accident problem in the United States for the facts are well known. The absolute number of motor-vehicle fatalities has been steadily growing in recent years, although it should be noted that the use of motor vehicles, and therefore their exposure to accident, has also been increasing. In 1934 motor-vehicle fatalities numbered 36,101, in 1935, 37,000 (estimated), in 1936 they may reach 37,500 according to the best available estimates. Injuries involving permanent or temporary disabilities in 1935 aggregated more than 1,250,000, while the total economic loss from deaths, injuries, and property damage was conservatively estimated to exceed $1,500,000,000.

This alarming annual toll of accidents should be viewed, of course, in the light of the very large number of motor vehicles now using the streets and highways of the Nation, more than 26,000,000 at the end of 1935. No figures are available to show how many of these accidents involved vehicles which are now to be subject to the safety regulations of the Commission. In addition to the direct effect upon the carriers subject to our jurisdiction, however, these regulations may be expected to have a certain real influence upon the general accident situation. It is hoped and believed that our findings upon such basic safety elements in the operation of interstate busses and trucks, as properly qualified drivers, sound driving rules, adequate brakes, lights, and other parts and accessories upon vehicles, and a proper reporting of accidents, as well as upon other important matters to be considered in the future, will provide a definite impetus toward greater uniformity in the statutes and regulations of the several States, and thereby toward better understanding of and compliance with highway safety requirements by the general public. That the results will be beneficial in this larger field can hardly be doubted.

PRELIMINARY STUDIES

Prior to hearings, our Bureau of Motor Carriers made a study of State laws and regulations relating to motor-vehicle operation, particularly as they concerned busses and trucks, and of the practices of many motor carriers in the promotion of safety in their own businesses. Upon this study, and upon the background of experience brought to this task by the personnel assigned to the matter, there was based an initial outline of subjects which appeared proper to include in a connected and well-rounded safety program for interstate motor carriers. This general outline was used as a basis of discussion at a series of conferences with duly appointed representatives of many organizations, including motor carriers, manufacturers, insurance companies, organized labor, technical and engineering groups, shippers, railroads, State and Federal officials, and others. Individual interviews with competent and experienced persons to the number of several hundred were also held.

These activities, extending over a period of about six months, resulted in the issuance by our Bureau of Motor Carriers, on July 1, 1936, of a booklet entitled "Proposed Safety Regulations of the Interstate Commerce Commission Applicable to Motor Carriers Subject to the Motor Carrier Act, 1935." This booklet, more than 8,500 copies of which were distributed throughout the United States, invited criticism and comment upon the proposed regulations. Many organizations and individuals responded with detailed suggestions, and their comments were carefully assembled and studied.

Three public hearings were then conducted: The first at Washington, D.C., before division 5, and the second and third at Portland, Oreg., and Los Angeles, Calif., respectively, before an individual com-

missioner. At these hearings, many witnesses testified, and the evidence presented reflected the same wide range of interests as in the case of the earlier conferences and interviews. Sitting with us at various hearings were officials of six States, namely, New Jersey, Virginia, Iowa, Arizona, Washington, and Oregon.

The extensive record of conferences, correspondence, and the testimony taken at the hearings outlined above shows ample support for the general intent and scope of the proposed regulations issued on July 1. Many detailed items in the original proposals, however, have been revised to meet the criticism and comment submitted to us. The experience and judgment of a host of competent authorities, tempered by administrative and practical considerations which we have had constantly to keep in mind, may thus be said to be embodied in the initial regulations now promulgated. * * *

FINDINGS

We find upon a careful study of the record in this case that the rules and regulations printed in the appendix to this report are reasonable requirements with respect to safety of operation and equipment of motor vehicles by common and contract carriers engaged in interstate or foreign commerce, except as to the special operations set forth in section 203 (b) of the Motor Carrier Act, 1935, and they are hereby approved and adopted.

We recognize that such carriers will require a reasonable time to equip their vehicles in accordance with the regulations and otherwise conform to them. For this reason, we do not deem it wise to make the rules and regulations effective immediately. Part IV relating to the "reporting of accidents" will be made effective as of April 1, 1937. Part I relating to the "qualifications of drivers", Part II relating to the "driving of motor vehicles", and Part III relating to "parts and accessories necessary for safe operation" will be made effective as of July 1, 1937.

An appropriate order will be entered.[8]

[8] The appendix, containing the text of the rules and regulations promulgated in the report, is omitted.

(3) The Practice under the Emergency Price Control Act of 1942 [h]

INTERWOVEN STOCKING CO. v. BOWLES

United States Emergency Court of Appeals.
141 F.2d 696 (1944).

MARIS, Chief Judge. In this case the complainant, Interwoven Stocking Company, complains of the action of the Price Administrator in denying its protest against the application of the General Maximum Price Regulation [1] to the sale of men's half-hose manufactured by it. It appears that the complainant's sole business consists of the manufacture and sale of such hose under the brand name "Interwoven". The hose manufactured by it fall into three principal categories which it designates as staples, semi-staples and fancies. With respect to its lines of staples and semi-staples the complainant issued a revised price list on March 14, 1942, putting into effect price increases for most of those styles. These increased prices became under the terms of the Regulation the complainant's maximum prices for the styles to which they applied and the complainant is not here seeking to increase them. In the case of fancies, however, it is the complainant's practice to establish prices twice each year—in October for the so-called spring season, from January to June, and in March for the so-called fall season, from July to December. As the result of this practice the prices of its fancies in effect in March 1942 had been established in October, 1941. The complainant contends that these prices, having been established nearly six months previously on the basis of conditions then prevailing, did not reflect the increases in costs of materials and labor which had taken place in the interim. Its principal ground of protest was that since the fancies constituted the major part of its output,—two series, Nos. 3.000 and 5.000, alone comprising 64% of it—the freezing of these prices under the Regulation as maximum prices would subject the complainant to irreparable loss and hardship. In its protest the complainant accordingly requested certain increases in its maximum prices, including those for the two lines of fancies mentioned and for certain lines of its semi-staples.

The Administrator treated the complainant's protest as a protest against the validity of the General Maximum Price Regulation as applied to the complainant's business and also as an application for adjustment under the adjustment provisions contained in paragraphs (b) and (c) of Section 18 of the Regulation. Since the complainant offered no evidence tending to show that the Regulation was not generally fair and equitable to the men's hosiery industry as a whole the Administrator concluded that the protest, considered as a protest against the Regulation, must be denied. Considered as an application for individual adjustment, he concluded that it must also be denied because

[h] Act of Jan. 30, 1942, c. 26, 56 Stat. 23, as amended, 50 U.S C.App § 901 et seq.

[1] 7 F.R. 3153.

the complainant had failed to show that the operation of the Regulation had in fact caused it any substantial hardship. * * *

The complainant's contention that the Regulation is invalid because the Administrator failed before issuing it to advise and consult with representative members of the complainant's industry is without merit. Sec. 2(a) of the act provides that "Before issuing any regulation or order under the foregoing provisions of this subsection, the Administrator shall, so far as practicable, advise and consult with representative members of the industry which will be affected by such regulation or order." The General Maximum Price Regulation states that "So far as practicable the Price Administrator consulted with representatives of trade and industry." In view of the all inclusive scope of the Regulation and of the urgent necessity for its prompt issuance consultation with each industry to be affected was clearly not practicable and was, therefore, not required by the act. * * *

The complaint is dismissed.[1]

SAFEWAY STORES, INC. v. BOWLES

United States Emergency Court of Appeals.
145 F.2d 836 (1944).

MARIS, Chief Judge. Maximum Price Regulation 355 as originally issued,[1] established two sets of prices for each zone for beef, veal, lamb and mutton cuts. The higher set of prices applied to Groups 1 and 2 stores and the lower set of prices applied to Groups 3 and 4 stores. Groups 3 and 4 stores include any chain store (one of four or more stores under common ownership whose combined annual gross sales in 1942 were $500,000 or more) and any independent store with gross sales of $250,000 or more in 1942. The regulation was amended May 14, 1943 and as amended created a new class of stores consisting of those which had a total sales volume in 1942 of $250,000 or more and which were members of a chain organization having a combined total sales volume in 1942 of $40,000,000 or more.[2] Prices for these stores were fixed 10% below the prices for other Groups 3 and 4 stores.

The complainant is a corporation which operates a chain of retail food stores, some of which had a sales volume of more than $250,000, and the combined sales volume of which was more than $40,000,000 in 1942. It, therefore, falls within the class created by Amendment No. 3.

The complainant filed a protest against the regulation, as amended. * * *

[1] See § 2 of Emergency Price Control Act of 1942, as amended (Act of Jan. 30, 1942, c. 26, Title I, § 2, 56 Stat. 24, as amended, *50 U.S.C App § 902*); *Great Northern Co-op Ass'n v. Bowles*, 146 F. 2d 269 (Emerg.Ct.App.1944); *Foster & Co. v. Bowles*, 144 F.2d 870 (Emerg.Ct App.1944).

[1] *April 5, 1943, 8 F.R. 4423.*

[2] Amendment No. 3, 8 F.R. 6428.

First it is urged that the regulation is invalid because in its promulgation the Administrator arbitrarily and capriciously ignored the recommendation of representative members of the industry that there be but one price ceiling for meat at the retail level. Section 2(a) of the Emergency Price Control Act provides that

"Before issuing any regulation or order * * * the Administrator shall, so far as practicable, advise and consult with representative members of the industry which will be affected by such regulation or order."

By an amendment made by the Stabilization Extension Act of 1944 [4] it was made explicit that the Administrator "shall give consideration to their recommendations." At a meeting of the meat retailers the representatives there present adopted a resolution urging that only one price ceiling should be established for meats at the retail level. The complainant contends that the Administrator failed to comply with the mandate of the statute that he should consider this recommendation. We think this assertion is contrary to the facts.

The complainant has itself introduced the evidence which proves that the Administrator consulted with these representatives of the retail meat industry. It is clear from the Administrator's opinion that he did obey the statutory mandate by giving consideration to the recommendation for a single price ceiling. Consideration does not necessarily involve acceptance. The Administrator's reasons for refusing to accept the recommendation appear to us entirely persuasive.[5] * * *

A judgment will be entered dismissing the complaint.

[4] Stabilization Extension Act of 1944, § 102, c. 325, 58 Stat. 632, 50 U.S.C.A. Appendix § 902(a).

[5] See the discussion of this point in the Administrator's opinion of May 24, 1944 denying the protest against Amendment 3 to MPR 355 in which he said "The alternative of a single maximum price for small stores offering many services, and for large self-service stores would be either so high that larger stores would enjoy unprecedented margins, with a consequent increase in prices to the consumer, or so low that it would make continued operation by the small service store impossible." 2 O.P.A. Opinions and Decisions.

See also the discussion of this point in Safeway Stores, Inc., v. Bowles, Nos 111 and 150, 145 F.2d 836, decided today.

(4) The Practice under the Administrative Procedure Act

ADMINISTRATIVE PROCEDURE ACT,[1] §§ 3(a), 4

5 U.S.C.Supp. §§ 1002(a), 1003.

Sec. 3. Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency—

(a) RULES.—Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

Sec. 4. Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—

(a) NOTICE.—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

[1] Pub. No. 404, 79th Cong., 2nd Sess., c. 324, June 11, 1946.

(b) PROCEDURES.—After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.

(c) EFFECTIVE DATES.—The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

(d) PETITIONS.—Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule.

(5) The Requirement of Publication

EXCERPT FROM THE FEDERAL REGISTER ACT[k]

44 U.S.C.Supp. §§ 303, 305, 307, 311, 311a.

§ 303. [of 44 U.S.C.Supp.] **"Federal Register"; printing; contents; distribution; price**

All documents required or authorized to be published under section 305 of this chapter shall be printed and distributed forthwith by the Government Printing Office in a serial publication designated the "Federal Register." It shall be the duty of the Public Printer to make available the facilities of the Government Printing Office for the prompt printing and distribution of the Federal Register in the manner and at the times required in accordance with the provisions of this chapter and the regulations prescribed hereunder. The contents of the daily issues shall be indexed and shall comprise all documents, required or authorized to be published, filed with the Division up to such time of the day immediately preceding the day of distribution as shall be fixed by regulations hereunder. There shall be printed with each document a copy of the notation, required to be made under section 302 of this chapter, of the day and hour when, upon filing with the

[k] Act of July 26, 1935, as amended, 49 Stat. 500, 44 U.S.C. Supp. §§ 301–14; see also the second sentence of the Act of Dec. 10, 1942, c. 717, § 1, 56 Stat. 1045, 44 U.S.C. Supp. § 311a.

Division, such document was made available for public inspection. Distribution shall be made by delivery or by deposit at a post office at such time in the morning of the day of distribution as shall be fixed by such regulations prescribed hereunder. The prices to be charged for the Federal Register may be fixed by the administrative committee established by section 306 of this chapter without reference to the restrictions placed upon and fixed for the sale of Government publications by sections 72 and 72a of this title.

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§ 305. [of 44 U.S.C.Supp.] **Documents to be published in Federal Register; comments and news items excluded**

(a) There shall be published in the Federal Register (1) all Presidential proclamations and Executive Orders, except such as have no general applicability and legal effect or are effective only against Federal agencies or persons in their capacity as officers, agents, or employees thereof; (2) such documents or classes of documents as the President shall determine from time to time have general applicability and legal effect; and (3) such documents or classes of documents as may be required so to be published by Act of the Congress: *Provided,* That for the purposes of this chapter every document or order which shall prescribe a penalty shall be deemed to have general applicability and legal effect.

(b) In addition to the foregoing there shall also be published in the Federal Register such other documents or classes of documents as may be authorized to be published pursuant hereto by regulations prescribed hereunder with the approval of the President, but in no case shall comments or news items of any character whatsoever be authorized to be published in the Federal Register.

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§ 307. [of 44 U.S.C.Supp.] **Filing document as constructive notice; publication in Register as presumption of validity; judicial notice; citation**

No document required under section 305 (a) of this chapter to be published in the Federal Register shall be valid as against any person who has not had actual knowledge thereof until the duplicate originals or certified copies of the document shall have been filed with the Division and a copy made available for public inspection as provided by statute, such filing of any document, required or authorized to be published under section 305 of this chapter, shall, except in cases where notice by publication is insufficient in law, be sufficient to give notice of the contents of such document to any person subject thereto or affected thereby. The publication in the Federal Register of any document shall create a rebuttable presumption (a) that it was duly is-

sued, prescribed, or promulgated; (b) that it was duly filed with the Division and made available for public inspection at the day and hour stated in the printed notation; (c) that the copy contained in the Federal Register is a true copy of the original; and, (d) that all requirements of this chapter and the regulations prescribed hereunder relative to such document have been complied with. The contents of the Federal Register shall be judicially noticed and, without prejudice to any other mode of citation, may be cited by volume and page number.

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§ 311. [of 44 U.S.C.Supp.] **Report by Government agencies of documents issued; publication in supplement to Register**

(a) On July 1, 1938, and on the same date of every fifth year thereafter, each agency of the Government shall have prepared and shall file with the Administrative Committee a complete codification of all documents which, in the opinion of the agency, have general applicability and legal effect and which have been issued or promulgated by such agency and are in force and effect and relied upon by the agency as authority for, or invoked or used by it in the discharge of, any of its functions or activities on June 1, 1938 or on the same date of every fifth year thereafter. The Committee shall, within ninety days thereafter, report thereon to the President, who may authorize and direct the publication of such codification in special or supplemental editions of the Federal Register.

(b) The Division of the Federal Register shall supervise and coordinate the form, style, arrangement, and indexing of the codifications of the various agencies.

(c) The codified documents of the several agencies published in the supplemental edition of the Federal Register pursuant to the provisions of subsection (a) hereof, as amended by documents subsequently filed with the Division, and published in the daily issues of the Federal Register, shall be prima-facie evidence of the text of such documents and of the fact that they are in full force and effect on and after the date of publication thereof.

(d) The Administrative Committee shall prescribe, with the approval of the President, regulations for carrying out the provisions of this section.

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§ 311a. [of 44 U.S.C.Supp.] **Publication of cumulative supplement to Code of Federal Regulations**

The publication of a cumulative supplement to the Code of Federal Regulations instead of a new codification, prepared under the super-

vision of the Division of the Federal Register pursuant to the provisions of subsections (c) and (d) of section 311 of this title, is hereby authorized and required.[l]

B. The Requirement of a Hearing

(1) *Is a hearing necessary?*

As we have seen, statutory grants of the rule-making power commonly authorize the issuance of rules and regulations without a preliminary hearing.[m] A hearing may be required, however, by the terms of the statute;[n] and, apart from any statutory requirement, administrative agencies may provide for such hearings in appropriate cases in the exercise of their discretion.[o]

When a statute requires no hearing preliminary to the issuance of rules or regulations or orders of general applicability, a question may be raised as to its constitutionality.

BI-METALLIC INVESTMENT COMPANY v. STATE BOARD OF EQUALIZATION OF COLORADO

Supreme Court of the United States.
239 U.S. 441, 36 S.Ct. 141, 60 L.Ed. 372 (1915).

Mr. Justice HOLMES delivered the opinion of the court.

This is a suit to enjoin the State Board of Equalization and the Colorado Tax Commission from putting in force and the defendant Pitcher, as assessor of Denver, from obeying, an order of the boards, increasing the valuation of all taxable property in Denver 40 per cent. The order was sustained and the suit directed to be dismissed by the supreme court of the state. 56 Colo. 512, 138 Pac. 1010. See 56 Colo. 343, 138 Pac. 509. The plaintiff is the owner of real estate

[l] For an indication of the kind of experience which high-lighted the need for such a statute as the Federal Register Act, see Panama Refining Co. v. Ryan, 293 U.S. 388, 412–3, 55 S.Ct. 241, 245, 79 L.Ed. 446 (1935), *supra* at pp. 235–6.

[m] See, *e.g.*, Securities Exchange Act of 1934, as amended, §§ 23(a), 9(a) (6), 10(a), 15(c) (2), 15 U.S.C. 78w(a), 78i(a) (6), 78j (a), 78o(c) (2); Federal Trade Commission Act, as amended, § 6(g), 15 U.S.C. § 46(g); Internal Revenue Code, § 3791, 26 U.S.C. § 3791; Interstate Commerce Act, as amended, §§ 20(3), 204(a) (1), 49 U.S.C. Supp. §§ 20(3), 304(a) (1); all *supra*, pp. 223–5. See also Administrative Procedure Act, § 4, *supra*, p. 277.

[n] See e.g., Interstate Commerce Act, as amended, § 1(14) (a), 49 U.S.C.Supp. § 1(14) (a), *supra*, p. 224. *Cf.*, Boiler Inspection Act, §§ 2, 5, 6, 45 U.S.C. §§ 23, 28, 29, as construed in United States v. Baltimore and Ohio R. R., 293 U S. 454, 55 S. Ct. 268, 79 L.Ed. 587 (1935).

[o] See *e.g.*, Motor Carrier Safety Regulations, 1 M.C.C. 1 (1936), *supra* at p. 271.

in Denver, and brings the case here on the ground that it was given no opportunity to be heard, and that therefore its property will be taken without due process of law, contrary to the 14th Amendment of the Constitution of the United States. That is the only question with which we have to deal. There are suggestions on the one side that the construction of the state Constitution and laws was an unwarranted surprise, and on the other, that the decision might have been placed, although it was not, on the ground that there was an adequate remedy at law. With these suggestions we have nothing to do. They are matters purely of state law. The answer to the former needs no amplification; that to the latter is that the allowance of equitable relief is a question of state policy, and that as the supreme court of the state treated the merits as legitimately before it, we are not to speculate whether it might or might not have thrown out the suit upon the preliminary ground.

For the purposes of decision we assume that the constitutional question is presented in the baldest way,—that neither the plaintiff nor the assessor of Denver, who presents a brief on the plaintiff's side, nor any representative of the city and county, was given an opportunity to be heard, other than such as they may have had by reason of the fact that the time of meeting of the boards is fixed by law. On this assumption it is obvious that injustice may be suffered if some property in the county already has been valued at its full worth. But if certain property has been valued at a rate different from that generally prevailing in the county, the owner has had his opportunity to protest and appeal as usual in our system of taxation (Hagar v. Reclamation Dist. 111 U.S. 701, 709, 710, 28 L.Ed. 569, 572, 573, 4 Sup. Ct.Rep. 663), so that it must be assumed that the property owners in the county all stand alike. The question, then, is whether all individuals have a constitutional right to be heard before a matter can be decided in which all are equally concerned,—here, for instance, before a superior board decides that the local taxing officers have adopted a system of undervaluation throughout a county, as notoriously often has been the case. The answer of this court in the State R. Tax Cases, 92 U.S. 575, 23 L.Ed. 663, at least, as to any further notice, was that it was hard to believe that the proposition was seriously made.

Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule. If the result in this case had been reached, as it might have been by the state's doubling the rate of taxation, no

one would suggest that the 14th Amendment was violated unless every person affected had been allowed an opportunity to raise his voice against it before the body intrusted by the state Constitution with the power. In considering this case in this court we must assume that the proper state machinery has been used, and the question is whether, if the state Constitution had declared that Denver had been undervalued as compared with the rest of the state, and had decreed that for the current year the valuation should be 40 per cent higher, the objection now urged could prevail. It appears to us that to put the question is to answer it. There must be a limit to individual argument in such matters if government is to go on. In Londoner v. Denver, 210 U.S. 373, 385, 52 L.Ed. 1103, 1112, 28 Sup.Ct.Rep. 708, a local board had to determine "whether, in what amount, and upon whom" a tax for paving a street should be levied for special benefits. A relatively small number of persons was concerned, who were exceptionally affected, in each case upon individual grounds, and it was held that they had a right to a hearing. But that decision is far from reaching a general determination dealing only with the principle upon which all the assessments in a county had been laid.

Judgment affirmed.

BOWLES v. WILLINGHAM

Supreme Court of the United States.
321 U.S. 503, 64 S.Ct. 641, 88 L.Ed. 892 (1944).

Mr. Justice DOUGLAS delivered the opinion of the Court.

Appellee, Mrs. Willingham of Macon, Georgia, sued in a Georgia court to restrain the issuance of certain rent orders under the Emergency Price Control Act of 1942, 56 Stat. 23, 50 U.S.C.App. (Supp. II) § 901 et seq., 50 U.S.C.A.Appendix, § 901 et seq., on the ground that the orders and the statutory provisions on which they rested were unconstitutional. The state court issued, ex parte, a temporary injunction and a show cause order. Thereupon appellant, Administrator of the Office of Price Administration, brought this suit in the federal District Court pursuant to § 205(a) of the Act and § 24(1) of the Judicial Code, 28 U.S.C.A. § 41(1), to restrain Mrs. Willingham from further prosecution of the state proceedings and from violation of the Act, and to restrain appellee Hicks, Bibb County sheriff, from executing or attempting to execute any orders in the state proceedings. The District Court, 51 F.Supp. 597, in reliance on its earlier ruling in Payne v. Griffin, 51 F.Supp. 588, dismissed the Administrator's suit on bill and answer, holding that the orders in question and the provisions of the Act on which they rested were unconstitutional. The case is here on direct appeal. 50 Stat. 752, 28 U.S.C. § 349a, 28 U.S.C.A. § 349a.

Sec. 2(b) of the Act provides in part that, "Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he shall issue a declaration setting forth the necessity for, and recommendations with reference to, the stabilization or reduction of rents for any defense-area housing accommodations within a particular defense-rental area." Pursuant to that authority the Administrator on April 28, 1942, issued a declaration designating twenty-eight areas in various parts of the country, including Macon, Georgia, as defense-rental areas. 7 Fed. Reg. 3193. That declaration stated that defense activities had resulted in increased housing rents in those areas[1] and that it was necessary and proper in order to effectuate the purposes of the Act to stabilize and reduce such rents. It also contained a recommendation pursuant to § 2(b) that the maximum rent for housing accommodations rented on April 1, 1941, should be the rental for such accommodations on that date;[2] and that in case of accommodations not rented

[1] The declaration recited that the designated areas were the location of the armed forces of the United States or of war production industries, that the influx of people had caused an acute shortage of rental housing accommodations, that most of the areas were those in which builders could secure priority ratings on critical materials for residential construction, that new construction had not been sufficient to restore normal rental markets, that surveys showed low vacancy ratios for rental housing accommodations in the areas, that defense activities had resulted in substantial and widespread increases in rents affecting most of these accommodations in the areas, and that official surveys in the areas had shown a marked upward movement in the general level of residential rents.

[2] Sec. 2(b) provides: "Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he shall issue a declaration setting forth the necessity for, and recommendations with reference to, the stabilization or reduction of rents for any defense-area housing accommodations within a particular defense-rental area. If within sixty days after the issuance of any such recommendations rents for any such accommodations within such defense-rental area have not in the judgment of the Administrator been stabilized or reduced by State or local regulation, or otherwise, in accordance with the recommendations, the Administrator may by regulation or order establish such maximum rent or maximum rents for such accommodations as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum rent for any defense-area housing accommodations, the Administrator shall ascertain and give due consideration to the rents prevailing for such accommodations, or comparable accommodations, on or about April 1, 1941 (or if, prior or subsequent to April 1, 1941, defense activities shall have resulted or threatened to result in increases in rents for housing accommodations in such area inconsistent with the purposes of this Act, then on or about a date (not earlier than April 1, 1940), which in the judgment of the Administrator, does not reflect such increases), and he shall make adjustments for such relevant factors as he may determine and deem to be of general applicability in respect of such accommodations, including increases or decreases in property taxes and other costs. In designating defense-rental areas, in prescribing regulations and orders establishing maximum rents for such accommodations, and in selecting persons to administer such regulations and orders, the Administrator shall, to such extent as he determines to be practicable, consider any recommendations which may be made by State and local officials concerned with hous-

on April 1, 1941, or constructed thereafter provisions for the determination, adjustment, and modification of maximum rents should be made, such rents to be in principle no greater than the generally prevailing rents in the particular area on April 1, 1941. The declaration also stated in accordance with the provisions of § 2(b) [3] that if within sixty days after April 28, 1942, such rents within the areas in question had not been stabilized or reduced by state or local regulation or otherwise in accordance with the Administrator's recommendation, the Administrator might fix the maximum rents.

On June 30, 1942, the Administrator issued Maximum Rent Regulation No. 26, effective July 1, 1942, establishing the maximum legal rents for housing in these defense areas, including Macon, Georgia. 7 Fed.Reg. 4905. It recited that the rentals had not been reduced or stabilized since the declaration of April 28, 1942, and that defense activities had resulted in increases in the rentals on or about April 1, 1941, but not prior to that date. The maximum rentals fixed for housing accommodations rented on April 1, 1941 were the rents obtained on that date. § 1388.1704(a). As respects housing accommodations not rented on April 1, 1941, but rented for the first time between that date and the effective date of the regulation, July 1, 1942—the situation involved in this case—it was provided that the maximum rent should be the first rent charged after April 1, 1941. § 1388.1704 (c). But in that case it was provided that the Rent Director (designated by § 1388.1713) might order a decrease on his own initiative on the ground, among others, that the rent was higher than that generally prevailing in the area for comparable housing accommodations on April 1, 1941. § 1388.1704(c), § 1388.1705(c) (1). By Procedural Regulation No. 3, as amended (8 Fed.Reg. 526, 1798, 3534, 5481, 4811) issued pursuant to § 201(d) and § 203(a) of the Act [4] provision

ing or rental conditions in any defense-rental area."

And § 2(c) provides: "Any regulation or order under this section may be established in such form and manner, may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act. Any regulation or order under this section which establishes a maximum price or maximum rent may provide for a maximum price or maximum rent below the price or prices prevailing for the commodity or commodities, or below the rent or rents prevailing for the defense-area housing accommodations, at the time of the issuance of such regulation or order."

[3] See the provisions of § 2(b) in note 2, supra.

[4] Sec. 201(d) provides: "The Administrator may, from time to time, issue such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of this Act."

Sec. 203(a) provides in part: "Within a period of sixty days after the issuance of any regulation or order under section 2, * * * or in the case of a price schedule, within a period of sixty days after the effective date thereof specified in section 206, * * * any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written

was made that when the Rent Director proposed to take such action he should serve a notice upon the landlord involved, stating the proposed action and the grounds therefor. § 1300.207. Within 60 days of the final action of the Rent Director the landlord might file an application for review by the regional administrator for the region in which the defense-rental area office was located and then file a protest with the Administrator for review of the action of the regional office (§ 1300.209, § 1300.210); or he might proceed by protest immediately. § 1300.209, § 1300.215. As we develop more fully hereafter, the Act provides in § 203(a) for the filing of protests with the Administrator. The machinery for a hearing on a protest and a determination of the issue by the Administrator (§ 1300.215-§ 1300.240) was designed to provide the basis of judicial review by the Emergency Court of Appeals as authorized by § 204(a) of the Act.

In June 1943, the Rent Director gave written notice to Mrs. Willingham that he proposed to decrease the maximum rents for three apartments owned by her, and which had not been rented on April 1, 1941, but were first rented in the summer of 1941, on the ground that the first rents for these apartments received after April 1, 1941 were in excess of those generally prevailing in the area for comparable accommodations on April 1, 1941. Mrs. Willingham filed objections to that proposed action together with supporting affidavits. The Rent Director thereupon advised her that he would proceed to issue an order reducing the rents. Before that was done she filed her bill in the Georgia court. The present suit followed shortly, as we have said.

* * *

IV. It is finally suggested that the Act violates the Fifth Amendment because it makes no provision for a hearing to landlords before the order or regulation fixing rents becomes effective. Obviously, Congress would have been under no necessity to give notice and provide a hearing before it acted, had it decided to fix rents on a national basis the same as it did for the District of Columbia. See 55 Stat. 788. We agree with the Emergency Court of Appeals (Avant v. Bowles, 139 F.2d 702) that Congress need not make that requirement when it delegates the task to an administrative agency. In Bi-Metallic Investment Co. v. State Board, 239 U.S. 441, 36 S.Ct. 141, 60 L.Ed. 372, a suit was brought by a taxpayer and landowner to enjoin a Colorado Board from putting in effect an order which increased the valuation of all taxable property in Denver 40 per cent. Such action, it was alleged, violated the Fourteenth Amendment as the plaintiff was given no opportunity to be heard. Mr. Justice Holmes, speaking for

evidence in support of such objections. At any time after the expiration of such sixty days any persons subject to any provision of such regulation, order, or price schedule may file such a protest based solely on grounds arising after the expiration of such sixty days. Statements in support of any such regulation, order, or price schedule may be received and incorporated in the transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the Administrator."

the Court, stated, page 445 of 239 U.S., page 142 of 36 S.Ct., 60 L.Ed. 372: "Where a rule of conduct applies to more than a few people, it is impracticable that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule." We need not go so far in the present case. Here Congress has provided for judicial review of the Administrator's action. To be sure, that review comes after the order has been promulgated; and no provision for a stay is made. But as we have held in Yakus v. United States, supra, that review satisfies the requirements of due process. As stated by Mr. Justice Brandeis for a unanimous Court in Phillips v. Commissioner, 283 U.S. 589, 596, 597, 51 S.Ct. 608, 611, 75 L.Ed. 1289. "Where only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate. Springer v. United States, 102 U.S. 586, 593, 26 L.Ed. 253; Scottish Union & National Ins. Co. v. Bowland, 196 U.S. 611, 631, 25 S.Ct. 345 [351], 49 L.Ed. 619. Delay in the judicial determination of property rights is not uncommon where it is essential that governmental needs be immediately satisfied."

Language in the cases that due process requires a hearing before the administrative order becomes effective (Morgan v. United States, 304 U.S. 1, 19, 20, 58 S.Ct. 773, 776, 777, 999, 82 L.Ed. 1129; Opp Cotton Mills, Inc. v. Administrator, supra, 312 U.S. pages 152, 153, 61 S.Ct. pages 535, 536, 85 L.Ed. 624) is to be explained on two grounds. In the first place the statutes there involved required that procedure.

Secondly, as we have held in Yakus v. United States, supra, Congress was dealing here with the exigencies of war time conditions and the insistent demands of inflation control. Cf. Porter v. Investors' Syndicate, 286 U.S. 461, 471, 52 S.Ct. 617, 620, 76 L.Ed. 1226. Congress chose not to fix rents in specified areas or on a national scale by legislative fiat. It chose a method designed to meet the needs for rent control as they might arise and to accord some leeway for adjustment within the formula which it prescribed. At the same time the procedure which Congress adopted was selected with the view of eliminating the necessity for "lengthy and costly trials with concomitant dissipation of the time and energies of all concerned in litigation rather than in the common war effort." S.Rep. No. 931, 77th Cong., 2d Sess., p. 7. To require hearings for thousands of landlords before any rent control order could be made effective might have defeated the program of price control. Or Congress

might well have thought so. National security might not be able to afford the luxuries of litigation and the long delays which preliminary hearings traditionally have entailed.

We fully recognize, as did the Court in Home Bldg. & Loan Association v. Blaisdell, 290 U.S. 398, 426, 54 S.Ct. 231, 235, 78 L.Ed. 413, 88 A.L.R. 1481, that "even the war power does not remove constitutional limitations safeguarding essential liberties." And see Hamilton v. Kentucky Distilleries Co., supra, 251 U.S. page 155, 40 S.Ct. page 107, 64 L.Ed. 194. But where Congress has provided for judicial review after the regulations or orders have been made effective it has done all that due process under the war emergency requires.

Other objections are raised concerning the regulations or orders fixing the rents. But these may be considered only by the Emergency Court of Appeals on the review provided by § 204. Yakus v. United States, supra.

Reversed.[p]

(2) Nature of the hearing when required

NORWEGIAN NITROGEN PRODUCTS COMPANY v. UNITED STATES

Supreme Court of the United States.
288 U.S. 294, 53 S.Ct. 350, 77 L.Ed. 796 (1933).

Mr. Justice CARDOZO delivered the opinion of the Court.

On May 6, 1924 (43 Stat. 1949) the President of the United States determined and proclaimed that an increase in the rate of duty on sodium nitrite was necessary to equalize the differences in the costs of production in the United States and the principal competing country, Norway, and that to that end the duty should be increased from 3 cents per pound to 4½ cents per pound. The proclamation was made after an investigation and report by the United States Tariff Commission under the flexible tariff provisions of the Tariff Act of 1922. Tariff Act of September 21, 1922, c. 356, § 315, 42 Stat. 858, 941–943 (19 U.S.C.A. §§ 154–159). After the new rate of duty had thus gone into effect, there were new importations of sodium nitrite at the port of New York. The duty was assessed by the customs officers in accordance with the proclamation; and protests were filed by the petitioner, which is the exclusive agent within the United States of the leading exporter to this country of the commodity affected. The protests were made upon the ground that the Tariff Commission in investigating the costs of production in the United States and

[p] The concurring opinion of Mr. Justice Rutledge and the dissenting opinion of Mr. Justice Roberts are omitted.

Norway had not given the petitioner the hearing prescribed by the statute, and that all that followed was of no validity. A judgment of the Customs Court overruling the protests (T.D. 44,824, 59 Treas.Dec. 921) was affirmed by the Court of Customs and Patent Appeals. T. D. 45,674. A writ of certiorari brings the case here.

In October, 1922, the American Nitrogen Products Company submitted to the Tariff Commission a request for a report and recommendation to the President that the duty on sodium nitrite be increased 50 per cent. It stated in this request that with every reasonable effort to economize it had been unable to compete with the foreign manufacturers and had been forced to close its plant. In response to this request, the Commission on March 27, 1923, ordered that an investigation be made, declared that a public hearing would be held on a date thereafter to be fixed, and gave public notice of its order. The Commission then proceeded to the business of investigation. From the chief producers of sodium nitrite in the United States (the American Nitrogen Products Company and another), the agents of the Commission received the fullest measure of disclosure as to the costs of production and other details of the business. The information as to costs was subject to a pledge of secrecy; the manufacturers taking the position, to which the Commission acceded, that costs were trade secrets, to be withheld from competitors. The chief foreign producers were two; the Norsk-Hydro, a Norwegian company, represented by the petitioner, and the Badische-Anilin of Germany. Both foreign producers refused to supply the investigators for the Commission with any statement of costs, or to permit access to their records. The Norwegian company wrote afterwards in a cablegram to the petitioner: "On principle we always refuse publish cost price, consequently did not furnish investigators any information enabling them calculate cost price." The Commission was hindered, but not baffled. Its investigators went to Norway, and, consulting other sources of information, made an estimate of cost as best they could. By July 20, 1923, the preliminary investigation was over, and the Commission was ready for a public hearing. It gave public notice on that date that on September 10, 1923, all parties interested would be given an opportunity to appear before the Commission, to produce evidence, and to be heard with regard to differences in the cost of sodium nitrite and any other facts and conditions affecting the inquiry.

At the time thus appointed, the petitioner appeared, represented by its counsel. It made a motion at the beginning that it receive a complete copy of the request or application for an increase of rates. The copy already furnished to it was not complete, in that the details of the costs of production at the applicant's factory had been left out. The president of the applicant protested that the information as to costs had been given under a promise to hold it confidential, and the chairman of the Commission thereupon assured him that the promise

of domestic and foreign articles in the principal markets of the United States; (3) advantages granted to a foreign producer by a foreign government, or by a person, partnership, corporation, or association in a foreign country; and (4) any other advantages or disadvantages in competition." This provision is followed by others designed to give protection against hasty or ill-considered changes. There shall be no proclamation under the authority of the statute until an investigation to assist the President has been made by the United States Tariff Commission, which is "authorized to adopt such reasonable procedure, rules, and regulations as it may deem necessary." Coupled with these general directions is a mandate more particular, which is the petitioner's chief reliance. "The commission shall give reasonable public notice of its hearings, and shall give reasonable opportunity to parties interested to be present, to produce evidence, and to be heard." Section 315(c).

The decision of this case hinges upon our answer to the question whether the petitioner has been "heard" in accordance with the statute. Does the requirement of a hearing mean that every producer or importer affected by a tariff may explore at will the data collected by the Commission as to the capital, the wages, the cost of material and manufacture, in the business of any other person similarly affected, and may cross-examine investigators and competitors upon the data thus laid bare? If something less than this is exacted, is there still a minimum of disclosure without which the purpose of the hearing will be thwarted altogether, and was this minimum attained by what was done by the Commission here?

1. History, analogy, and administrative practice point with sureness to the conclusion that letters of marque have not been issued to every producer or importer affected by a tariff to capture knowledge of the business of every rival so affected in all the intimate details uncovered to the investigating officers.

The appeal to history is a threefold one: To the history of the process of tariff making by Congress and congressional committees; to the history of this statute in its progress through the Houses; and to the history of this investigating commission and of others that came before.

The process of tariff making by Congress and congressional committees is not different in essentials from that for legislation generally. If the bill has gone to a committee, the practice has been general to give the privilege of a hearing to business men and others affected by its provisions. The hearing is not one that may be demanded as of right. A change of the tariff laws like a change of any other statute is not subject to impeachment on the score of invalidity, though notice to those affected has been omitted altogether. Luce, Legislative Procedure, p. 143, cf. Buttfield v. Stranahan, 192 U.S. 470, 24 S.Ct. 349, 48 L.Ed. 525. Even so, the privilege is now so fortified by practice that it may fairly be taken for granted. But the

hearing when given is not similar to a trial as conducted in a court. The proponents of a bill and the contestants make their statements for and against, bringing forward such confirmatory documents, trade journals, letters, governmental reports, and what not, as they believe to be important. The kind of information thus supplied can be gathered from the proceedings of the committees that reported the Tariff Act in question, the act of 1922, as well as from those leading up to the tariff acts of other years. In none of these congressional hearings has the practice ever prevailed of permitting the advocates of a measure to cross-examine the opponents, or the opponents the advocates, or of compelling the committee itself to submit to an inquisition as to data collected by its members through independent investigation. The committee determines for itself whether its sessions shall be public or private. "Investigations [in Congress] often proceed behind closed doors, for the manifest reason that otherwise some witnesses would not be frank, perhaps would not attend, putting themselves if possible beyond the reach of the committee." Luce, Legislative Procedure, p. 144. It is all a matter of discretion. What is done by the Tariff Commission and the President in changing the tariff rates to conform to new conditions is in substance a delegation, though a permissible one, of the legislative process. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 48 S.Ct. 348, 72 L.Ed. 624; Buttfield v. Stranahan, supra; Field v. Clark, 143 U.S. 649, 12 S.Ct. 495, 36 L.Ed. 294. The inference is, therefore, a strong one that the kind of hearing assured by the statute to those affected by the change is a hearing of the same order as had been given by congressional committees when the legislative process was in the hands of Congress and no one else. To be sure there has been a change of sanction. What was once a mere practice has been converted into a legal privilege. But the limits of the privilege were not meant to be greatly different from those of the ancient practice that had shaped the course of legislation.

We have said that the inference is a strong one, yet, of course, it is far from conclusive and might even be inadequate if it were considered by itself. The history of the statute as it passed through the two Houses of the Congress supplies confirmatory evidence. The bill in its early stages empowered the President to change tariff rates, but said nothing whatever as to the manner in which the preliminary investigation should be made. 62 Cong.Rec., pt. 7, p. 7108, pt. 11, pp. 11,155, 11,156, 11,193. A letter from President Harding to the chairman of the Finance Committee of the Senate recommended that Congress name the Tariff Commission as the source of information and recommendation upon which the President might proclaim a change. 62 Cong.Rec., pt. 11, p. 11,211. Several amendments embodying this recommendation were proposed in each chamber of the Congress. Nowhere in the long debates that followed is there a suggestion by any one that witnesses or others appearing in the inquiry

should be heard in any other way than according to the customary procedure for investigating bodies. The first amendment named the Tariff Commission as the investigator, but gave no directions as to the mode of action. 62 Cong.Rec., pt. 11, pp. 11,229, 11,232. A second provided that the Commission "shall give such opportunity as it deems proper for the presentation of material facts in each case and arguments thereon." 62 Cong.Rec., pt. 11, p. 11,229. These provisions aroused the fear that at times there might be no hearing, or hearings at which only one side would be permitted to appear. 62 Cong.Rec., pt. 11, p. 11,231. A third amendment, proposed in the Senate, recast the statute by providing that "the Commission shall give reasonable public notice and shall give reasonable opportunity to parties interested to be present and to produce evidence and to be heard," which is in the statute as enacted, and by providing also "said hearings shall be public" and the President shall publish with his findings "the hearings and testimony." 62 Cong.Rec., pt. 11, pp. 11,231, 11,232. These last provisions were omitted in conference, and the section was thus amended to read as it stands today. 62 Cong. Rec., pt. 12, p. 12,627. The omission may have been unwise, but it certainly was not inadvertent. The managers on the part of the House reported (62 Cong.Rec., pt. 12, p. 12,660): "The action of the conferees eliminates the provision of the Senate amendment that the Tariff Commission hearings shall be public and that the President shall make the findings, hearings and testimony in all proceedings public as soon as practicable after the issuance of a proclamation." The change was criticized in the Senate (62 Cong.Rec., pt. 12, p. 12,888), but in the face of the criticism it was written into the law.

* * *

Our discussion of the significance of history as an aid to the construction of the statute will be inadequate if it is confined to the history of hearings by congressional committees and to the amendments of the bill in its progress through the Houses. There is need to consider also the history of this Commission before the act of 1922, and that of earlier commissions organized for kindred purposes.

The powers of the President under the flexible tariff provisions of the act of 1922 differ in degree rather than in kind from powers that have long been his. By an act of March 3, 1815 (3 Stat. 224), the President was empowered to give effect to a repeal of duties upon imports whenever he was "satisfied that the discriminating or countervailing duties" of the foreign nation affected, "so far as they operate to the disadvantage of the United States," had been abolished. See Field v. Clark, 143 U.S. 649, 685, 12 S.Ct. 495, 36 L.Ed. 294. Powers very similar were conferred in later years. See, e. g., Act of March 3, 1817, c. 39, 3 Stat. 361; Act of January 7, 1824, c. 4, 4 Stat. 2, 3; Act of May 31, 1830, c. 219, 4 Stat. 425; Act of June 26, 1884, c. 121, 23 Stat. 57; Field v. Clark, supra, pages 686, 689 of 143 U.S.,

12 S.Ct. 495, 36 L.Ed. 294.[1] The Tariff Act of 1890 went farther than those before it. Whenever the President became satisfied that the government of any country producing and exporting certain enumerated articles had imposed duties upon the agricultural or other products of the United States which he found to be reciprocally unequal and unreasonable, he was to have power to suspend the provisions of the tariff law whereby importation of the enumerated articles had previously been free. 26 Stat. 567, 612, c. 1244. Broader still was the delegation of power under the Tariff Act of 1909, which set up a system of maximum and minimum rates with permission to the President to adopt the one set or the other. 36 Stat. 11, 82, c. 6. Under none of these statutes was executive action conditioned upon an inquiry and report by any officer or department. In the fulfillment of his duties, the President consulted whatever sources of information appeared to be appropriate, and, when satisfied as to the facts, made proclamation of his action.

The first statute for the appointment of a commission to deal with the problem of the tariff was enacted in 1882. 22 Stat. 64, c. 145. See F. W. Taussig, Tariff History of the United States (8th Ed.) p. 231. The Commission, which was to be an investigating body merely, was established as an aid to Congress rather than the President. It was to report at the next session of Congress what changes it thought desirable. After the expiration of its life, neither President nor Congress received official aid that was more than desultory or occasional till a body styled the Tariff Board was organized by President Taft in 1909. Taussig, supra, pp. 405, 481. This board was established under a provision of the Tariff Act of that year, which by section 2 gave the President a choice between two sets of duties; a maximum and a minimum. "To secure information to assist the President in the discharge of the duties imposed upon him by this section, and the officers of the Government in the administration of the customs laws, the President is hereby authorized to employ such persons as may be required." 36 Stat. 83, c. 6. The function of the new board was to investigate and advise. See Taussig, supra, p. 424.

The Tariff Board went down at the end of 1912 through the failure of the Congress to provide the ways and means. Taussig, supra, 424, n. 1. No similar body was created till the organization of the present Tariff Commission in 1916. * * *

From the beginning there has been an administrative policy to treat the costs or investments of identified producers as akin to a trade secret, with the result that disclosure, even if not strictly within the prohibition of the statute (Revenue Act of 1916, § 708 [19 U.S.C.A.

[1] For other instances, see Comer, Legislative Functions of National Administrative Authorities, pp. 64, et seq.

§ 105]), was forbidden in the view of the Commission by persuasive considerations of fair dealing and expediency. Congress did not then protest and indeed never has protested, though Congress was the very body for whose benefit the investigation had been made and the reports transmitted. In providing, as it did, in 1922, that a reasonable opportunity for a hearing should be given to any one affected by a change, it had no thought, we may well believe, to prohibit reservations and confidences that would be allowed against itself. * * *

We are not unmindful of cases in which the word "hearing" as applied to administrative proceedings has been thought to have a broader meaning. All depends upon the context. There is no denial of the power of Congress to lay bare to the business rivals of a producer and indeed to the public generally every document in the office of this Commission and all the information collected by its agents. The question for us here is whether there was the will to go so far. The answer will not be found in definitions of a hearing lifted from their setting and then applied to new conditions. The answer will be found in a consideration of the ends to be achieved in the particular conditions that were expected or foreseen. To know what they are, there must be recourse to all the aids available in the process of construction, to history and analogy, and practice as well as to the dictionary. Much is made by the petitioner of the procedure of the Interstate Commerce Commission when regulating the conduct or the charges of interstate carriers, and that of the Public Service Commissions of the states when regulating the conduct or the charges of public service corporations. The Tariff Commission advises; these others ordain. There is indeed this common bond that all alike are instruments in a governmental process which according to the accepted classification is legislative, not judicial. Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 226, 29 S.Ct. 67, 53 L.Ed. 150; Keller v. Potomac Electric Power Co., 261 U.S. 428, 440, 43 S.Ct. 445, 67 L.Ed. 731. Cf. People ex rel. Central Park, M. & E. R. R. Co. v. Willcox, 194 N.Y. 383, 386, 87 N.E. 517. Whatever the appropriate label, the kind of order that emerges from a hearing before a body with power to ordain is one that impinges upon legal rights in a very different way from the report of a commission which merely investigates and advises. The traditionary forms of hearing appropriate to the one body are unknown to the other. What issues from the Tariff Commission as a report and recommendation to the President, may be accepted, modified, or rejected. If it happens to be accepted, it does not bear fruit in anything that trenches upon legal rights. No one has a legal right to the maintenance of an existing rate or duty. Neither the action of Congress in fixing a new tariff nor that of the President in exercising his delegated power is subject to impeachment if the prescribed forms of legislation have been regularly observed. It is very different, however, when orders are directed against public service corporations limiting their powers in the transaction of their

business. They may be challenged in the courts if the effect is to reduce the charges to the point of confiscation. Smyth v. Ames, 169 U.S. 466, 18 S.Ct. 418, 42 L.Ed. 819. They may be challenged for other reasons when they are without evidence supporting them, and are merely arbitrary edicts. Interstate Commerce Commission v. Union Pac. R. Co., 222 U.S. 541, 547, 32 S.Ct. 108, 56 L.Ed. 308; Manufacturers' R. Co. v. United States, 246 U.S. 457, 481, 38 S.Ct. 383, 62 L.Ed. 831; Northern Pac. R. Co. v. Dept. Public Works, 268 U.S. 39, 44, 45 S.Ct. 412, 69 L.Ed. 836; Chicago, M. & St. P. R. Co. v. Public Utilities Comm., 274 U.S. 344, 351, 47 S.Ct. 604, 71 L.Ed. 1085. Cf. Sharfman, The Interstate Commerce Commission, vol. II, p. 424. The "hearing" that such commissions are to give must be adapted to the consequences that are to follow, to the attack and the review to which their orders will be subject. Interstate Commerce Commission v. Louisville & Nashville R. Co., 227 U.S. 88, 93, 33 S.Ct. 185, 57 L.Ed. 431; St. Louis Southwestern R. Co. v. Interstate Commerce Commission, 264 U.S. 64, 44 S.Ct. 294, 68 L.Ed. 565; Atchison, T. & S. F. R. Co. v. United States, 284 U.S. 248, 52 S.Ct. 146, 76 L.Ed. 273. The Commerce Act, as it stands today, and kindred statutes in the states, are instinct with the recognition of a duty to give a hearing of such a kind that the courts will understand why a commission has acted as it has if their supervisory powers are afterwards invoked for enforcement or revision. No such inference is to be drawn from the act before us now.

The tokens of intention set down in this opinion have a force in combination that is denied to any one of them alone. They impel us to the holding that within the meaning of this act the "hearing" assured to one affected by a change of duty does not include a privilege to ransack the records of the Commission, and to subject its confidential agents to an examination as to all that they have learned. There was no thought to revolutionize the practice of investigating bodies generally, and of this one in particular. Hearings had once been optional. By the new statute they became mandatory. The form remained the same. * * *

The judgment is affirmed.

Mr. Justice McREYNOLDS is of the opinion that the judgment should be reversed.

THE ASSIGNED CAR CASES

Supreme Court of the United States.
274 U.S. 564, 47 S.Ct. 727, 71 L.Ed. 1204 (1927).

Mr. Justice BRANDEIS delivered the opinion of the Court.

These five suits were brought in the federal court for Eastern Pennsylvania under the Urgent Deficiencies Act October 22, 1913, c. 32, 38 Stat. 208, 219 (Comp. St. § 994), to enjoin and annul an order

of the Interstate Commerce Commission. The order, which was to become effective March 1, 1925, prescribes for all railroads subject to its jurisdiction a so-called "assigned car rule" governing the distribution of cars among bituminous coal mines in times of car shortage. Assigned Cars for Bituminous Coal Mines, 80 Interst. Com. Com'n R. 520; Id., 93 Interst. Com. Com'n R. 701. Some of the plaintiffs are operators of coal mines, some distributors of coal, some large private consumers of coal, and some are railroads. All had been parties to the proceeding before the Commission in which the order was entered. The defendants in each case are the United States, the Interstate Commerce Commission, and various intervening mine operators. All the defendants answered. The cases were heard together on the evidence before three judges. A final decree granting the relief prayed for was entered in each case on December 15, 1925. Berwind-White Coal Mining Co. v. United States (D. C.) 9 F.(2d) 429. The cases are here on appeal under section 238 of the Judicial Code as amended (Comp.St. § 1215). They were argued together. * * *

The rule here assailed was the fruit of an investigation commenced by the Commission of its own motion, in March, 1921, with a view to prescribing just and reasonable rules applicable to all carriers concerning the use of assigned cars for bituminous coal. Every carrier subject to its jurisdiction was made a respondent. Private coal car owners, coal mine operators, coal miners, coal distributors and large coal consumers became parties by intervention. The evidence introduced occupied nearly 6,000 pages. The investigation extended over four years. The reports of the Commission on the original hearing and the rehearing occupy 117 pages of the record. It concluded that the practices expressed in the Hocking Valley-Traer rule, and other existing regulations of carriers, resulted in unjust discrimination and were unreasonable. It ordered that the carriers cease and desist from such practices. And it prescribed the uniform rule which prohibits any carrier from placing for loading at any mine more than that mine's ratable share of all cars, including assigned cars, available for use in the district; unless the carrier is permitted to place more by an emergency order issued by the Commission pursuant to paragraph (15) of section 1 of the Interstate Commerce Act as amended by section 402 of the Transportation Act February 28, 1920, c. 91, 41 Stat. 456, 477 (Comp.St. § 8563). This rule requires that in determining how many cars are available in the district, the carrier placing the cars shall count all cars; that is, it must include with those owned by it, all owned by foreign railroads and assigned for their fuel service and likewise all owned by private shippers and assigned for their service. Thus, the prohibition embodied in the rule applies to all carriers, whatever the character of the consignor or consignee, and whatever the use to which the coal is to be put.

The operation of the uniform rule may be illustrated by the following example: Assume that there are in the district 10 mines each

with the rating, or capacity, of 20 cars a day; that of the 200 cars needed to fill the district's requirement only 100 cars are available on a particular day; and that of the 100, only 85 are owned by the railroad, the remaining 15 being owned by mine A. Under the rule, the share of each mine would be 10 cars. Mine A would be permitted to have placed its own cars, but only 10 of them. If, on the other hand, 95 of the 100 cars had been owned by the carrier, and only 5 by mine A, there would be placed at its mine, in addition to its own 5 cars, 5 of the carrier's so-called system cars. The rule does not divert the surplus of cars owned by one shipper to use by another. It merely puts a restriction upon the use of the private car by limiting the number of the so-called assigned cars which may be placed at a particular mine at a particular time. The owner may use the surplus elsewhere, or he may lease the surplus cars to the carrier or to another shipper. The operation of the rule upon assigned railroad fuel cars is precisely similar. The limitation is imposed in order to improve the service and to prevent any mine (including one operated by a railroad) from securing, at the particular time, more than its ratable share of the aggregate available coal transportation facilities. * * *

Second. The main question for decision is one of statutory construction. It is whether Congress has vested in the Commission authority to prohibit a use of assigned cars by a general rule, which in its judgment is necessary to prevent unjust discrimination among mines or shippers and to provide reasonable service. The legislation to be construed is paragraphs 10 to 17, added to section 1 of the Interstate Commerce Act by section 402 of Transportation Act, 1920, February 28, 1920, c. 91, 41 Stat. 456, 476. The paragraphs more directly involved are:

"(12) It shall also be the duty of every carrier by railroad to make just and reasonable distribution of cars for transportation of coal among the coal mines served by it, whether located upon its line or lines or customarily dependent upon it for car supply. During any period when the supply of cars available for such service does not equal the requirements of such mines it shall be the duty of the carrier to maintain and apply just and reasonable ratings of such mines and to count each and every car furnished to or used by any such mine for transportation of coal against the mine. Failure or refusal so to do shall be unlawful, and in respect of each car not so counted shall be deemed a separate offense, and the carrier, receiver, or operating trustee so failing or refusing shall forfeit to the United States the sum of $100 for each offense, which may be recovered in a civil action brought by the United States. * * *

"(14) The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by carriers by railroad subject to this act. * * *" * * *

Fourth. The contention that findings of the Commission concerning discrimination were unsupported by evidence, or that findings essential to the order are lacking, rests largely upon a misconception. This objection was directed particularly to the finding that the existing practice in regard to assigned cars results in giving to the mines enjoying assigned cars an unjust and unreasonable share of railroad services and of facilities other than cars. The claim is that the evidence, upon which the finding of the resulting discrimination in these other transportation facilities rests, relates to only a few carriers, and that the general finding to that effect is without support, because the evidence introduced was not shown to be typical. Compare New England Divisions Case, 261 U.S. 184, 196, 197, 43 S.Ct. 270, 67 L.Ed. 605; United States v. Abilene & Southern Ry. Co., 265 U.S. 274, 291, 44 S.Ct. 656, 68 L.Ed. 1016. The argument overlooks the difference in the character between a general rule prescribed under paragraph (12) and a practice for particular carriers ordered or prohibited under sections 1, 3, and 15 of the Interstate Commerce Act (Comp.St. §§ 8563, 8565, 8583). In the cases cited, the Commission was determining the relative rights of the several carriers in a joint rate. It was making a partition; and it performed a function quasi-judicial in its nature. In the case at bar, the function exercised by the Commission is wholly legislative. Its authority to legislate is limited to establishing a reasonable rule. But in establishing a rule of general application, it is not a condition of its validity that there be adduced evidence of its appropriateness in respect to every railroad to which it will be applicable. In this connection, the Commission, like other legislators, may reason from the particular to the general.
* * *

The order challenged is valid. The bills must be dismissed. The decrees are reversed.[q]

SECTION 4. CONTROL THROUGH RULES ADOPTED BY THE REGULATED ENTERPRISES

INTERSTATE COMMERCE ACT, § 1(13)

49 U.S.C. § 1(13).

Sec. 1. (13) The Commission is hereby authorized by general or special orders to require all carriers by railroad subject to this part, or any of them, to file with it from time to time their rules and regulations with respect to car service, and the Commission may, in

[q] The dissenting opinion of Mr. Justice McReynolds is omitted. The footnotes of the court have likewise been omitted.

its discretion, direct that such rules and regulations shall be incorporated in their schedules showing rates, fares, and charges for transportation, and be subject to any or all of the provisions of this part relating thereto.

PROCTER & GAMBLE CO. v. UNITED STATES

Supreme Court of the United States.
225 U.S. 282, 32 S.Ct. 761, 56 L.Ed. 1091 (1912).

Mr. Chief Justice WHITE delivered the opinion of the court.

Having three manufacturing plants, one at Ivorydale, Ohio, a second at Port Ivory, New York, and a third at Kansas City, Kansas, in which they carried on the business of refining cottonseed and other oils and of manufacturing soap and other products from grease and oil, the Procter & Gamble Company, to facilitate the transportation to their factories of the substances required for their operation, and of shipping out the finished products, became the owner of about five hundred railroad tank cars. The cars were exclusively devoted to the business of the company in the following manner: On the property of the company in the yards about their factories there were railroad tracks belonging to the company which served for holding empty or loaded cars, the cars thus situated being held for storage and for movement from place to place, as business required. At each of the factories there was also an interchange track connected with the tracks in the yards and with the tracks of the railroad company or companies through whom the business of shipping in interstate commerce to and from the factories was carried on. The movement of cars to the interchange tracks for outward shipment and from the interchange tracks when they were left there by railroad companies was at two of the factories carried on by the company through its own employees and motive power. At the other one this work was done by a railroad company, who made an independent and special charge for the service. The transportation of the private tank cars of the corporation by the railroad companies was governed by established rules, and the price paid to the railroads for transporting the commodities of the company in its private cars was the regular price fixed for such commodities in the established tariffs. The railroads, however, paid to the company for the use of its private cars a fixed sum per mile, this payment being also stated in the regular established tariffs in compliance with law. A portion of the carrier's rule (rule 29), relating to the subject of compensation for hauling such private tank cars, is in the margin.†

† Rule 29. **(Sec. 1.)** In providing ratings in this classification for articles in tank cars, the carriers whose tariffs are governed by this classification do not assume any obligation to furnish tank cars in cases where they do not own or have not made arrangements for supplying such equipment. When tank cars are furnished by shippers or owners, mileage at the rate of three quarters (¾) of one cent per mile will be allowed for the use of such tank cars, loaded or emp-

In 1910, among others, the railroads engaged in transporting tank cars from the plants of the Procter & Gamble Company adopted a system of rules governing the payment of demurrage by shippers. The provisions of these rules pertinent to this case are excerpted in the margin.

The rules in question were prepared by a committee of the National Association of Railroad Commissioners, composed of a representative from each state having a railroad commission and a member of the Interstate Commerce Commission, and were adopted in convention by the National Association, and were subsequently approved by the Interstate Commerce Commission, although putting them in force was not imperatively prescribed by that body.

The Procter & Gamble Company, dissatisfied with the regulations concerning demurrage, in so far as they imposed in certain respects charges upon its tank cars, filed a complaint with the Interstate Commerce Commission, charging the rules to be repugnant to the act to regulate commerce because unjust and oppressive, and because to enforce them would create preferences and discriminations forbidden by the act. After hearing, the Commission made a report declaring that the rules complained of were in no sense in conflict with the act to regulate commerce, and on the contrary conformed to that act, and tended to prevent and repress unlawful preferences and discriminations. An award of relief was therefore denied. In February, 1911, the Procter & Gamble Company filed a petition in the commerce court of the United States, making defendants the United States, the Interstate Commerce Commission, and the railroads who had been complained of in the proceeding before the Commission. The petition recited the facts stated above as to the character of the business of the petitioner, the ownership of tank cars, etc., the establishment of the rules for demurrage, their repugnancy to the act to regulate commerce, the injury which had resulted from being compelled to pay the charges for demurrage in accordance with the rules, the application made to the Commission, and the refusal of that body to award relief. The conception upon which the petition was based is shown in the excerpt in the margin,† wherein it was also charged that the order of the Commission dismissing the complaint as above set forth "is null and void and beyond the power of said Interstate Commission, in that it sustains the validity of * * * said demurrage rules."

The prayer was as follows:

"Wherefore, complainant prays that the aforesaid order of said Interstate Commerce Commission made in said cause No. 3208 on November 14, 1910, be set aside and annulled, and that the defendant railway companies, and each of them, be enjoined from collecting or attempting to collect any demurrage charges upon complainant's loaded

ty, provided the cars are properly equipped No mileage will be allowed on cars switched at terminals nor for movement of cars under empty freight car tariffs.

† [Footnote omitted—Ed.]

tank cars after said cars have been delivered to complainant and placed upon tracks owned or controlled by it; and further, that said defendant railway companies and each of them be required to repay to complainant herein all sums found to have been wrongfully collected by them, or any of them, under the rule here complained of; and that complainant be granted such other and further relief as it may be entitled to in the premises."

The railroads answered the bill. The United States and the Interstate Commerce Commission appearing for the purpose, challenged the jurisdiction of the court to entertain the cause, and moved to dismiss, upon this general ground: "Because the order of the Interstate Commerce Commission complained of directed no affirmative relief and the negative order of the Commission dismissing the complaint affords no ground for an action in this court;" and upon the following more detailed specifications filed on behalf of the United States:

"(*a*) It prays that the order of the Interstate Commerce Commission be enjoined, when said order directed no action against any party, and therefore the same is not subject either to enforcement or to injunction.

"(*b*) It prays that the defendant common carriers, who are not proper parties to this proceeding except on their own motion, be enjoined from collecting the demurrage mentioned, when no order inhibiting the same has been made by the Interstate Commerce Commission, and in the absence of such an order this court has no power to grant such relief.

"(*c*) It prays that the defendant common carriers be required to repay to complainant all sums heretofore wrongfully collected as demurrage, when this court has no power or jurisdiction to grant such relief, either with or without an order of the Interstate Commerce Commission directing such repayment. * * *

The case was then brought here by the appeal of the Procter & Gamble Company. That company insists that the court below erred in not awarding the relief which was asked and in dismissing the petition. On the other hand, the Interstate Commerce Commission and the railroads insist that the court was right in refusing relief and dismissing the bill. Before we can come, if at all, to consider the merits, however, it is necessary to dispose of the question concerning the jurisdiction of the court below to entertain the petition, because the United States insists at bar, as it did in the lower court, that the court erred in overruling the demurrer to the jurisdiction and refusing to dismiss the cause for want of jurisdiction.

The provisions of the act to establish the commerce court, fixing the jurisdiction of that court, are stated in the 1st section of the act of June 18, 1910 [36 Stat. at L. 539, chap. 309], now § 207 of the judiciary act of March 3, 1911 (36 Stat. at L. 1148, chap. 231, U.S.Comp. Stat.Supp.1911, p. 216). And in view of the necessity of having the

provisions of the section immediately in mind, we reproduce them. They are as follows:

"Sec. 207. The commerce court shall have the jurisdiction possessed by circuit courts of the United States and the judges thereof immediately prior to June eighteenth, nineteen hundred and ten, over all cases of the following kinds:

"First. All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty, or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money.

"Second. Cases brought to enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission.

"Third. Such cases as by section three of the act entitled, 'An Act to Further Regulate Commerce with Foreign Nations and Among the States,' approved February nineteenth, nineteen hundred and three [32 Stat. at L. 848, chap. 708, U.S.Comp.Stat.Supp.1911, p. 1309], are authorized to be maintained in a circuit court of the United States.

"Fourth. All such mandamus proceedings as, under the provisions of section twenty or section twenty-three of the act entitled, 'An Act to Regulate Commerce,' approved February fourth, eighteen hundred and eighty-seven [24 Stat. at L. 386, 387, chap. 104, U.S.Comp.Stat. Supp.1911, p. 1304], as amended, are authorized to be maintained in a circuit court of the United States.

"Nothing contained in this chapter shall be construed as enlarging the jurisdiction now possessed by the circuit courts of the United States or the judges thereof, that is hereby transferred to and vested in the commerce court.

"The jurisdiction of the commerce court over cases of the foregoing classes shall be exclusive; but this chapter shall not affect the jurisdiction possessed by any circuit or district court of the United States over cases or proceedings of a kind not within the above-enumerated classes."

The question to be decided is this: Does the authority with which the commerce court is clothed in virtue of these provisions invest that body with jurisdiction to redress complaints based exclusively upon the conception that the Interstate Commerce Commission, in a matter submitted to its judgment and within its competency to consider, has mistakenly refused, upon the ground that no right to the relief claimed was given by the act to regulate commerce, to award the relief which was claimed at its hands? In other words, the important question is, Is the authority of the commerce court confined to enforcing or restraining, as the case may require, affirmative orders of the Commission, or has it the power to exert its own judgment by originally interpreting the administrative features of the act to regulate commerce, and upon that assumption treat a refusal of the Commission to grant relief as an affirmative order, and accordingly pass on its correctness?

Turning for the elucidation of the question to the jurisdictional provisions, it is plain that although all of the four numbered subdivisions composing the section may serve to throw light upon the issue for decision, the solution of the question must intrinsically be found in a correct interpretation of the second subdivision. We say this because clearly the first deals alone with cases for the enforcement of orders of the Commission as therein described; the third deals only with cases brought under the act of February 19, 1903, which is wholly foreign to the subject here reviewed, since the act referred to relates only to proceedings to enjoin either discriminations or departures by carriers from their published rates; and the fourth refers exclusively to the right to mandamus, conformably to § 20 or 23 of the act to regulate commerce, which sections are concerned with the performance of certain duties imposed upon carriers by the act to regulate commerce. The words of this second subdivision are: "Second. Cases brought to enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Commission."

Giving to these words their natural significance we think it follows that they confer jurisdiction only to entertain complaints as to affirmative orders of the Commission; that is, they give the court the right to take cognizance, when properly made, of complaints concerning the legality of orders rendered by the Commission, and confer power to relieve parties in whole or in part from the duty of obedience to orders which are found to be illegal. No resort to exposition can add to the cogency with which the conclusion stated is compelled by the plain meaning of the words themselves. But if it be conceded, for the sake of argument, that the language of the provision is ambiguous, a consideration of the context of the act will at once clarify the subject. Thus, the first subdivision provides for the enforcement of orders; that is, the compelling of the doing or abstaining from doing of acts embraced by a previous affirmative command of the Commission; and the second (the one with which we are concerned) dealing with the same subject from a reverse point of view, provides for the contingency of a complaint made to the court by one seeking to prevent the enforcement of orders of the Commission such as are contemplated by the first paragraph. In other words, by the co-operation of the two paragraphs, authority is given, on the one hand, to enforce compliance with the orders of the Commission, if lawful, and, on the other hand, power is conferred to stay the enforcement of an illegal order. The other provisions of the act are equally convincing. Thus, § 3 (208), provides that the mere pendency of a suit to enjoin, set aside, annul, or suspend an order of the Commission "shall not stay or suspend the operation of such order," but confers upon the court the power, under circumstances stated, to restrain or suspend, in whole or in part, the operation of an order. The same section, moreover, causes the meaning of the provision, if possible, to become clearer by making a finding that irreparable injury will result from the operation of an order sought to

be enforced essential to the granting of an order or injunction restraining or suspending its enforcement.

We might well be content to rest our conclusion upon the considerations just stated. In view, however, of the importance of the subject, we do not do so, but shall consider the matter in a broader aspect, for the purpose of demonstrating that to give to the statute a meaning contrary to that which we have found results from its text, and therefore to recognize the existence in the court below of the power which it deemed it possessed, would result in frustrating the legislative public policy which led to the adoption of the act to regulate commerce, would render impossible a resort to the remedies which the statute was enacted to afford, would multiply the evils which the act to regulate commerce was adopted to prevent, and thus bring about disaster by creating confusion and conflict where clearness and unity of action were contemplated. It cannot be disputed that the act creating the commerce court was intended to be but a part of the existing system for the regulation of interstate commerce, which was established by virtue of the original adoption in 1887 of the act to regulate commerce, and which was expanded by the repeated amendments of that act which followed, developed in practical execution by the rulings of the body (Interstate Commerce Commission) upon whom was cast the administrative enforcement of the act, the whole elucidated and sanctioned by a long line of decisions of this court. That, in adopting the provision concerning the commerce court, and making it part of the system, it was not intended to destroy the existing machinery or method of regulation, but to cause it to be more efficient by affording a more harmonious means for securing the judicial enforcement of the act to regulate commerce, is certain. The act creating the commerce court was entitled, "An Act to Create a Commerce Court, and to Amend the Act Entitled, 'An Act to Regulate Commerce,' Approved February Fourth, Eighteen Hundred and Eighty-seven, as Heretofore Amended, and for Other Purposes." The first six sections, which called into being the commerce court and defined its powers all demonstrate the purpose as above stated; that is, to adjust the powers and duties of the newly created court in such manner as to cause them to accord with the system of regulation provided by the act to regulate commerce as it then existed.

What was then the existing system and the functions which the new court was created to perform will be conclusively shown by a brief outline of the scope and purpose of the system which arose from the enactment of the act to regulate commerce (act February 4, 1887, chap. 104, 24 Stat. at L. 379, U.S.Comp.Stat.Supp.1911, p. 1284) and its development. By that act, as originally enacted, many regulations and consequent duties were imposed upon carriers in the interest of the public and of shippers which did not theretofore exist, and various administrative safeguards were formulated, all of which, in their very essence, required, first, for their compulsory enforcement, the exercise

of official functions of an administrative nature; and, second, for their harmonious development, an official unity of action which could only be brought about by a single administrative initiative and primary control. To that end the act (§ 11) created an administrative body endowed with what may be in some respects qualified as *quasi* judicial attributes, to whom was confided the enforcement of those provisions of the act which essentially exacted unity in order that they might beneficially operate. And for the purposes stated, to the body thus created was committed the trust of enforcing the act in the respect stated, of determining, limited as to the subject-matters to which we have referred, whether the provisions of the act had been violated, and if so, of primarily enforcing the act by awarding appropriate relief. The statute, therefore, necessarily, while it created new rights in favor of shippers, in order to make those rights fruitful as to the subjects with which the statute dealt, coming within the scope of the administrative unity which we have mentioned, primarily made the judgment of the administrative body to whom the statute confided the enforcement of the act in the respects stated a prerequisite to a resort to the courts. In other words, as to the subjects stated, the act did not give to the courts power to hear the complaint of a party concerning a violation of the act, but only conferred power to give effect to such complaints when, by previous submission to the Commission, they had been sanctioned by a command of that body.

In the long interval which intervened between 1887, when the act to regulate commerce was enacted, and June 18, 1910, when the commerce court act was passed, we have learned of no instance where it was held or even seriously asserted, that as to subjects which in their nature were administrative and within the competency of the Commission to decide, there was power in a court, by an exercise of original action, to enforce its conceptions as to the meaning of the act to regulate commerce by dealing directly with the subject, irrespective of any prior affirmative command or action by the Interstate Commerce Commission. On the contrary, by a long line of decisions, whereby applications to enforce orders of the Commission were considered and disposed of, or where requests to restrain the enforcement of such orders were passed upon, it appears by the reasoning indulged in that it was never considered that there was power in the courts as an original question, without previous affirmative action by the Commission, to deal with what might be termed in a broad sense the administrative features of the act to regulate commerce by determining as an original question that there had been a compliance or noncompliance with the provisions of the act. The subject is illustrated and made clear by the rulings in Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U.S. 510, 56 L.Ed. 863, 32 S.Ct. 535; Robinson v. Baltimore & O. R. Co., 222 U.S. 506, 56 L.Ed. 288, 32 S.Ct. 114; Southern R. Co. v. Reid, 222 U.S. 424, 56 L.Ed. 257, 32 S.Ct. 140, and Texas & P. R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 51 L.Ed. 553, 27 S.Ct. 350, 9 Ann.

Cas. 1075. The latter case especially will serve to point out that where the power of original action by a court, without previous action of the Commission, was insisted upon, it was based upon the conception that the particular subject-matter as to which such power was asserted was, by the express terms of the act to regulate commerce, not embraced within the subjects primarily confided by the act exclusively to the administrative authority of the Commission.

Originally the duty of the courts to determine whether an order of the Commission should or not be enforced carried with it the obligation to consider both the facts and the law. But it had come to pass prior to the passage of the act creating the commerce court that, in considering the subject of orders of the Commission, for the purpose of enforcing or restraining their enforcement, the courts were confined by statutory operation to determining whether there had been violations of the Constitution, a want of conformity to statutory authority, or of ascertaining whether power had been so arbitrarily exercised as virtually to transcend the authority conferred, although it may be not technically doing so. Interstate Commerce Commission v. Union P. R. Co., 222 U.S. 541, 547, 56 L.Ed. 308, 32 S.Ct. 108; Interstate Commerce Commission v. Illinois C. R. Co., 215 U.S. 452, 54 L.Ed. 280, 30 S.Ct. 155. So also, at the time the law creating the commerce court was passed, suits to compel obedience to orders of the Commission, or to restrain an enforcement of such orders, were required to be brought in the circuit court of the United States in the district where a carrier, or one of two or more carriers to whom the order was directed, had its principal operating office.

In view of the provisions of the act to regulate commerce just referred to as originally enacted, of the legislative evolution of that act, its uniform practical enforcement and the constant judicial interpretation which we have thus briefly indicated, it is impossible, we think, in reason, to give to the act creating the commerce court the meaning affixed to it by the court below, since to do so would be virtually to overthrow the entire system which had arisen from the adoption and enforcement of the act to regulate commerce. First, because, as the previous ascertainment by the Commission on complaint made to it as to whether violations of the act had been committed, with reference to the subjects as to which previous action was required, was an essential prerequisite to a right to complain in a court, the interpretation given below would, by destroying the necessity for the prerequisite, action of the Commission, operate to create a vast body of rights which had no existence at the time the commerce court act was passed. Second, because the recognition of a right in a court to assert the power now claimed would, of necessity, amount to a substitution of the court for the Commission, or, at all events, would be to create a divided authority on a matter where, from the beginning, primary singleness of action and unity was deemed to be imperative. Third, because the result of the interpretation would be to bring about the contradiction and

the confusion which it had been the inflexible purpose of the lawmaker from the beginning to guard against,—an interpretation which would seemingly create rights hitherto nonexistent, and yet at once proceed to destroy such rights by bringing about a confusion which would render the rights which the act creates practically valueless. Indeed, these inevitable results of the interpretation given by the court below to the act would necessarily amount to declaring that Congress, in seeking to unify and perfect the administrative machinery of the act to regulate commerce, and to make more beneficial its operation, had overthrown the whole fabric of the system as previously existing. * * *

As it follows from what we have said that the court below erred in taking jurisdiction of the petition, it results that our duty is to remand the cause to the court below, with directions to dismiss the petition for want of jurisdiction.

And it is so ordered.

BOILER INSPECTION ACT, §§ 2, 5

45 U.S.C. §§ 23, 28.

§ 23.[a] Use of unsafe locomotives and appurtenances unlawful; inspection and tests

It shall be unlawful for any carrier to use or permit to be used on its line any locomotive unless said locomotive, its boiler, tender, and all parts and appurtenances thereof are in proper condition and safe to operate in the service to which the same are put, that the same may be employed in the active service of such carrier without unnecessary peril to life or limb, and unless said locomotive, its boiler, tender, and all parts and appurtenances thereof have been inspected from time to time in accordance with the provisions of sections 28, 29, 30, and 32 of this title and are able to withstand such test or tests as may be prescribed in the rules and regulations hereinafter provided for.

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§ 28.[a] Rules and instructions as to inspection

Rules and instructions for the inspection of locomotive boilers which have been made by a carrier subject to this chapter and approved by the Interstate Commerce Commission are obligatory on such carrier until changed in the manner hereafter provided, and a violation thereof shall be punished as provided in section 34 of this title. A carrier may from time to time change such rules and instructions, but such change shall not take effect and the new rules and instructions be in

[a] Of Title 45 of the United States Code Annotated

force until the same shall have been filed with and approved by the Interstate Commerce Commission. The director of locomotive inspection shall also make all needful rules, regulations, and instructions not inconsistent herewith for the conduct of his office and for the government of the district inspectors: *Provided, however,* That all such rules and instructions shall be approved by the Interstate Commerce Commission before they take effect.[b]

SECURITIES EXCHANGE ACT OF 1934, AS AMENDED, § 19(b)

15 U.S.C. § 78s(b).

See *supra* at pp. 29–30.

SEC., THIRD ANNUAL REPORT (1937) p. 75

B. Trading Rules Adopted by Exchanges at the Request of the Commission.

These rules consist of the following:

(1) The sixteen trading rules recommended by the Commission in April 1935 for adoption by national securities exchanges.

(2) The interpretation of the tenth of the foregoing sixteen rules, applicable to trading by specialists, made by the Director of the Trading and Exchange Division.

(3) The margin rules adopted by exchanges which desired to permit "when issued" dealing thereon, covering the amount of margin required on all commitments in securities or rights admitted to "when issued" dealing upon such exchanges.

(4) The rules embodying the requirement that commitments of members, their firms and their partners made during any single day shall be fully margined at all times.

(1) *The Sixteen Trading Rules:*

The sixteen rules for the regulation of trading on exchanges recommended by the Commission on April 16, 1935 for adoption by national securities exchanges are intended to provide additional safeguards against certain activities on exchanges which lend themselves to manipulative tendencies.[c]

[b] See United States v. Baltimore & Ohio R. R., 293 U.S. 454, 55 S.Ct. 268, 79 L.Ed. 587 (1935).

[c] See id. at 72–3 and 76–9. See also the first paragraph of SEC, Securities Exchange Act of 1934 Release No. 1548, January 24, 1938, *supra*, at p. 266.

SEC., FOURTH ANNUAL REPORT (1938) pp. 20–1

NATIONAL SECURITIES EXCHANGES

Exchange Reorganization

During the past fiscal year, material progress has been made toward the attainment of one of the Commission's vital objectives, namely, the adequate supervision of national securities exchanges. The Commission has consistently advocated such regulation by the exchanges themselves that the Commission need only exercise a residual control or supervision. It had long been apparent, however, that serious defects in the organization of many exchanges had hindered their effective assumption of this degree of responsibility for the conduct of their business. Efforts were being made, however, by groups of members of certain exchanges to replace the cumbersome administrative mechanism with organizations that were adapted to current needs. To these efforts the Commission gave its encouragement.

In connection with this matter, conferences between representatives of the New York Stock Exchange and the Commission were held during the latter part of the year 1937. During the conferences various plans were discussed, but no agreement as to an adequate solution could be reached. Therefore, on November 23, 1937, the Commission, through its Chairman, publicly requested the New York Stock Exchange to proceed at once to work out a satisfactory plan of reorganization in order that the needs of efficient management of an important public institution might be satisfied. In compliance with this request, the Exchange appointed an independent committee to study and report on the need for such a reorganization. This Committee, headed by Carle C. Conway, Chairman of the Board of Directors of the Continental Can Company, immediately instituted studies and on January 27, 1938, submitted an outstanding report to the Exchange. This report recognized the fact that national securities exchanges are public institutions impressed with a public trust, and provided a plan for a modern administrative organization to supplant the old outmoded one. On March 17, 1938, the Exchange, in order to effectuate the principal recommendations contained in this report, voted to adopt a radically revised constitution. On May 16, 1938, that constitution became effective and the newly elected Exchange administration assumed office. William McC. Martin, Jr., was elected President on June 30, 1938.

The reorganization of the New York Stock Exchange provides for direct representation of the public on the Board of Governors and increased representation of Exchange firms doing business with the public. Further results of this reorganization are as follows: The administrative structure has been greatly simplified; the number of stand-

ing committees was reduced from 17 to 7; the President of the Exchange is a salaried individual and may not be a member of the Exchange; and executive staffs have been created to carry out, under the direction of the President of the Exchange, the administrative functions formerly conducted by the Governors sitting as committee members.

The process of exchange reorganization has not been limited to the New York Stock Exchange. In addition, on March 31, 1938, the Chicago Stock Exchange, after long and careful study, effected a revision of its constitution to provide a form of administrative organization more in keeping with the modern, progressive concept of a stock exchange. Also, the New York Curb Exchange appointed a committee to study its organizational problems and to make recommendations in regard thereto. At the end of the past fiscal year this committee had not as yet made public its findings and recommendations. On February 15, 1938, the Detroit Stock Exchange materially amended its constitution and rules in order to effect changes in its existing procedure and practice.

SECTION 5. EFFECT OF RULES AND REGULATIONS[a] IN BINDING THE ADMINISTRATIVE AGENCY AND THE PERSONS IN TERMS SUBJECT THERETO—INTERPRETATION BY ADMINISTRATIVE AGENCY OF ITS OWN RULES

M. KRAUS & BROS. v. UNITED STATES

Supreme Court of the United States.
327 U.S. 614, 66 S.Ct. 705, 90 L.Ed. — (1946).

Mr. Justice MURPHY announced the conclusion and judgment of the Court.

The problem here is whether the petitioner corporation was properly convicted of a crime under the Emergency Price Control Act of 1942.

The petitioner is engaged in the wholesale meat and poultry business in New York City. Poultry is a commodity subject to the provisions of Revised Maximum Price Regulation No. 269, promulgated by the Price Administrator pursuant to Section 2(a) of the Emergency

[a] Including orders of general applicability prescribing future conduct.

Price Control Act of 1942. Two informations, each containing six counts, were filed against petitioner. Each count alleged that, as an integral part of a specified sale of poultry on a day during the Thanksgiving season in November, 1943, the petitioner "unlawfully, wilfully and knowingly evaded the provisions of said Revised Maximum Price Regulation No. 269, Sec. 1429.5, by demanding, compelling and requiring" the retail buyer to purchase chicken feet or chicken skin at a specified price as a condition of the sale of the poultry. Petitioner's president was named as a co-defendant in the first information and the two informations were consolidated for trial purposes.

The theory of the Government is that the petitioner was guilty of an evasion of the price limitations set forth in this particular regulation if it required the purchase of chicken feet and skin as a necessary condition to obtaining the primary commodity, the poultry. This practice is commonly known as a "combination sale" or a "tying agreement." It is argued that the petitioner thereby received for the poultry the ceiling price plus the price of the secondary commodities, the chicken parts.

The evidence was undisputed that the poultry was billed by petitioner at ceiling prices fixed by the Price Administrator and that no ceiling prices had been set for chicken feet or chicken skin. It was also undisputed that the demand for poultry during the Thanksgiving season far exceeded the supply and that petitioner voluntarily imposed a rationing system among its customers.

The Government's case rested primarily upon the testimony of seven retail butchers who had purchased poultry and poultry parts from petitioner during the period in question. Only one of them testified explicitly that the sale of poultry to him had been conditioned upon the sale of poultry parts which he did not want and for which there was no consumer demand. His testimony, however, was disbelieved by the jury since it acquitted the petitioner on the two counts involving sales to him. With two exceptions, the other butchers testified either that the feet and skins were loaded on their trucks without previous order or solicitation along with the poultry or that they were billed for both the poultry and the parts without comment. Five of them stated that they sold a small amount of the chicken parts and gave away the balance; one remarked that he could not sell any parts and was forced to dump them. There was no explicit evidence that any of the butchers protested, sought to return the chicken parts or asked to buy the poultry separately. It was reasonable, however, for the jury to find that the sale of poultry was conditioned upon the simultaneous sale of the chicken parts and no contrary claim is made before us.

Several times the petitioner tried to introduce testimony establishing that there was a demand for chicken parts and that they were of value. Petitioner's counsel stated that "The government has inferred through all of its testimony that chicken skin and chicken feet are so much waste, that they are dumped; that they are not used and they

have opened up the door to this type of testimony." But the trial judge ruled that the Government had not put that matter in issue and that the "only thing we are concerned with is whether or not the witnesses who testified purchased chicken feet to meet a demand in their stores." He accordingly refused to admit the profferred testimony from petitioner's witnesses, stating to petitioner's counsel that "I direct you not to put them on the stand."

On cross examination, however, petitioner's president was questioned as to the resale value of chicken skins from the retailer to the general public. He stated that the value was from 25 to 30 cents a pound and that the skin was used to make chicken fat. He also testified that chicken feet had a resale value of from 12 to 16 cents a pound and were used in making soup and gelatin. He further stated that the demand for chicken feet came from retail butchers such as had been on the stand. Petitioner's counsel then recalled one of the retail butchers whose testimony previously had been excluded by the court. He testified that he had bought chicken feet from the petitioner, had "created a demand" for them in his store, and had sold them for from 15 to 20 cents a pound. No further witnesses were called in regard to the retail value of chicken feet and skins.

In submitting the case to the jury, the judge stated that "what these defendants are charged with having done is imposing as a necessary condition to the purchase of turkeys the simultaneous purchase of gizzards, chicken feet or chicken skin, that were utterly useless and valueless to the purchasers. In order to violate the law these defendants must have made more than the fixed price of 37½ cents on the chickens, or the turkey price of 40 to 45 cents. And the testimony about the use of these additional articles sold, the use that can be made of them, will enable you to determine that they were sold at prices—and the prices are on all these slips that are in evidence—entirely out of line with any value that attaches to them, so that it is almost entirely profit to these defendants, and in doing that, by making the purchase of these things at the prices fixed, the defendants both realized a greater consideration than the Office of Price Administration allows for the commodity sold." He also told the jury that the "one question in the case is whether the sale of the chicken skin and feet was a necessary condition to the purchase of the other [poultry]."

The jury acquitted petitioner's president but convicted the petitioner on nine counts. Petitioner was fined $2,500 on each count, a total of $22,500. The conviction was affirmed by the court below, one judge dissenting because of the exclusion of petitioner's proffered testimony. 2 Cir., 149 F.2d 773. In our opinion, however, the conviction must be set aside.

Section 205(b) of the Emergency Price Control Act of 1942 imposes criminal sanctions on "Any person who willfully violates any provision of section 4 of this Act." Section 4(a) of the Act in turn provides that "It shall be unlawful * * * for any person to sell or de-

liver any commodity, * * * in violation of any regulation or order under section 2 * * *." Section 2(a) authorizes the Price Administrator under prescribed conditions to establish by regulation or order such maximum prices "as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act." Section 2 (g) further states that "Regulations, orders, and requirements under this Act may contain such provisions as the Administrator deems necessary to prevent the circumvention or evasion thereof."

The Price Administrator, pursuant to Section 2(a), issued Revised Maximum Price Regulation No. 269 on December 18, 1942, which regulation was in effect at the time the poultry sales in question were made. Section 1429.5 of this regulation, referred to in the informations, stems from Section 2(g) of the Act. It is entitled "Evasion" and reads as follows: "Price limitations set forth in this Revised Maximum Price Regulation No. 269 shall not be evaded whether by direct or indirect methods, in connection with any offer, solicitation, agreement, sale, delivery, purchase or receipt of, or relating to, the commodities prices of which are herein regulated, alone or in conjunction with any other commodity, or by way of commission, service, transportation, or other charge, or discount, premium, or other privilege or other trade understanding or otherwise."

The manifest purpose of Congress in enacting this statute was to preserve and protect the economic balance of the nation during a period of grave emergency, thereby achieving the prevention of inflation and its consequences enumerated in Section 1. Yakus v. United States, 321 U.S. 414, 423, 64 S.Ct. 660, 666, 88 L.Ed. 834. That aim was implemented by criminal sanctions to be imposed on those who deliberately choose to ignore the national welfare in this respect by selling commodities at prices above established levels. As appears from a combined reading of Sections 205(b), 4(a) and 2(a), criminal liability attaches to any one who willfully sells commodities in violation of a regulation or order of the Price Administrator establishing maximum prices. Cf. United States v. Eaton, 144 U.S. 677, 12 S.Ct. 764, 36 L. Ed. 591. Recognizing that sales at above-ceiling prices may be accomplished by devious as well as by direct means, Congress in Section 2(g) authorized the Administrator to make provisions against circumvention and evasion of maximum prices. Hence one who willfully sells commodities at prices above the maximum in an evasive manner specified by the Administrator subjects oneself to criminal liability. These statutory warnings are clear and unambiguous. When incorporated with such definite and clear regulations and orders as the Administrator may promulgate, the provisions of the Act leave no doubt as to the conduct that will render one liable to criminal penalties.

This delegation to the Price Administrator of the power to provide in detail against circumvention and evasion, as to which Congress has imposed criminal sanctions, creates a grave responsibility. In a very literal sense the liberties and fortunes of others may depend upon his

definitions and specifications regarding evasion. Hence to these provisions must be applied the same strict rule of construction that is applied to statutes defining criminal action. In other words, the Administrator's provisions must be explicit and unambiguous in order to sustain a criminal prosecution; they must adequately inform those who are subject to their terms what conduct will be considered evasive so as to bring the criminal penalties of the Act into operation. See United States v. Wiltberger, 5 Wheat. 76, 94–96, 5 L.Ed. 37. The dividing line between unlawful evasion and lawful action cannot be left to conjecture. The elements of evasive conduct should be so clearly expressed by the Administrator that the ordinary person can know in advance how to avoid an unlawful course of action.

In applying this strict rule of construction to the provisions adopted by the Administrator, courts must take care not to construe so strictly as to defeat the obvious intention of the Administrator. Words used by him to describe evasive action are to be given their natural and plain meaning, supplemented by contemporaneous or longstanding interpretations publicly made by the Administrator. But patent omissions and uncertainties cannot be disregarded when dealing with a criminal prosecution. A prosecutor in framing an indictment, a court in interpreting the Administrator's regulations or a jury in judging guilt cannot supply that which the Administrator failed to do by express word or fair implication. Not even the Administrator's interpretations of his own regulations can cure an omission or add certainty and definiteness to otherwise vague language. The prohibited conduct must, for criminal purposes, be set forth with clarity in the regulations and orders which he is authorized by Congress to promulgate under the Act. Congress has warned the public to look to that source alone to discover what conduct is evasive and hence likely to create criminal liability. United States v. Resnick, 299 U.S. 207, 57 S.Ct. 126, 81 L.Ed. 127.

In light of these principles we are unable to sustain this conviction of the petitioner based upon Section 1429.5 of Revised Maximum Price Regulation No. 269. For purposes of this case we must assume that the Administrator legally could include tying agreements and combination sales involving the sale of valuable secondary commodities at their market value among the prohibited evasion devices. Any problem as to his power so to provide would have to be raised initially in a proceeding before the Emergency Court of Appeals. Lockerty v. Phillips, 319 U.S. 182, 63 S.Ct. 1019, 87 L.Ed. 1339; Yakus v. United States, 321 U.S. 414, 427–431, 64 S.Ct. 660, 668–670, 88 L.Ed. 834; Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 418–419, 65 S.Ct. 1215, 1219; Case v. Bowles, 327 U.S. 92, 66 S.Ct. 438, 441, 90 L.Ed. ——. The only issue bearing upon the regulation which is open in this criminal proceeding is whether the Administrator did in fact clearly and unmistakably prohibit tying agreements of this nature by virtue

of the language he used in Section 1429.5. That issue we answer in the negative.

Section 1429.5, so far as here pertinent provides that price limitations shall not be evaded by any method, direct or indirect whether in connection with any offer or sale of a price-regulated commodity alone "or in conjunction with any other commodity," or by way of any trade understanding "or otherwise." No specific mention is made of tying agreements or combination sales.

It is urged by the Government that this language fits the type of tying agreement allegedly used by petitioner. The contention is that petitioner received for the primary commodity not only the ceiling price but also the price of the secondary commodities which the retailers were required to buy. Conversely, the retailers were compelled to pay not only the ceiling price but also the price of the secondary commodities in order to secure the primary commodity, the poultry. Under this theory it is immaterial whether the secondary products, the chicken parts, had any value to the retailers or whether their price was a reasonable one. Reference is made in this respect to Section 302(b) of the Act, defining price as "the consideration demanded or received in connection with the sale of a commodity." Hence it is concluded that the price limitation on the primary commodity was evaded "in conjunction with any other commodity" within the meaning of Section 1429.5. This argument, moreover, represents the consistent interpretation of the Administrator.

But we do not believe that, under the strict rule of construction previously discussed, such an interpretation of Section 1429.5 is dictated by its plain language. It prohibits evasions through sales of price-regulated commodities "in conjunction with any other commodity." That clearly and undeniably prohibits evasions through the use of tying agreements where the tied-in commodity is worthless or is sold at an artificial price, thereby hiding an above-ceiling price for the primary commodity. But to say that the language covers more, that it also applies to a case where the secondary product has value and is sold at its ceiling or market price, is to introduce an element of conjecture and to give effect to an unstated judgment of policy.

The language of Section 1429.5 is appropriate to and consistent with a desire on the Administrator's part to prohibit only those tying agreements involving tied-in commodities that are worthless or that are sold at artificial prices. The Administrator may have thought that other tied-in sales did not constitute a sufficient threat to the price economy of the nation to warrant their outlawry, or that they were such an established trade custom that they should be recognized. But we are told that he had no such thought, that prohibition of all tying agreements is essential to prevent profiteering, and that this blanket prohibition is the only policy consistent with the purposes of the Act. All of this may well be true. But these are administrative judgments with which the courts have no concern in a criminal proceeding. We must

look solely to the language actually used in Section 1429.5. And when we do we are unable to say that the Administrator has made his position in this respect self-evident from the language used.

The Administrator's failure to express adequately his intentions in Section 1429.5 is emphasized by the complete and unmistakable language he has used in other price regulations to prohibit all tying agreements, including those involving the sale of valuable secondary products. Thus he has inserted in the meat regulation a provision prohibiting evasion of price limitations by "offering, selling or delivering beef, veal or any processed product on condition that the purchaser is required to purchase some other commodity." Section 1364.406, Revised Maximum Price Regulation No. 169, as amended March 30, 1943, 8 Fed.Reg. 4099. And in the clothing regulation, the Administrator has provided that "No manufacturer shall make a sale of garments which is conditioned directly or indirectly on the purchase of any other commodity or service." Section 15, Revised Maximum Price Regulation No. 287, issued June 29, 1943, 8 Fed.Reg. 9126. See also Section 1389.555, Maximum Price Regulation No. 330, as amended August 7, 1943, 8 Fed.Reg. 11041.

The very definiteness with which tying agreements of all types were prohibited in regard to many other commodities and the absence of any such prohibition in Section 1429.5 of Revised Maximum Price Regulation No. 269 might well have led a reasonable man to believe that tying agreements involving the sale of a valuable secondary commodity at its market price were permissible in the poultry business when the transactions in question took place. Certainly the language used by the Administrator did not compel the opposite conclusion. And certainly a criminal conviction ought not to rest upon an interpretation reached by the use of policy judgments rather than by the inexorable command of relevant language.

In view of these considerations we interpret Section 1429.5 as prohibiting only those tying agreements involving secondary products that are worthless or that are sold at artificial prices. It follows that the conviction below cannot stand. While the informations can be interpreted as charging a crime under Section 1429.5 as we have read it, the trial judge's charge to the jury was clearly erroneous. There was evidence, at first excluded but later admitted, that the chicken parts which the petitioner sold did have value and were sold at their market price. If the jury believed such evidence it was entitled to acquit the petitioner. But the trial judge charged that the "one" question in the case was whether the sale of the chicken parts was a necessary condition to the purchase of the poultry. On the basis of that charge the jury may well have disregarded as irrelevant the evidence of value as to the secondary products and convicted solely on the ground that there was a tie-in sale. Such a charge is thus reversible error.

There were additional statements in the charge to the jury, to be sure, that the petitioner was charged with having compelled, in connection with the purchase of poultry, the simultaneous purchase of chicken parts "That were utterly useless and valueless to the purchasers" and at prices "entirely out of line with any value that attaches to them." While such statements tended to charge a violation of Section 1429.5, as properly interpreted, they were so intertwined with the incorrect charge as to negative their effect. "A conviction ought not to rest upon an equivocal direction to the jury on a basic issue." Bollenbach v. United States, 326 U.S. 607, 66 S.Ct. 402, 405, 90 L.Ed. ——.

The case must therefore be remanded for a new trial, allowing full opportunity for the introduction of evidence as to the value of the chicken parts and charging the jury in accordance with the proper interpretation of Section 1429.5.

It is so ordered.

Reversed and remanded for a new trial.[b]

In COLUMBIA BROADCASTING SYSTEM, INC. v. UNITED STATES, 316 U.S. 407, 62 S.Ct. 1194, 86 L.Ed. 1563 (1942), the Court, through Chief Justice Stone, said, at p. 422 of 316 U.S. (p. 1202 of 62 S.Ct.):

The Commission argues that since its Report characterized the regulations as announcements of policy, the order promulgating them is no more subject to review than a press release similarly announcing its policy. Undoubtedly regulations adopted in the exercise of the administrative rule-making power, like laws enacted by legislatures, embody announcements of policy. But they may be something more. When, as here, the regulations are avowedly adopted in the exercise of that power, couched in terms of command and accompanied by an announcement of the Commission that the policy is one "which we will follow in exercising our licensing power", they must be taken by those entitled to rely upon them as what they purport to be—an exercise of the delegated legislative power—which, until amended, are controlling alike upon the Commission and all others whose rights may be affected by the Commission's execution of them. The Commission's contention that the regulations are no more reviewable than a press release is hardly reconciliable with its own recognition that the regulations afford legal basis for cancellation of the license of a station if it renews its contract with appellant.[c]

[b] The concurring opinion of Mr. Justice Douglas and Mr. Justice Rutledge, and the dissenting opinion of Mr. Justice Black, are omitted. Footnotes of the court have been omitted.

[c] For the remainder of this opinion, see *infra*, p. 673.

In KRITZIK v. FEDERAL TRADE COMMISSION, 125 F.2d 351 (C.C.A. 7th, 1942), the Court said, at p. 352:

By the Federal Trade Commission Act, 15 U.S.C.A. § 46 (g), the Commission is empowered to make rules and regulations for the purpose of carrying out the provisions of the Act. These rules have the force and effect of law. National Candy Co. v. Federal Trade Commission, 7 Cir., 104 F.2d 999 and Hill v. Federal Trade Commission, 5 Cir., 124 F.2d 104, decided December 23, 1941. The Commission's findings of fact cover every fact alleged in the complaint and are within the issues tendered. Under the Commission's Rules of Practice, where an alleged fact is left without denial, any issue with respect to such allegation is foreclosed by the pleadings. National Candy Company case, supra, 104 F.2d page 1003. A fact admitted by answer is no longer a fact in issue. Hill case, supra.[d]

BRIDGES v. WIXON

Supreme Court of the United States.
326 U.S. 135, 65 S.Ct. 1443, 89 L.Ed. 2103 (1945).

Mr. Justice DOUGLAS delivered the opinion of the Court.

Harry Bridges is an alien who entered this country from Australia in 1920. In 1938 deportation proceedings were instituted against him on the ground that he both had been and then was a member of or affiliated with the Communist Party of the United States and that that party advised and taught the overthrow by force of the government of the United States and caused printed matter to be circulated which advocated that course. Under the statute then in force past membership or past affiliation was insufficient for deportation, present membership or present affiliation being required. Kessler v. Strecker, 307 U.S. 22, 59 S.Ct. 694, 83 L.Ed. 1082. A hearing was had. The examiner, Hon. James M. Landis, concluded that the evidence established neither that Harry Bridges "is a member of nor affiliated with" the Communist Party of the United States. The Secretary of Labor sustained the examiner and dismissed the proceedings. That was in January 1940. By the Act of June 28, 1940, Congress amended the statute so as to provide for deportation of any alien who was "at the time of entering the United States, or has been at any time thereafter" a member of or affiliated with an organization of the character attributed to the Communist Party in the first proceeding. A second deportation proceeding was instituted against Harry Bridges under the amended statute on the ground that he had been a member of or affiliated with that organization. Another hearing was had. The inspector designated to con-

[d] *Cf.* Securities and Exchange Commission v. Torr, 15 F.Supp. 144 (S.D.N.Y.1936).

duct the hearings and make a report, Hon. Charles B. Sears, found that the Communist Party of the United States was an organization of the character described in the statute, that the Marine Workers Industrial Union was affiliated with the Communist Party and was an organization of the same character, and that after entering this country Harry Bridges had been affiliated with both organizations and had been a member of the Communist party. He recommended deportation. The case was heard by the Board of Immigration Appeals which found that Harry Bridges had not been a member of or affiliated with either of those organizations at any time after he entered this country. The Attorney General reviewed the decision of the Board and rendered an opinion in which he made findings in accordance with those proposed by the inspector and ordered Harry Bridges to be deported. A warrant of deportation was issued. Harry Bridges surrendered himself to the custody of respondent and challenged the legality of his detention by a petition for a writ of habeas corpus in the District Court for the Northern District of California. That court denied the petition and remanded petitioner to the custody of respondent. 49 F.Supp. 292. The Circuit Court of Appeals affirmed by a divided vote. 9 Cir., 144 F.2d 927, 944. The case is here on a petition for a writ of certiorari which we granted because of the serious character of the questions which are presented.

As we have said, Harry Bridges came here from Australia in 1920. He has not returned to Australia since that time. He was a longshoreman In 1933 he became active in trade union work on the water front in San Francisco. The Attorney General found that he had "done much to improve the conditions that existed among the longshoremen". He reorganized and headed up the International Longshoremen's Association, an American Federation of Labor union. He led the maritime workers' strike on the Pacific Coast in 1934. He was president of the local International Longshoremen's Association from 1934 to 1936 and was Pacific Coast president in 1936. In 1937 his union broke with the American Federation of Labor, changed its name to International Longshoremen and Warehousemen's Union, and became affiliated with the Committee for Industrial Organization. Bridges was elected Pacific Coast District President of that union and has held the office ever since. He also holds several important offices in the C.I.O.

The two grounds on which the deportation order rests—that Harry Bridges at one time had been both "affiliated" with the Communist party and a member of it—present different questions with which we deal separately. * * *

Membership. The evidence of "affiliation" was used not only to support the finding that Harry Bridges had been "affiliated" with the Communist party but also to corroborate the finding that at one time he had been a member of that organization. We may assume that such evidence, though falling short of the requirements of "affiliation",

might be admissible for the latter purpose. But the difficulty is that the finding of membership like the finding of affiliation has an infirmity which may be challenged in this attack on the legality of Harry Bridges' detention under the deportation order.

Rule 150.1(c) of the Regulations of the Immigration and Naturalization Service (8 C.F.R., 1941 Supp. 150.1(c)) provides: "All statements secured from the alien or any other person during the investigation, which are to be used as evidence, shall be taken down in writing; and the investigating officer shall ask the person interrogated to sign the statement. Whenever such a recorded statement is to be obtained from any person, the investigating officer shall identify himself to such person and the interrogation of that person shall be under oath or affirmation. Whenever a recorded statement is to be obtained from a person under investigation, he shall be warned that any statement made by him may be used as evidence in any subsequent proceeding." And Rule 150.6(i) provides in part: "A recorded statement made by the alien (other than a General Information Form) or by any other person during an investigation may be received in evidence only if the maker of such statement is unavailable or refuses to testify at the warrant hearing or gives testimony contradicting the statements made during the investigation."

O'Neil was a government witness. He was intimate with Harry Bridges. During the course of the examination O'Neil was asked about statements which he allegedly had made to investigating officers some months earlier. These statements were not signed by O'Neil. They were not made by interrogation under oath. And it was not shown that O'Neil was asked to swear and sign or that being asked, he refused. They were read into the record and verified by the stenographer who took them down. And an officer testified that later O'Neil had repeated the statements to him and to other witnesses. These statements were that O'Neil joined the Communist party in December, 1936; that he walked into Bridges' office one day in 1937 and saw Bridges pasting assessment stamps in a Communist party book; and that Bridges reminded O'Neil that he had not been attending party meetings. O'Neil admitted making statements to the investigating officers but denied making those particular statements.

Judge Sears admitted the statements not for purposes of impeachment but as substantive evidence. The Board of Immigration Appeals and the Attorney General both conceded that the statements were admitted in violation of Rules 150.1(c) and 150.6(i). The Board held that it was error to consider the statements as affirmative, probative evidence. The Attorney General ruled: "Had the alien raised the question at the time of the hearing, compliance with the Departmental Regulations would have been obligatory and a deliberate rejection of a request to exclude the testimony would have rendered appropriate the objections now raised by the Board. No objection having been raised by the alien throughout the hearing, however, he waived the right to

object on the technical ground that the statement was not taken in accordance with the rules." One difficulty with that position is that Bridges did protest before Judge Sears over the use of the statement. He maintained that they were erroneously received and were without probative value though he did not rest his objection on the regulations. But there is a more fundamental difficulty. The original deciding body is not the inspector who hears the case. He merely submits a memorandum setting forth the evidence adduced at the hearing, his proposed findings of fact and conclusions of law, and a proposed order. The case then is heard by the Board of Immigration Appeals which is authorized to perform the functions of the Attorney General in relation to deportation. 8 C.F.R., 1940 Supp., §§ 90.2, 90.3. And the case may then go to the Attorney General for decision. If the objection to evidence on the ground that it violates the governing regulations is made before the agency entrusted with the duty of deciding whether a case for deportation has been established, it is made soon enough. Objection to the use of these statements as probative evidence was made before both the Board and the Attorney General. It was specifically objected that the statements did not qualify under the regulations.

The rules are designed to protect the interests of the alien and to afford him due process of law. It is the action of the deciding body, not the recommendation of the inspector, which determines whether the alien will be deported. The rules afford protection at that crucial stage of the proceedings or not at all. The person to whom the power to deport has been entrusted is the Attorney General or such agency as he designates. 8 U.S.C. § 155, 8 U.S.C.A. § 155. He is an original trier of fact on the whole record. It is his decision to deport an alien that Congress has made "final". 8 U.S.C. § 155, 8 U.S.C.A. § 155. Accordingly, it is no answer to say that the rules may be disregarded because they were not called to the attention of the inspector.

It was assumed in Bilokumsky v. Tod, 263 U.S. 149, 155, 44 S.Ct. 54, 56, 68 L.Ed. 221, that "one under investigation with a view to deportation is legally entitled to insist upon the observance of rules promulgated by the Secretary pursuant to law." We adhere to that principle. For these rules are designed as safeguards against essentially unfair procedures. The importance of this particular rule may not be gainsaid. A written statement at the earlier interviews under oath and signed by O'Neil would have afforded protection against mistakes in hearing, mistakes in memory, mistakes in transcription. Statements made under those conditions would have an important safeguard—the fear of prosecution for perjury. Moreover, if O'Neil had been asked to swear to and sign the statements and had refused to do so, the fact of his refusal would have weight in evaluating the truth of the statements.

The statements which O'Neil allegedly made were hearsay. We may assume they would be admissible for purposes of impeachment. But they certainly would not be admissible in any criminal case as sub-

stantive evidence. Hickory v. United States, 151 U.S. 303, 309, 14 S. Ct. 334, 336, 38 L.Ed. 170; United States v. Block, 2 Cir., 88 F.2d 618, 620. So to hold would allow men to be convicted on unsworn testimony of witnesses—a practice which runs counter to the notions of fairness on which our legal system is founded. There has been some relaxation of the rule in alien exclusion cases. See United States ex rel. Ng Kee Wong v. Corsi, 2 Cir., 65 F.2d 564. But we are dealing here with deportation of aliens whose roots may have become, as they are in the present case, deeply fixed in this land. It is true that the courts have been liberal in relaxing the ordinary rules of evidence in administrative hearings. Yet as was aptly stated in Interstate Commerce Commission v. Louisville & Nashville R. Co., 227 U.S. 88, 93, 33 S.Ct. 185, 187, 57 L.Ed. 431, "But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended."

Here the liberty of an individual is at stake. Highly incriminating statements are used against him—statements which were unsworn and which under the governing regulations are inadmissible. We are dealing here with procedural requirements prescribed for the protection of the alien. Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.

On the record before us it is clear that the use of O'Neil's ex parte statements was highly prejudicial. Those unsworn statements of O'Neil and the testimony of one Lundeberg were accepted by the Attorney General as showing that Bridges was a member of the Communist party. There was other testimony but it was so "untrustworthy, contradictory, or unreliable" as to be rejected by the Attorney General. If the finding as to Lundeberg's testimony was treated by the Attorney General independently of his finding as to O'Neil's, we would have a different case. Then we would have to determine whether the testimony of Lundeberg alone was sufficient to sustain the order. But the Attorney General, unlike Judge Sears, did not separate the testimony of Lundeberg and that of O'Neil for the purpose of his finding as to membership. He lumped them together and found that between them their total weight was sufficient to tip the scales against Harry Bridges. He ruled that if the unsworn statements of O'Neil and the testimony of Lundeberg were believed "the doubt is decided." It is thus apparent not only that the unsworn statements of O'Neil weighed heavily in the scales but also that it took those unsworn statements as well as Lundeberg's testimony to resolve the doubt on this sharply contested and close question. Whether the finding would have been made on this record from the testimony of Lundeberg alone is wholly conjectural and highly speculative. Not only was Lundeberg admittedly

hostile to Bridges. Not only did the Attorney General fail to rule that on the basis of Lundeberg's testimony alone Bridges had been a member of the party. But beyond that, the Board of Immigration Appeals significantly concluded that apart from O'Neil's unsworn statements the evidence of Bridges' membership was too flimsy to support a finding. It is thus idle to consider what the Attorney General might have ruled on the basis of the other evidence before him. Cf. United States ex rel. Hom Yuen Jum v. Dunton, D.C., 291 F. 905, 907. The issue of membership was too close and too crucial to the case to admit of mere speculation. Since it was error to admit O'Neil's unsworn statements against Bridges, since they were so crucial to the findings of membership, and since that issue was so close, we are unable to say that the order of deportation may be sustained without them.

In these habeas corpus proceedings the alien does not prove he had an unfair hearing merely by proving the decision to be wrong (Tisi v. Tod, 264 U.S. 131, 133, 44 S.Ct. 260, 68 L.Ed. 590) or by showing that incompetent evidence was admitted and considered. Vajtauer v. Commissioner, supra, 273 U.S. page 106, 47 S.Ct. page 304, 71 L.Ed. 560. But the case is different where evidence was improperly received and where but for that evidence it is wholly speculative whether the requisite finding would have been made. Then there is deportation without a fair hearing which may be corrected on habeas corpus. See Vajtauer v. Commissioner, supra.

Since Harry Bridges has been ordered deported on a misconstruction of the term "affiliation" as used in the statute and by reason of an unfair hearing on the question of his membership in the Communist party, his detention under the warrant is unlawful. Accordingly, it is unnecessary for us to consider the larger constitutional questions which have been advanced in the challenge to the legality of petitioner's detention under the deportation order.

The judgment below is reversed.

Reversed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.[e]

* * *

Mr. Chief Justice STONE.

Mr. Justice ROBERTS, Mr. Justice FRANKFURTER and I think that the deportation order should be sustained and the judgment below affirmed.

This case presents no novel question. Under our Constitution and laws, Congress has its functions, the Attorney General his, and the courts theirs in regard to the deportation of aliens. Our function is a

[e] Footnotes have been omitted from Mr. Justice Douglas' opinion.

very limited one. In this case our decision turns on the application of the long settled rule that in reviewing the fact findings of administrative officers or agencies, courts are without authority to set aside their findings if they are supported by evidence. This Court has not heretofore departed from that rule in reviewing deportation orders upon collateral attack by habeas corpus, Tisi v. Tod, 264 U.S. 131, 44 S.Ct. 260, 68 L.Ed. 590; Vajtauer v. Commissioner of Immigration, 273 U. S. 103, 106, 47 S.Ct. 302, 304, 71 L.Ed. 560; Costanzo v. Tillinghast, 287 U.S. 341, 343, 53 S.Ct. 152, 153, 77 L.Ed. 350, and cases cited, and there is no occasion for its doing so now.

Congress, in the exercise of its plenary power over the deportation of aliens, has directed the deportation of any alien who, at the time of his entry into the United States or at any time thereafter, has been a member of or affiliated with "any organization, association, society, or group, that believes in, advises, advocates, or teaches * * * the overthrow by force or violence of the Government of the United States * * * [or] that writes, circulates, distributes, prints, publishes, or displays * * * any written or printed matter" advising, advocating or teaching the overthrow by force or violence of the Government of the United States. §§ 1 and 2 of the Act of October 16, 1918, c. 186, 40 Stat. 1012, as amended by the Act of June 5, 1920, c. 251, 41 Stat. 1008, 1009, and the Act of June 28, 1940, c. 439, 54 Stat. 673, 8 U.S.C. § 137, 8 U.S.C.A. § 137.

Congress has committed the conduct of deportation proceedings to an administrative officer, the Attorney General, with no provision for direct review of his action by the courts. Instead it has provided that his decision shall be "final", 8 U.S.C. § 155, 8 U.S.C.A. § 155, as it may constitutionally do. Zakonaite v. Wolf, 226 U.S. 272, 275, 33 S.Ct. 31, 32, 57 L.Ed. 218, and cases cited. Only in the exercise of their authority to issue writes of habeas corpus, may courts inquire whether the Attorney General has exceeded his statutory authority or acted contrary to law or the Constitution. Bilokumsky v. Tod, 263 U.S. 149, 153, 44 S.Ct. 54, 55, 68 L.Ed. 221; Vajtauer v. Commissioner of Immigration, supra. And when the authority to deport the alien turns on a determination of fact by the Attorney General, the courts, as we have said, are without authority to disturb his finding if it has the support of evidence of any probative value. * * *

On this record we have only a single question to decide. Was there some evidence supporting the findings of Judge Sears and the Attorney General that Bridges was a member of the Communist Party? If there was, then, as we have said, we have no further function to perform and the judgment must be affirmed. To determine that issue we need not look beyond the testimony of Lundeberg. If his testimony is to be believed, Bridges admitted his membership in the Communist Party in circumstances which carry conviction of the truth of the fact admitted. It was for the hearing officer, Judge Sears, and the trier of fact, the Attorney General, not the courts, to

say whether Lundeberg was to be believed. In deciding that issue, the administrative officials could take into account, as they did, the facts that four persons, all evidently friendly to Bridges, and who according to the testimony were present at the interview between Lundeberg and Bridges, failed to testify and that Bridges' failure to call them as witnesses stands unexplained. Interstate Circuit v. United States, 306 U.S. 208, 225, 226, 59 S.Ct. 467, 473, 474, 83 L.Ed. 610, and cases cited.

The conclusion which the two administrative officers, charged with finding the facts, have drawn from this testimony, is not to be brushed aside by saying that the O'Neil statements are inadmissible as evidence and that the triers of fact would not or might not have accepted Lundeberg's testimony without O'Neil's. For neither Judge Sears nor the Attorney General made acceptance of the one dependent on acceptance of the other. Not a word in Judge Sears' decision or that of the Attorney General suggests that they did not regard the testimony of Lundeberg or the statements of O'Neil, each without the other, as sufficient to support their finding that Bridges was a member of the Communist Party. On the contrary, each declared that he accepted Lundeberg's testimony and O'Neil's statements, and that he believed each. It can hardly be said, without more, that they did not accept the credited evidence furnished by each witness as sufficient in itself to support their finding of Party membership.

But the record does not stop there. Both Judge Sears and the Attorney General examined the Lundeberg and the O'Neil testimony separately and made separate findings as to the effect to be given to each. The findings of Judge Sears, adopted by the Attorney General, show affirmatively that both officials accepted the testimony of Lundeberg and the statements of O'Neil, as independently sufficient to support the finding that Bridges was a member of the Communist Party.

Lundeberg's testimony related wholly to his interview with Bridges in 1935. Of Lundeberg's testimony, Judge Sears said:

"The question for me to answer is whether the Government has established that Bridges admitted to Lundeberg at the time specified that he was a member of the Communist Party. If he did so admit, it is in my judgment conclusive evidence of the fact."

After examining Lundeberg's testimony, and considering his demeanor on the witness stand, and the strongly corroborative circumstance that others, who were in a position to deny his testimony, had failed to do so, Judge Sears said:

"I reach the conclusion, therefore, that the conversation did take place substantially as testified by Lundeberg and that Bridges did then and there admit to Lundeberg that he was a member of the Communist party."

Thus Judge Sears clearly stated that Lundeberg's testimony alone was sufficient to sustain a finding that petitioner was a member of the Communist Party in 1935.

At the conclusion of his like examination of O'Neil's statements, which related wholly to O'Neil's interview with Bridges in 1937, Judge Sears said:

"Having thus concluded that O'Neil made the statements attributed to him by Mrs. Segerstrom [the stenographer] and Major Schofield, I am also convinced of their truth. I do not overlook O'Neil's repudiation of the statements or Bridges' denials of the facts recited therein.

"Taking into consideration all the evidence bearing on this phase of the proceeding, I conclude that it is established that the narrations contained in O'Neil's statement to Mrs. Segerstrom and in his conversation in the presence of Major Schofield are the truth, and I find the fact that in accordance therewith that Bridges was in 1937, a member of the Communist Party."

The Attorney General, after a like separate examination of the Lundeberg and O'Neil evidence, made it perfectly clear that he accepted Judge Sears' findings as to each. He too said that the question as to each witness was a matter of his credibility, and that he believed the witness, rather than petitioner, because on this point he accepted Judge Sears' finding that they, and not Bridges, were to be believed. The conclusion is inescapable that the administrative officers, whose concurrent findings we are bound to accept if supported by evidence, did not make their finding, from the Lundeberg testimony, that Bridges was a Party member in 1935, dependent in any degree upon their finding, from the O'Neil evidence, that Bridges was a member of the Party in 1937, or vice versa. This is particularly the case since Lundeberg's and O'Neil's testimony was not cumulative as to membership in the Communist Party at a single time; each testified as to a different time, some two years apart.

It is true that the Attorney General, in an introductory paragraph in his decision, said: "However, the evidence of two witnesses is accepted as showing that Bridges was a member of the Party. If this evidence is believed—and Judge Sears believed it—the doubt is decided." But he went on to say that the question was one of credibility, and that Judge Sears, who saw the witnesses, was in a far better position to decide that question than the Review Board. He continued with a separate discussion of each witness and his testimony. He concluded as to each, without any reference to the other, that the witness should be believed rather than Bridges, and that Judge Sears' conclusion as to the credibility of each (which was not dependent upon his like conclusion as to the other) should be sustained.

The record thus conclusively shows that both Judge Sears and the Attorney General found, on the Lundeberg testimony alone, that Bridges was a member of the Communist Party in 1935. That finding is supported by the sworn testimony of Lundeberg, which was admis-

sible in evidence and has probative force. As it supports the concurrent findings of Judge Sears and of the Attorney General that Bridges was a Party member at that time, we cannot reject that finding.

What we have said is not to be taken as conceding that O'Neil's prior statements were improperly admitted. The Court rejects them on two grounds, that they were admitted in violation of departmental regulations, and that as hearsay they were so untrustworthy as to make them inadmissible in any event. We think neither ground tenable.

We find nothing in the rules and regulations applicable to deportation cases calling for the exclusion of the testimony concerning O'Neil's prior statements.[1] Rule 150.1 provides that statements secured during an investigation "which are to be used as evidence" shall be made under oath, and taken down in writing and signed by the person interrogated. Such a statement is denominated a "recorded statement" by the rule. The purpose of securing recorded statements is obviously to preserve evidence in a readily available form, and to insure that before a warrant of arrest is issued, there is credible evidence that the person investigated is an alien and is subject to deportation. It provides neither explicitly nor by implication that statements other than recorded statements are inadmissible.

It is true that Rule 150.6 excludes "recorded" statements unless the maker of the statement is unavailable, refuses to testify or gives inconsistent testimony. These restrictions on the admissibility of ex parte recorded statements hardly can be strained into a sweeping exclusion of all unrecorded statements, otherwise admissible in the proceeding. Indeed the rule on its face quite clearly permits an inspector to testify as to statements made by persons who are unavailable, refuse to testify or give testimony contradictory to a prior statement.[2] The statements as to which the inspector may testify

[1] The opinion of the Court states that the Attorney General conceded that the evidence was admitted in violation of the Rules. The Department of Justice made no such concession in this Court. And we think that the Attorney General's decision, which is quoted by the Court, when fairly read, stated no more than that the objection based on the rules came too late; that had the question been raised in time, compliance with the rules would have been required (it was not stated what compliance with the rules would have entailed); that if the Inspector, after deliberation, then had rejected the objection based on the rules, it would have been "appropriate" to raise the objections before the Board of Immigration Appeals; and that the right to raise the objection had been waived Plainly he did not state or suggest that objections to their admissibility would have been valid if timely made, and there was no occasion for him to consider that question.

[2] Rule 150.6(i) provides, in part: "An affidavit of an inspector as to the statements made by the alien or any other person during an investigation may be received in evidence, otherwise than in support of the testimony of the inspector, only if the maker of such statement is unavailable or refuses to testify at the warrant hearing or gives testimony contradicting the statement and the inspector is unavailable to testify in person."

are not restricted by the terms of the rule to recorded statements. Hence Judge Sears' ruling that Mrs. Segerstrom and Major Schofield could testify, under oath, that O'Neil had made statements to them in contradiction with his testimony on the stand, was not in conflict with the departmental rules.

But it is said that the evidence was in any event inadmissible. That the evidence would be inadmissible in a criminal proceeding is irrelevant here, since a deportation proceeding is not a criminal proceeding. Bugajewitz v. Adams, 228 U.S. 585, 591, 33 S.Ct. 607, 608, 57 L.Ed. 978, and cases cited; Bilokumsky v. Tod, supra, 263 U.S. 154, 155, 44 S.Ct. 56, 68 L.Ed. 221; Mahler v. Eby, 264 U.S. 32, 39, 44 S.Ct. 283, 286, 68 L.Ed. 549. And no principle of law has been better settled than that the technical rules for the exclusion of evidence, applicable in trials in courts, particularly the hearsay rule, need not be followed in deportation proceedings, Bilokumsky v. Tod, supra, 263 U.S. 157, 44 S.Ct. 57, 68 L.Ed. 221, and cases cited; Tisi v. Tod, supra, 264 U.S. 133, 44 S.Ct. 260, 68 L.Ed. 590; Vajtauer v. Commissioner of Immigration, supra, 273 U.S. 106, 47 S.Ct. 304, 71 L.Ed. 560, more than in other administrative proceedings. Consolidated Edison Co. v. Labor Board, 305 U.S. 197, 229, 230, 59 S.Ct. 206, 216, 217, 83 L.Ed. 126, and cases cited; Opp Cotton Mills v. Administrator, 312 U.S. 126, 155, 657, 61 S.Ct. 524, 537, 85 L.Ed. 624, and cases cited. The only objections that can be taken to the evidence in such proceedings are not to its admissibility, but to its probative value. See Consolidated Edison Co. v. Labor Board, supra, 305 U.S. 230, 59 S.Ct. 537, 83 L.Ed. 126.

Judge Sears completely and accurately ruled on the admissibility of Mrs. Segerstrom's and Major Schofield's testimony as to O'Neil's earlier statements to them. He said:

"Whatever may be the common-law rule in relation to the reception of such evidence as that of Mrs. Segerstrom and Major Schofield, in this hearing the parties are not confined to common-law proof. Hearsay is admissible but the character of such evidence is an element to be used in its evaluation. The principal reason for the exclusion of hearsay at common law is that the opportunity for cross-examination is absent. In the present case, the sanction of cross-examination was present. Although the statement given to Mrs. Segerstrom and the statement made in the presence of Major Schofield were not under oath, there is something equivalent, for O'Neil testified on the stand that he told the truth in his interview with the agents of the F. B. I. and in the interview at which Major Schofield was present. There is in my opinion, therefore, every reason why this testimony should be heard and considered as substantive proof. It falls within the definition of substantial evidence heretofore quoted."

He appended in a footnote:

"(1) This view is fully supported by Dean Wigmore in the 3rd edition of his work (3 Wigmore, Evidence, 3rd ed., section 1018(b): 'It

does not follow, however, that Prior Self-Contradictions, when admitted, are to be treated as having no *affirmative testimonial* value, and that any such credit is to be strictly denied them in the mind of the tribunal. The only ground for so doing would be the Hearsay rule. But the theory of the Hearsay rule is that an extrajudicial statement is rejected because it was made out of Court by an absent person not subject to cross-examination. * * * Here, however, by hypothesis the witness is present and subject to cross-examination. There is ample opportunity to test him as to the basis for his former statement. The whole purpose of the Hearsay rule has been already satisfied. Hence there is nothing to prevent the tribunal from giving such testimonial credit to the extrajudicial statement as it may seem to deserve. Psychologically of course, the one statement is as useful to consider as the other; and everyday experience outside of courtrooms is in accord."

See also Opp Cotton Mills v. Administrator, supra, 312 U.S. 155, 61 S.Ct. 537, 85 L.Ed. 624, and cases cited.[3]

We think that the O'Neil statements were properly admitted and that, independently of the Lundeberg testimony, they warranted the Attorney General's finding that Bridges was a Party member.

With increasing frequency this Court is called upon to apply the rule, which it has followed for many years, in deportation cases as well as in other reviews of administrative proceedings, that when there is evidence more than a scintilla, and not unbelievable on its face, it is for the administrative officer to determine its credibility and weight. Merchants' Warehouse Co. v. United States, 283 U.S. 501, 508, 51 S.Ct. 505, 508, 75 L.Ed. 1227; Federal Trade Commission v. Education Society, 302 U.S. 112, 117, 58 S.Ct. 113, 115, 82 L.Ed. 141; Consolidated Edison Co. v. Labor Board, supra, 305 U.S. 229, 59 S.Ct. 216, 83 L.Ed. 126; National Labor Relations Board v. Nevada Copper Co., 316 U.S. 105, 62 S.Ct. 960, 86 L.Ed. 1305; Marshall v. Pletz, 317 U.S. 383, 388, 63 S.Ct. 284, 287, 87 L.Ed. 348; National Labor Relations Board v. Southern Bell Co., 319 U.S. 50, 60, 63 S.Ct. 905, 910, 87 L.Ed. 1250; Medo Corp. v. Labor Board, 321 U.S. 678, 681, 682, 64 S.Ct. 830, 831, 832, 88 L.Ed. 1007. We cannot rightly reject the administrative finding here and accept, as we do almost each week, particularly in our denials of certiorari, the findings of administrative agencies which rest on the tenuous support of evidence far less persuasive than the present record presents. That is especially the case here, since the Attorney General, the district court and the court of appeals have all concurred in the conclusion that the evidence is sufficient to support the findings. Coryell v. Phipps, 317 U.S. 406, 411, 63 S.Ct. 291, 293, 87 L.Ed. 363; United States v. Johnson, 319 U.S. 503, 518, 63 S.Ct. 1233, 1240, 87 L.Ed. 1546; Mahnich v. Southern S. S. Co., 321 U.S. 96, 99, 64 S.Ct. 455, 457, 88 L.Ed. 561, and cases

[3] [Footnote omitted.—Ed.]

cited; Goodyear Co. v. Ray-O-Vac Co., 321 U.S. 275, 278, 64 S.Ct. 593, 594, 88 L.Ed. 721.

Petitioner has made a number of other arguments which the Court finds it unnecessary to discuss. We think that they too are without merit. We would affirm the judgment.[f]

W. P. BROWN & SONS LUMBER COMPANY v. LOUISVILLE & NASHVILLE R. R.

Supreme Court of the United States.
299 U.S. 393, 57 S.Ct. 265, 81 L.Ed. 301 (1937).

Mr. Justice BRANDEIS delivered the opinion of the Court.

W. P. Brown & Sons Lumber Company and other shippers brought in the Interstate Commerce Commission a complaint under section 16 of the Interstate Commerce Act (49 U.S.C.A. § 16), seeking reparation for alleged overcharges on shipments of lumber and other forest products taking lumber rates. They were awarded damages in the proceedings known as Wausau Southern Lumber Co. v. Alabama Great Southern R. R. Co., 142 I.C.C. 521; Id., 182 I.C.C. 731. The Louisville & Nashville Railroad and some other carriers refused to comply with the order. Then this suit was brought in the federal court for Western Kentucky to recover the amounts awarded against them. The case was heard on demurrers to the amended petition and to certain paragraphs of the amended answer. The demurrer to the petition was sustained, and that to the answer overruled, on the ground that the award was founded upon an erroneous construction of the so-called "Jones" or "Combination Rule" in the tariffs. The parties declining to plead further, judgment was entered dismissing the petition (D.C.) 7 F.Supp. 593. That judgment was affirmed by the Circuit Court of Appeals 82 F.(2d) 94. We granted certiorari (299 U.S. 524, 57 S.Ct. 14, 81 L.Ed. 385) because of conflict with the decision of the Court of Appeals of the District of Columbia in Baltimore & Ohio R. R. Co. v. Domestic Hardwoods, Inc., 62 App.D.C. 142, 65 F.2d 488.

The shipments involved were from points in the South and Southwest to points North. For such shipments, there have long been commonly available over connecting lines more than one, and often many, through routes from each point of origin to destination. The Interstate Commerce Act does not require that the rates on all routes shall be the same. Nor does it require that there be on each route a joint through rate. Sometimes, none of the tariffs for the several available routes specifies a joint through rate. Where no joint rate is specified, the tariffs for the through routes commonly provide that the through rate shall be the sum of the local rates of the sev-

[f] The concurring opinion of Mr. Justice Murphy is omitted.

eral carriers contributing to the movement. In 1918, the Director General of Railroads made, by General Order No. 28, a percentage increase of lumber rates in southern territory, limited to 5 cents per 100 pounds. Thus, a joint through rate could not be increased more than 5 cents. But when the lumber moved on a combination through rate, the 5-cent limit was applied to each factor in the combination. The result was that on combination through routes the increase was often doubled, or tripled. To avoid such a result, the so-called "Jones" or "Combination Rule" was devised in February, 1919. Ever since, it has been commonly incorporated in tariffs.[2]

The question for decision is whether the "Combination Rule" applies to the shipments here involved. If it does not, there is no cause of action. If it does, the award was correct. The rule provides:

"Where no published through rates are in effect from point of origin to destination on Lumber * * *, carloads, and two or more commodity rate factors * * * are used in arriving at the through rate for a continuous rail shipment thereof, such through rate will be arrived at in the following manner. * * *" [Then follows a formula.]

When applied to the combination rate specified in the tariff, the formula effects a reduction thereof. While the combination rate itself is ordinarily, if not always, higher than the joint through rate, the effect of applying to it the Combination Rule would not necessarily produce equality in rates on the several routes. It might make the combination through rate lower than the published joint through rate. This is true as to many of the shipments here involved. The amended answer gave an example: Laurel, Miss., is a typical lumber shipping point; and Columbus, Ohio, a typical destination. The published through joint rate from Laurel to Columbus, applying via each of the several originating carriers at that point, was 43 cents per 100 pounds. A combination rate for the movement over other routes, unaffected by the Combination Rule, was 43½ cents. If the combination rate were subjected to the Combination Rule, the rate over the combination route would be 40½ cents. Thus the combination rate would be much less than the published joint through rate.

Each of these shipments here involved might have been made over a route for which a joint through rate from point of origin to destination had been published. Instead, the shipment was made over

[2] B. T. Jones' Tariff 228, I C C.U.S. 1, § 4. In Wausau Southern Lumber Co v. Alabama Great Southern R. Co, 142 I.C. C. 521, 524, the Commission states: "The combination rule was originally published by the director general about seven months after the issuance of General Order No. 28, as an emergency tariff provision to avoid a double increase on certain commodities moving on combination rates, the separate factors of which had been increased by specific amounts. Shortly after the general increase of 1920 the rule was amended substantially to reflect the increases then authorized. It was subsequently further amended to reflect the general reduction of 1922, and is still in effect"

a route for which the rate specified in the tariff was a combination rate. In some instances the route had been designated by the shipper. The carriers exacted the full combination rate. The shippers made reclamation, on the ground that the Combination Rule applies in every case where no joint through rate has been published over the route selected for the movement. The commission sustained the shippers' claim.

First. The rule declares that the prescribed formula is to be applied "where no published through rates are in effect from point of origin to destination." The language used is not technical. The meaning of the words is clear. There is no ambiguity. The construction of these railroad tariffs presents, therefore, a question of law, not differing in character from those presented when the construction of any other document is in dispute. Greatern Northern Ry. Co. v. Merchant's Elevator Co., 259 U.S. 285, 291, 42 S.Ct. 477, 479, 66 L. Ed. 943. As, in each instance, there was available some through route from point of origin to destination for which joint through rates had been published, the rule, by its terms, has no application. We so hold despite the construction given to the rule by the commission.

Second. The shippers contend that the construction given to the rule by the commission is conclusive, because preliminary resort to the commission was necessary. Texas & Pacific Ry. Co. v. American Tie & Timber Co., Ltd., 234 U.S. 138, 34 S.Ct. 885, 58 L.Ed. 1255; Loomis v. Lehigh Valley R. R. Co., 240 U.S. 43, 36 S.Ct. 228, 60 L.Ed. 517; Northern Pacific Ry. Co. v. Solum, 247 U.S. 477, 38 S.Ct. 550, 62 L.Ed. 1221. They argue that such preliminary resort was necessary, since the interpretation and application of the rule involved (a) the exercise of sound administrative discretion as to technical and intricate matters of tariff application and the relation of tariffs one to another; (b) the reasonableness of a practice of routing as between higher and lower-rated routes; and (c) uniformity in the application of rates, which is the paramount purpose of the Interstate Commerce Act. But the argument is not sound. To determine whether the rule was applicable to the several shipments does not call for, or indeed permit, the consideration of any of these matters. The simple question for decision, as to each shipment is whether there existed "published through rates" "in effect from point of origin to destination." The determination of that question requires ordinarily merely the examination of the tariffs. The inquiry would, in all respects, be like that commonly made by courts when called upon to construe and apply any other document. This is not a case like Standard Oil Co. (Indiana) v. United States, 283 U.S. 235, 238, 239, 51 S.Ct. 429, 430, 75 L.Ed. 999, where there was required "consideration of matters of fact and the application of expert knowledge for the ascertainment of the technical meaning of the words and a correct appreciation of a variety of incidents affecting their use." Here, the shippers might have brought their action at law without resort to the commission.

Third. The shippers urge that the carriers are estopped from contesting the interpretation given by the commission to the Combination Rule, because in Cancellation Rule for Constructing Combination Rates on Lumber, etc., 81 I.C.C. 745, decided by Division 3 in August, 1923, and affirmed on reargument before the full commission December 2, 1924, in 93 I.C.C. 614, the carriers vainly sought to have the rule modified so as to overcome the construction given by the commission. The denial of their application left them remediless by administrative action; but that action in no way prejudiced their right to insist in the courts upon the construction of the rule for which they had contended.

Fourth. The shippers urge that the interpretation given by the commission should be followed by the Court, because it embodies the settled administrative construction acquiesced in by carriers and shippers. It is true that the commission has repeatedly declared its adherence to the construction for which the shippers contend. Many carriers acquiesced in that construction, in part possibly, because they preferred to take the lesser amount rather than risk losing the traffic. But the cases cited show that other carriers protested vigorously; and their protests have been persistent. * * *

Affirmed.[g]

In FEDERAL COMMUNICATIONS COMMISSION v. POTTSVILLE BROADCASTING COMPANY, 309 U.S. 134, 60 S.Ct. 437, 84 L.Ed. 656 (1940), the Court, in footnote No. 6 on p. 143 of 309 U.S. (441–2 of 60 S.Ct.) said:

The Communications Commission's Rules of Practice, Rule 106.4, provided that "the Commission will, so far as practicable, endeavor to fix the same date * * * for hearing on all applications which * * * present conflicting claims * * * excepting, however, applications filed after any such application has been designated for hearing." Respondent contends, and the court below seemed to believe that this rule bound the Commission to give respondent a noncomparative consideration because its application had been set down for hearing before the later and rival applications were filed. The Commission interprets this rule simply as governing the order in which applications shall be heard, and not touching upon the order in which they shall be acted upon or the manner in which they shall be considered. That interpretation is binding upon the courts. American Tel. & Tel. Co. v. United States, 299 U.S. 232, 57 S.Ct. 170, 81 L.Ed. 142.

[g] Cf. Great Northern Railway Company v. Merchants' Elevator Company, 259 U.S. 285, 42 S.Ct. 477, 66 L.Ed. 943 (1922), *infra* at p. 609.

Footnotes of the court, except for footnote No. 2, have been omitted.

AMERICAN TELEPHONE & TELEGRAPH COMPANY v. UNITED STATES

Supreme Court of the United States.
299 U.S. 232, 57 S.Ct. 170, 81 L.Ed. 142 (1936).

Mr. Justice CARDOZO delivered the opinion of the Court.

This suit was brought in the United States District Court for the Southern District of New York to set aside an order of the Federal Communications Commission prescribing a uniform system of accounts for telephone companies subject to the Communications Act of 1934. Act of June 19, 1934, c. 652, 48 Stat. 1064, 47 U.S.C. § 151 et seq. (47 U.S.C.A. § 151 et seq.). The plaintiffs are forty-four telephone companies, thirty-seven of them members of the Bell system, and seven of them members of another group. The defendants are the United States and the Federal Communications Commission, with whom the National Association of Railroad and Utilities Commissioners was afterwards joined, intervening as the representative of the regulatory commissions of forty-six states in support of the contested order.

The Communications Act of 1934 provides (section 220 [47 U.S.C.A. § 220]) that "the Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda" to be kept by carriers subject to the act, "including the accounts, records, and memoranda of the movement of traffic, as well as of the receipts and expenditures of moneys." This is a power that had previously been lodged with the Interstate Commerce Commission (Interstate Commerce Act, § 20(5), 49 U.S.C.A. § 20(5), which framed a set of rules for telephone companies to take effect January 1, 1913, and a revised set of rules effective January 1, 1933. After the transfer of jurisdiction over telephone companies from the Interstate Commerce Commission to the Federal Communications Commission in 1934, the new Commission prepared a "draft of a Uniform System of Accounts," which was considered at a conference with representatives of the companies and of the state commissions. The outcome of the conference was the order of June 19, 1935, to take effect January 1, 1936, which is the subject of this suit.

The plaintiffs having moved for an interlocutory injunction, the cause was heard, in accordance with the requirement of the statute (47 U.S.C. § 402(a) [47 U.S.C.A. § 402(a)]; 28 U.S.C. § 47 [28 U.S.C.A. § 47]), by a District Court of three judges, the affidavits in support of the motion and against it being also submitted for and against the final decree. Five provisions of the order were attacked as arbitrary. The District Court sustained two objections of minor importance, which are not in controversy now, and overruled the others. One of these was directed to the "original cost" rule; the second to a provision as to "just and reasonable" charges; the third

to a classification dividing plants in present use from those held for use thereafter. The court dismissed the bill as to the objections overruled, stating in an opinion the reasons for its action. 14 F.Supp. 121. The case is here upon appeal. 48 Stat. 1064, 1093, § 402(a), 47 U.S.C. § 402(a), 47 U.S.C.A. § 402(a); 38 Stat. 219, 220, 28 U.S.C. §§ 47, 47a, 28 U.S.C.A. §§ 47, 47a.

This court is not at liberty to substitute its own discretion for that of administrative officers who have kept within the bounds of their administrative powers. To show that these have been exceeded in the field of action here involved, it is not enough that the prescribed system of accounts shall appear to be unwise or burdensome or inferior to another. Error or unwisdom is not equivalent to abuse. What has been ordered must appear to be "so entirely at odds with fundamental principles of correct accounting" (Kansas City Southern Ry. Co. v. United States, 231 U.S. 423, 444, 34 S.Ct. 125, 131, 58 L.Ed. 296, 52 L.R.A.(N.S.) 1) as to be the expression of a whim rather than an exercise of judgment. Norfolk & Western Ry. Co. v. United States, 287 U.S. 134, 141, 53 S.Ct. 52, 54, 77 L.Ed. 218; Kansas City Southern Ry. Co. v. United States, supra, 231 U.S. 423, at page 456, 34 S.Ct. 125, 58 L.Ed. 296, 52 L.R.A.(N.S.) 1. Then, too, in gauging rationality, regard must steadily be had to the ends that a uniform system of accounts is intended to promote. "The object of requiring such accounts to be kept in a uniform way, and to be open to the inspection of the Commission, is not to enable it to regulate the affairs of the corporations not within its jurisdiction, but to be informed concerning the business methods of the corporations subject to the act, that it may properly regulate such matters as are really within its jurisdiction." Interstate Commerce Commission v. Goodrich Transit Co., 224 U.S. 194, 211, 32 S.Ct. 436, 439, 56 L.Ed. 729; cf. Kansas City Southern Ry. Co. v. United States, supra, 231 U.S. 423, at page 445, 34 S.Ct. 125, 58 L.Ed. 296, 52 L.R.A.(N.S.) 1. With these principles in mind, we proceed to consider separately the regulations and instructions now challenged as unlawful.

First: *The Original Cost Provisions.*

Four new balance sheet accounts, each of them a sub-title of the general title of "Investments", must be kept under the new system. The first (100.1) is described as Telephone Plant in Service; the second (100.2), Telephone Plant under Construction; the third (100.3), Property held for Future Telephone Use; and the fourth (100.4), Telephone Plant Acquisition Adjustment. Account 100.1 "shall include the original cost [defined by Instruction 3 (S. 1)] of the company's property used in telephone service at the date of the balance sheet." Account 100.2 "shall include the original cost [as so defined] of construction of telephone plant not completed ready for service" at such date. Account 100.3 "shall include the original cost [so defined] of property owned and held for imminent use in telephone service under a definite plan for such use." The term "origi-

nal cost" as appearing in these rules receives (under Instruction 3 (S. 1)) a special definition. " 'Original cost' or 'cost,' as applied to telephone plant, franchises, patent rights, and right-of-way, means the actual money cost of (or the current money value of any consideration other than money exchanged for) property at the time when it was first dedicated to the public use, whether by the accounting company or by a predecessor public utility." If actual costs are unknown, estimates are to take their place. Instruction 21 (B). From all this it follows that the sum of the three accounts which represent the original cost of property acquired by the accounting company from other telephone utilities, may be less or greater than the investment in such property by the accounting company itself. The difference is taken care of by account 100.4, Telephone Plant Acquisition Adjustment.* The same rule provides in a subdivision designated (C) that "the amounts recorded in this account [i. e. 100.4] with respect to each property acquisition shall be disposed of, written off, or provision shall be made for the amortization thereof in such manner as this Commission may direct."

Before explaining the appellants' objections to these provisions as to cost, we may pause to indicate the reasons that led to their adoption. To a great extent, the telephone business as conducted in the United States is that of a far flung system of parent, subsidiary and affiliated companies. The Bell system is represented in this case by thirty-seven companies, the American Telephone & Telegraph Company at their head. Seven other companies, intervening as a group, represent a second and smaller system. Purchases are frequently made by a member or members of a system from affiliates or subsidiaries, and with comparative infrequency from strangers. At times obscurity or confusion has been born of such relations. There is widespread belief that transfers between affiliates or subsidiaries complicate the task of rate-making for regulatory commissions and impede the search for truth. Buyer and seller in such circumstances may not be dealing at arm's length, and the price agreed upon between them may be a poor criterion of value. Dayton Power & Light Co. v. Public Utilities Comm. of Ohio, 292 U.S. 290, 295, 54 S.Ct. 647, 650, 78 L.Ed. 1267; Western Distributing Co. v. Public Service Comm. of Kansas, 285 U.S. 119, 52 S.Ct. 283, 76 L.Ed. 655; Smith v. Illinois Bell Telephone Co., 282 U.S. 133, 51 S.Ct. 65, 75 L.Ed. 255. Even if

*"This account shall include the difference between (a) the amount of money actually paid (or the current money value of any consideration other than money exchanged) for telephone plant acquired, plus preliminary expenses incurred in connection with the acquisition; and (b) the original cost (note instruction 3 (S.1)) of such plant, governmental franchises and similar rights acquired, less the amounts of reserve requirements for depreciation and amortization of the property acquired, and amounts of contributions to the predecessor company or companies for construction and acquisition of such property. If the actual original cost is not known, the entries in this account shall be based upon an estimate of such cost."

the property has been acquired by treaty with an independent utility or a member of a rival system, there is always a possibility that it is nuisance value only—and not market or intrinsic value for the uses of the business—that has dictated the price paid. Accordingly, the work of the Commission may be facilitated by spreading on the face of the accounts a statement of the cost as of the time when the property to be valued was first acquired by a utility or dedicated to the public use. The same considerations show why the regulations do not direct that the inquiry as to original cost shall be carried even farther back, so as to cover, for illustration, the cost to manufacturers who may have sold to the first utility. In the process of analysis, inquiry is halted at the point where it ceases to be fruitful.

With this explanatory background we can now go forward with understanding to a statement of the objections to the order and a determination of their weight.

(a) The companies object that by the "original cost" provisions of the order they are prevented "from recording their actual investment in their accounts" with the result that the accounts do not fairly exhibit their financial situation to shareholders, investors, tax collectors and others.

The argument is that account 100.4, representing the difference between original and present cost, is not to be reckoned, either wholly or in part, as a statement of existing assets, but must be written off completely. The Commission is charged, we are told, with a mandatory duty to extinguish the entire balance recorded in that account, its presence under the title of "investments" having the effect of a misleading label. To give support to that conception of official duty, they rely on subdivision (C), which provides, as we have seen, that "the amounts recorded in this account with respect to each property acquisition shall be disposed of, written off, or provision shall be made for the amortization thereof in such manner as this Commission may direct."

If subdivision (C) had the meaning thus imputed to it, there would be force in the contention that the effect of the order is to distort in an arbitrary fashion the value of the assets. But the imputed meaning is not the true one. The Commission is not under a duty to write off the whole or any part of the balance in 100.4, if the difference between original and present cost is a true increment of value. On the contrary, only such amount will be written off as appears, upon an application for appropriate directions, to be a fictitious or paper increment. This is made clear, if it might otherwise be doubtful, by administrative construction. Thus, the Commission's chief accountant testified that by the proper interpretation of account 100.4, amounts therein "would be disposed of, after the character of the item had been determined, in a manner consistent with the general rules underlying the uniform system of accounts for the distribution of expenditures, according to their character, to operating expenses,

income, surplus, *or remain an investment.*" Other witnesses gave testimony in substance to the same effect. But even more decisive are statements made by counsel, appearing for the Government and arguing the case before us. To avoid the chance of misunderstanding and to give adequate assurance to the companies as to the practice to be followed, we requested the Assistant Attorney General to reduce his statements in that regard to writing in behalf of the Commission. He did this and informs us that "the Federal Communications Commission construes the provisions of Telephone Division Order No. 7-C, issued June 19, 1935, pertaining to account 100.4" as meaning "that amounts included in account 100.4 that are deemed, after a fair consideration of all the circumstances, to represent an investment which the accounting company has made in assets of continuing value will be retained in that account until such assets cease to exist or are retired; and, in accordance with paragraph (C) of account 100.4, provision will be made for their amortization."

We accept this declaration as an administrative construction binding upon the Commission in its future dealings with the companies. Hicklin v. Coney,[h] 290 U.S. 169, 175, 54 S.Ct. 142, 145, 78 L.Ed. 247; Addy Co. v. United States,[i] 264 U.S. 239, 245, 44 S.Ct. 300, 302, 68 L.Ed. 658. The case in that respect is sharply distinguished from New York Edison Co. v. Maltbie, 244 App.Div. 685, 281 N.Y.S. 223; Id., 271 N.Y. 103, 2 N.E.2d 277, where under rules prescribed by the Public Service Commission of New York, there was an inflexible requirement that an account similar in some aspects to 100.4 be written off in its entirety out of surplus, whether the value there recorded was genuine or false. The administrative construction now affixed to the contested order devitalizes the objection that the difference between present value and original cost is withdrawn from recognition as a legitimate investment.

[h] This case deals with a situation quite different from that with respect to which it is cited in the principal case. The Railroad Commission of South Carolina had brought suit in the Supreme Court of South Carolina to enforce a state statute regulating transportation by motor vehicles. The respondents had defended on the ground, among others, that the statute denied them the equal protection of the laws because of certain statutory exemptions alleged to be discriminatory. The opinion of the Supreme Court of the United States, at p. 175 of 290 U.S., cited to the text of the principal case, discusses the averment of the Railroad Commission that "it had uniformly construed the statute" in a particular way, and had embodied this construction in a formal interpretative regulation. The opinion goes on to point out that the South Carolina Supreme Court had reached its interpretation of the statute independently of the Railroad Commission's interpretation, and had in part rejected the Commission's interpretation. No administrative construction of an administrative regulation was involved, nor was there any reference to the effect of such an interpretation in binding the Commission.

[i] In this case, the Supreme Court construed an order of the Fuel Administrator, issued under the Lever Act of August 10, 1917, in such a way as to preclude giving it retroactive effect. The proposition in support of which this case is cited to the text of the principal case does not appear to have been involved.

We are not impressed by the argument that the classification is to be viewed as arbitrary because the fate of any item, its ultimate disposition, remains in some degree uncertain until the Commission has given particular directions with reference thereto. By being included in the adjustment account, it is classified as provisionally a true investment, subject to be taken out of that account and given a different character if investigation by the Commission shows it to be deserving of that treatment. Such a reservation does not amount to a departure from the statutory power to fix the forms of accounts for "classes" of carriers rather than for individuals. The forms of the accounts *are* fixed, and fixed by regulations of adquate generality. What disposition of their content may afterwards be suitable upon discovery that particular items have been carried at an excessive figure must depend upon evidentiary circumstances, difficult to define or catalogue in advance of the event. If once there was any need for explanation more precise than that afforded by the order, it is now supplied, we think, by an administrative construction, which must be read into the order as supplementary thereto.

The decree should be affirmed, and it is so ordered.

Affirmed.

Mr. Justice STONE took no part in the determination or decision of this case.[j]

In NATIONAL LABOR RELATIONS BOARD v. PACIFIC GAS & ELECTRIC Co., 118 F.2d 780 (C.C.A. 9th, 1941), the court, at p. 788–9, said:

There is a suggestion that the complaint violates the Board's rules (§ 4 (e) of Art. II), but we assume that since the Board has power to make the rules it has power to suspend them.[k]

NATIONAL LABOR RELATIONS BOARD v. MALL TOOL CO

Circuit Court of Appeals for the United States, Seventh Circuit.
119 F.2d 700 (1941).

LINDLEY, DISTRICT JUDGE. Petitioner seeks to enforce its order directing respondent (1) to cease and desist from unfair labor practices, (2) to reinstate employees found to have been discriminated against, (3) to make such employees whole for loss of wages, and (4)

[j] In United States v. New York Telephone Co., 326 U.S. 638, 66 S.Ct. 393, 90 L.Ed. —— (1946), the effect of the "binding" administrative construction of the Commission and the stipulation by the Assistant Attorney General was substantially nullified by the Court's interpretation of the scope and effect of the stipulation.

[k] Does the power of an administrative agency to revoke, amend or suspend its rules and regulations by formal action import a power to "suspend" them casually by ignoring or refusing to apply them in a particular case?

to post appropriate notices. The order was based upon a finding that respondent had interfered with, restrained, and coerced its employees in violation of Section 8(1) of the National Labor Relations Act, 29 U.S.C.A. § 158(1), by threatening discharge of its employees and closure of its plant, if they did not refrain from activity in the union, which, for brevity, we shall designate as the Amalgamated, by declaring its opposition to unions, by locking out its employees, and by dominating and interfering with the formation and administration of another union, which we shall designate the Council. The Board found further that respondent on March 15, 1937, wrongfully locked out eight employees and ever thereafter refused to reinstate them, all in violation of Section 8(1) and (3) of the Act. Respondent insists that the findings are not supported by substantial evidence and that the order is invalid and improper.

It is unnecessary to extend to any great length our discussion concerning applicability of the Act, 29 U.S.C.A. § 151 et seq., or the findings of fact as to unfair labor practices. Upon the undisputed facts, the Act is clearly applicable, under National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893, 108 A.L.R. 1352; Santa Cruz Fruit Packing Co. v. N.L.R.B., 303 U.S. 453, 58 S.Ct. 656, 82 L.Ed. 954; National Labor Relations Board v. Fainblatt, 306 U.S. 601, 59 S.Ct. 668, 83 L.Ed. 1014. Similarly, there is little question as to substantial evidence in support of the finding of unfair labor practices. Respondent, through its officials, maintained and repeatedly expressed hostility toward unions in general and openly discriminated against organizers of the Amalgamated. It determined that the most feasible method of discouraging union activity would be to close its plant, believing that a temporary shutdown would produce effective discouragement. A picket line formed in protest. The president of respondent talked to the picketers, saying "I see what this is all about,—the C. I. O. is behind it. I don't want to see any of you union men around here." He announced their discharge, telling them to "get their tools and get out." Respondent then wrote all employees that great uncertainty existed as to when the plant would reopen and that they should remove their tools. Simultaneously, however, the foreman was instructed to advise such employees as were not members of Amalgamated to disregard the letter. These instructions were obeyed. Eventually the plant reopened and at that time substantially all former members of Amalgamated who returned to work and had testified in the proceeding had terminated their union memberships. Some of them testified that when they returned, the president informed them that he would not have union men working in his shop.

Within thirty days after the plant reopened, a supervisory employee of respondent suggested creation of the Council. The president approved and furnished a pamphlet containing instructions upon setting up a union, which the foreman delivered to the organizer of the new

association. And within another thirty days, respondent had entered into a contract with the Council recognizing it as exclusive bargaining agent of the employees. However, the new union did not function actively for any extended period and, finally, in September, 1937, some of its officers resigned. Thereafter it seems to have relapsed into innocuous desuetude.

When the plant reopened, reinstatement was denied eight employees. Three of them had been singled out previously as leaders in labor union activity. Two of them had been in the picket line when the president attempted to discharge the picketers. The other three had resisted an attempt to induce them to leave the picket line and return to work. All except one participated in the picketing. There was substantial evidence that respondent had discriminated against these employees in violation of the act in that they had been locked out and denied reinstatement because of union affiliation and activity in behalf of the Amalgamated.

This short resume of some of the facts appearing in the record, to which the Board gave credence over and beyond controverting testimony, clearly indicates substantial evidence in support of the findings mentioned.

Of more serious import is the contention of respondent that the order is unfair and improper in that it directs that certain employees receive back wages from March 15, 1937, inasmuch as the charges were not filed until September 23, 1938 and the amended charge April 28, 1939. This lapse of time, coupled with the circumstances in the record, respondent insists, renders unreasonable this portion of the order.

Respondent directs our attention to the fact that the Board itself has quite generally ruled that it will order back pay only from time of the filing of the charges, if there is unreasonable delay in filing charges and no mitigating circumstances are shown. The record does not disclose that these eight employees were engaged in any negotiations with respondent between April, 1937 and the time of the filing of the charges in September, 1938. We find in the record no mitigating circumstances justifying the delay. The language of the Board in L. C. Smith & Corona Typewriters, Inc., 11 N.L.R.B. 1382, seems applicable: "Since such delay would otherwise unduly prejudice the respondent, and with a view to encouraging the prompt disposition of charges, we shall not award back pay to * * * for the period in which the union failed to file its charges, in the absence of any showing of mitigating circumstances for this delay."

Consistency in administrative rulings is essential, for to adopt different standards for similar situations is to act arbitrarily. Under such circumstances, affirmative orders violate administrative discretion and become punitive, rather than remedial measures, outside the scope of the Board's powers. Republic Steel Corp. v. N. L. R. B.,

311 U.S. 7, 61 S.Ct. 77, 85 L.Ed. 6; Consolidated Edison Co. v. N. L. R. B., 305 U.S. 197, 59 S.Ct. 206, 83 L.Ed. 126; National Labor Relations Board v. Fansteel Metallurgical Corp., 306 U.S. 240, 59 S.Ct. 490, 83 L.Ed. 627, 123 A.L.R. 599. It is obvious that undue delay in filing charges may not only prejudice the employer but also tend to encourage employees to await in idleness with the expectation that no matter how long they delay filing charges, they will receive compensation for all time during which they have been quiescent. The legislation contemplates that a proceeding such as this shall promote the public welfare; not that it shall benefit private parties in respects unrelated to that welfare. * * *

In the respects indicated the order is modified; in all others it is approved. An order of enforcement, to the extent of such approval, is entered.

SECTION 6. CHOICE OF ADMINISTRATIVE METHOD OF ACTION

A. Regulation [a] or Order [b]

PUBLIC UTILITY HOLDING COMPANY ACT OF 1935, §§ 7(a) (b), 11(b) (e) [c]

15 U.S.C. §§ 79g(a) (b), 79k(b) (e).

Sec. 7. (a) A registered holding company or subsidiary company thereof may file a declaration with the Commission, regarding any of the acts enumerated in subsection (a) of section 6, in such form as the Commission *may by rules and regulations prescribe* as necessary or appropriate in the public interest or for the protection of investors or consumers. Such declaration shall include—

(1) such of the information and documents which are required to be filed in order to register a security under section 7 of the Securities Act of 1933, as amended, as the Commission may by rules and regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers; and

(2) such additional information, in such form and detail, and such documents regarding the declarant or any associate company thereof, the particular security and compliance with such

[a] *I.e.*—Rule, regulation or order of general applicability prescribing future conduct.

[b] *I.e.*—Order of particular applicability.

[c] Act of August 26, 1935, c. 687, Title I, §§ 7(a) (b), 11(b) (e), 49 Stat. 815, 820.

State laws as may apply to the act in question as the Commission may by rules and regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers.

(b) A declaration filed under this section shall become effective within such reasonable period of time after the filing thereof as the Commission *shall fix by rules and regulations or order,* unless the Commission prior to the expiration of such period shall have issued an order to the declarant to show cause why such declaration should become effective. Within a reasonable time after an opportunity for hearing upon an order to show cause under this subsection, unless the declarant shall withdraw its declaration, the Commission *shall enter an order* either permitting such declaration to become effective as filed or amended, or refusing to permit such declaration to become effective. Amendments to a declaration may be made upon such terms and conditions as the Commission may prescribe. [Italics added.]

Sec. 11. * * *

(b) It shall be the duty of the Commission, as soon as practicable after January 1, 1938:

(1) *To require by order,* after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such action as the Commission shall find necessary to limit the operations of the holding-company system of which such company is a part to a single integrated public-utility system, and to such other businesses as are reasonably incidental, or economically necessary or appropriate to the operations of such integrated public-utility system: *Provided, however,* That the Commission shall permit a registered holding company to continue to control one or more additional integrated public-utility systems, if, after notice and opportunity for hearing, it finds that—

(A) Each of such additional systems cannot be operated as an independent system without the loss of substantial economies which can be secured by the retention of control by such holding company of such system;

(B) All of such additional systems are located in one State, or in adjoining States, or in a contiguous foreign country; and

(C) The continued combination of such systems under the control of such holding company is not so large (considering the state of the art and the area or region affected) as to impair the advantages of localized management, efficient operation, or the effectiveness of regulation.

The Commission may permit as reasonably incidental, or economically necessary or appropriate to the operations of one or more integrated public-utility systems the retention of an interest in any business (other than the business of a public-utility

company as such) which the Commission shall find necessary or appropriate in the public interest or for the protection of investors or consumers and not detrimental to the proper functioning of such system or systems.

(2) *To require by order,* after notice and opportunity for hearing, that each registered holding company, and each subsidiary company thereof, shall take such steps as the Commission shall find necessary to ensure that the corporate structure or continued existence of any company in the holding-company system does not unduly or unnecessarily complicate the structure, or unfairly or inequitably distribute voting power among security holders, of such holding-company system. In carrying out the provisions of this paragraph the Commission shall require each registered holding company (and any company in the same holding-company system with such holding company) to take such action as the Commission shall find necessary in order that such holding company shall cease to be a holding company with respect to each of its subsidiary companies which itself has a subsidiary company which is a holding company. Except for the purpose of fairly and equitably distributing voting power among the security holders of such company, nothing in this paragraph shall authorize the Commission to require any change in the corporate structure or existence of any company which is not a holding company, or of any company whose principal business is that of a public-utility company.

The Commission *may by order revoke or modify* any order previously made under this subsection, if, after notice and opportunity for hearing, it finds that the conditions upon which the order was predicated do not exist. Any order made under this subsection shall be subject to judicial review as provided in section 24. [Italics added]

(e) *In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate* in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions

of subsection (f) of section 18, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of section 11, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed. [Italics added.]

SECURITIES AND EXCHANGE COMMISSION v. CHENERY CORP.

Supreme Court of the United States.
318 U.S. 80, 63 S.Ct. 454, 87 L.Ed. 626 (1943).

Mr. Justice FRANKFURTER delivered the opinion of the Court.

The respondents, who were officers, directors, and controlling stockholders of the Federal Water Service Corporation (hereafter called Federal), a holding company registered under the Public Utility Holding Company Act of 1935, c. 687, 49 Stat. 803, 15 U.S.C. § 79 et seq., 15 U.S.C.A. § 79 et seq., brought this proceeding under § 24(a) of the Act to review an order made by the Securities and Exchange Commission on September 24, 1941, approving a plan of reorganization for the company. Under the Commission's order, preferred stock acquired by the respondents during the period in which successive reorganization plans proposed by the management of the company were before the Commission, was not permitted to participate in the reorganization on an equal footing with all other preferred stock. The Court of Appeals for the District of Columbia, with one judge dissenting, set the Commission's order aside, 75 U.S.App.D.C. 374, 128 F.2d 303, and because the question presented looms large in the administration of the Act, we brought the case here. 317 U.S. 609, 63 S.Ct. 52, 87 L.Ed. 494.

The relevant facts are as follows. In 1937 Federal was a typical public utility holding company. Incorporated in Delaware, its assets consisted of securities of subsidiary water, gas, electric, and other companies in thirteen states and one foreign country. The respondents controlled Federal through their control of its parent, Utility Operators Company, which owned all of the outstanding shares of Federal's Class B common stock, representing the controlling voting power in the company. On November 8, 1937, when Federal registered as a holding company under the Public Utility Holding Company Act of 1935, its management filed a plan for reorganization under §§ 7 and 11 of

the Act, the relevant portions of which are copied in the margin. This plan, as well as two other plans later submitted by Federal, provided for participation by Class B stockholders in the equity of the proposed reorganized company. This feature of the plans was unacceptable to the Commission, and all were ultimately withdrawn. On March 30, 1940, a fourth plan was filed by Federal. This plan, proposing a merger of Federal, Utility Operators Company, and Federal Water and Gas Corporation, a wholly-owned inactive subsidiary of Federal, contained no provision for participation by the Class B stock. Instead, that class of stock was to be surrendered for cancellation, and the preferred and Class A common stock of Federal were to be converted into common stock of the new corporation. As the Commission pointed out in its analysis of the proposed plan, "except for the 5.3% of new common allocated to the present holders of Class A stock, substantially all of the equity of the reorganized company will be given to the present preferred stockholders."

During the period from November 8, 1937, to June 30, 1940, while the successive reorganization plans were before the Commission, the respondents purchased a total of 12,407 shares of Federal's preferred stock. (The total number of outstanding shares of Federal's preferred stock was 159,269.) These purchases were made on the over-the-counter market through brokers at prices lower than the book value of the common stock of the new corporation into which the preferred stock would have been converted under the proposed plan. If this feature of the plan had been approved by the Commission, the respondents through their holdings of Federal's preferred stock would have acquired more than 10 per cent of the common stock of the new corporation. The respondents frankly admitted that their purpose in buying the preferred stock was to protect their interests in the company.

In ascertaining whether the terms of issuance of the new common stock were "fair and equitable" or "detrimental to * * * the interest of investors" within § 7 of the Act, the Commission found that it could not approve the proposed plan so long as the preferred stock acquired by the respondents would be permitted to share on a parity with other preferred stock. The Commission did not find fraud or lack of disclosure, but it concluded that the respondents, as Federal's managers, were fiduciaries and hence under a "duty of fair dealing" not to trade in the securities of the corporation while plans for its reorganization were before the Commission. It recommended that a formula be devised under which the respondents' preferred stock would participate only to the extent of the purchase prices paid plus accumulated dividends since the dates of such purchases. Accordingly, the plan was thereafter amended to provide that the preferred stock acquired by the respondents, unlike the preferred stock held by others, would not be converted into stock of the reorganized company, but could only be surrendered at cost plus 4 per cent interest. The Com-

mission, over the respondents' objections, approved the plan as thus amended, and it is this order which is now under review.

We completely agree with the Commission that officers and directors who manage a holding company in process of reorganization under the Public Utility Holding Company Act of 1935 occupy positions of trust. We reject a lax view of fiduciary obligations and insist upon their scrupulous observance. See Wormley v. Wormley, 8 Wheat. 421, 441, 5 L.Ed. 651; Southern Pacific Co. v. Bogert, 250 U.S. 483, 487, 488, 39 S.Ct. 533, 535, 63 L.Ed. 1099; and see Stone, The Public Influence of the Bar, 48 Harv.L.Rev. 1, 8–9. But to say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?.

The Commission did not find that the respondents as managers of Federal acted covertly or traded on inside knowledge, or that their position as reorganization managers enabled them to purchase the preferred stock at prices lower than they would otherwise have had to pay, or that their acquisition of the stock in any way prejudiced the interests of the corporation or its stockholders. To be sure, the new stock into which the respondents' preferred stock would be converted under the plan of reorganization would have a book value—which may or may not represent market value—considerably greater than the prices paid for the preferred stock. But that would equally be true of purchases of preferred stock made by other investors. The respondents, the Commission tells us, acquired their stock as the outside world did, and upon no better terms. The Commission dealt with this as a specific case, and not as the application of a general rule formulating rules of conduct for reorganization managers. Consequently, it is a vital consideration that the Commission conceded that the respondents did not acquire their stock through any favoring circumstances. In its own words, "honesty, full disclosure, and purchase at a fair price" characterized the transactions. The Commission did not suggest that, as a result of their purchases of preferred stock, the respondents would be unjustly enriched. On the contrary, the question before the Commission was whether the respondents, simply because they were reorganization managers, should be denied the benefits to be received by the 6,000 other preferred stockholders. Some technical rule of law must have moved the Commission to single out the respondents and deny their preferred stock the right to participate equally in the reorganization. To ascertain the precise basis of its determination, we must look to the Commission's opinion.

The Commission stated that "in the process of formulation of a 'voluntary' reorganization plan, the management of a corporation occupies a fiduciary position toward all of the security holders to be affected, and that it is subjected to the same standards as other fiduciaries with respect to dealing with the property which is the subject matter of the

trust." Applying by analogy the restrictions imposed on trustees in trafficking in property held by them in trust for others, Michoud v. Girod, 4 How. 503, 557, 11 L.Ed. 1076, the Commission ruled that even though the management does not hold the stock of the corporation in trust for the stockholders, nevertheless the "duty of fair dealing" which the management owes to the stockholders is violated if those in control of the corporation purchase its stock, even at a fair price, openly and without fraud. The Commission concluded that "honesty, full disclosure, and purchase at a fair price do not take the case outside the rule."

In reaching this result the Commission stated that it was merely applying "the broad equitable principles enunciated in the cases heretofore cited", namely, Pepper v. Litton, 308 U.S. 295, 60 S.Ct. 238, 84 L. Ed. 281; Michoud v. Girod, 4 How. 503, 557, 11 L.Ed. 1076; Magruder v. Drury, 235 U.S. 106, 119, 120, 35 S.Ct. 77, 81, 82, 59 L.Ed. 151; and Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545, 62 A.L.R. 1 Its opinion plainly shows that the Commission purported to be acting only as it assumed a court of equity would have acted in a similar case. Since the decision of the Commission was explicitly based upon the applicability of principles of equity announced by courts, its validity must likewise be judged on that basis. The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.

In confining our review to a judgment upon the validity of the grounds upon which the Commission itself based its action, we do not disturb the settled rule that, in reviewing the decision of a lower court, it must be affirmed if the result is correct "although the lower court relied upon a wrong ground or gave a wrong reason." Helvering v. Gowran, 302 U.S. 238, 245, 58 S.Ct. 154, 158, 82 L.Ed. 224. The reason for this rule is obvious. It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate. But it is also familiar appellate procedure that where the correctness of the lower court's decision depends upon a determination of fact which only a jury could make but which has not been made, the appellate court cannot take the place of the jury. Like considerations govern review of administrative orders. If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment. For purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency.

If, therefore, the rule applied by the Commission is to be judged solely on the basis of its adherence to principles of equity derived from judicial decisions, its order plainly cannot stand. As the Commission

concedes here, the courts do not impose upon officers and directors of a corporation any fiduciary duty to its stockholders which precludes them, merely because they are officers and directors, from buying and selling the corporation's stock. The cases upon which the Commission relied do not establish principles of law and equity which in themselves are sufficient to sustain its order. The only question in Pepper v. Litton, 308 U.S. 295, 60 S.Ct. 238, 84 L.Ed. 281, was whether claims obtained by the controlling stockholders of a bankrupt corporation were to be treated equally with the claims of other creditors where the evidence revealed "a scheme to defraud creditors reminiscent of some of the evils with which 13 Eliz. c. 5 was designed to cope", 308 U.S. at page 296, 60 S.Ct. at page 240, 84 L.Ed. 281. Another case relied upon, Woods v. City Bank Co., 312 U.S. 262, 61 S.Ct. 493, 85 L.Ed. 820, held only that a bankruptcy court, in the exercise of its plenary power to review fees and expenses in connection with a reorganization proceeding under Chapter X of the Chandler Act, 52 Stat. 840, 11 U.S.C.A. § 501 et seq., could deny compensation to protective committees representing conflicting interests. Michoud v. Girod, 4 How. 503, 11 L. Ed. 1076, and Magruder v. Drury, 235 U.S. 106, 35 S.Ct. 77, 59 L.Ed. 151, dealt with the specific obligations of express trustees and not with those of persons in control of a corporate enterprise toward its stockholders.

Determination of what is "fair and equitable" calls for the application of ethical standards to particular sets of facts. But these standards are not static. In evolving standards of fairness and equity, the Commission is not bound by settled judicial precedents. Congress certainly did not mean to preclude the formulation by the Commission of standards expressing a more sensitive regard for what is right and what is wrong than those prevalent at the time the Public Utility Holding Company Act of 1935 became law. But the Commission did not in this case proffer new standards reflecting the experience gained by it in effectuating the legislative policy. On the contrary, it explicitly disavowed any purpose of going beyond those which the courts had theretofore recognized. Since the Commission professed to decide the case before it according to settled judicial doctrines, its action must be judged by the standards which the Commission itself invoked. And judged by those standards, i. e., those which would be enforced by a court of equity, we must conclude that the Commission was in error in deeming its action controlled by established judicial principles.

But the Commission urges here that the order should nevertheless be sustained because "the effect of trading by management is not measured by the fairness of individual transactions between buyer and seller, but by its relation to the timing and dynamics of the reorganization which the management itself initiates and so largely controls." Its argument lays stress upon the "strategic position enjoyed by the management in this type of reorganization proceeding and the vesting in it of statutory powers available to no other representative of security

holders". It contends that these considerations warrant the stern rule applied in this case since the Commission "has dealt extensively with corporate reorganizations, both under the Act, and other statutes entrusted to it", and "has, in addition, exhaustively studied protective and reorganization committees", and that the situation was therefore "peculiarly within the Commission's special administrative competence".

In determining whether to approve the plan of reorganization proposed by Federal's management, the Commission could inquire, under § 7(d) (6) and (e) of the Act, whether the proposal was "detrimental to the public interest or the interest of investors or consumers", and, under § 11(e), whether it was "fair and equitable". That these provisions were meant to confer upon the Commission broad powers for the protection of the public plainly appears from the reports of the Congressional committees in charge of the legislation. The provisions of § 7 were "designed to give adequate protection to investors and consumers * * * and are in accord with the underlying purpose of the legislation to give to investors and consumers full protection against the deleterious practices which have characterized certain holding-company finance in the past." Sen.Rep.No.621, 74th Cong., 1st Sess., p. 28. Similarly, the authority given the Commission by § 11 was intended to be responsive to the demands of the particular situations with which the Commission would be faced: "Under these subsections [11(d) (e), and (f)], Commission approval of reorganization plans and supervision of the conditions under which such plans are prepared will make it impossible for a group of favored insiders to continue their domination over inarticulate and helpless minorities, or even as is often the case, majorities * * *." Id., p. 33.

In view of this legislative history, reflecting the range of public interests committed to the care of the Commission, § 17(a) and (b), which requires officers and directors of any holding company registered under the Act to file statements of their security holdings in the company and provides that profits made from dealing in such securities within any period of less than six months shall inure to the benefit of the company, cannot be regarded as a limitation upon the power of the Commission to deal with other situations in which officers and directors have failed to measure up to the standards of conduct imposed upon them by the Act. The Act vests in the officers and directors of a holding company registered under the Act broad powers as representatives of all the stockholders. Besides the Commission, only the management can initiate a proceeding before the Commission to simplify the corporate structure and to effect a fair and equitable distribution of voting power among security holders. Only the management can amend a plan under §§ 7 and 11(e), and this it may do at any time; only the management can withdraw the plan, and this too it may do at will; and even after the Commission has approved a plan, it cannot be carried out without the consent of the management.

Notwithstanding § 17(a) and (b), therefore, the Commission could take appropriate action for the correction of reorganization abuses found to be "detrimental to the public interest or the interest of investors or consumers." It was entitled to take into account those more subtle factors in the marketing of utility company securities that gave rise to the very grave evils which the Public Utility Holding Act of 1935 was designed to correct. See the concurring opinion of Judge Learned Hand in Morgan, Stanley & Co. v. Securities Exchange Commission, 2 Cir., 126 F.2d 325, 332.

But the difficulty remains that the considerations urged here in support of the Commission's order were not those upon which its action was based. The Commission did not rely upon "its special administrative competence"; it formulated no judgment upon the requirements of the "public interest or the interest of investors or consumers" in the situation before it. Through its preoccupation with the special problems of utility reorganizations the Commission accumulates an experience and insight denied to others. Had the Commission, acting upon its experience and peculiar competence, promulgated a general rule of which its order here was a particular application, the problem for our consideration would be very different. Whether and to what extent directors or officers should be prohibited from buying or selling stock of the corporation during its reorganization, presents problems of policy for the judgment of Congress or of the body to which it has delegated power to deal with the matter. Abuse of corporate position, influence, and access to information may raise questions so subtle that the law can deal with them effectively only by prohibitions not concerned with the fairness of a particular transaction. But before transactions otherwise legal can be outlawed or denied their usual business consequences, they must fall under the ban of some standards of conduct prescribed by an agency of government authorized to prescribe such standards—either the courts or Congress or an agency to which Congress has delegated its authority. Congress itself did not proscribe the respondents' purchases of preferred stock in Federal. Established judicial doctrines do not condemn these transactions. Nor has the Commission, acting under the rule-making powers delegated to it by § 11 (e), promulgated new general standards of conduct. It purported merely to be applying an existing judge-made rule of equity. The Commission's determination can stand, therefore, only if it found that the specific transactions under scrutiny showed misuse by the respondents of their position as reorganization managers, in that as such managers they took advantage of the corporation or the other stockholders or the investing public. The record is utterly barren of any such showing. Indeed, such a claim against the respondents was explicitly disavowed by the Commission.

In view of the conditions imposed by the Commission in approving the plan, it is clear that the respondents were charged with violation of a positive command of law rather than with any moral wrong. If

there had been a wrong, it would be against the stockholders from whom they purchased the preferred stock at less than the book value of the new stock—which, as we have already said, may or may not be its real value. But the Commission did not regard such stockholders as beneficiaries of the respondents' "trust" and hence entitled to restitution. The Commission did not undo the purchases deemed by it to have been made by the respondents in violation of their fiduciary obligations. Instead, the Commission confirmed the purchases and ordered that the stock be surrendered to the corporation.

Judged, therefore, as a determination based upon judge-made rules of equity, the Commission's order cannot be upheld. Its action must be measured by what the Commission did, not by what it might have done. It is not for us to determine independently what is "detrimental to the public interest or the interest of investors or consumers" or "fair and equitable" within the meaning of §§ 7 and 11 of the Public Utility Holding Company Act of 1935. The Commission's action cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order as an appropriate safeguard for the interests protected by the Act. There must be such a responsible finding. Compare United States v. Chicago, M., St. P. & P. R. Co., 294 U.S. 499, 510, 511, 55 S.Ct. 462, 467, 79 L.Ed. 1023. There is no such finding here.

Congress has seen fit to subject to judicial review such orders of the Securities and Exchange Commission as the one before us. That the scope of such review is narrowly circumscribed is beside the point. For the courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review. If the action rests upon an administrative determination—an exercise of judgment in an area which Congress has entrusted to the agency—of course it must not be set aside because the reviewing court might have made a different determination were it empowered to do so. But if the action is based upon a determination of law as to which the reviewing authority of the courts does come into play, an order may not stand if the agency has misconceived the law. In either event the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained. "The administrative process will best be vindicated by clarity in its exercise." Phelps Dodge Corp. v. National Labor Relations Board, 313 U.S. 177, 197, 61 S.Ct. 845, 853, 85 L.Ed. 1271, 133 A.L.R. 1217. What was said in that case is equally applicable here: "We do not intend to enter the province that belongs to the Board, nor do we do so. All we ask of the Board is to give clear indication that it has exercised the discretion with which Congress has empowered it. This is to affirm most emphatically the authority of the Board." Ibid. Compare United States v. Carolina Carriers Corp., 315 U.S. 475, 488, 490, 62 S.Ct. 722, 729, 730, 86 L.Ed. 971. In finding that the Commission's order cannot be sustained, we are not imposing any

trammels on its powers. We are not enforcing formal requirements. We are not suggesting that the Commission must justify its exercise of administrative discretion in any particular manner or with artistic refinement. We are not sticking in the bark of words. We merely hold that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained.

The cause should therefore be remanded to the Court of Appeals with directions to remand to the Commission for such further proceedings, not inconsistent with this opinion, as may be appropriate.

So ordered.

Remanded.

Mr. Justice DOUGLAS took no part in the consideration and decision of this case.

Mr. Justice BLACK, with whom Mr. Justice REED and Mr. Justice MURPHY concur, dissenting.

For reasons set out in the Court's opinion and the dissenting opinion below, I agree that these respondents, officers and directors of the Corporations seeking reorganization, acted in a fiduciary capacity in formulating and managing plans they submitted to the Commission, and that, as fiduciaries, they should be held to a scrupulous observance of their trust. I further agree that Congress conferred on the Commission "broad powers for the protection of the public", investors and consumers; and that the Commission, not the Court, was invested by Congress with authority to determine whether a proposed reorganization or merger would be "fair and equitable", or whether it would be "detrimental to the public interest or the interest of investors or consumers."

The conclusions of the Court with which I disagree are those in which it holds that while the Securities and Exchange Commission has abundant power to meet the situation presented by the activities of these respondents, it has not done so. This conclusion is apparently based on the premise that the Commission has relied upon the common law rather than on "new standards reflecting the experience gained by it in effectuating legislative policy", and that the common law does not support its conclusion; that the Commission could have promulgated "a general rule of which its order here was a particular application", but instead made merely an ad hoc judgment; and that the Commission made no finding that these practices would prejudice anyone.

The Commission's actual finding was that "The plan of reorganization herein considered, like the previous plans filed with us over the past several years, was formulated by the management of Federal, and discussions concerning the reorganization of this corporation have taken place between the management and the staff of the Commission over the past several years;" that C. T. Chenery purchased 8,618

shares of preferred stock during this period; that other officers and directors of the concerns involved acquired 3,789 shares during the same period; that for this stock these respondent fiduciaries paid $328,346.89 and then submitted their latest reorganization plan, under which this purchased stock would have a book value in the reorganization company of $1,162,431.90. In the light of these and other facts the Commission concluded that the new plan would be "unfair, inequitable, and detrimental so long as the preferred stock purchased by the management at low prices is to be permitted to share on a parity with other preferred stock." The Commission declined to give "effectiveness" to the proposed plan and entered "adverse findings" against it under §§ 7(d) (1) and 7(d) (2) of the controlling Act, resting its refusal to approve on this statement: "We find that the provisions for participation by the preferred stock held by the management result in the terms of issuance of the new securities being detrimental to the interests of investors and the plan being unfair and inequitable."

The grounds upon which the Commission made its findings seem clear enough to me. Accepting as the Court does the fiduciary relationship of these respondents in managing the Commission proceedings, it follows that their peculiar information as to the stock values under their proposed plan afforded them opportunities for stock purchase profits which other stockholders did not have. While such fiduciaries, they bought preferred stock and then offered a reorganization plan which would give this stock a book value of four times the price they had paid for it. What the Commission has done is to say that no such reward shall be reaped by these fiduciaries. At the same time they are permitted to recover the full purchase price with interest. To permit their reorganization plan to put them in the same position as the old stockholders gives to these fiduciaries an unconscionable profit for trading with inside information.

I can see nothing improper in the Commission's findings and determinations. On the contrary, the rule they evolved appears to me to be a salutary one, adequately supported by cogent reasons and thoroughly consistent with the high standards of conduct which should be required of fiduciaries. That the Commission saw fit to draw support for its own administrative conclusion from decisions of courts should not detract from the validity of its findings.[d] * * *

[d] Footnotes of the court have been omitted.

IN THE MATTER OF FEDERAL WATER SERVICE CORPORATION, UTILITY OPERATORS COMPANY, FEDERAL WATER AND GAS CORPORATION

— S.E.C. —; SEC Holding Company Act Release No. 5584 (Feb. 7, 1945).

Federal Water & Gas Corporation ("Federal Water") has filed an application in this proceeding for approval of an amendment to the plan of reorganization of its predecessor, Federal Water Service Corporation ("Federal") under the Public Utility Holding Company Act of 1935. The amendment proposes that the merger agreement which we heretofore approved and which has long since been consummated (except with respect to certain securities of Federal which are in controversy here) should now be altered so as to provide for the issuance of new common stock of the reorganized company for distribution to certain officers and directors (hereinafter referred to as "interveners"),[1] *pari passu* with public investors, in respect of shares of old preferred stock acquired by such officers and directors during the period in which the management of Federal was proposing successive plans of reorganization for the approval of this Commission.

The interveners join with Federal Water in asking that the proposed amendment be approved. Counsel for our Public Utilities Division and counsel for William S. Fox, a holder of common stock of Federal Water and formerly a holder of Class A stock of Federal, oppose the application. Briefs have been filed and oral argument heard.

In our opinion of March 24, 1941, we disapproved an identical provision in the plan then before us for the reason, among others, that it was unfair and inequitable, and detrimental to the interests of investors. Federal Water Service Corporation, et al., 8 S.E.C. 893, 915-21 (1941).

Thereafter, the plan was amended to provide that the shares acquired by the interveners during the reorganization might be surrendered to the reorganized company for cash in the amount of their cost plus 4% interest from the dates of purchase to the date of consummation of the plan. Over the objection of the interveners, we approved the plan as modified. Id., 10 S.E.C. 200 (1941).

Upon review by the United States Court of Appeals for the District of Columbia, our decision on this feature of the plan was reversed. Chenery Corporation, et al. v. S. E. C., 128 F.2d 303, 75 App.D.C. 374 (1942), Miller, J., dissenting. On certiorari the Supreme Court expressed disagreement with some of the views of the Court of Appeals, but disagreed also with the reasoning on which we based our conclu-

[1] These were officers and directors of Federal, of certain of its subsidiaries, of its corporate parent Utility Operators Company and also include Chenery Corporation, the personal holding company of Federal's president, C. T. Chenery. They intervened in 1941, prior to our approval of the plan of merger (*infra*).

sion. S. E. C. v. Chenery Corporation, et al., 318 U.S. 80, 63 S.Ct. 434, 87 L.Ed. 626 (1943), Black, Reed and Murphy, JJ., dissenting. The Supreme Court neither reversed nor affirmed, but remanded the case to the Court of Appeals with directions to remand to the Commission for such further proceedings, not inconsistent with the Supreme Court's opinion, as may be appropriate. Thereupon the Court of Appeals set aside our order and remanded the cause to us.

On April 17, 1944, we issued an order denying the present application on the basis of findings and opinion simultaneously issued. Upon objections thereto we decided to reopen the proceedings for further argument, and accordingly suspended the effectiveness of our order. Having heard such argument we have determined that our findings and opinion of April 17, 1944, should be withdrawn and the following substituted therefor.

As we understand the opinion of the Supreme Court, our determination of 1941 in this case was held to be unsupported by certain equity precedents on which we relied. And as we construe the Supreme Court's mandate we are directed to reexamine the case and to decide on the facts, viewed in the light of that conclusion of the Court, whether our special experience in administering the legislative policy of the Act indicates a necessity for reaffirming our previous determination or whether, instead, our earlier ruling should be modified.

The question that we have to consider is whether the plan before us, as it would be amended in accordance with the present application, in the particular circumstances of the case, meets the standards prescribed by the Holding Company Act. It is not, and was not previously, a question of prescribing a standard of conduct generally applicable to trading by corporate officers, directors and large stockholders.

Before we can approve the amendment to the plan, whereby the preferred shares in question would participate on a parity with the publicly held shares, we are required by Section 11 (e) of the Act to find affirmatively that the plan, amended as proposed, is "fair and equitable" to the persons affected by it; and we cannot give it our approval if we find that component parts thereof are "detrimental to the public interest or the interest of investors or consumers" within the meaning of Sections 7 (d) (6) and 7 (e) of the Act, or would result in an "unfair and inequitable distribution of voting power" within the meaning of Section 7 (e). * * *

Thus the precise question is whether, on the record before us, it would be consistent with the purposes and standards of the Holding Company Act for us to approve the amended plan as the means by which the interveners may realize the increment, in terms of profit and control, that they expected would accrue to them through their acquisition of preferred shares while this reorganization was under consideration.

This question, as we see it, is not the same as the more general legal question whether corporate managers normally are entitled to realize whatever advantages they may seek by trading in the stock of the corporation they manage. Two main factors limit and define the issue before us more narrowly and require that for correct decision it must be considered in sharp focus under the provisions of this particular statute.

The first of these factors is the nature of our function under the Act at this stage of the proceedings. The second is the nature of the voluntary reorganization process established by the Act, wherein the holding company management occupies the position of an active and, as far as the corporation is concerned, the dominating participant.

In passing upon the plan under the Act we must consider three statutory questions in the light of the record before us. These are:

(1) Is the plan with the proposed amendment "fair and equitable" to the persons affected thereby within the meaning of Section 11 (e)?

(2) Are the terms on which it is proposed that the new common stock shall be issued "detrimental to the public interest or the interest of investors or consumers" within the meaning of Section 7 (d) (6) of the Act? and

(3) Will the proposed alteration of rights of Federal's security holders "result in an unfair or inequitable distribution of voting power" among the security holders of Federal or be "detrimental to the public interest or the interest of investors or consumers" within the meaning of Section 7 (e)? [15]

With respect to the first of these questions, if the record leads us to a negative answer, or leaves undispelled doubts generated by any step taken by the management in the reorganization process, we cannot in good conscience make the affirmative finding required to sustain our approval and must accordingly withhold such approval, even if we made no affirmative finding under the second or third question above. * * *

(e) Reasons for Action by Order Rather Than by General Rule

We have already pointed out the reasons why it is necessary to act by order in this case, under Sections 11 (e) and 7.

The position of the interveners comes down to this: that approving a plan limiting them to their cost plus 4% interest is unfair to them because when they made their purchases they expected to perpetuate their control and make a profit, and that our order operates, accord-

[15] These statutory questions run together through every aspect of this case. In large measure they are affected by similar considerations. To treat them separately would create artificial demarcations and would necessitate substantial repetition of facts and reasoning. Accordingly, we shall discuss the case as a whole, pointing out in the course of that discussion what we believe our answers to these questions must be.

ing to their claim, retroactively to prevent the realization of their expectations. But this is true only in the sense that the decision of any case of first impression may have an effect not foreseen or foreseeable. The effects of our decision upon the expectations of the interveners must be weighed against the interests of others, and we think that a contrary decision would be unfair and detrimental to the interests of investors and to the public interest itself.

Moreover in this case the interveners, when they bought the preferred stock of Federal, were not acting wholly in a legal vacuum. As reasonable men they must at least have known that they were running some risk that their purchase program might not achieve its purpose. In fact, at the outset of this proceeding they took steps to avoid the criticism that had been voiced at the hearings with respect to their early purchases of preferred stock, by agreeing among themselves not to make purchases while negotiations for a plan were pending and the terms of such plan were undisclosed to the public. Moreover, in 1934 the reorganization provisions of the Bankruptcy Act had notified reorganization managers in proceedings under that Act that claims asserted by them in respect of the debtor's securities might be limited to the actual consideration paid therefor, and in 1938 this provision of the Bankruptcy Act was reenacted and broadened. While none of these legal principles was directly applicable to the interveners, they indicated a climate of opinion in which at least some reasonable men considered transactions of this character to be fraught with temptation and of dubious propriety.

The interveners urge that we have no alternative but to act first by general rule or published statement of policy if we are to act at all in a matter of this kind. The Supreme Court indicated the advisability of promulgating a general rule, though we do not understand its opinion to hold that the absence of a pre-existing rule is fatal to the decision we have reached. Now that we have had the question sharply focused in this and other cases before us, and have had an extensive period in which to consider the problems involved, we may well decide that a general rule, with adequately flexible provisions,[31] would be both practicable and desirable; but we do not see how the promulga-

[31] Without flexibility the rule might itself operate unfairly. Limitation to cost appears appropriate here, but would be inappropriate in a case where the cost of the security purchased was in excess of its reorganization value, and in some instances cash payment by the company would not be feasible. In addition, special treatment of any sort might be inappropriate for incidental purchases not made as part of a program in contemplation of reorganization benefits. In this connection, we wish to emphasize that our concern here is not primarily with the normal corporate powers which make it possible for officers and directors to influence the market for their own gain, in the absence of reorganization, by a choice of dividend policies, accounting practices, published reports, and the like. The questions of fairness and detriment here presented arise before us in the context of a capital readjustment. At that point our scrutiny is called for, and that our scrutiny is to be vigilant cannot be doubted. See Appendix to Sen.Rep.No. 621 (74th Cong., 1st Sess) on S. 2796, at p. 58, quoted *supra*.

tion of such a rule now or later would affect our duty to act by order in this case in deciding whether this plan is fair and equitable and meets the other standards of the Act. We therefore reserve for further consideration the question whether or not a rule should be adopted.

NATURE OF ORDER TO BE ENTERED

Our order of September 24, 1941, approved Federal's plan as a whole, including the provision for allowing cost plus 4% interest for the preferred shares acquired by the interveners during the course of the reorganization proceeding. Only that provision of our order was objected to upon judicial review under Section 24 (a) of the Act, but the mandate of the Court of Appeals for the District of Columbia appears on its face to set aside our order as a whole. Both we and counsel for Federal Water believe the mandate of the Court of Appeals probably operates so as to set aside only that part of our order which dealt with the interveners' participations under the plan. Counsel for Federal Water has, however, expressed some concern that this mandate might be construed more broadly, and that there may now be no effective order approving the transactions heretofore effected by the company under the plan. Therefore, although we think the provisions of Section 20 (d) of the Act would go far to protect the company from liability for any acts done in reliance upon our order prior to the Court's mandate, we have determined to eliminate all doubt on this score by treating the pending application as requesting not only an order approving the amendment offered for the benefit of the interveners but also an order approving the other provisions of the plan and the transactions which have already been carried out thereunder.

An appropriate order will issue disapproving the pending amendment, and reapproving the plan as constituted on September 24, 1941.

By the Commission (Chairman Purcell and Commissioners Healy, Pike, and McConnaughey).[e]

CHENERY CORP. v. SECURITIES AND EXCHANGE COMMISSION

United States Court of Appeals for the District of Columbia.
154 F.2d 6 (1946).

GRONER, C. J. This is a petition for the review of an order of the Securities and Exchange Commission, issued February 7, 1945, under the Public Utility Holding Company Act, 15 U.S.C.A. § 79 et seq. The same case was here in 1942.

[e] All footnotes of the Commission, except footnotes No. 1, No. 15, and No. 31, have been omitted.

A brief statement of proceedings on the first appeal may be helpful in understanding the question now presented for decision.

In 1937 Federal Water Service Corporation, hereafter called "Federal," a Delaware holding company, owning securities of subsidiaries operating water, gas, electric and other properties, filed a plan of voluntary reorganization with the Commission under §§ 7 and 11 of the Holding Company Act of 1935. The plan contemplated simplification of the corporate structure and the elimination of existing capital deficits by a reduction of capital which would permit Federal to resume payment of dividends. Subsequently, two additional plans were filed, but were ultimately withdrawn largely on objection by the Commission's staff.

In March, 1940, Federal, as the result of a then recent Delaware Supreme Court decision, filed a new plan of merger, which, with modifications, was approved by the Commission. The new plan, as modified, contained no provision for participation by Class B stock of Federal—which the Commission had found to be without value. Instead, that stock was to be surrendered for cancellation and only Class A common and all issues of preferred were to be converted into common stock of the new corporation.

Petitioners, who were officers and directors of Federal, held a one-third interest in Utility Operators Company, and that company in turn had virtual control of Federal through the ownership of Federal Class B common stock, representing forty-three per cent of voting power. During the period the various plans of reorganization were before the Commission, petitioners purchased Federal's preferred stock to the total amount of 12,467 shares. The purchases were made in the open market, at current prices, from time to time over the three and a half year period during which the negotiations with the Commission's staff were in progress. All of the purchases were made individually, and, except as to Chenery and van den Berg, averaged around 130 shares per individual. Chenery, for the account of a family corporation controlled by him, acquired approximately 8,000 shares, 2,700 shares of which he obtained for $100,000 of Federal's gold bonds in an exchange arrangement with a banking syndicate; and van den Berg, who at the time of final action by the Commission had ceased to be a director of the corporation, purchased in the open market approximately 1,700 shares. If the stock so acquired had been converted into common stock of the new corporation, under the plan as finally approved by the Commission, petitioners stood to receive 79,077 shares of new common, having a par and probable market value (as determined by the Commission) of $5 per share, or an aggregate value of $395,385, in return for the preferred stock which cost petitioners $328,347, a difference of little more than the amount of interest lost in holding the preferred shares pending completion of the plan. The common stock which petitioners (including Chenery Corporation and van den Berg) would thus have received, if their pre-

ferred stock had participated in the new corporation, would have represented 7.4% of the total voting power in the new corporation. In addition, petitioners, individually, had acquired 6,500 preferred shares of Federal prior to the filing of any plan of reorganization which when converted would have represented 2.7% of the total voting power. Added together, petitioners stood to hold 10.1% of the voting power of the reorganized corporation.

The Commission on March 24, 1941, made formal findings on the basis of which it concluded that the plan could not be approved insofar as it provided participation of the preferred shares purchased by petitioners during the period reorganization plans were before the Commission, even though the purchases were made honestly, after full disclosure and at a fair price at public sale. The Commission based its conclusion on its holding that during the pendency of proceedings before the Commission, officers and directors of the corporation occupied a fiduciary relationship to the corporation and to its shareholders, and consequently were subject to the limitations imposed upon fiduciaries in dealing with trust property. Accordingly, on July 1, 1941, an amendment to the plan was submitted by Federal, over petitioners' protest, whereby the stock so purchased would not be converted into common stock of the new corporation, but would be surrendered to the corporation at cost plus 4% interest.

The plan as amended was approved September 24, 1941.

On petition to us to review, we reversed and remanded for further proceedings in conformity with our opinion. Chenery Corp. v. Securities and Exchange Commission, 75 U.S.App.D.C. 374, 128 F.2d 303. Certiorari was granted, 317 U.S. 609, 63 S.Ct. 52, 87 L.Ed. 494, and on February 1, 1943, the Supreme Court handed down an opinion directing us to remand to the Commission for further action not inconsistent therewith. Securities and Exchange Commission v. Chenery Corp., 318 U.S. 80, 63 S.Ct. 454, 87 L.Ed. 626. On rehearing no new or additional evidence was adduced and in February, 1945, the Commission reaffirmed its former order.

The case is now again before us pursuant to § 24(a) of the Act.

It should be borne in mind that on the previous appeal the Commission conceded that the transactions of which we have spoken were accomplished without ulterior purpose and without intent on petitioners' part to profit personally in the consummation of the plan, likewise held that honesty, full disclosure and purchase at a fair price at public sale characterized the transactions, and concluded that the result was neither unfair nor inequitable to the persons affected by the plan.

Accordingly, we had then, as we have now, a case in which there is not one jot or tittle of evidence tending to contradict petitioners' declared purpose in the purchase of preferred stocks to be the transfer of their interest from one class, declared by the Commission to be

worthless, to another with voting rights, in order that to some extent they might make, as they thought, a safe investment and at the same time preserve some interest in a company to which they had devoted a considerable part of their business lives.

The Supreme Court subsequently held, as we had held, that the Commission's order on this record could not be sustained, but presumably, in order that the Commission might reconsider the case, in the light of the standards imposed by the Act, directed us to remand the cause to the Commission for further proceedings not inconsistent with its opinion. This action is in line with the Supreme Court's statement in the Pottsville case,[2] that an administrative determination open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy. Considered in this view, obviously, the only question now open is whether the Commission has rightly construed and rightly followed the opinion of the Supreme Court. That the Supreme Court can itself best answer this question goes without saying; but in the meantime it is our duty—which we may not escape by certification—to make, in the light of its content, our own interpretation of the opin ion. As preliminary to this, it seems to us clear that the Supreme Court's rejection of the Commission's original order was primarily because it was not sustainable on the grounds on which the Commission based its action,—that is to say, the Commission having affirmatively found that petitioners' purchases of stock were in all respects fair, honest and aboveboard, resulting neither in unjust enrichment to themselves, nor harm to other stockholders or the public, such purchases were not subject to proscription on any ground relied upon by the Commission. And as sustaining this, the Supreme Court said [318 U.S. 80, 63 S.Ct. 461]: "Congress itself did not proscribe the respondents' purchases of preferred stock in Federal. Established judicial doctrines do not condemn these transactions. Nor has the Commission, acting under the rule-making powers delegated to it by § 11(e), promulgated new general standards of conduct."

The Commission, the Supreme Court said, dealt with this as a specific case, and not as the application of a general rule of conduct for reorganization managers, and as explanatory of this added: "Had the Commission, acting upon its experience and peculiar competence, promulgated a general rule of which its order here was a particular application, the problem for our consideration would be very different."

In this aspect, then, the immediate question is whether the Commission's action in again outlawing petitioners' purchases of stocks, considered in the light of the Supreme Court's opinion, is a permissible exercise of administrative discretion entrusted to it by Congress.

[2] Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134, 145, 60 S.Ct. 437, 84 L.Ed. 656. [See *infra* at p. 590.—Ed.]

We are of opinion that its action cannot be sustained on that ground. The Commission, adhering to its original conclusion, stated its interpretation of the Supreme Court's directive in these words: "As we understand the opinion of the Supreme Court, our determination of 1941 in this case was held to be unsupported by certain equity precedents on which we relied. And as we construe the Supreme Court's mandate we are directed to re-examine the case to decide on the facts, viewed in the light of that conclusion of the Court, whether our special experience in administering the legislative policy of the Act indicates a necessity for reaffirming our previous determination or whether, instead, our earlier ruling should be modified."

Proceeding on this theory, the Commission declared that the problem is not a question of prescribing a standard of conduct generally applicable to trading "by corporate officers, directors and large stockholders," and expressly declined to adopt a rule applicable in such cases. The Commission says that "without flexibility" such a rule might itself "operate unfairly." It accordingly held that its decision must turn first, upon an affirmative finding by it that the plan was fair and equitable within the meaning of Section 11(e); second, that it was not detrimental to the interest of investors and consumers under Section 7(d) (6); and third, that it would not result in an unfair distribution of voting power under Section 7(e), and concluded that if the record left it with "undispelled doubts" on the first question, the plan should be proscribed, "even if we (it) made no affirmative finding" in relation to the two other questions. Having reached this conclusion, the Commission, after citing instances in which, in the reorganization of corporations, "management" had availed of opportunities, or temptations, afforded by such proceedings to obtain personal advantage or gain, says that questions of " 'honesty, full disclosure and purchase at a fair price,' traditionally applied to dealings in normal course between corporate managers and stockholders, cannot be the controlling tests * * *." And on this basis the Commission reaffirmed its decision that petitioners' preferred stock must be placed on a different footing than that of other stockholders, saying:

"We are led to this result not by proof that the interveners committed acts of conscious wrongdoing but by the character of the conflicting interests created by the interveners' program of stock purchases carried out while plans for reorganization were under consideration. Doubts, inevitably suggested by the existence of these conflicting interests, remain unresolved and prevent an affirmative finding of fairness and equity under Section 11(e).

"The existence of such conflicting interests, and the persistence of unanswered questions they generate, similarly furnish the basis for a finding that component elements of the plan, * * * would be 'detrimental' within the meaning of Section 7(d) (6) and 7(e)."

The Commission's present view in no substantial respect differs from its original view except that then the Commission grounded its

decision "on principles of equity derived from judicial decisions," whereas now it attempts to sustain its position on what it calls its special experience in administering the legislative policy of the Act.

The Commission's position actually amounts to neither more nor less than a definite holding that purchases of stock of a corporation in process of reorganization are unlawful, when made by officers or employees of the corporation,—and this without regard to any factor of good or bad faith, or any other factor which might impute special knowledge, secret information, or indeed anything tending to show a lack of bona fides in the transaction. For, as we have seen, the Commission expressly says the integrity of interveners in the respects in which they acted is not at issue. And as to this latter statement, in passing, we may properly observe that it cannot be, for the Commission has put that issue out of the case by its previous admission on the same facts that "honesty, full disclosure and purchase at a fair price" characterized the transactions. In practical effect, therefore, the Commission now insists upon doing precisely what the Supreme Court said it could not do; that is to say, in applying to this specific case a standard which has never been promulgated, either by the Commission in its regulations or by legislative act, and which the Commission says can not fairly be generally applied.

Considered in this view, we think that the Commission has failed to interpret correctly the limits prescribed for its guidance by the Supreme Court. It is true, as the Commission now asserts, that the Supreme Court recognizes that the Act and its provisions confer upon it broad powers for the protection of the public and that this authority was intended to be responsive to the demands of the particular situations with which the Commission might be faced. But it is also true that the Court recognized that the Commission, like the ocean, has its appointed bounds, and lest it break through its limits and engulf a continent,—spoke these words of caution: "The Commission's action cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order as an appropriate safeguard for the interests protected by the Act." And the Court added this further caution that the grounds upon which the administrative agency acts must be clearly disclosed and adequately sustained.

But the Commission has made no additional findings and disclosed no additional considerations to justify its adherence to its former order. In short, its attitude seems to be that Section 11(e) of the Act,[3] confers a purely discretionary power not subject to judicial re-

[3] § 11(e): "In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company * * * may * * * submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company * * * for the purpose of enabling such company * * * to comply with the provisions of subsec-

view. But we are referred to nothing and can find nothing in the Act to sustain this view. Nor is it sustainable on the theory of Congressional intent, for as we pointed out in our earlier opinion, the Senate Committee's report on submission of the bill declared that the authority of the Commission must be administered within the well defined limits of the Act; and the Act itself certainly confers no such grant of general power.

Section 11(e), which delineates the Commission's power, reads in part "If, after notice and opportunity for hearing, the Commission shall find such plan * * * necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such plan, the Commission shall make an order approving such plan * * *."

The words of the section "notice and opportunity for hearing," cannot, we think, be held to erect a standard of judgment so indefinite as to confer unlimited powers, but rather to impose and require quasi judicial action. And as Mr. Justice Brandeis said of similar authority conferred by Section 5(2) of the Act to Regulate Commerce, 49 U.S.C.A. § 5(2), "Upon application of a carrier, the Commission must form a judgment whether the acquisition proposed will be in the public interest. It may form this judgment only after hearing. The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it. To refuse to consider evidence introduced or to make an essential finding without supporting evidence is arbitrary action."

That such a limitation is obviously necessary was recently emphasized by the Supreme Court in the Pottsville case in which Mr. Justice Frankfurter said: "To be sure, the laws under which these agencies operate prescribe the fundamentals of fair play. They require that interested parties be afforded an opportunity for hearing and that judgment must express a reasoned conclusion."

Certainly, a reasoned conclusion must be based on evidence, and may not be pitched alone on unresolved doubts, nor upon weaknesses or selfishness which the commission believes is inherent in human nature. The construction advanced by the Commission would permit it to exercise a power of disapproval free of judicial review, and the notice and hearing required by the statute would become an empty form. The Commission, free of the inhibitions imposed by the particular facts, would be left to roam the widest possible area of authority influenced and impelled only by its own doubts.

Thus considered, it is apparent that the Commission has made its present order without reliance upon such evidence or findings as

tion (b). *If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate* the provisions of subsection (b) and *fair and equitable to the persons affected by such plan,* the Commission shall make an order approving such plan * * *." (Emphasis added.)

would warrant our affirmance. Compare National Labor Relations Board v. Columbian Co., 306 U.S. 292–299, 59 S.Ct. 501, 83 L.Ed. 660. In no respect, as we have said, has the Commission made the findings to support the present order as appropriate effectuate the policies of the Act, or to show that petitioners' actions were other than fair and equitable, or that their participation in the merger scheme would be detrimental to the public interest or to the interest of investors or consumers. In laying down, as it does, a rule of fiat unassociated with the facts in this case, the Commission has strayed from the course laid out and charted by the opinion of the Supreme Court, and accordingly we must refuse to give it effect.

Mr. Justice Frankfurter, who spoke for the Supreme Court, and whose language we have previously quoted in recognition of the broad powers of the Commission, said of the Commission's former order: [6] "* * * Whether and to what extent directors or officers should be prohibited from buying or selling stock of the corporation during its reorganization, presents problems of policy for the judgment of Congress or of the body to which it has delegated power to deal with the matter. Abuse of corporate position, influence, and access to information may raise questions so subtle that the law can deal with them effectively only by prohibitions not concerned with the fairness of a particular transaction. *But before transactions otherwise legal can be outlawed or denied their usual business consequences, they must fall under the ban of some standards of conduct prescribed by an agency of government authorized to prescribe such standards*—either the courts or Congress or an agency to which Congress has delegated its authority. Congress itself did not proscribe the respondents' purchases of preferred stock in Federal. Established judicial doctrines do not condemn these transactions. Nor has the Commission, acting under the rule-making powers delegated to it by § 11(e), promulgated new general standards of conduct. It purported merely to be applying an existing judge-made rule of equity. The Commission's determination can stand, therefore, only if it found that the specific transactions under scrutiny showed misuse by the respondents of their position as reorganization managers, in that as such managers they took advantage of the corporation or the other stockholders or the investing public. The record is utterly barren of any such showing. Indeed, such a claim against the respondents was explicitly disavowed by the Commission." (Emphasis added.)

This language, we think, is equally applicable to the present order, for it is clear now, as it was before, that the Commission has prescribed no fixed standards of conduct which would ban the stock purchases in question, nor promulgated before or since any rule applicable thereto, but, on the contrary, has declined to adopt standards

[6] S. E. C. v. Chenery Corp., 318 U.S. 80, 92, 93, 63 S.Ct. 454, 461, 87 L.Ed. 626. [See *supra* at p. 353.—Ed.]

or promulgate a rule, on the ground that no rule or standard which would be fair and equitable in all cases can be made. Certainly, then, it would seem to us to follow that in a case in which the Commission points to no fact challenging good faith, suggests no betrayal of a fiduciary duty, and hints at no use of inside or confidential information, a holding of illegality is not responsive to the Court's conclusion that "The Commission's determination can stand, therefore, only if it found that the specific transactions under scrutiny showed misuse by the respondents of their position as reorganization managers, in that as such managers they took advantage of the corporation or the other stockholders of the investing public." It may well be, as the Supreme Court suggests, that the Commission's fact-finding functions are like those of a jury. But nothing is more positively imbedded in our law than the principle that a jury may not guess or speculate in deciding facts. Certainly, neither in a court nor before a Commission can an unsupported suspicion sustain a decision.

In nothing we have said do we wish to be understood as expressing any opinion as to the right of the Commission under its broad powers to promulgate a rule of general application forbidding officers and directors of a corporation in process of reorganization from buying—and perhaps also from selling—securities of the corporation during the pendency of proceedings before the Commission. That question is not present in this case. What we do say is that, without such a rule, of which notice is given so that all may know of its existence, transactions in themselves fair and just and honest and in accord with traditional business practices, and which "Congress itself did not proscribe," and which "judicial doctrines do not condemn," may not properly be "outlawed or denied" their ordinary effect.

But here the Commission's position goes beyond the mere question of the necessity of a rule. It insists upon an absolute right to approve in one case and to refuse to approve in another. It says, quite frankly, that it would be inappropriate to condemn a transaction such as we have here in a case in which the cost of the security purchased was in excess of its reorganization value; and again that it might be inconvenient to apply it if to do so would embarrass the corporation's finances. These are but instances which demonstrate its claim to unfettered discretion, irrespective of adequate findings based upon a fair appraisal of the evidence. Nothing that we find in the opinion of the Supreme Court warrants such a conclusion and nothing could be more directly in conflict with the terms and spirit of the law.

Reversed.[f]

[f] Footnotes of the Court, except for Nos. 2, 3, and 6, have been omitted.

In COLUMBIA BROADCASTING SYSTEM, INC. v. UNITED STATES, 316 U. S. 407, 62 S.Ct. 1194, 86 L.Ed. 1563 (1942), the Court said, at p. 421 of 316 U.S. (p. 1202 of 62 S.Ct.):

Of course the Commission was at liberty to follow a wholly different procedure. Instead of proclaiming general regulations applicable to all licenses, in advance of any specific contest over a license, it might have awaited such a contest to declare that the policy which these regulations embody represents its concept of the public interest. As a matter of sound administrative practice, both the rule-making proceeding and the specific license proceeding undoubtedly have much to commend them. But they are by no means the same, nor do they necessarily give rise to the same kind of judicial review. Having adopted this order under its rule-making power, the Commission cannot insist that the appellant be relegated to that judicial review which would be exclusive if the rule-making power had never been exercised and consequently had never subjected appellant to the threatened irreparable injury.[s]

B. Promulgation of Standards Which will Govern Exercise of Administrative Discretion in Future Actions of Administrative Agency

COLUMBIA BROADCASTING SYSTEM, INC. v. UNITED STATES

Supreme Court of the United States.
316 U.S. 407, 62 S.Ct. 1194, 86 L.Ed. 1563 (1942).

See at p. 673, *infra*.

GILLESPIE–ROGERS–PYATT CO. v. BOWLES

United States Emergency Court of Appeals.
144 F.2d 361 (1944).

Before MARIS, Chief Judge, and MAGRUDER and LAWS, Judges.

MARIS, Chief Judge. The complainants, who comprise 8 of the 13 members of the bleached shellac manufacturing industry, in October, 1943, filed identical protests, supported by identical affidavits, attacking the maximum prices for bleached shellac established in Maximum Price Regulation No. 245 which had been issued on October 21, 1942. The grounds of protest were that the prices were no longer generally fair and equitable because of increased costs of production and distribution and decreased profit margins which had occurred

[s] For remainder of this opinion, see *infra*, p. 673.

since the issuance of the Regulation. The protests were denied by the Administrator upon the ground that the protestants had failed to offer proof of facts which were necessary to be shown in order to establish that the maximum prices had ceased to be generally fair and equitable as measured by the pricing standards which he had adopted for determining that question. The complainants thereupon filed the present joint complaint in this court. It presents two questions for our consideration. The first is whether the standards which the Administrator uses to determine whether a maximum price is no longer generally fair and equitable within the meaning of the act are valid. The second is whether, if these standards are valid, the Administrator was right in holding that the complainants had failed to offer sufficient evidence to show that the maximum prices involved were no longer generally fair and equitable as measured by the standards in question.

The basic standards which Congress has prescribed to guide the Administrator in applying wartime price control are set forth in the Emergency Price Control Act of 1942. The Stabilization Act of 1942 added other basic standards but the latter are not involved in this case. The standards with which we are here concerned are contained in Section 2(a) of the Emergency Price Control Act which authorizes the Administrator to fix maximum prices which "in his judgment will be generally fair and equitable and will effectuate the purposes of this Act." Section 2(a) directs the Administrator, in fixing maximum prices in conformity with these standards, to give due consideration to the prices prevailing from October 1 to 15, 1941, and to make adjustments in such prices for relevant factors of general applicability, including speculative fluctuations and general increases or decreases in costs or profits, during and subsequent to the year ended October 1, 1941.

The Administrator recognizes that maximum prices which are generally fair and equitable when first promulgated may cease to be so by reason of the intervention of factors of the character just described and that under such circumstances the act requires him to authorize an increase in the maximum prices involved in order that they may continue to be generally fair and equitable. In order that he may carry out this statutory obligation in a uniform way he has adopted pricing standards by which to test the merits of applications for increases in maximum prices. These are the so-called industry earnings and product standards, the latter being used as a secondary guide in the case of a multiple product industry. These administrative standards are described in a supplemental statement attached to the report of the Committee on Banking and Currency of the Senate upon the bill (S. 1764) which became the Stabilization Extension Act of 1944, as follows:

"Under this [industry earnings] standard, as a general rule, price increases are allowed to compensate for those cost increases which

the industry cannot absorb without impairment of its normal peacetime earnings. As a guide for determining the extent to which price increases are required under this standard, the Administrator uses a representative peacetime period, usually the years 1936–39, the base period adopted by Congress for excess-profits taxes. Where this period is not fairly representative, the years included in the period are varied or other appropriate adjustments are made. If during or subsequent to the year ended October 1, 1941, costs have incerased more than gross income, then, to the extent that the industry's earnings, adjusted for changes in investment, provide a smaller return before Federal income and excess-profits taxes than the industry earned in the base period, the Administrator considers an increase in the industry's maximum prices to be required by law.

"Even though a price increase is not required under the industry earnings standard, an increase may be required under the so-called product standard which is used as a secondary pricing guide in the case of multiple-product industries. Under this standard, unless it had been the industry's practice to sell some of its products below cost, the Administrator considers himself required to increase the maximum price for any particular product sold by the industry, if its current maximum price should fail to cover the out-of-pocket costs incurred by the highest-cost firms which are not included in the industry's high-cost marginal fringe. Ordinarily an industry will be considered as a single-product industry even though the bulk of the product is produced by multiple-product firms if a substantial portion of the output is produced by single-product firms.

"Taken together with the industry earnings standard, the product standard means that maximum prices in a multiple-product industry are, as a general rule to be deemed generally fair and equitable if the industry (1) is receiving over-all earnings on all its operations equaling or exceeding its peacetime earnings, and (2) is not, except for the highest-cost fringe of producers, incurring an out-of-pocket loss on any particular line or product."

The complainants argue that these administrative standards do not correctly interpret the mandate of the act that maximum prices shall be increased when they are no longer generally fair and equitable. They strongly urge that the statute does not authorize the industry earnings standard but contemplates the fixing of maximum prices for each individual product upon a level which will permit the realization of a profit thereon without regard to the other earnings of the industry. We cannot accept the complainants' contention, however, since we are satisfied that the standards which the Administrator has adopted as pricing guides to be used in determining when increases in maximum prices must be made are fairly calculated to carry out the mandate and purposes of the act.

It is settled by the decisions of this court that the mere showing of a cost increase in connection with a particular commodity does not

of itself entitle the industry involved to a corresponding increase in the maximum price of the commodity. It must also be shown at the very least that the increase in costs relied upon has not been offset by a decrease in costs in another direction and that an unreasonable decrease in the profits of the industry derived from the sale of the commodity has actually resulted. Chatlos v. Brown, Em.App. 1943, 136 F.2d 490; Lakemore Co. v. Brown, Em.App.1943, 137 F.2d 355; United States Gypsum Co. v. Brown, Em.App.1943, 137 F.2d 360, certiorari denied 320 U.S. 775, 64 S.Ct. 88; Spaeth v. Brown, Em.App.1943, 137 F.2d 669; Philadephia Coke Co. v. Bowles, Em. App.1943, 139 F.2d 349; Madison Park Corp. v. Bowles, Em.App.1943, 140 F.2d 316; Interwoven Stocking Co. v. Bowles, Em.App.1944, 141 F.2d 696.

It follows that the industry earnings standard is valid when applied to a single-product industry. We think that it is equally valid when applied to a multiple-product industry in conjunction with the application of the product standard to the products dealt in by the industry.

The use in Section 2(a) of the statute of the phrase "price or prices of a commodity or commodities" and "maximum price or maximum prices" indicates that the statutory standard—"generally fair and equitable"—is not necessarily to be applied separately to the price of each individual commodity but may, in an appropriate situation, be applied to the aggregate of the prices of a group of commodities. An industry which customarily deals in a group of commodities presents such a situation. It is a phenomenon of all peacetime economy that a multiple-product industry which earns satisfactory profits on its over-all operations frequently finds it necessary or desirable to sell one or more items of its line of commodities at cost or even at a loss. The act does not compel changes in practices of this sort. Consequently the effect of the aggregate of the maximum prices of all the commodity items dealt in by a multiple-product industry upon its over-all operations and profits and the resulting increase or decrease in industry earnings is relevant in considering the question whether the maximum price of a particular item continues to be generally fair and equitable to the industry.

The effect of the maximum price of the particular item is, of course, equally relevant. The Administrator's policy, as we have seen, is to protect the industry against an out-of-pocket loss on every item not customarily sold at a loss. But the raising of the maximum price of a particular commodity to a level which would assure a profit upon its sale without regard to the total profits of the industry from its overall operations might not effectuate the purposes of the act to stabilize prices and prevent abnormal and unwarranted price increases. The factors involved in this problem and the reasons which support the Administrator's pricing standards have been well stated by

his counsel in a memorandum submitted to the Committees on Banking and Currency of the Senate and House of Representatives, as follows:

"The problem, like most problems of price control, is one of choice between alternatives. It should be emphasized, however, that the choice is not between a standard which relies exclusively upon the test of over-all earnings and one which measures the fairness of a price solely in terms of cost and profit data applicable to the particular product. As the very existence of the product standard makes clear, the Administrator has never taken the position that any price for a particular product is fair, no matter how low, so long as over-all peacetime earnings are equaled. Obviously the Administrator cannot maintain a ceiling price of 1 cent for a loaf of bread merely because bakers are doing well on pies, cakes, and cookies. The product standard recognized this. It was developed precisely for the purpose of giving firm assurance that no such extreme variations from normal or appropriate price relationships would occur, or, if they occurred, be maintained. The choice accordingly is between the existing dual standards, which take account of both over-all earnings and single-product costs, and a single standard which disregards over-all earnings and looks exclusively to costs and profits on the particular product.

"A product standard which disregarded overall earnings would obviously have to provide a measure of profits appropriate to the particular product. This might be done in one of two ways. The first and best way would be to try to preserve for the industry generally aggregate peacetime profits for the particular product, adjusted for subsequent changes in investment. The second way would be to try to preserve a percentage or dollar margin of profit fairly representative of the industry's peacetime experience.

"The first of these two ways of measuring earnings appropriate to a particular product would be impossible to administer, and the second next to impossible. Figures on aggregate dollar profits for separate products of multiple-product industries are probably unprocurable; information on the investment separately allocable to such products is certainly so. The data on percentage or dollar margins of profit of representative firms necessary to apply the second measure, on the other hand, cannot be said to be unobtainable. Such a standard, however, would compel the Office of Price Administration to make literally thousands of studies of the historical and current costs and profits allocable to particular products. In the course of these studies it would be required to reexamine and reconcile the cost and profits data of different firms which are based upon different accounting practices and to resolve the most difficult problems of accounting theory. It is true that the existing product standard compels a substantial number of cost studies for separate products. For the precise reason that this standard is a minimal one, however, relatively few products ceilings are challengeable under it. A product standard based upon an actual historical profit for each product of

each industry would open up to question a vastly greater number of ceilings. The Office of Price Administration does not have and cannot hope to employ a staff large enough to make such studies. Price control would break down under the burden of trying to make them.

"The second of the two suggested measures of profit for particular products would be intrinsically inflationary. If based upon a percentage margin of profit it would result in the pyramiding of prices and costs as the general price level rose. Whether based upon a percentage or dollar margin of profit, it would compel disregard of aggregate dollar earnings. Thus, in many instances it would require a price increase on a particular product, as a minimum obligation of law, even though an increase in volume, such as is characteristic of wartime conditions, had resulted in unprecedented industry earnings on that very product.

"A legal guaranty of an actual historical profit for each product, however measured, would be inflationary for still another and even more important reason. It would place the law of averages on the side of price increases. So doing, it would necessarily result in the establishment of prices at abnormal levels. As a matter of policy, the Administrator always attempts, so far as practicable, to secure normal price relationships between products and normal or historical margins of profit upon them. The product standard, however, measures not the ideal to be sought but the minimum which must be attained. In practice the Administrator's goal can never be achieved with exactness. Data are at best incomplete. Changes in conditions affecting costs and profits are incompletely foreseeable. It is inevitable, therefore, when the effort is made to assure historical profits on each product, that many products will actually return abnormal profits while others will return profits which are less than normal. The Administrator, to be sure, has power to reduce those prices which prove excessive. But this is a costly and time-consuming process, subject to severe practical limitations. Most of the prices which prove to be too high, therefore, will in practice remain so. Under the suggested standard, however, all the prices on which profits fell below the goal sought would have, as a matter of law, to be increased. The mathematical consequences of such a policy in multiple-product industries would be that the general level of both prices and earnings would be abnormally high.

"A view of the practical effect of a product standard which attempted to guarantee some stated measure of profit on each product, if it were now adopted, confirms the foregoing considerations. The immediate effect would be to require a large number of price increases. These would not be confined to industries in a relatively less favorable position. They would be widely distributed also among the relatively most prosperous industries. They would go to swell indiscriminately business earnings which, taken as a whole, are currently, even after taxes, at the highest levels in American history. To permit a

multitude of such indiscriminate price increases for no other reason than that the earnings on the particular products—regarded separately—are below some historical measure would be self-evidently unwarranted and inflationary. It is seriously to be doubted whether the stabilization structure could absorb the shock of them.

"The existing product standard, taken together with the industry earnings standard, proceeds on the premise that it is broadly fair to balance the less favorable prices in an industry against more favorable ones, so long as extreme variations from the normal are prevented and so long as the over-all earnings of the industry equal or better peacetime earnings. Any other standard for particular products would be impracticable to administer and, even if practicable, would lead to unwarranted price increases which in the aggregate would be disastrous to the economy."

We think that Congress fully understood and approved the use by the Administrator of the industry earnings and product pricing standards when it extended the Emergency Price Control Act by the enactment of the Stabilization Extension Act of 1944. The use by the Administrator of these standards in the consideration of applications for price increases and the reasons for their use were clearly and forcefully disclosed to both Houses of Congress in connection with the consideration of that act. Not only was the memorandum from which we have quoted before the Committees on Banking and Currency of both Houses but the subject was discussed at the hearings held by the Committees, in the report of the Senate Committee and in the debates. Congress nevertheless continued without any modification the statutory standard—"generally fair and equitable"—which had been thus interpreted by the Administrator.

The legislative history provides even more convincing evidence of the Congressional understanding. The so-called Bankhead cotton amendment to the Stabilization Extension Act as adopted by the Senate expressly provided that the maximum prices for any textile product processed or manufactured in whole or substantial part from cotton yarn should include *for each specific textile item* a reasonable profit on such item in addition to the costs of materials and processing or manufacturing. This requirement for a profit on each specific item was recognized as a departure from the standards applicable under the act to commodities generally. See in this connection the views of the minority of the Senate Committee which opposed the amendment. In the Stabilization Extension Act as finally enacted the Bankhead Amendment was modified to read in part here material as follows:

"On and after the date of the enactment of this paragraph, it shall be unlawful to establish, or maintain, any maximum price for any agricultural commodity or any commodity processed or manufactured in whole or substantial part from any agricultural commodity which will reflect to the producers of such agricultural commodity a price below the highest applicable price standard (applied separately to each ma-

jor item in the case of products made in whole or major part from cotton or cotton yarn) of this Act."

It will be seen that there is in this provision a clear direction by Congress that in the case of cotton textile commodities the price standards of the act are to be applied separately to individual commodity items, although even here they are only to be so applied to the major items. The fact that Congress thought it necessary to incorporate this provision in the act shows that it recognized that the act does not otherwise require that its standards shall under all circumstances be applied separately to each individual commodity item. Likewise the fact that this provision was restricted to major textile items can only mean that Congress approved the application to all other commodity items of the pricing standards which the Administrator had adopted in the administration of the act.

We conclude that the use by the Administrator of the industry earnings standard in conjunction with the product standard to determine whether a maximum price previously set by him is no longer generally fair and equitable and such as will effectuate the purposes of the Emergency Price Control Act is a reasonable exercise of the discretion conferred upon him in the administration of the act and is in consonance with its mandate. It follows that the present complainants, who sought to have the maximum prices of bleached shellac modified upon the ground that they were no longer fair and equitable, had the burden of showing the facts from which the Administrator in the light of the industry earnings and product standards could find that these prices had ceased to conform to the statutory standard.

We accordingly pass to the question whether the Administrator was right in denying the complainants' protests upon the ground that they had failed to offer sufficient evidence to enable him to find that, as measured by the industry earnings and product standards, the maximum prices protested against were no longer generally fair and equitable. In considering this question it must be remembered that the burden is upon a protestant to offer evidence sufficient to overcome the presumption of validity which attends the Administrator's regulations and orders. Montgomery Ward & Co. v. Bowles, Em.App.1943, 138 F. 2d 669. In the present case we may put to one side the question whether a complainant who represents but one unit in an industry has the burden of proving the costs and profits of his competitors in the industry as well as his own or whether he may make out a prima facie case by merely offering his own data and proving that his operations are substantially representative of the industry and are not in its high cost marginal fringe. Here the complainants concededly comprise the major portion of the industry and may, therefore, by the mere production of data from their own records make a prima facie showing for the industry.

In support of their protests the complainants relied upon an increase in the cost of the raw materials from which they manufacture bleached shellac and in manufacturing, selling and administrative costs and the

consequent reduction in the margin of profit realized thereon which they said resulted from that increase. They did not offer evidence as to their manufacturing, selling or administrative costs, however, or as to their over-all net earnings either for the prewar period 1936–1939 or for the most recent wartime period. The Administrator thereupon entered an order in which he stated that he deemed the evidence submitted by the complainants with their protests to be insufficient for the determination of the issues raised thereby and that additional information was necessary. Accordingly by the order he afforded the complainants an opportunity to present additional evidence with regard to the quantity of production, manufacturing costs and receipts from the sale of bleached shellac in November and December, 1941, and in September and October, 1943, and as to the profit and loss statements of each complainant for the years 1936 to the first half of 1943, inclusive.

Pursuant to this order the complainants offered much additional data from the books and records of Gillespie-Rogers-Pyatt Co., Inc., which was the only one of the complainants then engaged in manufacturing operations and which was carrying on these operations for the account of the entire industry. The complainants, however, failed to produce any evidence as to the net earnings of Gillespie-Rogers-Pyatt Co., Inc., or any other members of the industry for either the prewar years 1936 to 1939 or the years 1941 to 1943. Counsel for the complainants in a letter to the Office of Price Administration transmitting certain of the evidence which was furnished, stated:

"I respectfully contend that the facts set forth in the Protests and Petitions and in the affidavits supporting the same clearly establish that the Protestants and Petitioners are entitled to the requested relief and the question of what their costs or profits were in the prior years referred to in the November 17th, 1943 Order has no bearing on the matter."

It thus appears that although the data must have been available in their books and records the complainants failed to comply with the request of the Administrator to offer in evidence their profit and loss statements for the years mentioned. Thereby they made it impossible for the Administrator to test the merits of their protests by the use of the industry earnings standard. The complainants did offer evidence as to the result of the operations of the bleach department of Gillespie-Rogers-Pyatt Co., Inc., for the years 1936 to October 31, 1943, inclusive. But these figures do not show, even for the most recent period, an out-of-pocket manufacturing loss which under the application of the product standard would call for a price increase regardless of the over-all earnings of the industry.

It is true that the complainants' evidence does show a reduction in the gross profit on bleached shellac which might call for an increase in the maximum price of that product under the industry earnings standard if the industry has in fact suffered a substantial decrease in its over-all earnings as compared with those of the prewar period. But

since the complainants declined to offer evidence as to their over-all earnings for either period they failed to provide the Administrator with the necessary basis for determining, by the application of the industry earnings and product standards, whether the maximum prices for bleached shellac had ceased to be generally fair and equitable. They failed to exclude the possibility that reduced profits on bleached shellac had been offset by increased profits in other departments of the industry.

The complainants urge that it has not been shown that theirs is a multiple-product industry. Therefore, they say, the industry earnings standard is not applicable to them. We think that this contention is without merit. In the first place industry earnings would be relevant even if the complainants were in a single-product industry for in that case the industry earnings would represent nothing more than the profits realized on bleached shellac. But we think that, while the evidence in the record on the point is perhaps meager there is sufficient to support the inference that the complainants are engaged in a multiple-product industry. The fact that the figures which they did offer in evidence were the profit and loss figures of the "Bleach Department" rather than the over-all profit and loss figures indicates quite clearly that the industry had other departments and that the profit and loss figures for the Bleach Department were not the same as those for the entire business. It may well be true, as suggested by the complainants, that their industry has been much restricted by the war and that they have perforce been compelled to drop a number of products which they formerly carried. Counsel for complainants conceded at bar, however, that they still do deal in orange shellac as well as the bleached shellac which is involved in this case.

We conclude that the Administrator rightly held that the complainants had failed to present in support of their protests evidence of facts relating to their own business which it was incumbent upon them to prove before the Administrator could determine that the maximum prices for bleached shellac were no longer fair and equitable. It necessarily follows that the order of the Administrator denying the protests was neither arbitrary nor capricious. Fearing, however, that the complainants may have misunderstood the Administrator's order inviting the submission of additional evidence we asked counsel for the complainants at the hearing of this case whether they desired leave at this time to introduce as additional evidence the profit and loss statements which the Administrator had requested but which had not been offered in the protest proceedings. However, counsel stated at bar that the complainants did not wish to offer additional evidence at this time but elected to stand on the record as it appears in the transcript certified by the Administrator.

Accordingly, a judgment will be entered dismissing the complaint.[h]

[h] Footnotes of the court have been omitted

PART II. ORDERS OF PARTICULAR APPLICABILITY PRESCRIBING FUTURE CONDUCT

SECTION 1. THE NATURE OF "LEGISLATIVE" ORDERS OF PARTICULAR APPLICABILITY

INTERSTATE COMMERCE ACT, §§ 15(1) (3) (6)

49 U.S.C. §§ 15(1) (3) (6).

Sec. 15. (1) That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered *to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed,* and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed. [Italics added]

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(3) The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or

charges, applicable to the transportation of passengers or property by carriers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. * * *

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(6) Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge.[a]

[a] See also §§ 1(15) and 1(21) of the Interstate Commerce Act (49 U.S.C. §§ 1(15), 1(21).

PUBLIC UTILITY HOLDING COMPANY ACT OF 1935, § 11(b) [b]

15 U.S.C. 79k(b).

See *supra*, pp. 345–346.

ADMINISTRATIVE PROCEDURE ACT.[c] § 2(c)

5 U.S.C Supp. § 1001(c).

Sec. 2. * * *

(c) Rule and Rule Making.—"Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

In PRENTIS v. ATLANTIC COAST LINE COMPANY, 211 U.S. 210, 29 S. Ct. 67, 53 L.Ed. 150 (1908), the court, through Mr. Justice Holmes, said, at p. 226 (p. 69 of 29 S.Ct.):

But we think it equally plain that the proceedings drawn in question here are legislative in their nature, and none the less so that they have taken place with a body which, at another moment, or in its principal or dominant aspect, is a court such as is meant by § 720. A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial, in kind, as seems to be fully recognized by the supreme court of appeals (Com. v. Atlantic Coast Line R. Co. 106 Va. 61, 64, 7 L.R.A.[N.S.] 1086, 117 Am.St. Rep. 983, 55 S.E. 572), and especially by its learned president in his pointed remarks in Winchester & S. R. Co. v. Com. 106 Va. 264, 281, 55 S.E. 692. See, further, Interstate Commerce Commission v. Cin-

[b] The constitutionality of § 11(b) § has been established. North American Co. v. Securities and Exchange Commission, 327 U.S. 686, 66 S.Ct. 785, 90 L.Ed. — (1946); American Power & Light Co. v. Securities and Exchange Commission, — U.S. —, 67 S.Ct. 133, — L.Ed. — (1946).

[c] Pub.No.404, 79th Cong., 2nd Sess., c. 324, June 11, 1946.

cinnati, N. O. & T. P. R. Co. 167 U.S. 479, 499, 500, 505, 42 L.Ed. 243, 253, 255, 17 S.Ct. 896; San Diego Land & Town Co. v. Jasper, 189 U.S. 439, 440, 47 L.Ed. 892, 893, 23 S.Ct. 571.[d]

THE NEW ENGLAND DIVISIONS CASE

Supreme Court of the United States
261 U.S. 184, 43 S.Ct. 270, 67 L.Ed. 605 (1923).

Mr. Justice BRANDEIS delivered the opinion of the Court.

Transportation Act 1920, c. 91, § 418, 41 Stat. 456, 486, amending Interstate Commerce Act, § 15(6), authorizes the Commission, upon complaint or upon its own initiative, to prescribe, after full hearing, the divisions of joint rates among carriers parties to the rate. In determining the divisions, the Commission is directed to give due consideration, among other things, to the importance to the public of the transportation service rendered by the several carriers; to their revenues, taxes, and operating expenses; to the efficiency with which the carriers concerned are operated; to the amount required to pay a fair return on their railway property; to the fact whether a particular carrier is an original, intermediate, or delivering line; and to any other fact which would, ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another of the joint rate.

Invoking this power of the Commission, the railroads of New England [1] instituted, in August, 1920, proceedings to secure for themselves larger divisions from the freight moving between that section and the rest of the United States, the joint rates on which had just been increased pursuant to the order entered in Ex parte 74, Increased Rates, 1920, 58 I.C.C. 220. More than 600 carriers of the United States, mostly railroads, were made respondents. The case was submitted on voluminous evidence. On July 6, 1921, a report was filed. The relief sought was not then granted; but no order was entered. Instead, the parties were directed by the report to proceed individually to readjust their divisional arrangements, and the record was held open for submission of the readjustment. New England Divisions, 62 I.C.C. 513. This direction was not acted on. Five months later the case was reargued upon the same evidence. On January 30, 1922, the Commission modified its findings and made an order (amended March 28, 1922) which directed, in substance, that the divisions, or shares, of

[d] For the remainder of this opinion, see *infra* at p. 644. *Cf.* Keller v. Potomac Electric Power Co., 261 U.S. 428, 43 S.Ct. 445, 67 L.Ed. 731 (1923); The Chicago Junction Case, 264 U.S. 258, 263, 44 S.Ct. 317, 319, 68 L.Ed. 667 (1924).

[1] Except the Boston & Albany, which is leased to the New York Central, one of the trunk lines which was a respondent before the Commission, and branches of two Canadian systems, the Grand Trunk and the Canadian Pacific.

the several New England railroads[2] in the joint through freight rates be increased 15 per cent. New England Divisions, 66 I.C.C. 196. Since it did not increase any rate, it necessarily reduced the aggregate amounts receivable from each rate by carriers operating west of Hudson river. The order was limited to joint class rates and those joint commodity rates which are divided on the same basis as the class rates.[3] It related only to transportation wholly within the United States. It was to continue in force only until further order of the Commission, and it left the door open for correction upon application of any carrier in respect to any rate.

Prior to the effective date of that order, there was in force between each of the New England carriers and substantially each of the railroads operating west of the Hudson, a series of contracts providing for the division of all joint class rates upon the basis of stated percentages.[4] These agreements were in the form of express contracts. Section 208(b) of Transportation Act of 1920 provided that all divisions of joint rates in effect at the time of its passage should continue in force until thereafter changed either by mutual agreement between the interested carriers or by state or federal authorities. The second report enjoined upon all parties the necessity for proceeding, as expeditiously as possible, with a revision of divisions upon a more logical and systematic basis, made specific suggestions as to the character of the study to be pursued, and invited carriers to present to the Commission any cases of inability to agree upon such revision. No further application was, however, made to the Commission.

In March, 1922, this suit was commenced in the federal court for the Southern District of New York to enjoin enforcement of the order and to have it set aside as void. The Akron, Canton & Youngstown Railway and 43 other carriers[5] joined as plaintiffs, suing on behalf of themselves and others similarly situated. The United States alone was named as defendant. But the Interstate Commerce Commission and 10 New England carriers intervened as such and filed answers. The case was then heard, on application for an interlocutory injunction, by three judges, under the provisions of Urgent Deficiencies Act Oct. 22, 1913, c. 32, 38 Stat. 208, 219 (Comp.St. § 998). The full record of the proceedings before the Commission, including all the evidence, was introduced. The injunction was denied ([D.C.] 282 F. 306), and the case is here by direct appeal. Plaintiffs urge six reasons why the order of the Commission should be held void.

[2] Other than the Bangor & Aroostook, which had been a complainant before the Commission, and the Boston & Albany, which had not.

[3] [Footnote omitted.—Ed.]

[4] [Footnote omitted.—Ed.]

[5] The number of carriers named as respondents in the order entered by the Commission is 617. Only 44 of these originally joined as plaintiffs in this suit. One of these, the Illinois Central, withdrew; 39 intervened later as plaintiffs. Leading trunk lines—the New York Central, the Pennsylvania, and the Baltimore & Ohio—by which a large part of all traffic interchanged with the New England railroads was carried, acquiesced in the Commission's order.

First. It is contended that the order is void, because its purpose was not to establish divisions just, reasonable, and equitable, as between connecting carriers, but, in the public interest, to relieve the financial needs of the New England lines, so as to keep them in effective operation. The argument is that Congress did not authorize the Commission to exercise its power to accomplish that purpose. An order, regular on its face, may, of course, be set aside if made to accomplish a purpose not authorized. Compare Southern Pacific Co. v. Interstate Commerce Commission, 219 U.S. 433, 443, 31 S.Ct. 288, 55 L.Ed. 283. But the order here assailed is not subject to that infirmity.

Transportation Act 1920, introduced into the federal legislation a new railroad policy. Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co., 257 U.S. 563, 585, 42 S.Ct. 232, 66 L.Ed. 371. Theretofore, the effort of Congress had been directed mainly to the prevention of abuses, particularly those arising from excessive or discriminatory rates. The 1920 act sought to insure, also, adequate transportation service. That such was its purpose Congress did not leave to inference. The new purpose was expressed in unequivocal language.[6] And, to attain it, new rights, new obligations, new machinery, were created. The new provisions took a wide range.[7] Prominent among them are those specially designed to secure a fair return on capital devoted to the transportation service.[8] Upon the Commission new powers were conferred, and new duties were imposed.

The credit of the carriers, as a whole, had been seriously impaired. To preserve for the nation substantially the whole transportation system was deemed important. By many railroads funds were needed, not only for improvement and expansion of facilities, but for adequate maintenance. On some, continued operation would be impossible, unless additional revenues were procured. A general rate increase alone would not meet the situation. There was a limit to what the traffic would bear. A 5 per cent. increase had been granted in 1914, The Five Per Cent. Case, 31 I.C.C. 351; Id., 32 I.C.C. 325; 15 per cent. in 1917, The Fifteen Per Cent. Case, 45 I.C.C. 303; 25 per cent. in 1918, General Order of Director General, No. 28. Moreover, it was not clear that the people would tolerate greatly increased rates (although no higher than necessary to produce the required revenues of weak lines), if thereby prosperous competitors earned an unreasonably large return upon the value of their properties. The existence of the varying needs of the several lines and of their widely varying earning power was fully realized. It was necessary to avoid unduly burdensome rate increases and yet secure revenues adequate to satisfy the needs of the weak carriers. To accomplish this two new devices were adopted: The group system of rate making and the

[6] [Footnote omitted.—Ed.]

[7] [Footnote omitted.—Ed.]

[8] [Footnote omitted.—Ed.]

division of joint rates in the public interest. Through the former, weak roads were to be helped by recapture from prosperous competitors of surplus revenues. Through the latter, the weak were to be helped by preventing needed revenue from passing to prosperous connections. Thus, by marshaling the revenues, partly through capital account, it was planned to distribute augmented earnings, largely in proportion to the carrier's needs. This, it was hoped, would enable the whole transportation system to be maintained, without raising unduly any rate on any line. The provision concerning divisions was, therefore, an integral part of the machinery for distributing the funds expected to be raised by the new rate-fixing sections. It was, indeed, indispensable.

Raising joint rates for the benefit of the weak carriers might be the only feasible method of obtaining currently the needed revenues. Local rates might already be so high that a further increase would kill the local traffic. The through joint rates might be so low that they could be raised without proving burdensome. On the other hand the revenues of connecting carriers might be ample; so that any increase of their earnings from joint rates would be unjustifiable. Where the through traffic would, under those circumstances, bear an increase of the joint rates, it might be proper to raise them, and give to the weak line the whole of the resulting increase in revenue. That, to same extent, may have been the situation in New England, when, in 1920, the Commission was confronted with the duty, under the new section 15a, of raising rates so as to yield a return of substantially 6 per cent. on the value of the property used in the transportation service. Ex parte 74, Increased Rates, 1920, 58 I.C.C. 220.[9]

The deficiency in income of the New England lines in 1920 was so great that (even before the raise in wages ordered by the Railroad Labor Board) an increase in freight revenues of 47.40 per cent. was estimated to be necessary to secure to them a fair return. On a like estimate, the increased revenues required to give the same return to carriers in Trunk Line Territory was only 29.76 per cent. and to carriers in Central Freight Association Territory 24.31 per cent.[10] To have raised the additional revenues needed by the New England lines wholly by raising the rates within New England—particularly when rates west of the Hudson were raised much less—might have killed New England traffic. Rates there had already been subjected (besides the three general increases mentioned above) to a special increase, applicable only to New England, of about 10 per cent. in 1918. Proposed Increases in New England, 49 I.C.C. 421. A further large increase in rates local to New England would, doubtless, have provoked more serious competition from auto trucks and water carriers. For hauls are short and the ocean is near. Instead of erecting New England into a separate rate group, the Commission placed it, with the

[9] [Footnote omitted—Ed.]

[10] [Footnote omitted.—Ed.]

other two subdivisions of Official Classification Territory, into the Eastern Group, and ordered that freight rates in that group be raised 40 per cent. At that rate level the revenues of the carriers in Trunk Line and Central Freight Association territories would, it was asserted, exceed by 1.48 per cent. what they would have received if they had been a separate group. It was estimated that the excess would be about $25,000,000.[11] Substantially that amount (besides the additional revenue to be raised otherwise) was said to be necessary to meet the needs of the New England lines.

Plaintiffs insist that Transportation Act 1920, did not, by its amendment of section 15(6) change, or add to, the factors to be considered by the Commission in passing upon divisions; that it had theretofore been the Commission's practice to consider all the factors enumerated in section 15(6);[12] that this enumeration merely put into statutory form the interpretation theretofore adopted; that the only new feature was the grant of authority to enter upon the inquiry into divisions on the Commission's initiative; that this authority was conferred in order to protect the short lines, which, because of their weakness, might refrain from making complaint, for fear of giving offense;[13] and that the power conferred upon the Commission is coextensive only with the duty imposed on the carriers by section 400 of Transportation Act 1920, which declares that they shall establish "in case of joint rates * * * just, reasonable, and equitable divisions thereof as between the carriers subject to this act participating therein which shall not unduly prefer or prejudice any of such participating carriers." It is true that section 12 of the Act of June 18, 1910, c. 309, 36 Stat. 539, 551, 552 (Comp.St. § 8583), which first conferred upon the Commission authority to establish or adjust divisions,[14] did not, in terms, confer upon the Commission power to act on its own initiative. The language of the act seemed to indicate that the authority was to be exercised only when the parties failed to agree among themselves, and only in supplement to some order fixing the rates.[15] The extent of the Commission's power was a subject of doubt, and Transportation Act 1920 undertook by section 15(6) to remove doubts which had arisen. But Congress had, also, the broad purpose explained above. This is indicated, among other things, by expressions used in dealing with joint rates. By new section 15(6), p. 486, the Commission is directed to give due consideration, in determining divisions, to "the importance to the public of the transportation services of such carriers;"[16] just as by new section 15 (3), p. 45, the Commission is authorized upon its own initiative when "desirable in the public interest" to establish joint rates and "the divisions of such rates."

[11] [Footnote omitted.—Ed.]
[12] [Footnote omitted.—Ed.]
[13] [Footnote omitted.—Ed.]
[14] [Footnote omitted.—Ed.]
[15] [Footnote omitted.—Ed.]
[16] [Footnote omitted.—Ed.]

Second. It is contended that if the act be construed as authorizing such apportionment of a joint rate on the basis of the greater needs of particular carriers it is unconstitutional. There is no claim that the apportionment results in confiscatory rates, nor is there in this record any basis for such a contention. The argument is that the division of a joint rate is essentially a partition of property; that the rate must be divided on the basis of the services rendered by the several carriers; that there is no difference between taking part of one's just share of a joint rate and taking from a carrier part of the cash in its treasury; and, thus, that apportionment according to needs is a taking of property without due process. But the argument begs the question. What is its just share? It is the amount properly apportioned out of the joint rate. That amount is to be determined, not by an agreement of the parties or by mileage. It is to be fixed by the Commission; fixed at what that board finds to be just, reasonable, and equitable. Cost of the service is one of the elements in rate making. It may be just to give the prosperous carrier a smaller proportion of the increased rate than of the original rate. Whether the rate is reasonable may depend largely upon the disposition which is to be made of the revenues derived therefrom.

What the Commission did was to raise the additional revenues needed by the New England lines, in part, directly, through increase of all rates 40 per cent, and, in part, indirectly, through increasing their divisions on joint rates. In other words, the additional revenues needed were raised partly by a direct, partly by an indirect tax. It is not true, as argued, that the order compels the strong railroads to support the weak. No part of the revenues needed by the New England lines is paid by the western carriers. All is paid by the community pursuant to the single rate increase ordered in Ex parte 74. If, by a single order, the Commission had raised joint rates throughout the Eastern group 40 per cent., and, in the same order, had declared that 90 per cent. of the whole increase in the joint rates should go to the New England lines (in addition to what they would receive under existing divisions), clearly nothing would have been taken from the Trunk Line and Central Freight Association carriers, in so ordering. The order entered in Ex parte 74 was at all times subject to change. The special needs of the New England lines were at all times before the Commission. That these needs were met by two orders, instead of one, is not of legal significance. The order here in question may properly be deemed a supplement to, or modification of, that entered in Ex parte 74.

Third. It is asserted that the order is necessarily based upon the theory that, under section 15(6), the Commission has authority to fix divisions as between groups of carriers without considering the carriers individually; that Congress did not confer such authority; and that, hence, the order is void. Whether Congress did confer that authority we have no occasion to consider; for it is clear that the

Commission did not base its order upon any such theory. The order directs a 15 per cent. increase in the divisions to the several New England lines. It is comprehensive. But it is based upon evidence which the Commission assumed was typical in character, and ample in quantity, to justify the finding made in respect to each division of each rate of every carrier. Whether the assumption was well founded will be discussed later. Here we are to consider merely, whether Congress authorized the method of proof and of adjudication pursued, and whether it could authorize it, consistently with the Constitution.

Obviously, Congress intended that a method should be pursued by which the task, which it imposed upon the Commission, could be performed. The number of carriers which might be affected by an order of the Commission, if the power granted were to be exercised fully, might far exceed 600; the number of rates involved, many millions. The weak roads were many. The need to be met was urgent. To require specific evidence, and separate adjudication, in respect to each division of each rate of each carrier, would be tantamount to denying the possibility of granting relief. We must assume that Congress knew this; and that it knew, also, that the Commission had been confronted with similar situations in the past and how it had dealt with them.

For many years before the enactment of Transportation Act, 1920, it had been necessary, from time to time, to adjudicate comprehensively upon substantially all rates in a large territory. When such rate changes were applied for, the Commission made them by a single order, and, in large part, on evidence deemed typical of the whole rate structure.[17] This remained a common practice after the burden of proof to show that a proposed increase of any rate was reasonable had been declared, by Act of June 18, 1910, c. 309, § 12, 36 Stat. 539, 551, 552, to be upon the carrier.[18] Thus, the practice did not have its origin in the group system of rate making provided for in 1920 by the new section 15(6). It was the actual necessities of procedure and administration which had led to the adoption of that method, in passing upon the reasonableness of proposed rate increases. The necessity of adopting a similar course when multitudes of divisions were to be passed upon was obvious. The method was equally appropriate in such inquiries,[19] and we must assume that Congress intended to confer upon the Commission power to pursue it.[20]

That there is no constitutional obstacle to the adoption of the method pursued is clear. Congress may, consistently with the due process clause, create rebuttable presumptions. Mobile, Jackson & Kansas City R. R. Co. v. Turnipseed, 219 U.S. 35, 31 S.Ct. 136, 55 L. Ed. 78, 32 L.R.A.(N.S.) 226, Ann.Cas.1912A, 463; Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 31 S.Ct. 337, 55 L.Ed. 369, Ann.

[17] [Footnote omitted—Ed.]
[18] [Footnote omitted—Ed.]
[19] [Footnote omitted.—Ed.]
[20] [Footnote omitted.—Ed.]

Cas.1912C, 160; and shift the burden of proof, Minneapolis & St. Louis R. R. Co. v. Railroad & Warehouse Commission, 193 U.S. 53, 24 S.Ct. 396, 48 L.Ed. 614. It might, therefore, have declared in terms that, if the Commission finds that evidence introduced is typical of traffic and operating conditions, and of the joint rates and divisions, of the carriers of a group, it may be accepted as prima facie evidence bearing upon the proper divisions of each joint rate of every carrier in that group. Congress did so provide, in effect, when it imposed upon the Commission the duty of determining the divisions. For only in that way could the task be performed. As pointed out in Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co., 257 U.S. 563, 579, 42 Sup.Ct. 232, 66 L.Ed. 371, serious injustice to any carrier could be avoided, by availing of the saving clause which allows anyone to except itself from the order, in whole or in part, on proper showing. * * *

Affirmed.

Orders of particular applicability prescribing future conduct may be directed to a single named respondent, or to several, or to many. In a single railroad rate proceeding there may be included as respondents all of the carriers by rail in a state, as in Wisconsin Passenger Fares, 59 I.C.C. 391 (1920);[e] all of the carriers by rail in a region, as in The New England Divisions Case; or all of the rail carriers in the United States, as in Ex Parte 74, Increased Rates, 1920, 58 I.C.C. 220 (1920). It is the fact that such orders may be directed to a single respondent, and that they are in any case directed to *specified* respondents—whether one, a few or many—, which constitutes the essential distinction between them and rules, regulations or orders of general applicability prescribing future conduct.

Under the definitions in the Administrative Procedure Act, the term "rule" is used to cover rules and regulations and "legislative" orders prescribing future conduct, whether of general or particular applicability. See section 2(c) of the Administrative Procedure Act, *supra* p. 382. The general context of the Act, however, does not suggest any intention to ignore or obliterate the distinction between rules, regulations, and orders of general applicability prescribing future conduct, on the one hand and orders of particular applicability prescribing future conduct on the other. This seems to be indicated especially in section 4[f] and section 10,[g] within the scope of which there appears to be ample latitude for courts and administrative agencies to continue to give effect to the distinction in accordance with the terms of the

[e] See also Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R., 257 U.S. 563, 42 S.Ct. 232, 66 L.Ed. 371, 22 A.L.R. 1086 (1921).

[f] Section 4 deals with notice and procedures (including hearings) in rule-making See *supra*, pp. 277–8.

[g] Section 10 deals with judicial review. See *infra*, pp. 751, 955, 988, 1079.

various regulatory statutes and received and developing judicial and administrative doctrine.

By section 2(d) of the Administrative Procedure Act, the term order is confined to "quasi-judicial" orders [h] and orders issuing upon applications for licenses as defined in section 2(e).[1]

A "legislative" order of particular applicability may be combined with a "quasi-judicial" order issuing in the same proceeding. See, *e. g.*, § 15(1) of the Interstate Commerce Act, as amended, *supra*, p. 380.

SECTION 2. PROCEDURE FOR THE ISSUANCE OF ORDERS OF PARTICULAR APPLICABILITY PRESCRIBING FUTURE CONDUCT: THE REQUIREMENT OF A HEARING

A. Is a Hearing Necessary

Statutory grants of power to issue orders of particular applicability prescribing future conduct commonly require a hearing prior to the issuance of an order.[a] The cases which follow bear upon a more fundamental inquiry: is a hearing in such a situation necessary to satisfy the requirements of due process?

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY v. MINNESOTA

Supreme Court of the United States.
134 U.S. 418, 10 S.Ct. 462, 702, 33 L.Ed. 970 (1890).

BLATCHFORD, J. This is a writ of error to review a judgment of the supreme court of the state of Minnesota, awarding a writ of *mandamus* against the Chicago, Milwaukee & St. Paul Railway Company. The case arose on proceedings taken by the railroad and warehouse commission of the state of Minnesota, under an act of the legislature of that

[h] *I.e.*—Orders of administrative agencies which issue in proceedings to determine whether named respondents have violated any provision of an applicable statute or of a rule, regulation or order thereunder. *Cf.* H.R.Rep.No. 1980, 79th Cong., 2nd Sess. (1946) 20, 29. See Chapter VI, Part II, Section 1, *infra* pp. 427ff.

[1] For the text of § 2(d) and § 2(e), see *infra* at pp. 427 and 438.

[a] See *e.g.* Interstate Commerce Act, as amended, §§ 15(1) (3) (6), 49 Stat. U.S.C. § 15(1) (3) (6), *supra* at pp. 380–1, *id.* § 1(21), 49 U.S.C. § 1(21); Public Utility Holding Company Act of 1935, § 11(b), 15 U.S.C. § 79k(b), *supra* at pp. 345–6. But *cf.* Interstate Commerce Act, as amended, § 1(15), 49 U.S.C. § 1(15).

state approved March 7, 1887, (Gen.Laws 1887, c. 10,) entitled "An act to regulate common carriers, and creating the railroad and warehouse commission of the state of Minnesota, and defining the duties of such commission in relation to common carriers." The act is set forth in full in the margin. The ninth section of that act creates a commission, to be known as the "Railroad and Warehouse Commission of the State of Minnesota," to consist of three persons, to be appointed by the governor by and with the advice and consent of the senate. The first section of the act declares that its provisions shall apply to any common carrier "engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water, when both are used under a common control, management, or arrangement, for a carriage or shipment from one place or station to another, both being within the state of Minnesota." The second section declares "that all charges made by any common carrier subject to the provisions of this act, for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be equal and reasonable; and every unequal and unreasonable charge for such service is prohibited, and declared to be unlawful." The eighth section provides that every common carrier subject to the provisions of the act shall print and keep for public inspection schedules of the charges which it has established for the transportation of property; that it shall make no change therein except after 10 days' public notice, plainly stating the changes proposed to be made, and the time when they will go into effect; that it shall be unlawful for it to charge or receive any greater or less compensation than that so established and published for transporting property; that it shall file copies of its schedules with the commission, and shall notify such commission of all changes proposed to be made; that, in case the commission shall find at any time that any part of the tariffs of charges so filed and published is in any respect unequal or unreasonable, it shall have the power, and it is authorized and directed, to compel any common carrier to change the same, and adopt such charge as the commission "shall declare to be equal and reasonable," to which end the commission shall, in writing, inform such carrier in what respect such tariff of charges is unequal and unreasonable, and shall recommend what tariff shall be substituted therefor; that, in case the carrier shall neglect for 10 days after such notice to adopt such tariff of charges as the commission recommends, it shall be the duty of the latter to immediately publish such tariff as it has declared to be equal and reasonable, and cause it to be posted at all the regular stations on the line of such carrier in Minnesota, and it shall be unlawful thereafter for the carrier to charge a higher or lower rate than that so fixed and published by the commission; and that, if any carrier subject to the provisions of the act shall neglect to publish or file its schedules of charges, or to carry

out such recommendation made and published by the commission, it shall be subject to a writ of *mandamus* "to be issued by any judge of the supreme court or of any of the district courts" of the state, on application of the commission, to compel compliance with the requirements of section 8, and with the recommendation of the commission, and a failure to comply with the requirements of the *mandamus* shall be punishable as and for contempt, and the commission may apply also to any such judge for an injunction against the carrier from receiving or transporting property or passengers within the state, until it shall have complied with the requirements of section 8, and with the recommendation of the commission, and for any willful violation or failure to comply with such requirements or such recommendation of the commission, the court may award such costs, including counsel fees, by way of penalty, on the return of said writs, and after due deliberation thereon, as may be just.

On the 22d of June, 1887, the Boards of Trade Union of Farmington, Northfield, Faribault, and Owatonna, in Minnesota, filed with the commission a petition in writing, complaining that the Chicago, Milwaukee & St. Paul Railway Company, being a common carrier engaged in the transportation of property wholly by railroad for carriage or shipment from Owatonna, Faribault, Dundas, Northfield, and Farmington to the cities of St. Paul and Minneapolis, all of those places being within the state of Minnesota, made charges for its services in the transportation of milk from said Owatonna, Faribault, Dundas, Northfield, and Farmington to St. Paul and Minneapolis which were unequal and unreasonable, in that it charged 4 cents per gallon for the transportation of milk from Owatonna to St. Paul and Minneapolis, and 3 cents per gallon from Faribault, Dundas, Northfield, and Farmington to the said cities; and that such charges were unreasonably high, and subjected the traffic in milk between said points to unreasonable prejudice and disadvantage. The prayer of the petition was that such rates be declared unreasonable, and the carrier be compelled to change the same, and adopt such rates and charges as the commission should declare to be equal and reasonable. * * *

On the 4th of August, 1887, the commission made a report in writing which included the findings of fact upon which its conclusions were based, its recommendation as to the tariff which should be substituted for the tariff so found to be unequal and unreasonable, and also a specification of the rates and charges which it declared to be equal and reasonable. * * *

On the 6th of December, 1887, the commission, by the attorney general of the state, made an application to the supreme court of the state for a writ of *mandamus* to compel the company to comply with the recommendation made to it by the commission, to change its tariff of rates on milk from Owatonna and Faribault to St. Paul and

Minneapolis, and to adopt the rates declared by the commission to be equal and reasonable. * * *

The case came on for hearing upon the alternative writ, and the return, and the company applied for a reference to take testimony on the issue raised by the allegations in the application for the writ and the return thereto, as to whether the rate fixed by the commission was reasonable, fair, and just. The court denied the application for a reference, and rendered judgment in favor of the relator, and that a peremptory writ of *mandamus* issue. * * *

To review this judgment the company has brought a writ of error.

The opinion of the supreme court is reported in 38 Minn. 281, 37 N.W.Rep. 782. In it the court, in the first place, construed the statute on the question as to whether the court itself had jurisdiction to entertain the proceeding, and held that it had. Of course, we cannot review this decision. It next proceeded to consider the question as to the nature and extent of the powers granted to the commission by the statute in the matter of fixing the rates of charges. On that subject it said: "It seems to us that, if language means anything, it is perfectly evident that the expressed intention of the legislature is that the rates recommended and published by the commission, assuming that they have proceeded in the manner pointed out by the act, should be not simply advisory, nor merely *prima facie* equal and reasonable, but final and conclusive as to what are lawful or equal and reasonable charges; that, in proceedings to compel compliance with the rates thus published, the law neither contemplates nor allows any issue to be made or inquiry had as to their equality and reasonableness in fact. Under the provisions of the act, the rates thus published are the only ones that are lawful, and therefore, in contemplation of law, the only ones that are equal and reasonable; and hence, in proceedings like the present, there is, as said before, no fact to traverse, except the violation of the law in refusing compliance with the recommendations of the commission. Indeed, the language of the act is so plain on that point that argument can add nothing to its force." It then proceeded to examine the question of the validity of the act under the constitution of Minnesota, as to whether the legislature was authorized to confer upon the commission the powers given to the latter by the statute. It held that, as the legislature had the power itself to regulate charges by railroads, it could delegate to a commission the power of fixing such charges, and could make the judgment or determination of the commission as to what were reasonable charges final and conclusive.

The Chicago, Milwaukee & St. Paul Railway Company is a corporation organized under the laws of Wisconsin. The line of railroad owned and operated by it in the present case extends from Calmar, in Iowa, to Le Roy, in Minnesota, and from Le Roy, through Owatonna and Faribault, to St. Paul and Minneapolis; the line from Calmar to St. Paul and Minneapolis being known as the "Iowa and Minnesota

Division," and being wholly in Minnesota from the point where it crosses the state line between Iowa and Minnesota. It was constructed under a charter granted by the territory of Minnesota to the Minneapolis & Cedar Valley Railroad Company, by an act approved March 1, 1856, (Laws 1856, c. 166, p. 325), to construct a railroad from the Iowa line, at or near the crossing of said line by the Cedar river, through the valley of Strait river to Minneapolis. Section 9 of that act provided that the directors of the corporation should have power to make all needful rules, regulations, and by-laws touching "the rates of toll, and the manner of collecting the same;" and section 13, that the company should have power to unite its railroad with any other railroad which was then, or thereafter might be, constructed in the territory of Minnesota, or adjoining states or territories, and should have power to consolidate its stock with any other company or companies. By an act passed March 3, 1857, c. 99, (11 St. 195,) the congress of the United States made a grant of land to the territory of Minnesota, to aid in constructing certain railroads. By an act of the legislature of the territory approved May 22, 1857, (Laws 1857, Extra Sess. 20,) a portion of such grant was conferred upon the Minneapolis & Cedar Valley Railroad Company. Subsequently, in 1860, the state of Minnesota, by proper proceedings, became the owner of the rights, franchises, and property of that company. By an act approved March 10, 1862, c. 17, (Sp. Laws 1862, p. 226,) the state incorporated the Minneapolis, Faribault & Cedar Valley Railroad Company, and conveyed to it all the franchises and property of the Minneapolis & Cedar Valley Railroad Company which the state had so acquired; and, by an act approved February 1, 1864, (Sp. Laws 1864, p. 164,) the name of the Minneapolis, Faribault & Cedar Valley Railroad Company was changed to that of the Minnesota Central Railway Company. That company constructed the road from Minneapolis and St. Paul to Le Roy, in Minnesota; and the road from Le Roy to Calmar, in Iowa, and thence to McGregor, in the latter state, was consolidated with it. In August, 1867, the entire road from McGregor, by way of Calmar, Le Roy, Austin, Owatonna, and Faribault, to St. Paul and Minneapolis, was conveyed to the Chicago, Milwaukee & St. Paul Railway Company, which succeeded to all the franchises so granted to the Minneapolis & Cedar Valley Railroad Company.

It is contended for the railway company that the state of Minnesota is bound by the contract made by the territory in the charter granted to the Minneapolis & Cedar Valley Railroad Company; that a contract existed that the company should have the power of regulating its rates of toll; that any legislation by the state infringing upon that right impairs the obligation of the contract; that there was no provision in the charter or in any general statute reserving to the territory or to the state the right to alter or amend the charter; and that no subsequent legislation of the territory or of the state could

deprive the directors of the company of the power to fix its rates of toll, subject only to the general provision of law that such rates should be reasonable. But we are of opinion that the general language of the ninth section of the charter of the Minneapolis & Cedar Valley Railroad Company cannot be held to constitute an irrepealable contract with that company that it should have the right for all future time to prescribe its rates of toll, free from all control by the legislature of the state. It was held by this court in Railroad Co. v. Miller, 132 U.S. 75, ante, 34, in accordance with a long course of decisions both in the state courts and in this court, that a railroad corporation takes its charter, containing a kindred provision with that in question, subject to the general law of the state, and to such changes as may be made in such general law, and subject to future constitutional provisions and future general legislation, in the absence of any prior contract with it exempting it from liability to such future general legislation in respect of the subject-matter involved; and that exemption from future general legislation, either by a constitutional provision or by an act of the legislature, cannot be admitted to exist unless it is given expressly, or unless it follows by an implication equally clear, with express words. There is nothing in the mere grant of power, by section 9 of the charter, to the directors of the company, to make needful rules and regulations touching the rates of toll and the manner of collecting the same, which can be properly interpreted as authorizing us to hold that the state parted with its general authority itself to regulate, at any time in the future when it might see fit to do so, the rates of toll to be collected by the company. In Stone v. Trust Co., 116 U.S. 307, 325, 6 S.Ct. 334, 388, 1191, the whole subject is fully considered, the authorities are cited, and the conclusion is arrived at that the right of a state reasonably to limit the amount of charges by a railroad company for the transportation of persons and property within its jurisdiction cannot be granted away by its legislature unless by words of positive grant, or words equivalent in law; and that a statute which grants to a railroad company the right, "from time to time to fix, regulate, and receive the tolls and charges by them to be received for transportation," does not deprive the state of its power, within the limits of its general authority, as controlled by the constitution of the United States, to act upon the reasonableness of the tolls and charges so fixed and regulated. But, after reaching this conclusion, the court said, (116 U.S. 331, 6 S.Ct. 345:) "From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law." There being, therefore, no con-

tract or chartered right in the railroad company which can prevent the legislature from regulating in some form the charges of the company for transportation, the question is whether the form adopted in the present case is valid.

The construction put upon the statute by the supreme court of Minnesota must be accepted by this court, for the purposes of the present case, as conclusive, and not to be re-examined here as to its propriety or accuracy. The supreme court authoritatively declares that it is the expressed intention of the legislature of Minnesota, by the statute, that the rates recommended and published by the commission, if it proceeds in the manner pointed out by the act, are not simply advisory, nor merely *prima facie* equal and reasonable, but final and conclusive as to what are equal and reasonable charges; that the law neither contemplates nor allows any issue to be made or inquiry to be had as to their equality or reasonableness in fact; that, under the statute, the rates published by the commission are the only ones that are lawful, and therefore, in contemplation of law, the only ones that are equal and reasonable; and that, in a proceeding for a *mandamus* under the statute, there is no fact to traverse except the violation of law in not complying with the recommendations of the commission. In other words, although the railroad company is forbidden to establish rates that are not equal and reasonable, there is no power in the courts to stay the hands of the commission, if it chooses to establish rates that are unequal and unreasonable. This being the construction of the statute by which we are bound in considering the present case, we are of opinion that, so construed, it conflicts with the constitution of United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions, or possessing the machinery of a court of justice. Under section 8 of the statute, which the supreme court of Minnesota says is the only one which relates to the matter of the fixing by the commission of general schedules of rates, and which section, it says, fully and exclusively provides for that subject, and is complete in itself, all that the commission is required to do is on the filing with it by a railroad company of copies of its schedules of charges, to "find" that any part thereof is in any respect unequal or unreasonable, and then it is authorized and directed to compel the company to change the same, and adopt such charge as the commission "shall declare to be equal and reasonable;" and to that end it is required to inform the company in writing in what respect its charges are unequal and unreasonable. No hearing is provided for; no summons or notice to

the company before the commission has found what it is to find, and declared what it is to declare; no opportunity provided for the company to introduce witnesses before the commission,—in fact, nothing which has the semblance of due process of law; and although, in the present case, it appears that, prior to the decision of the commission, the company appeared before it by its agent, and the commission investigated the rates charged by the company for transporting milk, yet it does not appear what the character of the investigation was, or how the result was arrived at. By the second section of the statute in question, it is provided that all charges made by a common carrier for the transportation of passengers or property shall be equal and reasonable. Under this provision, the carrier has a right to make equal and reasonable charges for such transportation. In the present case, the return alleged that the rate of charge fixed by the commission was not equal or reasonable, and the supreme court held that the statute deprived the company of the right to show that judicially. The question of the reasonableness of a rate of charge for transportation by a railroad company, involving, as it does, the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property, and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property, and thus, in substance and effect, of the property itself, without due process of law, and in violation of the constitution of the United States; and, in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws. It is provided by section 4 of article 10 of the constitution of Minnesota of 1857, that "lands may be taken for public way, for the purpose of granting to any corporation the franchise of way for public use," and that "all corporations, being common carriers, enjoying the right of way in pursuance to the provisions of this section, shall be bound to carry the mineral, agricultural, and other productions and manufacturers on equal and reasonable terms." It is thus perceived that the provision of section 2 of the statute in question is one enacted in conformity with the constitution of Minnesota.

The issuing of the peremptory writ of *mandamus* in this case was, therefore, unlawful, because in violation of the constitution of the United States; and it is necessary that the relief administered in favor of the plaintiff in error should be a reversal of the judgment of the supreme court awarding that writ, and an instruction for further proceedings by it not inconsistent with the opinion of this court. In view of the opinion delivered by that court, it may be impossible for any further proceedings to be taken other than to dismiss the proceeding for a *mandamus,* if the court should adhere to its

opinion that, under the statute, it cannot investigate judicially the reasonableness of the rates fixed by the commission. Still, the question will be open for review; and the judgment of this court is that the judgment of the supreme court of Minnesota, entered May 4, 1888, awarding a peremptory writ of *mandamus* in this case, be reversed, and the case be remanded to that court, with an instruction for further proceedings not inconsistent with the opinion of this court. * * *

BRADLEY, J., (dissenting.) I cannot agree to the decision of the court in this case. It practically overrules Munn v. Illinois, 94 U.S. 113, and the several railroad cases that were decided at the same time. The governing principle of those cases was that the regulation and settlement of the fares of railroads and other public accommodations is a legislative prerogative, and not a judicial one. This is a principle which I regard as of great importance. When a railroad company is chartered, it is for the purpose of performing a duty which belongs to the state itself. It is chartered as an agent of the state for furnishing public accommodation. The state might build its railroads, if it saw fit. It is its duty and its prerogative to provide means of intercommunication between one part of its territory and another. And this duty is devolved upon the legislative department. If the legislature commissions private parties, whether corporations or individuals, to perform this duty, it is its prerogative to fix the fares and freights which they may charge for their services. When merely a road or a canal is to be constructed, it is for the legislature to fix the tolls to be paid by those who use it; when a company is chartered, not only to build a road, but to carry on public transportation upon it, it is for the legislature to fix the charges for such transportation.

But it is said that all charges should be reasonable, and that none but reasonable charges can be exacted; and it is urged that what is a reasonable charge is a judicial question. On the contrary, it is pre-eminently a legislative one, involving considerations of policy, as well as of remuneration; and is usually determined by the legislature, by fixing a maximum of charges in the charter of the company, or afterwards, if its hands are not tied by contract. If this maximum is not exceeded, the courts cannot interfere. When the rates are not thus determined, they are left to the discretion of the company, subject to the express or implied condition that they shall be reasonable—express, when so declared by statute; implied by the common law, when the statute is silent; and the common law has effect by virtue of the legislative will. Thus the legislature either fixes the charges at rates which it deems reasonable, or merely declares that they shall be reasonable; and it is only in the latter case, where what is reasonable is left open, that the courts have jurisdiction of the subject. I repeat, when the legislature declares that the charges shall be reasonable, or, which is the same thing, allows the common law rule to that effect to prevail, and leaves the matter there, then resort may be

had to the courts to inquire judicially whether the charges are reasonable. Then, and not till then, is it a judicial question. But the legislature has the right, and it is its prerogative, if it chooses to exercise it, to declare what is reasonable. This is just where I differ from the majority of the court. They say in effect, if not in terms, that the final tribunal of arbitrament is the judiciary. I say it is the legislature. I hold that it is a legislative question, not a judicial one, unless the legislature or the law (which is the same thing) has made it judicial by prescribing the rule that the charges shall be reasonable, and leaving it there. * * *

The incongruity of this position will appear more distinctly by a reference to the nature of the cases under consideration. The question presented before the commission in each case was one relating simply to the reasonableness of the rates charged by the companies,—a question of more or less. In the one case the company charged 3 cents per gallon for carrying milk between certain points. The commission deemed this to be unreasonable, and reduced the charge to 2½ cents. In the other case the company charged $1.25 per car for handling and switching empty cars over its lines within the city of Minneapolis, and $1.50 for loaded cars; and the commission decided that $1 per car was a sufficient charge in all cases. The companies complain that the charges as fixed by the commission are unreasonably low, and that they are deprived of their property without due process of law; that they are entitled to a trial by a court and jury, and are not barred by the decisions of a legislative commission. The state court held that the legislature had a right to establish such a commission, and that its determinations are binding and final, and that the courts cannot review them. This court now reverses that decision, and holds the contrary. In my judgment the state court was right; and the establishment of the commission, and its proceedings, were no violation of the constitutional prohibition against depriving persons of their property without due process of law.

I think it is perfectly clear, and well settled by the decisions of this court, that the legislature might have fixed the rates in question. If it had done so, it would have done it through the aid of committees appointed to investigate the subject, to acquire information, to cite parties, to get all the facts before them, and finally to decide and report. No one could have said that this was not due process of law. And if the legislature itself could do this, acting by its committees, and proceeding according to the usual forms adopted by such bodies, I can see no good reason by it might not delegate the duty to a board of commissioners, charged, as the board in this case was, to regulate and fix the charges so as to be equal and reasonable. Such a board would have at its command all the means of getting at the truth, and ascertaining the reasonableness of fares and freights, which a legislative committee has. It might or it might not swear witnesses and examine parties. Its duties being of an administrative character, it

would have the widest scope for examination and inquiry. All means of knowledge and information would be at its command; just as they would be at the command of the legislature which created it. Such a body, though not a court, is a proper tribunal for the duties imposed upon it. * * * It is complained that the decisions of the board are final and without appeal. So are the decisions of the courts in matters within their jurisdiction. There must be a final tribunal somewhere for deciding every question in the world. Injustice may take place in all tribunals. All human institutions are imperfect,—courts as well as commissions and legislatures. Whatever tribunal has jurisdiction, its decisions are final and conclusive, unless an appeal is given therefrom. The important question always is, what is the lawful tribunal for the particular case? In my judgment, in the present case, the proper tribunal was the legislature, or the board of commissioners which it created for the purpose. * * *

I am authorized to say, that Mr. Justice GRAY and Mr. Justice LAMAR agree with me in this dissenting opinion.

UNITED STATES v. ILLINOIS CENTRAL RAILROAD

Supreme Court of the United States.
201 U.S. 457, 54 S.Ct. 471, 78 L.Ed. 909 (1934).

Mr. Justice SUTHERLAND delivered the opinion of the Court.

This is a suit brought by the Illinois Central Railroad Company and other railroad carriers, under the Urgent Deficiencies Act of October 22, 1913, U. S. C. title 28, § 47 (28 U.S.C.A. § 47), as amended by the Act of February 13, 1925, U. S. C. title 28, § 345 (28 U.S.C.A. § 345), to set aside, annul, and enjoin the enforcement of an amended order of the commission, made under section 3(e) of the Inland Waterways Corporation Act of June 3, 1924, c. 243, 43 Stat. 360, as amended, May 29, 1928, c. 891, § 2, 45 Stat. 978 (49 U.S.C.A. § 153(e). That section provides that any person, etc., about to engage in conducting a common carrier service upon certain designated waters may, upon application to the commission, obtain a certificate of public convenience and necessity in accordance with section 1 of the Interstate Commerce Act (49 U.S.C.A. § 1); and that the commission "shall thereupon, by order, direct all connecting common carriers and their connections to join with such water carrier in through routes and joint rates," and shall, in such order, "fix reasonable minimum differentials between all rail rates and joint rates in connection with said water service," etc. The commission is further authorized to require the interested common carriers to enter into negotiations for the purpose of establishing equitable divisions of these joint differential rates, and if they are unable to agree within a time specified in the act, the commission shall determine and establish reasonable divisions to become effective coincident with the effective date of the

joint rates. The act further authorizes the commission, upon complaint, at once, and if it so orders, without answer or other formal pleading, but upon reasonable notice, to enter upon a hearing concerning the reasonableness or lawfulness of any through route or joint rate filed pursuant to such order of the commission, etc., and after full hearings to "make such order with reference to any such matters as it may find to be proper and in the public interest." The burden of proof in such case is put upon the carrier or carriers making the complaint, and preference is to be given to the hearing and decision of the questions involved over all other questions pending before it, except where like preference is given by law; and the commission is directed to render a decision as speedily as possible.

Upon application under this section, the commission, after a hearing confined to that application, granted to the American Barge Line Company, a certificate of public convenience and necessity, Application of American Barge Line Co., 182 I.C.C. 521; and thereupon, without further hearing, entered an order directing the interested carriers to establish through barge-rail routes and rates. Subsequently, in August or September, 1932, because of competition from unregulated truck and water carriers, the railroad carriers published all-rail carload rates on cotton lower than those previously in effect. These rates were further reduced in November, 1932. But the railroad carriers declined to join in joint water and rail rates; and, thereupon, the Barge Line sought from the commission supplemental orders requiring the establishment of rail-barge-rail rates between designated points. The rail carriers opposed the application and requested a hearing before action by the commission. This hearing the commission refused, and entered an order requiring the rail carriers to join with the Barge Line in publishing specified rail-barge-rail rates on cotton in carloads. The order, particulars of which need not be stated, was issued December 10, 1932, to become effective on January 25, 1933, which time was afterwards extended to June 1, 1933, a period altogether of nearly six months from the date of issue.

Appellees, on February 2, 1933, before the order had become effective, brought this suit and sought relief from the order, upon the grounds (1) that it was made without according them a full and fair hearing, and that section 3(e) of the statute (as amended), in so far as it authorizes the commission to make and enforce the order without such hearing, contravenes the due process of law clause of the Fifth Amendment; and (2) that it also constitutes a delegation to the commission of legislative power. The court below held with appellees upon the first ground, and entered a decree enjoining, setting aside, annulling, and suspending the order of the commission. 3 F. Supp. 1005.

1. Assuming that the order in question, if enforced, would have the effect of depriving appellees of property or of property rights, we first inquire whether the statute, as interpreted and applied by the commis-

sion, does have the effect of denying appellants a full and fair hearing in respect of the matter prior to the enforcement of the order, and, consequently, fails to satisfy the constitutional requirement of due process of law. The provision of the statute that a certificate of public convenience and necessity to conduct a common carrier service upon the waters designated may be obtained upon application to the commission and thereupon the commission shall make the order described in the statute, undoubtedly empowers the commission to make the order, in the first instance, without a hearing. The commission, however, seems never to have held that it is not obliged upon complaint to grant a full and fair hearing after the making of the order but before putting it into effect. And both in the briefs filed on behalf of appellants, including the United States and the commission, and in the argument at the bar, the position is definitely taken that the order is tentative and the rates prescribed thereby cannot be enforced without a hearing if properly sought by appellees. The brief for the United States and the commission quotes from the concurring opinion of Commissioner Brainerd in Ex parte 94 (Procedure Under Barge Line Act), 148 I.C.C. 129, 141, to this effect, and adopts it as the view of the government and the commission. Upon the oral argument, in response to a direct question from the bench, this view was reiterated by the Assistant Solicitor General, his statement in effect being that the commission is bound to grant the hearing upon complaint being made by the railway carriers, and pending such hearing to postpone the effective date of the order upon a showing which is not frivolous. The conclusion of Commissioner Brainerd, thus adopted, is that if the commission issue a certificate of public convenience and necessity and enter an order without hearing, directing the establishment of through routes and joint rates and fixing reasonable minimum differentials, and later, before said rates become effective, a complaint is filed by an interested carrier, "it would then be our duty to hear said complaint and decide said matter before said rates become effective; that in the event such a hearing is not had and the matter disposed of before the effective date of said rates, it would be our further duty temporarily to suspend them until said matter is decided. * * *" And he declared that this procedure would be necessary to comply with the requirements of due process of law.

This is an admissible construction of the statutory provisions. That the order made by the commission upon granting the certificate of public convenience and necessity is not final and conclusive is clear, since, by the affirmative provisions of the act, the railway carriers may file the through routes and joint rates pursuant to the preliminary order, and immediately, upon complaint, secure a full hearing from, and a plenary determination by, the commission. Pending that hearing, the commission is authorized to suspend the operation of the preliminary order for as long as seven months beyond the time when it would otherwise go into effect. Interstate Commerce Act, as

amended by Act March 4, 1927, U. S. C. title 49, § 15(7), 49 U.S.C.A. § 15(7); and it is made clear by what has already been said that upon application and proper showing the commission would consider itself bound to take such action.

The provisions of section 3(e) with which we are dealing were enacted by Congress in an avowed effort to bring about co-operation on the part of the rail carriers with the water carriers. The report of the House Committee on the proposed legislation (H. Rept. 1537, 70th Cong., 1st Sess., pp. 5, 6) recites the necessity of overcoming opposition on the part of the rail carriers in respect of through routes, joint rates, etc., without interminable delay and the heavy expense necessary to carry on proceedings before the Interstate Commerce Commission, as a necessary prerequisite to the realization of privately owned transportation service on the inland waterways of the country. Transportation Act 1920 (U. S. C. title 49, § 142 [49 U.S.C.A. § 142]) declares the definite policy of Congress to be "to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States." Chicago, R. I. & P. R. Co. v. United States, 274 U.S. 29, 36, 47 S.Ct. 486, 488, 71 L.Ed. 911. In the light of the situation disclosed by this report and of the policy declared by the act just named, Congress evidently prescribed the course of procedure which section 3(e) (amended) requires.

Without attempting to lay down any general rule, but confining ourselves to the statute and case in hand, we accordingly hold that it was not essential, under the due process of law clause, that a hearing should be accorded in advance of the initiating order. It is enough that opportunity was given for a full and fair hearing before the order became operative. Since no routes or rates were in existence when the order was made, that order constituted the preliminary step toward their creation, equivalent, in essence, to an ex parte order on the carriers to show cause why the designated routes and rates should not be established. The effect of that order was simply to put upon the rail carriers the necessity, within a comparatively brief period, of either availing themselves of the right to file the routes and rates and appear and be heard in opposition thereto (the operation of the order in the meantime being held in abeyance), or of suffering them to go into effect by default. The statute gives preference to the hearing and decision of the questions involved, and directs the commission to render a decision as speedily as possible. Congress evidently believed that the procedure thus prescribed would bring about an earlier settlement of the matter than otherwise would be the case. The various steps to be taken constitute parts of the administrative process which must be completed before the extraordinary powers of a court of equity may be invoked. Porter v. Investors' Syndicate, 286 U.S. 461, 470, 471, 52 S.Ct. 617, 76 L.Ed. 1226.

The constitutional question raised by appellees, therefore, vanishes from the case, because the commission concedes and stands ready to

grant every administrative procedural right that appellees are lawfully entitled to claim. If the preliminary order be erroneous in any particular, it is susceptible of correction by the commission upon the hearing thus provided for. It will be time enough for appellees to seek the aid of a court of equity when they shall have fully availed themselves of this administrative remedy, and the commission shall have taken adverse action. Until then they are in no situation to invoke judicial action.

The provision of the statute which puts the burden of proof upon the carriers is not inconsistent with the due process clause of the Constitution. New England Divisions Case, 261 U.S. 184, 199, 43 S.Ct. 270, 67 L.Ed. 605; Minneapolis & St. Louis R. Co. v. Minnesota, 193 U.S. 53, 63, 24 S.Ct. 396, 48 L.Ed. 614.

2. The precise ground upon which appellees place their contention that the statute is invalid as constituting a delegation of legislative power is not entirely clear. Undoubtedly, the statute furnishes a sufficient primary standard to govern the action of the commission; and this appellees do not dispute. Their contention, as set forth in their brief, is that the only rule of decision laid down in section 3(e) (as amended 49 U.S.C.A. § 153(e) is that the through routes, rates, and differentials to be established must be reasonable and lawful, and "such reasonableness and lawfulness can be determined only by a full and fair hearing, and the establishment of rates and routes and differentials without such hearing constitutes necessarily an exercise by the Commission of pure legislative power." Since the government and the commission concede that a full and fair hearing must be accorded before the order becomes effective, this objection to the statute, as a distinct ground, necessarily falls.

Decree reversed.

Mr. Justice STONE.

I concur in the result.

The statute, in words, authorizes the commission to grant a hearing as to the reasonableness and lawfulness of the proposed rates and divisions, if complaint is filed, and the commission has plenary power, upon consideration of the complaint, to postpone the effective date of the order and to suspend the rates after the order becomes effective. Section 15(7), as amended March 4, 1927, and section 16(6), Interstate Commerce Act (49 U.S.C.A. §§ 15(7), 16(6).

As respondents have failed to invoke these administrative remedies by filing a complaint with the commission, it seems plain that their rights, constitutional or otherwise, have not been infringed, and I see no occasion for speculation as to what the statutory duty of the commission may be in the event a complaint is filed, or to resort to concessions of counsel in brief and argument to define that duty, or to suggest that the statute falls short of constitutional requirements if

it fails to command the administrative action which it permits. The mere power, unexercised, to withhold constitutional right is not a denial of it. It is enough that respondents have filed no complaint with the commission designed to secure a hearing. Before administrative action which respondents may invoke, but have not, it cannot be said that there is any infringement of their constitutional rights to a hearing or to protection from the rates pending a hearing. Compare Pacific Telephone & Telegraph Co. v. City of Seattle, 291 U.S. 350, 54 S.Ct. 383, 78 L.Ed. 810, decided February 5, 1934; Porter v. Investors' Syndicate, 286 U.S. 461, 470, 471, 52 S.Ct. 617, 76 L.Ed. 1226.

Further, there is no intimation in the record that upon resort to the administrative remedies which the statute permits any relief to which respondents are justly and equitably entitled will be withheld. And there is no contention that the proposed rates will not yield a fair return or that they otherwise infringe constitutional rights. At most it appears that the interest sought to be protected is a prospective share in future traffic which it is feared may be diverted to the Barge Line, an interest to which the Constitution plainly affords no protection. Edward Hines Yellow Pine Trustees v. United States, 263 U.S. 143, 148, 44 S.Ct. 72, 68 L.Ed. 216; Atchison, Topeka & Santa Fe R. Co. v. United States, 279 U.S. 768, 780, 49 S.Ct. 494, 73 L.Ed. 947; Sprunt & Son, Inc., v. United States, 281 U.S. 249, 50 S.Ct. 315, 74 L.Ed 832. Thus, regardless of what the statute commands, there is no such showing of threatened denial of a hearing or of injury to a property right as would warrant resort to the equity powers of a federal court. Vandalia Ry. Co. v. Public Service Commission, 242 U.S. 255, 37 S.Ct. 93, 61 L.Ed. 276; United States v. Los Angeles & S. L. R. Co., 273 U.S. 299, 314, 47 S.Ct. 413, 71 L.Ed. 651; White v. Johnson, 282 U.S. 367, 373, 51 S.Ct. 115, 75 L.Ed. 388; Porter v. Investors' Syndicate, supra.

Mr. Justice BRANDEIS, Mr. Justice ROBERTS, and Mr. Justice CARDOZO concur in this opinion.[b]

[b] Compare this case and Chicago, Milwaukee & St. Paul v. Minnesota, *supra*, p. 391 with Bi-Metallic Investment Company v. State Board of Equalization of Colorado, *supra*, p. 281, and Bowles v. Willingham, *supra*, p. 283. In this connection, the implication of Ohio Valley Water Company v. Ben Avon Borough, 253 U.S. 287, 40 S.Ct. 527, 64 L.Ed. 908 (1920), *infra*, p. 773, and St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 56 S.Ct. 720, 80 L.Ed. 1033 (1936), *infra*, p. 802, should be considered. See also Federal Power Commission v. Hope Natural Gas Company, 320 U.S. 591, 64 S Ct 281, 88 L.Ed. 333 (1944), especially 320 U.S. at 600–6, 619–20, 624–8, 64 S.Ct. at 287–9, 296, 298–300 (see excerpt *infra* at p. 814.

B. Nature of the Hearing

In determining the nature of a hearing upon which an administrative order is based, in cases in which such a hearing is required, courts and administrative agencies have not distinguished between orders of particular applicability prescribing future conduct and orders which issue in proceedings to determine whether named respondents have violated any provision of an applicable statute or of a rule, regulation or order thereunder. The cases are, in consequence, grouped and treated together herein, in Chapter VI, Part II, Section 2, *infra* pp. 460ff.

Chapter VI

THE ENFORCMENT OF THE ADMINISTRATIVE PROGRAM

PART I. STEPS PRELIMINARY TO FORMAL ENFORCEMENT PROCEEDINGS

SECTION 1. INFORMAL PROCEDURES FOR OBTAINING COMPLIANCE

A. The Practice of the Interstate Commerce Commission

RULES 24 AND 25 OF THE I.C.C. RULES OF PRACTICE

49 C.F.R.Cum.Supp. §§ 1.24, 1.25.

Commencement of Proceedings

Rule 24. Informal complaints not seeking damages.—(*a*) *Form and content.*—Informal complaint may be by letter or other writing, and will be serially numbered and filed as of the date of its receipt. No form of informal complaint is suggested, but in substance the letter or other writing (original only need be filed except as provided in rule 25(*d*)) must contain the essential elements of a formal complaint as specified in rules 28 and 30. It may embrace supporting papers.

(b) Correspondence handling.—If the informal complaint appears to be susceptible of informal adjustment, a copy or a statement of the substance thereof will be transmitted by the Commission to each person complained of in an endeavor to have it satisfied by correspondence and thus obviate the filing of a formal complaint.

(c) Discontinuance without prejudice.—A proceeding thus instituted on the informal docket is without prejudice to complainant's right to file and prosecute a formal complaint, in which event the proceeding on the informal docket will be discontinued.

Rule 25. Informal complaints seeking damages.—(*a*) *Actual filing required.*—Notification to the Commission that an informal complaint may or will be filed later seeking damages is not a filing within the meaning of the statute except as provided in subdivision *(e)* of this rule.

(b) Content.—An informal complaint seeking damages, when permitted under the act, must be filed within the statutory period, and should contain such data as will serve to identify with reasonable definiteness the shipments or transportation services in respect of which damages are sought. Such complaint should state: (1) That complainant makes claim for damages, (2) the name of each individual claimant seeking damages, (3) the names of defendants against which claim is made, (4) the commodities, the rate applied, the date when the charges were paid, by whom paid, and by whom borne, (5) the period of time within which or the specific dates upon which the shipments were made, and the dates when they were delivered or tendered for delivery, (6) the points of origin and destination, either specifically or, where they are numerous, by definite indication of a defined territorial or rate group of the points of origin and destination, and, if known, the routes of movement, and (7) the nature and amount of the injury sustained by each claimant.

(c) Statement of prior claim.—If a complaint filed under subdivision *(b)* or *(e)* of this rule contains a claim on any shipment which has been the subject of a previous informal or formal complaint to the Commission, reference to such complaint must be given.

(d) Copies.—It is desirable that the original of an informal complaint seeking damages be accompanied by copies in sufficient number to enable the Commission to transmit one to each defendant named.

(e) Special-docket proceedings.—Where the act provides for an award of damages for violation thereof and a carrier is willing to pay them, or to waive collection of undercharges, petition for appropriate authority should be filed by the carrier on the special docket in the form prescribed by the Commission. If the petition is granted, an appropriate order will be entered. Such petition, when not filed in connection with an informal complaint pending before the Commission, must be filed within the statutory period and will be deemed the equivalent of an informal complaint and an answer thereto admitting the matters stated in the petition. If a carrier is unable to file such petition within the statutory period and the claim is not already protected from the operation of the statute by informal complaint, a statement setting forth the facts may be filed by the carrier within the statutory period. Such statement will be deemed the equivalent of an informal complaint filed on behalf of the shipper or consignee and sufficient to stay the operation of the statute.

(f) Six months' rule.—If an informal complaint seeking damages cannot be disposed of informally, or is denied, or is withdrawn by complainant from further consideration, the parties affected will be so notified in writing by the Commission. The matter in such complaint will not be reconsidered unless, within 6 months after the date such notice is mailed, either a formal complaint as to such matter is filed, or it is informally resubmitted on an additional-fact basis. Such filing or resubmission will be deemed to relate back to the date of the

original filing, but reference to that date and the Commission's file number must be made in such resubmission or in the formal complaint filed. If the matter is not so resubmitted or included in a formal complaint, as provided in this rule, complainant will be deemed to have abandoned the complaint, and no complaint seeking damages based on the same cause of action will thereafter be placed on file or considered unless itself filed within the statutory period.

THIRTIETH ANNUAL REPORT OF THE INTERSTATE COMMERCE COMMISSION (1916) 2–3

DIVISION OF CORRESPONDENCE AND CLAIMS

To the division of correspondence and claims is assigned the task of disposing of a large volume of business submitted to the Commission informally. Owing to the number, scope, and intricacy of the problems so presented, it has been deemed advisable in the interest of consistency and uniformity to centralize and standarize the handling of them. This division has been organized to accomplish that object. It is equipped to give consideration to inquiries of a general character, to informal complaints, and to claims submitted on the special docket. Many of these matters call for an interpretation of the law, and result in informal rulings, some of which are promulgated in our bulletin of conference rulings.

During the past year this division received and answered approximately 50,000 general inquiries. This does not, however, represent the total number of letters or inquiries received by the Commission during that period.

In previous annual reports the Commission has indicated that it aims to assist in obviating the necessity of formal complaints when there is any probability of bringing about an amicable adjustment by correspondence. Thousands of complaints are satisfactorily adjusted by this expeditious and economical method. During the past year 4,939 informal complaints were received, a decrease of 1,561, as compared with the preceding year. However, these figures are somewhat misleading unless qualified. The decrease is due in part to the adoption of a somewhat different method of handling informal complaints. Much of the correspondence received by the Commission has the characteristics of informal complaints, but not all of it is so classified. It has been found that many complaints can be disposed of by simply pointing out to the complainant his rights and obligations under the law.

Complaints arising upon the special docket are informal as to the pleadings, but the orders entered in such cases spring from the same authority and have the same force and effect as do orders entered in

proceedings upon the formal docket. In special docket cases the carriers admit the justice of the matters and things alleged and are willing voluntarily to satisfy the complaint. The procedure and the purpose of this docket were fully explained in our twenty-third annual report. During the past year 6,040 special docket applications were filed by carriers, a decrease of 650 under the preceding year. Orders were entered in 4,370 cases, a decrease of 372 under the preceding year, and reparation has been awarded in amounts aggregating $432,493.39. There were, in addition, 1,833 cases dismissed or otherwise disposed of without an order.

THIRTY-FOURTH ANNUAL REPORT OF THE INTERSTATE COMMERCE COMMISSION (1920) 42

Bureau of Informal Cases [a]

This bureau was formerly designated as the bureau of correspondence and claims, and its functions were explained in detail in our annual report for the year 1916.

The number of informal complaints received was 4,208, a decrease of 242. The Director General of Railroads and carriers filed 1,798 special docket applications for authority to refund amounts collected under the published rates admitted by them to have been unreasonable, a decrease of 87. Orders authorizing refund were entered in 1,849 cases, an increase of 94, and reparation thereon was awarded in amounts aggregating $849,607.78. In addition, 442 cases were dismissed or otherwise disposed of without orders. The bureau also handled approximately 39,000 letters, many of which had the characteristics of complaints, although not so classified. Others sought general information and informal rulings upon the respective rights and obligations of the public and common carriers under existing statutes.

B. The Practice of the Federal Trade Commission

STATEMENT AS TO SETTLEMENT OF CASES BY STIPULATION

16 C.F.R. 1.3.

SETTLEMENT OF CASES BY STIPULATION

Whenever the Commission shall have reason to believe that any person has been or is using unfair methods of competition or unfair or deceptive acts or practices in commerce, and that the interest of

[a] See Attorney General's Committee on Administrative Procedure, Monograph No. 24 (Interstate Commerce Commission) 90–6.

the public will be served by so doing, it may withhold service of complaint and extend to the person opportunity to execute a stipulation satisfactory to the Commission, in which the person, after admitting the material facts, promises and agrees to cease and desist from and not to resume such unfair methods of competition or unfair or deceptive acts or practices. All such stipulations shall be matters of public record, and shall be admissible as evidence of prior use of the unfair methods of competition or unfair or deceptive acts or practices involved in any subsequent proceeding against such person before the Commission. It is not the policy of the Commission to thus dispose of matters involving intent to defraud or mislead; false advertisement of food, drugs, devices, or cosmetics which are inherently dangerous or where injury is probable; suppression or restraint of competition through conspiracy or monopolistic practices; violations of the Clayton Act; violations of the Wool Products Labeling Act of 1939 or the rules promulgated thereunder; or where the Commission is of the opinion that such procedure will not be effective in preventing continued use of the unlawful method, act, or practice. The Commission reserves the right in all cases, for any reasons which it regards as sufficient, to withhold this privilege.[b]

ANNUAL REPORT OF THE FEDERAL TRADE COMMISSION (1927) 19

The policy of the commission affording respondents an opportunity of disposing of certain cases by stipulation has resulted in a substantial saving in time and money to the Government, as well as to the prospective respondent, and at the same time has immediately eliminated unfair methods and practices from the channels of interstate trade.

From an estimate made by the commission, it was determined that the average cost of procedure by complaint, involving the taking of testimony, reporting, and trial, costs about $2,500, while the cost of settling application for complaint by stipulation—thus avoiding a complaint—costs less than $500 per case. The immediate cessation of the unfair practice, however, is of greater importance than the monetary saving involved.

The procedure by stipulation, in the opinion of the commission, has resulted in gradually establishing and perfecting precedents that in the future will greatly facilitate procedure, and at the same time eliminate from the channels of trade many unfair business methods that to a large extent have became prevalent, although recognized as unethical but tolerated through usage.

[b] For the early, controversial development of this policy, see Ann.Rep.F.T.C. (1925) 1, 111; (1925) 11 A.B.A.J. 639; Ann.Rep F.T.C. (1927) 18–19, 111–12.

In MILES LABORATORIES, INC. v. FEDERAL TRADE COMMISSION, 140 F.2d 683, 78 App.D.C. 326 (1944), the Court said, at p. 684:

Stated in general terms, the present controversy grows out of the fact that some two or three years ago the Federal Trade Commission, after an investigation, reached the tentative conclusion that appellant's advertising material failed fully to reveal that these preparations, if used by individuals in excess of the dosage recommended, might result in harm to the users. In consequence the Commission addressed a communication to appellant, notifying it of this finding, and suggesting the disposition of the matter by stipulation. This contemplated an agreement on the part of appellant to revise its advertising matter to include a warning to the public in line with the conclusions of the Commission; or, stated in the language of the Commission, so as to reveal to purchasers that its preparations, if used in excess of the dosage recommended on its labels, would be dangerous to health and cause mental derangement, skin eruptions or collapse or dependence upon the drug. The Commission offered as alternative, that if the directions for the use of the preparations appearing on the labels were changed to contain warnings, in similar language to that just used, of dangers of excessive use, the advertisements need contain only the cautionary statement "Caution, Use Only as Directed."

Appellant declined the Commission's offer to stipulate and brought this suit in the District Court under the Federal Declaratory Judgment Act, 28 U.S.C.A. § 400, seeking a declaration as to the limits of the Commission's authority to dictate and control the contents of appellant's labeling and advertising. * * *

* * * But appellant admits, as of course it must, that the Act does give the Commission power, after notice and hearing, to prohibit false advertising of drugs, as that term is defined in the Act; and that is the provision on which the Commission based its right to request a stipulation that appellant conform its advertising to the Commission's construction of the statute, as an alternative to a proceeding by the Commission to seek to accomplish the same end through the issuance of a "complaint." We see no objection to this procedure. * * *o

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C. The Practice of the Securities and Exchange Commission

THIRD ANNUAL REPORT OF THE SECURITIES AND EXCHANGE COMMISSION (1937) 43

The Commission receives thousands of letters annually complaining of fraudulent or other illegal activities by persons engaged in the sale of securities. While most of such letters are sent by members of

o For the remainder of this opinion, see p. 1020, *infra*.

the general public, many are likewise sent by State Securities Commissions, State and Federal officials, and voluntary agencies such as Better Business Bureaus and Chambers of Commerce.

If the information thus brought to the Commission's notice by complaint, or information independently obtained by the Commission from its own surveillance of trading activities and examination of registration statements, indicated a substantial possibility of a violation of any of the Acts administered by the Commission, it was handled as a complaint case, and the facts thereof were investigated informally. During the past year 678 new complaint cases were set up.

If an informal investigation disclosed no violation of the legislation administered by the Commission, or if sufficient facts did not appear to warrant a belief that there had been a violation, the case was closed at that point and no further action was taken by the Commission.[d]

SECTION 2. INVESTIGATIONS PRELIMINARY TO ENFORCEMENT PROCEEDINGS [a]

SECURITIES ACT OF 1933, § 20(a)

15 U.S.C. § 77t(a).

Sec. 20. (a) Whenever it shall appear to the Commission, either upon complaint or otherwise, that the provisions of this title, or of any rule or regulation prescribed under authority thereof, have been or are about to be violated, it may, in its discretion, either require or permit such person to file with it a statement in writing, under oath, or otherwise, as to all the facts and circumstances concerning the subject matter which it believes to be in the public interest to investigate, and may investigate such facts.

SECURITIES EXCHANGE ACT OF 1934, § 21(a) (b) (c) (d)

15 U.S.C. § 78u(a) (b) (c) (d).

See *supra* at pp. 221–2.

INTERSTATE COMMERCE ACT § 12

49 U.S.C. § 12.

See *supra* at pp. 206–8.

[d] See also *id.* at 43–4, *infra* at p. 415.

[a] See discussion of various types of investigation, *supra* at p. 174.

FEDERAL TRADE COMMISSION ACT, §§ 6 (c), 9, 10

15 U.S.C. §§ 46(c), 49, 50.

See *supra* at pp. 215–18.

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If, as a result of the informal investigation, sufficient facts were developed to warrant the institution of civil or criminal proceedings, appropriate action along those lines was immediately taken. Where enough facts were not elicited in the course of an informal investigation to merit immediate court proceedings, but substantial basis existed for the belief that the legislation administered by the Commission had in some respect been violated, a formal order for investigation was entered by the Commission pursuant to the powers conferred upon it under Sections 19 and 20 of the Securities Act of 1933 and Section 21 of the Securities Exchange Act of 1934. These formal orders empowered designated officers of the Commission to administer oaths and affirmations, subpena witnesses, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records which were relevant or material to the inquiry. If facts indicating a violation of any of the Acts administered by the Commission were discovered in a formal investigation, such action as was deemed most fitting to the circumstances was thereafter undertaken. But if the facts as developed in the formal investigation indicated that no violation had taken place, the case was closed.

IN RE SECURITIES AND EXCHANGE COMMISSION

Circuit Court of Appeals of the United States, Second Circuit.
84 F 2d 316 (1936).

MANTON, Circuit Judge. The appellee, acting under the authority of section 21 (a) and (b) of the Securities Exchange Act of 1934, 15 U.S.C.A. § 78u (a, b), on November 16, 1935, had ordered that an investigation be made to determine whether Pirnie Simons & Company, Inc., had violated, or were about to violate, section 9 (a) (1–5) of the act, 15 U.S.C.A. § 78i (a) (1–5), in transactions in the stock of Dictograph Products Company, Inc. The order appointed an officer of the Commission to administer oaths and subpœna witnesses. Each of the appellants, alleged to be employees of Pirnie Simons & Co., were duly subpœnaed to appear and testify before the officer. All appeared, pursuant to the subpœna, represented by an attorney who was also the attorney for Pirnie Simons & Co., Inc. When they appeared, they stated that they were ready and willing to testify before the

Commission upon matters pertaining to its investigation provided the Commission would furnish each of them with a copy of the transcript of his testimony. The Commission refused to agree to furnish such transcript and claiming that the Commission was "unjust, unreasonable and improper," the appellants "refused to testify unless such condition is removed." The Commission thereupon petitioned the court below, pursuant to section 21(c) of the Securities Exchange Act of 1934, 15 U.S.C.A. § 78u (c), for an order requiring them to testify. In the answer filed, respondents stated: They "have at all times been ready and willing to testify before the Securities & Exchange Commission upon matters pertaining to its investigation but the Securities & Exchange Commission has placed a condition upon such testimony, to wit, that no copy of the transcript thereof shall be furnished to said witnesses or any of them. That the said condition so placed upon the testimony of respondents is unreasonable, unjust, illegal and improper and for that reason the respondents have refused to testify unless such condition is removed."

In assuming this stand, appellants rely upon rule IV (c) of the Rules of Practice of the Commission, which provides: "Hearings shall be stenographically reported and a transcript thereof shall be made which shall be made a part of the record of the proceeding. Transcripts will be supplied to parties by the official reporter at such rates as may be fixed by contract between the Commission and the reporter."

Section 21(a), 15 U.S.C.A. § 78u (a), empowers the Commission to make such investigations as it deems necessary to determine whether any person has violated, or is about to violate, the act, and gives the complementary power to compel the attendance of witnesses. Paragraphs (b) and (c) of the section set forth the methods of such investigation and compulsion of testimony. The information so obtained is not conclusively final against any one. Under section 21(e), 15 U.S.C.A. § 78u (e), the institution of criminal prosecutions, or suits for injunction, are authorized whenever the facts as to violations shall appear to the Commission, and, in the case of prosecution, the Attorney General, as a matter of discretion, co-operates. Provision is made that the Commission may in its discretion publish the information obtained. While this latter authority gives an advantage which might be abused, this is not a sufficient reason to forbid or restrain this preparatory investigation. An investigation is conducted in order to determine whether the facts justify a determination by the Commission to hold a "hearing" or to bring suit for injunctive relief. The investigation makes no determination or decision between the parties for there are no parties. This fundamental distinction between an investigation and a hearing has received judicial recognition. Cf. Lindsay v. Allen, 113 Tenn. 517, 82 S.W. 648; In re Edwards, 44 Idaho, 163, 255 P. 906. A hearing presupposes a formal proceeding upon notice with adversary parties, and with issues on which evidence may be

adduced by both parties and in which all have a right to be heard. See State v. Milhollon, 50 N.D. 184, 195 N.W. 292, 295. Rule IV (c) in terms applies to hearings, not investigations, and means what it says. Securities & Exchange Comm. v. Torr (D.C.S.D.N.Y.) 15 F. Supp. 144.

The character of the investigation, as a preparatory matter looking to the enforcement of the act, gives the basis for refusal to grant copies of the testimony. Grand jury proceedings are somewhat analogous and their records are not open to defendants. U. S. v. Cotter, 60 F. (2d) 689, 692 (C.C.A.2); U. S. v. Herzig (D.C.) 26 F.(2d) 487; U. S. v. Garsson (D.C.) 291 F. 646; U. S. v. Violon (C.C.) 173 F. 501.

The value and validity of secrecy has been upheld in proceedings under the New York State Martin Act (General Business Law [Consol.Laws, c. 20] art. 23–A, § 352 et seq.), similar in purpose to the Securities Exchange Act. See Ottinger v. State Civil Service Comm., 240 N.Y. 435, 438, 148 N.E. 627. Cf. also People ex rel. Karlin v. Culkin, 248 N.Y. 465, 478, 479, 162 N.E. 487, 60 A.L.R. 851.

In Interstate Commerce Comm. v. Brimson, 154 U.S. 447, 14 S.Ct. 1125, 38 L.Ed. 1047, the Supreme Court upheld section 12 of the Interstate Commerce Act (49 U.S.C.A. § 12) authorizing the compulsion of witnesses to attend investigations on the enforcement of the Interstate Commerce Act. Thus for years a procedure like that authorized for the Commission has been used by another government administrative body without question as to its validity.

Appellant argued that the order allows a "fishing expedition" of the type considered improper in Federal Trade Comm. v. American Tobacco Co., 264 U.S. 298, 44 S.Ct. 336, 68 L.Ed. 696, 32 A.L.R. 786, and Ellis v. I. C. C., 237 U.S. 434, 35 S.Ct. 645, 59 L.Ed. 1036. But appellants' answer expressed a willingness to testify conditioned only upon a desire for a copy of the testimony. Moreover, the order for the investigation of Pirnie Simons & Co., Inc., is to ascertain the facts about any violation occurring in trading in the specific stock mentioned, under section 9(a) (1–5). These sections relate to the manipulation of stocks. If the order were required to set out more definite facts, it would make investigations available only when superfluous. In Harriman v. I. C. C., 211 U.S. 407, 29 S.Ct. 115, 118, 53 L.Ed. 253, the court, in outlining the scope of the power to require testimony given by that act, said that it "is limited, as it usually is in English-speaking countries, at least, to the only cases where the sacrifice of privacy is necessary—those where the investigations concern a specific breach of the law." The investigation here is limited closely enough to a breach of the act by trading in a certain stock in a certain prohibited manner.

Jones v. Securities & Exchange Comm., 298 U.S. 1, 56 S.Ct. 654, 80 L.Ed. 1015, does not aid the appellant. There the court said that Jones was authorized to withdraw a registration statement previously

filed by him; an order directing Jones to appear and testify in a proceeding to determine whether or not a stop order could be issued suspending the effectiveness of such registration statement had been granted. The court held that the Commission had no right to refuse to allow the withdrawal of the registration statement and that with such withdrawal the proceeding was ended. The investigation had ceased to be legitimate when the registrant had withdrawn his statement.

In the instant case, the investigation was specifically ordered for a certain purpose on a question sufficiently narrow to be clearly supportable. The appellants were subpœnaed as employees of the firm under investigation and it was proper to examine them.

The order is affirmed.[b]

CONSOLIDATED MINES OF CALIFORNIA v. SECURITIES AND EXCHANGE COMMISSION

Circuit Court of Appeals of the United States, Ninth Circuit.
97 F.2d 704 (1938).

HEALY, Circuit Judge. The Securities and Exchange Commission, under authority of § 22(b) of the Securities Act of 1933, 15 U.S.C.A. § 77v (b), applied to the district court to enforce compliance with a subpoena duces tecum directed against appellants in the course of an investigation ordered by the Commission. From an order directing obedience to the subpoena, this appeal was taken.

The appellant Consolidated Mines of California is a California corporation, operating in Calaveras County. Appellants Wikoff and Tyler are respectively its president and secretary. On November 5, 1937 the Commission, pursuant to § 20(a) of the Securities Act of 1933, 15 U.S.C.A. § 77t(a), ordered an investigation of the facts concerning alleged violations by appellants of §§ 5 and 17(a) of the act, 15 U.S.C.A. §§ 77e, 77q(a). These latter are shown on the margin. Pursuant to § 19(b), 15 U.S.C.A. § 77s(b), officers were appointed for the purpose of the investigation and empowered to require the attendance of witnesses and the production of documentary evidence deemed relevant to the inquiry. A copy of the order is annexed to the application filed with the court.

It sufficiently appears from its application and the showing made in support of it that the Commission was in possession of information affording reasonable grounds for the belief that the appellant corporation and its officers, although no registration statement was in effect as to its securities, had for a long period been engaged in the sale of the corporation's stock; further, that during the same period these

[b] *Cf.* Securities and Exchange Commission v. Torr, 15 F.Supp. 144 (S.D.N.Y. 1936).

securities were being marketed on the basis of untrue statements concerning the extent and value of ore bodies and the profits to be derived by the corporation from its operations.

Prior to ordering the investigation, the Commission had received complaints and information tending to establish that those in charge of the affairs of the appellant corporation had undertaken to sell its stock in interstate commerce and through the use of the mails. In these efforts it was represented that the company possessed ore bodies running from $18.00 to $38.53 per ton; that the company could have shown a good profit on ore of an average value of $10.00 per ton, due to low costs of milling; that "our engineers report that we now have enough ore blocked out to justify the erection of the mill with assurance that we have sufficient ore for continuous operation"; that "our assays show that the value of the ore we have developed is much higher than we had anticipated. An average of several hundred assays runs in the neighborhood of $35.00"; that the company's mill had been producing steadily and that its capacity was being increased. The Commission had information that these representations were false and misleading, and that in fact the company had operated at a substantial loss from its organization to as late as September 30, 1937, the latest date as to which figures were made available to the Commission's investigators.

Acting upon this information, the Commission issued its order to determine whether infractions of §§ 5 and 17 of the act had in fact taken place or were threatened. The officers of the Commission designated to conduct the investigation issued subpœnas directed to the corporation and to appellants Wikoff and Tyler, the latter being ordered to appear at the investigation to be held on November 22, 1937, and these produce the following:

"1. All the engineers' reports, together with covering letters, exhibits, supporting data and supplements in the possession of the company, concerning the McKisson, Grand Prize and/or Mineral Lode Properties in Calaveras County, California.

"2. All mining records and assay records in the possession of Consolidated Mines of California, pertaining to the McKisson, Grand Prize and/or Mineral Lode Properties in Calaveras County, California, for the period from January 1, 1934, to October 1, 1937, including all sampler's books assay certificates, assay records, sample maps, the assay and routine records of the McKisson mill, with the head assays, tail assays, concentrate assays, records of tonnage handled, plus the daily records of mill operation, smelter settlement sheets and mint returns, all reports from officers or employees at the properties, all ore reserve estimates including tonnage and grade calculations and maps relative thereto, all records of receipts and disbursements pertaining to any of said properties, including payroll records, material and equipment purchases, maintenance accounts and segregation records showing segregation of receipts and disbursements against de-

velopment, mining, milling, selling or other costs; the general journal and general ledger of the company concerning said properties, all said records being for the period from January 1, 1934, to October 31, 1937."

The appellants failed to appear, advising the Commission's representative that they would refuse to respond to the subpoena until so ordered by the court. The order subsequently made by the trial court required the production of the documentary evidence called for in the subpoena.

It is urged that the application for the production order was defective in that it did not allege that any complaint or statement of facts respecting the claimed violation of the statute had been filed with the Commission. It is said that § 20(a) requires such complaint or statement as prerequisite to an investigation. This court, in Woolley v. United States, 9 Cir., 97 F.2d 258, has held otherwise. § 20(a) provides that "whenever it shall appear to the Commission, either upon complaint or otherwise, that the provisions of this title [subchapter], or of any rule or regulation prescribed under authority thereof, have been or are about to be violated, it may, in its discretion, either require or permit such person to file with it a statement in writing, under oath, or otherwise, as to all the facts and circumstances concerning the subject matter which it believes to be in the public interest to investigate, and may investigate such facts." If the Commission is in possession of facts affording reasonable grounds for the belief that a violation of the act has occurred or is threatened, it may order an investigation. The form of the information or its source is not material.

The appellants do not deny that sales were made and solicited, or that the mails and the means and instruments of communication in interstate commerce were used for this purpose. They say, however, that the sales were made by appellant Tyler of his personally owned stock, independently of the company. The Commission had substantial evidence to the contrary. Letters soliciting sales or encouraging purchases were written on the stationery of the corporation, and in some instances the signers designated themselves as corporate officers. The proceeds of the securities sold were in part loaned or contributed to the corporation and were used to keep the properties in operation, thereby enabling more stock sales to be effected. Certainly, the facts in the possession of the Commission justified an investigation to determine whether the sales were in truth the individual transactions of Tyler, or were made on behalf or at the behest of the corporation.

It appears to be the view of appellants that virtually conclusive evidence of a violation of the act must be in the possession of the Commission before an investigation can be ordered. If this were so there would be no point in conducting an investigation. The very purpose

of the inquiry authorized by § 20(a), 15 U.S.C.A. § 77t(a), is to investigate the accuracy of information in the possession of the Commission tending to show a violation, and to aid the Commission in determining whether the facts justify injunction proceedings or the placing of the matter before the Attorney General for the institution of criminal prosecutions. See § 20(b), 15 U.S.C.A. § 77t(b); In re Securities and Exchange Commission, 2 Cir., 84 F.2d 316.

It is urged that the investigation is a "fishing expedition" of the sort condemned in Federal Trade Commission v. American Tobacco Company, 264 U.S. 298, 44 S.Ct. 336, 68 L.Ed. 696, 32 A.L.R. 786; also, that the order for the production of the documents called for is so harsh, sweeping and summary in its terms as to violate the rights of appellants under the Fourth Amendment to the constitution, U.S.C.A. Const. Amend. 4, citing Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746.

We are unable to agree that the order invades the constitutional immunities of the appellants. The materiality of the documentary evidence called for is apparent. The reports of the company's engineers as to the extent of its ore reserves, the values disclosed by assays made, the records of the company relating to the economy and efficiency of its milling operations and to its mining costs, and the records of returns from concentrates and from sales to the mint, are all pertinent to the subject matter of the investigation. All bear on the truth or falsity of the representations shown to have been made on behalf of the corporation in effecting sales of its securities. The case made out by the Commission abundantly discloses the propriety of the order for the production of these records. From them it may be determined whether the stock-selling campaign was in fact based on representations which were materially false or misleading, and whether the corporation and its officers had acted in bad faith. Newfield v. Ryan, 5 Cir., 91 F.2d 700; McMann v. Securities and Exchange Commission, 2 Cir., 87 F.2d 377, 109 A.L.R. 1445. Compare Smith v. Interstate Commerce Commission, 245 U.S. 33, 38 S.Ct. 30, 62 L.Ed. 135; Wheeler v. United States, 226 U.S. 478, 483, 33 S.Ct. 158, 57 L.Ed. 309; Brown v. United States, 276 U.S. 134, 48 S.Ct. 288, 72 L.Ed. 500.

Investigations of the sort here under consideration are analogous to those of a grand jury. In re Securities and Exchange Commission supra; Woolley v. United States, supra. The scope of the inquiries of a grand jury, it has been said, is "not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime. As has been said before, the identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury's labors, not at the beginning." Blair v. United States,

250 U.S. 273, 39 S.Ct. 468, 471, 63 L.Ed. 979; see, also, Norcross v. United States, 9 Cir., 209 F. 13.

Affirmed.[c]

ADMINISTRATIVE PROCEDURE ACT § 6(b)

5 U.S.C.Supp. § 1005(b).

Sec. 6. * * *

(b) Investigations.—No process, requirement of a report, inspection, or other investigative act or demand shall be issued, made, or enforced in any manner or for any purpose except as authorized by law. Every person compelled to submit data or evidence shall be entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

REPORT OF THE COMMITTEE ON THE JUDICIARY OF THE HOUSE OF REPRESENTATIVES ON § 6(b) OF THE ADMINISTRATIVE PROCEDURE ACT

H.Rep. No. 1980, 79th Cong., 2nd Sess. (1946) 32-3.

This section is designed to preclude "fishing expeditions" and investigations beyond jurisdiction or authority. It applies to any demand, whether or not a formal subpena is actually issued. It includes demands or requests to inspect or for the submission of reports. An investigation must be substantially and demonstrably necessary to agency operation, conducted through authorized and official representatives, and confined to the legal and factual sphere of the agency as provided by law. Investigations may not disturb or disrupt personal privacy, or unreasonably interfere with private occupation or enterprise. They should be conducted so as to interfere in the least degree compatible with adequate law enforcement.

"Nonpublic investigatory proceeding" means those of the grand jury kind in which evidence is taken behind closed doors. The limitation, for good cause, to inspection of the official transcript may be properly invoked by an agency where evidence is taken in a case in which prosecutions may be brought later and it would nullify the execution of the laws to permit copies to be circulated. In those cases the "good cause" should be clear and convincing; then the wit-

[c] Footnotes of the court have been omitted.

See, also, Woolley v. United States, 97 F.2d 258 (C.C.A.9th, 1938); McMann v. Engel, 16 F.Supp. 446 (S.D.N.Y.1936). *Cf.* Harriman v. Interstate Commerce Commission, 211 U.S. 407, 419, 29 S.Ct. 115, 118, 53 L.Ed. 253, *supra* at pp. 199, 203.

ness or his counsel may be limited to inspection of the relevant portions of the transcript. Parties should in any case have copies or an opportunity for inspection in order to assure that their evidence is correctly set forth, to refresh their memories in the case of stale proceedings, and to enable them to be advised by counsel. They should also have such copies whenever needed in other judicial or administrative proceedings.[d]

FEDERAL TRADE COMMISSION v. CLAIRE FURNACE COMPANY

Supreme Court of the United States.
274 U.S. 160, 47 S.Ct. 553, 71 L.Ed. 978 (1927).

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

This was a bill in equity, brought in the Supreme Court of the District of Columbia on behalf of 22 companies of Ohio, Pennsylvania, West Virginia, New York, Delaware, New Jersey, and Maryland, in the coal, steel, and related industries, to enjoin the Federal Trade Commission from enforcing or attempting to enforce orders issued by that Commission against the complainant companies, requiring them to furnish monthly reports of the cost of production, balance sheets and other voluminous information in detail upon a large variety of subjects relating to the business in which complainant corporations are engaged. The authority under which the Commission professed to act was expressed in the following resolution adopted by the Commission December 15, 1919:

"Whereas, at a hearing held by the committee on appropriations of the House of Representatives on August 25, 1919, the Federal Trade Commission was requested to suggest what it might undertake to do to reduce the high cost of living; and

"Whereas, the Commission recommended to the said committee that it would be desirable to obtain and publish from time to time current information with respect to 'the production, ownership, manufacture, storage, and distribution of foodstuffs, or other necessaries, and the products or by-products arising from or in connection with the preparation and manufacture thereof, together with figures of cost and wholesale and retail prices,' and particularly with respect to various basic industries, including coal and steel; and

"Whereas the said committee recommended an appropriation of $150,000 for the current fiscal year for the said commission in consequence of this recommendation and the same was duly made by authority of Congress, and made available on November 4, 1919: Now, therefore, be it

[d] See also S.Rep.No.752, 79th Cong., 1st Sess. (1945) 19–20.

"Resolved, that the Federal Trade Commission, by virtue of section 6, paragraphs (a) and (b), of the Federal Trade Commission Act, proceed to the collection and publication of such information with respect to such basic industries as the said appropriation and other funds at its command will permit. And be it further

"Resolved, that such action be started as soon as possible with respect to the coal industry and the steel industry, including in the latter closely related industries such as the iron ore, coke, and pig iron industries."

Purporting to proceed under this resolution, the Commission served separate notices upon the 22 appellees and many other corporations, engaged in mining, manufacturing, buying, and selling coal, coke, ore, iron and steel products, etc., which directed them to furnish monthly reports in the form prescribed showing output of every kind, itemized cost of production, sale prices, contract prices, capacity, buying orders, depreciation, general administration and selling expenses, income, general balance sheet, etc. Elaborate questionnaires, accompanying these orders, asked for answers revealing the intimate details of every department of the business, both intrastate and interstate. A summary of these printed in the margin sufficiently indicates their contents. The concluding paragraph of the notice declared:

"The purpose of this report is to compile in combined or consolidated form the data received from individual companies and to issue currently in such form accurate and comprehensive information regarding changes in the conditions of the industry both for the benefit of the industry and of the public."

Appellees did not comply with the inquiries in the notices but filed in the Supreme Court, District of Columbia, their joint bill against the Commission and its members, wherein they set out its action, alleged that it had exceeded its powers, and asked that all defendants be restrained "from the enforcement of said orders, and from requiring answers to said questionnaires, and from taking any proceedings whatever with reference to the enforcement of compliance with said orders and answers to said questionnaires"; also for general relief.

Without questioning the appellees' right to seek relief by injunction, the appellants answered, admitted issuing of the orders, claimed authority therefor under sections 6 and 9, Federal Trade Commission Act (Act Sept. 26, 1914, c. 311, 38 Stat. 717, 721, 722 [Comp.St. §§ 8836f, 8836i]), and further alleged and said:

That the reports were required "for all the purposes and under all the authority granted to them by law, including the purpose of gathering and compiling said information for publication and the consequent regulation of the interstate commerce of said complainants resulting from such publication of the true trade facts as to all of the business of complainants and of others engaged in commerce in those commodities, and including the purpose of making reports to Congress and of recommending additional legislation to Congress.

"Defendants allege that all of the information to be acquired through the answers to said questionnaires is necessary and has direct relation to regulation and control of the interstate and foreign commerce of complainants and others answering said questionnaires, and is sought by the Federal Trade Commission for the purpose and in necessary aid of the regulation of said commerce.

"Defendants admit that no complaint has been filed or is now pending before the commission against any of complainants for a violation of section 5 of the Trade Commission Act, but aver that the activities sought to be enjoined were instituted and are sought to be carried on under the provisions of said Trade Commission Act.

"That one purpose of the requirements made in this case is the gathering of complete information, which is necessary in the proper regulation through publicity of the true facts as to the interstate business of the industry. That such purpose cannot be properly performed without the acquisition of the complete facts. That the acquisition of the complete information and facts required will effectuate such purpose, in that the dissemination of such complete trade information will tend to prevent undue fluctuations and panic markets based on ignorance of the true facts, or based on incomplete and partial or self-interested information, published only whenever and in so far as it may serve those self-interested who may publish it. That regulation by publicity is, and for a long time has been, recognized as one form of regulation which has been generally conceded to be fair and equitable to all concerned. That unless such regulation through public dissemination of the full and complete facts is carried out, other more drastic forms of attempted regulations without proper information may follow.

"That in addition to the regulatory effect, in and of itself, of such public dissemination of the complete facts, it is one of the purposes of these activities to gather and convey to Congress, for its information in the performance of its duties, the full and complete facts, in order that instead of legislating on incomplete or partial or prejudiced information, it may have the full facts before it. That if any regulatory effect upon intrastate commerce flows from such publicity, it is merely incidental to the general regulation of interstate commerce, as to which the power of Congress is complete."

The cause was heard upon motion to strike the answer from the files because it contained no adequate defense. The trial court concluded that, as the propounded questions were not limited to interstate commerce, but asked also for detailed information concerning mining, manufacture and intrastate commerce, they were beyond the Commission's authority. "The power claimed by the Commission is vast and unpracticable. The mere fact that a corporation engaged in mining ships a portion of its product to other states does not subject its business of production or its intrastate commerce to the powers of Congress." It accordingly held the answer insufficient, and, as de-

fendants declined to amend, granted the injunction as prayed. The Court of Appeals affirmed this action. 52 App.D.C. 202, 285 F. 936. The cause, here by appeal, has been twice argued.

Appellees were not charged with practicing unfair methods of competition (section 5, Act of Sept. 26, 1914 [Comp. St. § 8836e]), or violating the Clayton Act, c. 323, §§ 2, 3, 7, 8 (38 Stat. 730, 731, 732, being Comp. St. §§ 8835b, 8835c, 8835g, 8835h). Orders under such charges can be enforced only through a Circuit Court of Appeals. Section 11, Clayton Act (Comp. St. § 8835j); section 5, Federal Trade Commission Act [Comp. St. § 8836e].

The action of the Commission here challenged must be justified, if at all, under the paragraphs of sections 6 and 9, Act of September 26, 1914, copied below, and the only methods prescribed for enforcing orders permitted by any of these paragraphs are specified in sections 9 and 10 (Comp. St. §§ 8836i, 8836j). They are application to the Attorney General to institute an action for mandamus, and proceedings by him to recover the prescribed penalties.

[The court here set forth the text of §§ 6(a) (b) (f) (g) (h), 9 and 10 of the Federal Trade Commission Act, for which see pp. 215–218, *supra*.—Ed.]

There was nothing which the Commission could have done to secure enforcement of the challenged orders except to request the Attorney General to institute proceedings for a mandamus or supply him with the necessary facts for an action to enforce the incurred forfeitures. If, exercising his discretion, he had instituted either proceeding, the defendant therein would have been fully heard, and could have adequately and effectively presented every ground of objection sought to be presented now. Consequently the trial court should have refused to entertain the bill in equity for an injunction.

We think that the consent of the parties was not enough to justify the court in considering the fundamental question that has been twice argued before us. It was intended by Congress in providing this method of enforcing the orders of the Trade Commission to impose upon the Attorney General the duty of examining the scope and propriety of the orders, and of sifting out of the mass of inquiries issued what in his judgment was pertinent and lawful before asking the court to adjudge forfeitures for failure to give the great amount of information required or to issue a mandamus against those whom the orders affected and who refused to comply. The wide scope and variety of the questions, answers to which are asked in these orders, show the wisdom of requiring the chief law officer of the government to exercise a sound discretion in designating the inquiries to enforce which he shall feel justified in invoking the action of the court. In a case like this, the exercise of this discretion will greatly relieve the court and may save it much unnecessary labor and discussion. The purpose of Congress in this requirement is plain, and we do not think

that the court below should have dispensed with such assistance. Until the Attorney General acts, the defendants cannot suffer, and, when he does act, they can promptly answer and have full opportunity to contest the legality of any prejudicial proceeding against them. That right being adequate, they were not in a position to ask relief by injunction. The bill should have been dismissed for want of equity.[e]

PART II. FORMAL ENFORCEMENT PROCEEDINGS BEFORE THE ADMINISTRATIVE AGENCY

The provisions of a regulatory statute, or of regulations or orders of general applicability prescribing future conduct issued thereunder, may be enforced in proceedings before the administrative agency, or, in appropriate cases, by direct resort to the courts. Although orders of particular applicability prescribing future conduct might also be enforced through administrative proceedings, such orders typically are enforced by court action. Enforcement proceedings before the administrative agency culminate in "quasi-judicial" orders. Ultimately, "quasi-judicial" orders of an administrative agency depend for execution upon judicial sanctions. As a matter of practical effect, however, many such orders carry a powerful compulsion of their own. This is notably true of orders in the nature of grants or refusals of licenses, which are examined in Section 1 C of this Part, pp. 430 to 438, *infra*.

SECTION 1. TYPES OF ORDERS—ADMINISTRATIVE EXERCISE OF "JUDICIAL" POWER

A. In General

ADMINISTRATIVE PROCEDURE ACT § 2(d)

5 U.S.C.Supp. § 1001(d).

Sec. 2. * * *

(d) Order and Adjudication.—"Order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive,

[e] Footnotes of the court, and the separate opinion of Mr. Justice McReynolds, have been omitted.

or declaratory in form) of any agency in any matter other than rule making but including licensing. "Adjudication" means agency process for the formulation of an order.[a]

B. Cease and Desist Orders

FEDERAL TRADE COMMISSION ACT, § 5(b) (g)

15 U.S.C. § 45(b) (g).

Sec. 5. * * *

(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 or deceptive 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. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. 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. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the transcript of the record in the proceeding has been filed in a circuit court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside,

[a] See discussion of § 2(c) of the Administrative Procedure Act, *supra* at pp. 382, 390–1.

in whole or in part, any report or any order made or issued by it under this section. 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: *Provided, however,* That the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate circuit court of appeals of the United States, in the manner provided in subsection (c) of this section.

(g) An order of the Commission to cease and desist shall become final—

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the Commission may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b); or

(2) Upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed, or the petition for review dismissed by the circuit court of appeals, and no petition for certiorari has been duly filed; or

(3) Upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review dismissed by the circuit court of appeals; or

(4) Upon the expiration of thirty days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the Commission be affirmed or the petition for review dismissed.[b]

[b] *Cf* National Labor Relations Act § 10(b) (c) (d), 29 U.S.C. § 160(b) (c) (d); Interstate Commerce Act § 15(1) (2), 49 U.S.C. § 15(1) (2).

C. Orders in the Nature of Grants or Refusals of Licenses

(1) Stop Orders, Refusal Orders and Other Orders Permitting or Refusing to Permit Sales, Acquisitions or Other Acts

SECURITIES ACT OF 1933, §§ 5(a), 8(b) (d) (e)

15 U.S.C. §§ 77e(a), 77h(b) (d) (e).

Sec. 5. (a) Unless a registration statement is in effect as to a security, it shall be unlawful for any person, directly or indirectly—

(1) to make use of any means or instruments of transportation or communication in interstate commerce or of the mails to sell or offer to buy such security through the use or medium of any prospectus or otherwise; or

(2) to carry or cause to be carried through the mails or in interstate commerce, by any means or instruments of transportation, any such security for the purpose of sale or for delivery after sale.

Sec. 8. * * *

(b) If it appears to the Commission that a registration statement is on its face incomplete or inaccurate in any material respect, the Commission may, after notice by personal service or the sending of confirmed telegraphic notice not later than ten days after the filing of the registration statement, and opportunity for hearing (at a time fixed by the Commission) within ten days after such notice by personal service or the sending of such telegraphic notice, issue an order prior to the effective date of registration refusing to permit such statement to become effective until it has been amended in accordance with such order. When such statement has been amended in accordance with such order the Commission shall so declare and the registration shall become effective at the time provided in subsection (a) or upon the date of such declaration, whichever date is the later.

(d) If it appears to the Commission at any time that the registration statement includes any untrue statement of a material fact or omits to state any material fact required to be stated therein or necessary to make the statements therein not misleading, the Commission may, after notice by personal service or the sending of confirmed telegraphic notice, and after opportunity for hearing (at a time fixed by the Commission) within fifteen days after such notice by personal service or the sending of such telegraphic notice, issue a stop order suspending the effectiveness of the registration statement. When such statement has been amended in accordance with such

stop order the Commission shall so declare and thereupon the stop order shall cease to be effective.

(e) The Commission is hereby empowered to make an examination in any case in order to determine whether a stop order should issue under subsection (d). In making such examination the Commission or any officer or officers designated by it shall have access to and may demand the production of any books and papers of, and may administer oaths and affirmations to and examine, the issuer, underwriter, or any other person, in respect of any matter relevant to the examination, and may, in its discretion, require the production of a balance sheet exhibiting the assets and liabilities of the issuer, or its income statement, or both, to be certified to by a public or certified accountant approved by the Commission. If the issuer or underwriter shall fail to cooperate, or shall obstruct or refuse to permit the making of an examination, such conduct shall be proper ground for the issuance of a stop order.

INTERSTATE COMMERCE ACT § 20a(2) (3)

49 U.S.C. § 20a(2) (3).

Sec. 20a. * * *

(2) From and after one hundred and twenty days after this section takes effect it shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed "securities") or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the Commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the Commission by order authorizes such issue or assumption. The Commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose.

(3) The Commission shall have power by its order to grant or deny the application as made, or to grant it in part and deny it in part, or to grant it with such modifications and upon such terms and conditions as the Commission may deem necessary or appropriate in the

premises, and may from time to time, for good cause shown, make such supplemental orders in the premises as it may deem necessary or appropriate, and may by any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any securities so theretofore authorized or the proceeds thereof may be applied, subject always to the requirements of the foregoing paragraph (2).[c]

PUBLIC UTILITY HOLDING COMPANY ACT OF 1935, §§ 9(a), 10(a) (b) (c) (d)

15 U.S.C. §§ 79i(a), 79j(a) (b) (c) (d).

Sec. 9. (a) Unless the acquisition has been approved by the Commission under section 10, it shall be unlawful—

(1) for any registered holding company or any subsidiary company thereof, by use of the mails or any means or instrumentality of interstate commerce, or otherwise, to acquire, directly or indirectly, any securities or utility assets or any other interest in any business;

(2) for any person, by use of the mails or any means or instrumentality of interstate commerce, to acquire, directly or indirectly, any security of any public-utility company, if such person is an affiliate, under clause (A) of paragraph (11) of subsection (a) of section 2, of such company and of any other public utility or holding company, or will by virtue of such acquisition become such an affiliate.

Sec. 10. (a) A person may apply for approval of the acquisition of securities or utility assets, or of any other interest in any business, by filing an application in such form as the Commission may by rules and regulations prescribe as necessary or appropriate in the public interest or for the protection of investors and consumers. Such application shall include—

(1) in the case of the acquisition of securities, such information and copies of such documents as the Commission may by rules and regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers in respect of—

(A) the security to be acquired, the consideration to be paid therefor, and compliance with such State laws as may apply in respect of the issue, sale, or acquisition thereof,

[c] *Cf.* Public Utility Holding Company Act of 1935, § 7, 15 U.S.C. § 79g.

(B) the outstanding securities of the company whose security is to be acquired, the terms, position, rights, and privileges of each class and the options in respect of any such securities,

(C) the names of all security holders of record (or otherwise known to the applicant) owning, holding, or controlling 1 per centum or more of any class of security of such company, the officers and directors of such company, and their remuneration, security holdings in, material contracts with, and borrowings from such company and the offices or directorships held, and securities owned, held, or controlled, by them in other companies, relation to, agreements with, and interest in the securities of, the applicant or any associate company thereof as the Commission may by rules and regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers; and

(3) in the case of the acquisition of any other interest in any business, such information concerning such business and the interest to be acquired, and the consideration to be paid, as the Commission may by rules and regulations or order prescribe as necessary or appropriate in the public interest or for the protection of investors or consumers.

(b) If the requirements of subsection (f) are satisfied, the Commission shall approve the acquisition unless the Commission finds that—

(1) such acquisition will tend towards interlocking relations or the concentration of control of public-utility companies, of a kind or to an extent detrimental to the public interest or the interest of investors or consumers;

(2) in case of the acquisition of securities or utility assets, the consideration, including all fees, commissions, and other remuneration, to whomsoever paid, to be given, directly or indirectly, in connection with such acquisition is not reasonable or does not bear a fair relation to the sums invested in or the earning capacity of the utility assets to be acquired or the utility assets underlying the securities to be acquired; or

(3) such acquisition will unduly complicate the capital structure of the holding-company system of the applicant or will be detrimental to the public interest or the interest of investors or consumers or the proper functioning of such holding-company system.

The Commission may condition its approval of the acquisition of securities of another company upon such a fair offer to purchase such of the other securities of the company whose security is to be acquired as the Commission may find necessary or appropriate in the public interest or for the protection of investors or consumers.

(c) Notwithstanding the provisions of subsection (b), the Commission shall not approve—

(1) an acquisition of securities or utility assets, or of any other interest, which is unlawful under the provisions of section 8 or is detrimental to the carrying out of the provisions of section 11; or

(2) the acquisition of securities or utility assets of a public-utility or holding company unless the Commission finds that such acquisition will serve the public interest by tending towards the economical and efficient development of an integrated public-utility system. This paragraph shall not apply to the acquisition of securities or utility assets of a public-utility company operating exclusively outside the United States.

(d) Within such reasonable time after the filing of an application under this section as the Commission shall fix by rules and regulations or order, the Commission shall enter an order either granting or, after notice and opportunity for hearing, denying approval of the acquisition unless the applicant shall withdraw its application. Amendments to an application may be made upon such terms and conditions as the Commission may prescribe.[d]

(2) Orders Permitting or Refusing Entry into or Continuance in Business

SECURITIES EXCHANGE ACT OF 1934 § 15(a) (b)

15 U.S.C. § 78*o*(a) (b).

Sec. 15. (a) No broker or dealer (other than one whose business is exclusively intrastate) shall make use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange, unless such broker or dealer is registered in accordance with subsection (b) of this section.

(b) A broker or dealer may be registered for the purposes of this section by filing with the Commission an application for registration, which shall contain such information in such detail as to such broker or dealer and any person directly or indirectly controlling or controlled by, or under direct or indirect common control with, such broker or dealer, as the Commission may by rules and regulations require as necessary or appropriate in the public interest or for the

[d] *Cf.* Interstate Commerce Act, § 5(2), 49 U.S.C.Supp. § 5(2); Federal Power Act, § 203, 16 U.S.C. § 824b.

protection of investors. Except as hereinafter provided, such registration shall become effective thirty days after the receipt of such application by the Commission or within such shorter period of time as the Commission may determine.[e]

INTERSTATE COMMERCE ACT §§ 206(a) (b), 207(a), 208(a), 212(a)

49 U.S.C. §§ 306(a) (b), 307(a), 308(a), 312(a).

Sec. 206. (a) Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations:
* * *

(b) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission shall, by regulation, require.

Sec. 207. (a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

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[e] *Cf.* Securities Exchange Act of 1934, §§ 5, 6, 15 U.S.C. §§ 78e, 78f (registration of exchanges), *supra* at pp. 25–6; Public Utility Holding Company Act of 1935, §§ 4, 5, 15 U.S.C. §§ 79d, 79e (registration of holding companies). See also Securities Exchange Act of 1934, § 15A, 15 U.S.C. § 78o–3, *supra* at pp. 35–41; and id., § 19(a), 15 U.S.C. § 78s(a), *supra* at pp. 29–30.

Sec. 208. (a) Any certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, * * *

Sec. 212. (a) Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: * * *[f]

COMMUNICATIONS ACT OF 1934[g] §§ 301, 307(a) (b) (d), 308(a) (b), 309(a)

47 U.S.C.Supp. §§ 301, 307(a) (b) (d), 308(a) (b), 309(a).

§ 301. It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the

[f] *Cf.* Interstate Commerce Act §1(18) (19) (20), 49 U.S.C. § 1(18) (19) (20) (construction, extension or abandonment of railroad line).

[g] Act of June 19, 1934, c. 652, 48 Stat. 1064, as amended.

United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter.

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§ 307. (a) The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license provided for by this chapter.

(b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

* * *

(d) No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses and not to exceed five years in the case of other licenses, but action of the Commission with reference to the granting of such application for the renewal of a license shall be limited to and governed by the same considerations and practice which affect the granting of original applications.

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§ 308. (a) The Commission may grant licenses, renewal of licenses, and modification of licenses only upon written application therefor received by it: * * *

(b) All such applications shall set forth such facts as the Commission by regulation may prescribe as to the citizenship, character, and

financial, technical, and other qualifications of the applicant to operate the station; the ownership and location of the proposed station and of the stations, if any, with which it is proposed to communicate; the frequencies and the power desired to be used; the hours of the day or other periods of time during which it is proposed to operate the station; the purposes for which the station is to be used; and such other information as it may require. The Commission, at any time after the filing of such original application and during the term of any such license, may require from an applicant or licensee further written statements of fact to enable it to determine whether such original application should be granted or denied or such license revoked. Such application and/or such statement of fact shall be signed by the applicant and/or licensee under oath or affirmation.

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§ 309. (a) If upon examination of any application for a station license or for the renewal or modification of a station license the Commission shall determine that public interest, convenience, or necessity would be served by the granting thereof, it shall authorize the issuance, renewal, or modification thereof in accordance with said finding. In the event the Commission upon examination of any such application does not reach such decision with respect thereto, it shall notify the applicant thereof, shall fix and give notice of a time and place for hearing thereon, and shall afford such applicant an opportunity to be heard under such rules and regulations as it may prescribe.[h]

ADMINISTRATIVE PROCEDURE ACT § 2(e)

5 U.S.C.Supp. § 1001(e).

Sec. 2. * * *

(e) License and Licensing.—"License" includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission. "Licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation amendment, modification, or conditioning of a license.

[h] See Federal Communications Commission v. Sanders Bros. Radio Station, 309 U.S. 470, 60 S.Ct. 693, 84 L.Ed. 869, (1940), *infra* at p. 969.

D. Orders Requiring the Payment of Money or Other Affirmative Acts to Restore Position of Person Injured

INTERSTATE COMMERCE ACT § 16(1) (2)

49 U.S.C. § 16(1) (2).

Sec. 16. (1) That if, after hearing on a complaint made as provided in section thirteen of this part, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this part for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

(2) If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the district court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State court of general jurisdiction having jurisdiction of the parties, a complaint setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit in the district court of the United States shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and except that the plaintiff shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the plaintiff shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit.

MEEKER v. LEHIGH VALLEY RAILROAD

Supreme Court of the United States.
236 U.S. 412, 35 S.Ct. 328, 59 L.Ed. 644, Ann.Cas.1916B, 691 (1915).

Mr. Justice VAN DEVANTER delivered the opinion of the Court:

This was an action under § 16 of the act to regulate commerce to recover from the Lehigh Valley Railroad Company damages alleged to have been sustained by a shipper and awarded by the Interstate Commerce Commission by reason of the company's violation of the prohibition in §§ 1 and 2 of that act against unreasonable rates and unjust discrimination. The plaintiff prevailed in the district court, but the circuit court of appeals reversed the judgment (211 Fed. 785), and a writ of certiorari granted under § 262 of the Judicial Code [36 Stat. at L. 1162, chap. 231, Comp.Stat. 1913, § 1239] brings the case here (234 U.S. 749, 58 L.Ed. 1576, 34 Sup.Ct.Rep. 674).

The plaintiff was the surviving member of Meeker & Company, a copartnership, and sued in that capacity. This firm was engaged in the anthracite coal trade in New York City, and was accustomed to purchase its coal at collieries in Pennsylvania, and to ship it over the defendant's railroad to tidewater at Perth Amboy, New Jersey, and thence by vessel to New York. Two distinct claims were involved. The first covered shipments from November 1, 1900, to August 1, 1901, and was grounded upon a charge that the railroad company had unjustly and injuriously discriminated against Meeker & Company by giving (on August 1, 1901) to another and extensive shipper of anthracite between the same points an indirect but substantial rebate upon all shipments during the same period, and that by reason of this rebate the other shipper had obtained a contemporaneous service in all respects like that rendered for Meeker & Company at a less rate than was exacted from the latter. The second covered shipments from August 1, 1901, to July 17, 1907, and was based upon the charge that the established rate paid by Meeker & Company during that period was excessive and unreasonable.

On July 17, 1907, a complaint embodying both claims was presented to the Interstate Commerce Commission under §§ 9 and 13 of the act, and after a full hearing in which the railroad company was an active participant, the Commission made a written report (21 Inters. Com.Rep. 129) finding that the charge of unjust discrimination was sustained by the evidence, condemning as excessive and unreasonable the rate which was in effect from August 1, 1901, to the date of the report, naming what was deemed a maximum reasonable rate, holding that the claimant was entitled to an award of reparation upon both claims, and directing that further proceedings be had to determine the amount to be awarded. Under § 15 of the act an order was then made requiring the railroad company, within a time named, to cease giving effect to the prior rate found unreasonable, and to establish a new rate not exceeding that found reasonable.

Thereafter a further hearing was had at which additional evidence bearing upon the question of reparation was presented, and, on May 7, 1912, the Commission made a supplemental report, * * *

Thereupon the Commission made and entered of record an order for reparation * * *

Although duly served with a copy of this order, the railroad company refused to comply with it; and, on September 3, 1912, after the time allotted for compliance had expired, the plaintiff, conformably to § 16 of the act, filed in the district court his petition setting forth briefly the causes for which he claimed damages and the reports and orders of the Commission, and praying judgment against the railroad company for the amounts claimed and awarded and for interest and costs, including a reasonable attorney's fee. The defendant answered denying the claims set forth in the petition, and asserting that they were barred by the applicable statute of limitations,

that the Commission was without jurisdiction "to make the findings and order of reparation" relied upon, and that "there was before the Commission no substantial evidence to sustain said findings and said order." A trial resulted in a verdict for the plaintiff assessing the damages at $109,280.17, the total amount awarded by the Commission with interest, and judgment was entered for this sum with costs, including an attorney's fee.

At the trial the plaintiff produced no evidence tending to show unjust discrimination, exaction of unreasonable rates, injury to Meeker & Company, or what damages were sustained by them, other than the evidence afforded by the reports and orders of the Commission; and the defendant produced no evidence whatever, save some computations intended to be helpful in determining how much of the claims was barred according to each of several views advanced respecting the applicable statute of limitations.

Whether the claims were barred in whole or in part by some applicable statute is one of the questions which the record presents, and to dispose of it we must notice three statutes upon which the defendant relies. * * *

It follows from these views that the complaint, which was filed with the Commission July 17, 1907, was seasonably presented, and that no part of either claim was barred at that time. And, as the action in the district court was begun within a year after the date of the order for reparation, the defense predicated upon the statute of limitations must fail.

With a single exception, the other questions pressed upon our attention center about the use and effect of the reports and orders of the Commission as evidence,—a subject concerning which the courts below differed.

The pertinent provisions of the act to regulate commerce are these: Section 14 requires the Commission, upon investigating a complaint, to make a written report thereon "which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises," and, if damages be awarded, "shall include the findings of fact on which the award is made." Section 16 requires the Commission, upon awarding damages to a complaining party, to make an order directing that "the sum to which he is entitled" be paid within a fixed time; and then, after authorizing a suit to enforce payment, if the order be not obeyed, provides: "Such suit shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated."

At the trial the plaintiff offered in evidence the reports and orders of the Commission and asked that the facts stated in the findings and orders be taken as prima facie true.

An objection was interposed to the admission of the reports upon the ground that they contained various statements which it was claimed were not findings of fact, and therefore were not admissible. A colloquy ensued between court and counsel in which counsel for the plaintiff conceded that portions of the reports should be eliminated, and suggested that this could be done in the charge to the jury. As a result of the colloquy the reports were received in evidence, the court observing that it would indicate to the jury what portions were to be considered. The reports were not read at the time, but, when the evidence was concluded, counsel for the plaintiff, as the record recites, "read to the jury what he stated to be material portions" of them. The record does not more definitely identify what was read; nor does it show that complaint was then made that anything was read that should have been omitted, or that the court's attention was drawn to the subject at the time of charging the jury, either by a request for a particular instruction thereon, or by excepting to the absence of such an instruction. The court's charge apparently proceeded upon the theory that the portions of the reports which had been read to the jury were properly before them. In these circumstances the objection cannot now be considered. If it was not obviated by excluding the supposedly objectionable portions of the reports from what was read to the jury, it was waived by the failure to direct the court's attention to the subject when the jury was charged.

Another objection which was directed against the orders as well as the reports is that they contain no findings of fact, or, at least, not enough to sustain an award of damages. The arguments advanced to sustain this objection proceed upon the theory that the statute requires that the reports, if not the orders, shall state the evidential rather than the ultimate facts; that is to say, the primary facts from which, through a process of reasoning and inference, the ultimate facts may be determined. We think this is not the right view of the statute, and that what it requires is a finding of the ultimate facts,—a finding which, as applied to the present case, would disclose (1) the relation of the parties as shipper and carrier in interstate commerce; (2) the character and amount of the traffic out of which the claims arose; (3) the rates paid by the shipper for the service rendered and whether they were according to the established tariff; (4) whether and in what way unjust discrimination was practised against the shipper from November 1, 1900, to August 1, 1901; (5) whether, if there was unjust discrimination, the shipper was injured thereby, and, if so, the amount of his damages; (6) whether the rate collected from the shipper from August 1, 1901, to July 17, 1907, was excessive and unreasonable, and, if so, what would have been a reasonable rate for the service; and (7) whether, if the rate was excessive and unreasonable, the shipper was injured thereby, and, if so, the amount of his damages. Upon examining the reports as set forth in the record, we think they contain findings of fact which meet the requirements of the

statute, and that the facts stated in the findings, if taken as prima facie true, sustain the award of the Commission. True, the findings in the original report are interwoven with other matter, and are not expressed in the terms which courts generally employ in special findings of fact, but there is no difficulty in separating the findings from the other matter, or in fully understanding them, and particularly is this true when the two reports are read together, as they should be. We say "should be" because both were made in the same proceeding, and the later one affirmatively shows that it was made to supplement and give effect to the original. * * *

It is also urged, as it was in the courts below, that the provision in § 16 that, in actions like this, "the findings and order of the Commission shall be prima facie evidence of the facts therein stated" is repugnant to the Constitution in that it infringes upon the right of trial by jury and operates as a denial of due process of law.

This provision only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury. At most, therefore, it is merely a rule of evidence. It does not abridge the right of trial by jury, or take away any of its incidents. Nor does it in anywise work a denial of due process of law. In principle it is not unlike the statutes in many of the states, whereby tax deeds are made prima facie evidence of the regularity of all the proceedings upon which their validity depends. Such statutes have been generally sustained. Pillow v. Roberts, 13 How. 472, 476, 14 L.Ed. 228, 230; Marx v. Hanthorn, 148 U.S. 172, 182, 37 L.Ed. 410, 413, 13 Sup.Ct.Rep. 508; Turpin v. Lemon, 187 U.S. 51, 59, 47 L.Ed. 70, 74, 23 Sup.Ct.Rep. 20; Cooley, Const.Lim. 7th Ed. 525, as have many other state and Federal enactments establishing other rebuttable presumptions. Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U.S. 35, 42, 55 L.Ed. 78, 80, 32 L.R.A.(N.S.) 226, 31 Sup.Ct.Rep. 136, Ann.Cas.1912A, 463, 2 N.C. C.A. 243; Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 81, 55 L.Ed. 369, 378, 31 Sup.Ct.Rep. 337, Ann.Cas.1912C, 160; Reitler v. Harris, 223 U.S. 437, 56 L.Ed. 497, 32 Sup.Ct.Rep. 248; Luria v. United States, 231 U.S. 9, 25, 58 L.Ed. 101, 106, 34 Sup.Ct.Rep. 10. An instructive case upon the subject is Holmes v. Hunt, 122 Mass. 505, 23 Am.Rep. 381, where, in an elaborate opinion by Chief Justice Gray, a statute making the report of an auditor prima facie evidence at the trial before a jury was held to be a legitimate exercise of legislative power over rules of evidence, and in nowise inconsistent with the constitutional right of trial by jury. And in Chicago, B. & Q. R. Co. v. Jones, 149 Ill. 361, 382, 24 L.R.A. 141, 4 Inters.Com.Rep. 683, 41 Am.St.Rep. 278, 37 N.E. 247, a like ruling was made in respect of a statutory provision similar to that now before us.

Complaint is made because the court refused to direct a verdict for the defendant, but of this it suffices to say that the ruling was undoubtedly right, because the plaintiff's evidence, including the find-

ings and orders of the Commission, tended to show every fact essential to a recovery upon both claims, and there was no opposing evidence.

The district court made an allowance of $20,000 as a fee for the plaintiff's attorneys, and directed that it be taxed and collected as part of the costs, the allowance being expressly apportioned in equal amounts between the services in the proceeding before the Commission and the services in the action in court. Complaint is made of this on the grounds (a) that the allowance is, in any view, excessive, (b) that the act does not authorize an allowance for services before the Commission, and (c) that the provision authorizing an allowance for services in the action is invalid as being purely arbitrary, and as imposing a penalty merely for failing to pay a debt.

Without considering whether the mere amount of an allowance under the statute can ever be re-examined here (see Rev.Stat. § 1011, Comp.Stat. § 1672; Martinton v. Fairbanks, 112 U.S. 670, 672, 28 L.Ed. 862, 863, 5 Sup.Ct.Rep. 321; W. W. Montague & Co. v. Lowry, 193 U.S. 38, 48, 48 L.Ed. 608, 612, 24 Sup.Ct.Rep. 307; New York C. & H. R. R. Co. v. Fraloff, 100 U.S. 24, 31, 25 L.Ed. 531, 534; New York, L. E. & W. R. Co. v. Winter, 143 U.S. 60, 75, 36 L.Ed. 71, 80, 12 Sup.Ct.Rep. 356, 8 Am.Neg.Cas. 690), we are clear that it cannot be in this instance. The record discloses that the allowance was predicated upon an exhibition of a transcript of the proceedings before the Commission and upon a statement made in open court, in the presence of counsel for the defendant, of the services rendered before the Commission and in the action. But the transcript and statement have not been made part of this record, and so we cannot know what was shown by them, and cannot judge of their bearing upon the amount of the allowance. Besides, it does not appear that the defendant offered any evidence tending to show what would be a reasonable allowance, or that it in any way objected or excepted to the amount of the allowance when it was made. The only exception reserved was addressed to the allowance of any fee for the services before the Commission or for those in the action. In this situation the defendant is not now in a position to claim that, as matter of fact, the allowance is excessive. Whether, as matter of law, it is objectionable, is another question.

Section 8 provides that a carrier violating the act shall be liable to any person injured for the damages he sustains, "together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case." And § 16, relating to actions to enforce claims for damages after the Commission has acted thereon, provides: "If the petitioner shall finally prevail, he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit."

In our opinion the services for which an attorney's fee is to be taxed and collected are those incident to the action in which the recovery is had, and not those before the Commission. This is not only implied in the words of the two provisions just quoted, but is suggested by the absence of any reference to proceedings anterior to the action. And that nothing more is intended becomes plain when we consider another provision in § 16, which requires the Commission, upon awarding damages, to make an order directing the carrier to pay the sum awarded "on or before a day named," and then declares that, if the carrier does not comply with the order "within the time limit," the claimant may proceed to collect the damages by suit. The Commission is not to allow a fee, but only to find the amount of the damages and fix a time for payment; and, if the carrier pays the award within the time named, no right to an attorney's fee arises. It is only when the damages are recovered by suit that a fee is to be allowed, and this is as true of the provision in § 8 as of that in § 16. The evident purpose is to charge the carrier with the costs and expenses entailed by a failure to pay without suit,—if the claimant finally prevails,—and to that end to tax as part of the costs in the suit wherein the recovery is had a reasonable fee for the services of the claimant's attorney in instituting and prosecuting that suit. It follows that the district court erred in matter of law in allowing a fee for services before the Commission.

The contention that the provision for an attorney's fee for services in the suit is invalid as being purely arbitrary, and as imposing a penalty for merely failing to pay a debt, is without merit. The provision is leveled against common carriers engaged in interstate commerce, a quasi public business, and is confined to cases wherein a recovery is had for damages resulting from the carrier's violation of some duty imposed in the public interest by the act to regulate commerce. Atlantic Coast Line R. Co. v. Riverside Mills, 219 U.S. 186, 208, 55 L.Ed. 167, 183, 31 L.R.A.(N.S.) 7, 31 Sup.Ct.Rep. 164. One of its purposes is to promote a closer observance by carriers of the duties so imposed; and that there is also a purpose to encourage the payment, without suit, of just demands, does not militate against its validity. Missouri, K. & T. R. Co. v. Cade, 233 U.S. 642, 651, 58 L.Ed. 1135, 1138, 34 Sup.Ct.Rep. 678, and cases cited. It requires that the fee be reasonable and fixed by the court, and does not permit it to be taxed against the carrier until the plaintiff's demand has been adjudged upon full inquiry to be valid. In these circumstances the validity of the provision is not doubtful, but certain.

It results from what has been said that the judgment of the Circuit Court of Appeals must be reversed and that of the District Court must be modified by eliminating the allowance of $10,000 as an attorney's fee for services before the Commission, and affirmed as so modified.

It is so ordered.

IN RE OPINION OF THE JUSTICES

Supreme Court of New Hampshire.
87 N.H. 492, 179 A. 344, 110 A.L.R. 819 (1933).

In the matter of the opinion of the Justices of the Supreme Court on a question submitted by resolution of the State Senate.

At the present session of the Legislature, the following resolution adopted by the Senate was transmitted to the justices of the Supreme Court on March 20, 1935:

"Be it resolved that the President of the Senate be and hereby is directed to obtain from the Honorable Justices of the Supreme Court their opinion upon the following question:

"Do the provisions of Senate Bill No. 37, an act relating to compensation for motor vehicle accidents, copy of which is annexed hereto and made a part of this resolution, violate any of the provisions of our state Constitution?"

The following answer was returned:

To the Honorable Senate:

The undersigned, the justices of the Supreme Court, answer your inquiry relative to Senate Bill No. 37 as follows:

The commission proposed by the bill is intended to be an executive tribunal, and not a court within the judiciary department of the state government. The bill proposes to confer upon the commission power to adjudicate certain disputes of a legal character between individuals. A question arises whether such power may be thus vested constitutionally.

Article 37 of the Bill of Rights in the state Constitution declares that the powers of the three branches of government, legislative, executive, and judicial, "ought to be kept as separate from, and independent of, each other, as the nature of free government will admit, or as is consistent with" the unity of the whole.

The reasons for this separation of governmental departments do not here need discussion beyond saying that when the Constitution was founded they were urgent and insistent. Historical antecedence and political philosophy made the demand for them imperative. No change in this fundamental principle has taken place. Opinion of the Justices, 85 N.H. 562, 569, 154 A. 217.

It is consistent with the Constitution that executive officers should be vested with some judicial power. It is not only convenient but necessary that it be given, in order that government may function. But it must be power needed to enable them to perform their executive duties. It may not be given them merely because it is thought that efficiency and convenience in the administration of a statute will be promoted thereby. "The government has no need of action in vio-

lation of the Constitution." Goodrich Falls Electric Co. v. Howard, 86 N.H. 512, 521, 171 A. 761, 766.

In the connection between the departments some overlapping is permissible, and there is a region of authority, alternative and concurrent, the boundaries of which are fixed by no final rule. As a rule which meets most situations, when an executive board has regulatory functions, it may hear and determine controversies which are incidental thereto, but if the duty is primarily to decide questions of legal right between private parties, the function belongs to the judiciary. Courts of justice, in their popular sense, may not be set up and established in the executive organization. They pertain exclusively to the branch of the judiciary.

Under this rule the grant or reservation of judicial review of the decisions of an administrative board does not change the character of the decisions. If they are of judicial nature, because performed in the exercise of the strict judicial function, an undertaking to give authority to the courts to review them and to correct the board's errors of law does not validate the board's authority. An administrative board may proclaim only administrative judgments. If they may be judicially reviewed, the right to have them reviewed does not transform them into judicial judgments, although the review and action therein is judicial. But a valid administrative judgment has the same force of obligation and finality as a judicial one. The view sometimes adopted that the right of appeal to the courts, either in wide or limited measure, saves action of an executive board from a valid charge of judicial invasion is not considered to be sound in principle. Authority to correct its errors does not alter the character of its undertaking. "The nature of the final act determines the nature of the previous inquiry." Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 227, 29 S.Ct. 67, 70, 53 L.Ed. 150.

The question how far there may be administrative finality may invoke constitutional issues, but not on the assignment of governmental powers.

The creation of an executive board is justified if its service is to determine and maintain a public right or interest. To accomplish its purposes judicial powers may be necessarily exerted. But they must concern matters of an executive character. They are proper if it may fairly be said that there is need of them in order to produce an efficient and effective administrative enforcement of the public interest.

By way of illustration, taxation is a branch of governmental maintenance. The general charge, control, and conduct of taxation is executive. An assessment against a taxpayer is a judgment (Jaffrey v. Smith, 76 N.H. 163, 171, 80 A. 504), and so is the abatement of a tax by selectmen (Melvin v. Town of Weare, 56 N.H. 436, 439). But they are administrative acts because they are performed in pursuance of executive duties. The authority of the courts to entertain appeals in

respect to them is judicial because the rights of litigants are then of sole consideration. Enforcement of the public interest is displaced by the administration of justice. The fact that the same question may be passed upon by both executive and judicial tribunals shows that it is not the question itself, but how it arises, that determines its allocation for determination.

When assessing boards determine contests between the state, or its subdivisions, and the taxpayers, they do so in their administrative capacity, and not as courts. If the contests are for practical purposes regarded as trials between litigants, they are so necessarily incident to the enforcement of taxation as to be a part of the enforcement. Performance of the duty to tax calls for an assessment upon each taxpayer, and to hear a taxpayer upon his assessment is within the duty. Whether the decision has finality, or whether there may be an appeal, general or upon restricted issues, to the courts, is to be determined by declared legislative policy. So far as appeals are authorized, their consideration is an exercise of the judicial arm of government.

A public interest to set up in the executive department a court of justice does not warrant a violation of the constitutional order prohibiting it. However much the vesting of the control of private litigation in an administrative board may be thought to aid in the maintenance of some public policy, it is not permissible. It is as much forbidden as it is to require a court to take on executive functions. An administrative officer in the discharge of his duties may have occasion to interpret and apply a law in order to enforce it, but he can have no such occasion in order to determine the rights of private litigants, since he may not be constitutionally authorized to take jurisdiction in respect to them.

The consent or willingness of the litigants to submit their disputes to the official or board is beside the point. The Constitution denying the power of the Legislature to confer jurisdiction, it may not be conferred by private authority. Action taken by consent might be valid as an unofficial arbitration, but the decision would have no force as a judgment. There would be no power to act in an official capacity.

One purpose of the bill is to induce motor vehicle insurance as an indirect protection to highway travelers, by imposing certain burdens upon uninsured owners. The argument is made that the Legislature, in its power to regulate, may prescribe the terms upon which motor vehicles may be operated on the highways. But the terms must be constitutional. A term that one must submit to an unconstitutional court is invalid. There can be no valid existence of the court. The Constitution regulates the power of the Legislature to regulate. The police power is not so predominant as to be uncontrolled.

Whatever the borderland of doubt and interchange, argument seems unneeded to demonstrate that the function of trying and deciding litigation is strictly and exclusively for the judiciary when it is between

private parties, neither of whom seeks to come under the protection of a public interest and to have it upheld and maintained for his benefit. The function cannot be executive unless executive activity may embrace litigation in general. If the proposed jurisdiction might be bestowed, the limits of executive authority would be almost without bounds and indefinite encroachment on judicial power would be possible.

In its plan for an executive tribunal to adjudicate private litigation the bill is considered to contain a fundamentally invalid proposal.

If the bill were redrafted to assign to the charge of the judiciary the litigation for which it seeks to provide, some parts of it might raise other constitutional issues. But there appears to be no occasion to consider it thus changed. The general plan of the bill resting upon a basic defect, it is understood that no answer is sought upon an assumption of a cure of the defect.

CROWELL v. BENSON

Supreme Court of the United States.
285 U.S. 22, 52 S.Ct. 285, 76 L.Ed. 598 (1932).

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

This suit was brought in the District Court to enjoin the enforcement of an award made by petitioner Crowell, as Deputy Commissioner of the United States Employees' Compensation Commission, in favor of the petitioner Knudsen and against the respondent Benson. The award was made under the Longshoremen's and Harbor Workers' Compensation Act (Act of March 4, 1927, c. 509, 44 Stat. 1424, U.S.C. tit. 33, §§ 901–950 [33 U.S.C.A. §§ 901–950]), and rested upon the finding of the deputy commissioner that Knudsen was injured while in the employ of Benson and performing service upon the navigable waters of the United States. The complainant alleged that the award was contrary to law for the reason that Knudsen was not at the time of his injury an employee of the complainant and his claim was not "within the jurisdiction" of the Deputy Commissioner. An amended complaint charged that the act was unconstitutional upon the grounds that it violated the due process clause of the Fifth Amendment, the provision of the Seventh Amendment as to trial by jury, that of the Fourth Amendment as to unreasonable search and seizure, and the provisions of article 3 with respect to the judicial power of the United States. The District Judge denied motions to dismiss and granted a hearing de novo upon the facts and the law, expressing the opinion that the act would be invalid if not construed to permit such a hearing. The case was transferred to the admiralty docket, answers were filed presenting the issue as to the fact of employment, and, the evidence of both parties having been heard, the District Court decided that Knudsen

was not in the employ of the petitioner and restrained the enforcement of the award. 33 F.2d 137; 38 F.2d 306. The decree was affirmed by the Circuit Court of Appeals [45 F.(2d) 66] and this Court granted writs of certiorari. 283 U.S. 814, 51 S.Ct. 353, 75 L.Ed. 1430.

The question of the validity of the act may be considered in relation to (1) its provisions defining substantive rights and (2) its procedural requirements.

First. The act has two limitations that are fundamental. It deals exclusively with compensation in respect of disability or death resulting "from an injury occurring upon the navigable waters of the United States" if recovery "through workmen's compensation proceedings may not validly be provided by State law," and it applies only when the relation of master and servant exists. Section 3. "Injury," within the statute, "means accidental injury or death arising out of and in the course of employment," and the term "employer" means one "any of whose employees are employed in maritime employment, in whole or in part," upon such navigable waters. Section 2 (2) (4), 33 USCA § 902 (2, 4). Employers are made liable for the payment to their employees of prescribed compensation "irrespective of fault as a cause for the injury." Section 4 (33 USCA § 904). The liability is exclusive, unless the employer fails to secure payment of the compensation. Section 5 (33 USCA § 905). The employer is required to furnish appropriate medical and other treatment. Section 7 (33 USCA § 907). The compensation for temporary or permanent disability, total or partial, according to the statutory classification, and in case of the death of the employee, is fixed, being based upon prescribed percentages of average weekly wages, and the persons to whom payments are to be made are designated. Sections 6, 8, 9, 10 (33 USCA §§ 906, 908, 909, 910). Employers must secure the payment of compensation by procuring insurance or by becoming self-insurers in the manner stipulated. Section 32 (33 USCA § 932). Failure to provide such security is a misdemeanor. Section 38 (33 USCA § 938).

As the act relates solely to injuries occurring upon the navigable waters of the United States, it deals with the maritime law, applicable to matters that fall within the admiralty and maritime jurisdiction (Const. Art. 3, § 2; Nogueira v. N. Y., N. H. & H. R. Co., 281 U.S. 128, 138, 50 S.Ct. 303, 74 L.Ed. 754), and the general authority of the Congress to alter or revise the maritime law which shall prevail throughout the country is beyond dispute. In limiting the application of the act to cases where recovery "through workmen's compensation proceedings may not validly be provided by State law," the Congress evidently had in view the decisions of this Court with respect to the scope of the exclusive authority of the national Legislature. The propriety of providing by federal statute for compensation of employees in such cases had been expressly recognized by this Court, and within its sphere the statute was designed to accomplish the same general purpose as the Workmen's Compensation Laws of the states. In defining

substantive rights, the act provides for recovery in the absence of fault, classifies disabilities resulting from injuries, fixes the range of compensation in case of disability or death, and designates the classes of beneficiaries. In view of federal power to alter and revise the maritime law, there appears to be no room for objection on constitutional grounds to the creation of these rights, unless it can be found in the due process clause of the Fifth Amendment. But it cannot be said that either the classifications of the statute or the extent of the compensation provided are unreasonable. In view of the difficulties which inhere in the ascertainment of actual damages, the Congress was entitled to provide for the payment of amounts which would reasonably approximate the probable damages. See Chicago, B. & Q. R. Co. v. Cram, 228 U.S. 70, 84, 33 S.Ct. 437, 57 L.Ed. 734; compare Missouri Pacific R. Co. v. Tucker, 230 U.S. 346, 348, 33 S.Ct. 961, 57 L.Ed. 1507. Liability without fault is not unknown to the maritime law, and, apart from this fact, considerations are applicable to the substantive provisions of this legislation, with respect to the relation of master and servant, similar to those which this Court has found sufficient to sustain workmen's compensation laws of the states against objections under the due process clause of the Fourteenth Amendment. New York Central R. Co. v. White, 243 U.S. 188, 37 S.Ct. 247, 61 L.Ed. 667, L.R.A.1917D, 1, Ann.Cas.1917D, 629; Mountain Timber Company v. Washington, 243 U.S. 219, 37 S.Ct. 260, 61 L.Ed. 685, Ann.Cas.1917D, 642; Ward & Gow v. Krinsky, 259 U.S. 503, 42 S.Ct. 529, 66 L.Ed. 1033, 28 A.L.R. 1207; Lower Vein Coal Co. v. Industrial Board, 255 U.S. 144, 41 S.Ct. 252, 65 L.Ed. 555; Madera Sugar Pine Company v. Industrial Accident Commission, 262 U.S. 499, 501, 502, 43 S.Ct. 604, 67 L.Ed. 1091; Sheehan Company v. Shuler, 265 U.S. 371, 44 S.Ct. 548, 68 L.Ed. 1061, 35 A.L.R. 1056; Dahlstrom Metallic Door Company v. Industrial Board, 284 U.S. 594, 52 S.Ct. 202, 76 L.Ed. 511, decided January 18, 1932. See Nogueira v. N. Y., N. H. & H. R. Co., supra, at pages 136, 137 of 281 U.S., 50 S.Ct. 303, 74 L.Ed. 754.

Second. The objections to the procedural requirements of the act relate to the extent of the administrative authority which it confers. The administration of the act—"except as otherwise specifically provided"—was given to the United States Employees' Compensation Commission, which was authorized to establish compensation districts, appoint deputy commissioners, and make regulations. Sections 39, 40 (33 USCA §§ 939, 940). Claimants must give written notice to the deputy commissioner and to the employer of the injury or death within thirty days thereafter; the deputy commissioner may excuse failure to give such notice for satisfactory reasons. Section 12 (33 USCA § 912). If the employer contests the right to compensation, he is to file notice to that effect. Section 14 (d) 33 USCA § 914 (d). A claim for compensation must be filed with the deputy commissioner within a prescribed period, and it is provided that the deputy commissioner shall have full authority to hear and determine all questions in respect to

the claim. Sections 13, 19 (a), 33 USCA §§ 913, 919 (a). Within ten days after the claim is filed, the deputy commissioner, in accordance with regulations prescribed by the Commission, must notify the employer and any other person who is considered by the deputy commissioner to be an interested party. The deputy commissioner is required to make, or cause to be made, such investigations as he deems to be necessary, and upon application of any interested party must order a hearing, upon notice, at which the claimant and the employer may present evidence. Employees claiming compensation must submit to medical examination. Section 19 (33 USCA § 919). In conducting investigations and hearings, the deputy commissioner is not bound by common law or statutory rules of evidence, or by technical or formal rules or procedure, except as the act provides, but he is to proceed in such manner "as to best ascertain the rights of the parties." Section 23 (a), 33 USCA § 923 (a). He may issue subpoenas, administer oaths, compel the attendance and testimony of witnesses, the production of documents or other evidence or the taking of depositions, and may do all things conformable to law which may be necessary to enable him effectively to discharge his duties. Proceedings may be brought before the appropriate federal court to punish for misbehavior or contumacy as in case of contempt. Section 27 (33 USCA § 927). Hearings before the deputy commissioner are to be public and reported stenographically, and the Commission is to provide by regulation for the preparation of a record. Section 23 (b). Compensation orders are to be filed in the office of the deputy commissioner, and copies must be sent to the claimant and employer. Section 19. The act provides that it shall be presumed, in the absence of substantial evidence to the contrary, that the claim comes within the provisions of the act, that sufficient notice of claim has been given, that the injury was not occasioned solely by the intoxication of the injured employee, or by the willful intention of such employee to injure or kill himself or another. Section 20 (33 USCA § 920). A compensation order becomes effective when filed, and, unless proceedings are instituted to suspend it or set it aside it becomes final at the expiration of thirty days. Section 21 (a), 33 USCA § 921 (a). If there is a change in conditions, the order may be modified or a new order made. Section 22 (33 USCA § 922). In case of default for thirty days in the payment of compensation, application may be made to the deputy commissioner for a supplementary order declaring the amount in default. Such an order is to be made after investigation, notice, and hearing, as in the case of claims. Upon filing a certified copy of the supplementary order with the clerk of the federal court, as stated, judgment is to be entered for the amount declared in default, if such supplementary order "is in accordance with law." Review of the judgment may be had as in civil suits for damages at common law, and the judgment may be enforced by writ of execution. Section 18 (33 USCA § 918).

The act further provides that, if a compensation order is "not in accordance with law," it "may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest" against the deputy commissioner making the order and instituted in the federal District Court for the judicial district in which the injury occurred. Payment is not to be stayed pending such proceedings unless, on hearing after notice, the court allows the stay on evidence showing that the employer would otherwise suffer irreparable damage. Section 21 (b), 33 USCA § 921 (b). Beneficiaries of awards or the deputy commissioner may apply for enforcement to the federal District Court, and, if the court determines that the order "was made and served in accordance with law," obedience may be compelled by writ of injunction or other proper process. Section 21 (c).

As the claims which are subject to the provisions of the act are governed by the maritime law as established by the Congress and are within the admiralty jurisdiction, the objection raised by the respondent's pleading as to the right to a trial by jury under the Seventh Amendment is unavailing (Waring v. Clarke, 5 How. 441, 459, 460, 12 L.Ed. 226), and that under the Fourth Amendment is neither explained nor urged. The other objections as to procedure invoke the due process clause and the provision as to the judicial power of the United States.

(1) The contention under the due process clause of the Fifth Amendment relates to the determination of questions of fact. Rulings of the deputy commissioner upon questions of law are without finality. So far as the latter are concerned, full opportunity is afforded for their determination by the federal courts through proceedings to suspend or to set aside a compensation order (section 21 (b), by the requirement that judgment is to be entered on a supplementary order declaring default only in case the order follows the law (section 18), and by the provision that the issue of injunction or other process in a proceeding by a beneficiary to compel obedience to a compensation order is dependent upon a determination by the court that the order was lawfully made and served (section 21 (c). Moreover, the statute contains no express limitation attempting to preclude the court, in proceedings to set aside an order as not in accordance with law, from making its own examination and determination of facts whenever that is deemed to be necessary to enforce a constitutional right properly asserted. See Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287, 289, 40 S.Ct. 527, 528, 64 L.Ed. 908; Ng Fung Ho v. White, 259 U.S. 276, 284, 285, 42 S.Ct. 492, 66 L.Ed. 938; Prendergast v. New York Telephone Co., 262 U.S. 43, 50, 43 S.Ct. 466, 67 L.Ed. 853; Tagg Bros. & Moorhead v. United States, 280 U.S. 420, 443, 444, 50 S.Ct. 220, 74 L.Ed. 524; Phillips v. Commissioner, 283 U.S. 589, 600, 51 S.Ct. 608, 75 L.Ed. 1289. As the statute is to be construed so as to support rather than to

defeat it, no such limitation is to be implied. Panama Railroad Co. v. Johnson, 264 U.S. 375, 390, 44 S.Ct. 391, 68 L.Ed. 748.

Apart from cases involving constitutional rights to be appropriately enforced by proceedings in court, there can be no doubt that the act contemplates that as to questions of fact, arising with respect to injuries to employees within the purview of the act, the findings of the deputy commissioner, supported by evidence and within the scope of his authority, shall be final. To hold otherwise would be to defeat the obvious purpose of the legislation to furnish a prompt, continuous, expert, and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task. The object is to secure within the prescribed limits of the employer's liability an immediate investigation and a sound practical judgment, and the efficacy of the plan depends upon the finality of the determinations of fact with respect to the circumstances, nature, extent, and consequences of the employee's injuries and the amount of compensation that should be awarded. And this finality may also be regarded as extending to the determination of the question of fact whether the injury "was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another." While the exclusion of compensation in such cases is found in what are called "coverage" provisions of the act (section 3 [33 USCA § 903]), the question of fact still belongs to the contemplated routine of administration, for the case is one of employment within the scope of the act, and the cause of the injury sustained by the employee as well as its character and effect must be ascertained in applying the provisions for compensation. The use of the administrative method for these purposes, assuming due notice, proper opportunity to be heard, and that findings are based upon evidence, falls easily within the principle of the decisions sustaining similar procedure against objections under the due process clauses of the Fifth and Fourteenth Amendments.

The statute provides for notice and hearing, and an award made without proper notice, or suitable opportunity to be heard, may be attacked and set aside as without validity. The objection is made that, as the deputy commissioner is authorized to prosecute such inquiries as he may consider necessary, the award may be based wholly or partly upon an ex parte investigation and upon unknown sources of information, and that the hearing may be merely a formality. The statute, however, contemplates a public hearing, and regulations are to require "a record of the hearings and other proceedings before the deputy commissioners." Section 23 (b), 33 USCA § 923 (b). This implies that all proceedings by the deputy commissioner upon a particular claim shall be appropriately set forth, and that whatever facts he may ascertain and their sources shall be shown in the record and be open to challenge and opposing evidence. Facts conceivably known

to the deputy commissioner, but not put in evidence so as to permit scrutiny and contest, will not support a compensation order. Interstate Commerce Commission v. Louisville & Nashville R. R. Co., 227 U.S. 88, 93, 33 S.Ct. 185, 57 L.Ed. 431; The Chicago Junction Case, 264 U.S. 258, 263, 44 S.Ct. 317, 68 L.Ed. 667; United States v. Abilene & Southern Railway Co., 265 U.S. 274, 288, 44 S.Ct. 565, 68 L.Ed. 1016. An award not supported by evidence in the record is not in accordance with law. But the fact that the deputy commissioner is not bound by the rules of evidence which would be applicable to trials in court or by technical rules of procedure (section 23 (a), 33 USCA § 923 (a) does not invalidate the proceeding, provided substantial rights of the parties are not infringed. Interstate Commerce Commission v. Baird, 194 U.S. 25, 44, 24 S.Ct. 563, 48 L.Ed. 860; Interstate Commerce Commission v. Louisville & Nashville R. R. Co., supra; Spiller v. Atchison, T. & S. F. Ry. Co., 253 U.S. 117, 131, 40 S.Ct. 466, 64 L.Ed. 810; United States v. Abilene & Southern Railway Co., supra; Tagg Bros. & Moorhead v. United States, supra, at page 442 of 280 U.S., 50 S.Ct. 220.

(2) The contention based upon the judicial power of the United States, as extended "to all Cases of admiralty and maritime Jurisdiction" (Const. art. 3), presents a distinct question. In Murray's Lessee v. Hoboken Land & Improvement Company, 18 How. 272, 284, 15 L.Ed. 372, this Court, speaking through Mr. Justice Curtis, said: "To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination."

The question in the instant case, in this aspect, can be deemed to relate only to determinations of fact. The reservation of legal questions is to the same court that has jurisdiction in admiralty, and the mere fact that the court is not described as such is unimportant. Nor is the provision for injunction proceedings (section 21 (b) open to objection. The Congress was at liberty to draw upon another system of procedure to equip the court with suitable and adequate means for enforcing the standards of the maritime law as defined by the act. The Genesee Chief, 12 How. 443, 459, 460, 13 L.Ed. 1058. Compare Panama R. R. Co. v. Johnson, supra, at page 388 of 264 U.S., 44 S.Ct. 391. By statute and rules, courts of admiralty may be empowered to grant injunctions, as in the case of limitation of liability proceedings. Hartford Accident & Indemnity Co. v. Southern Pacific Co., 273 U.S. 207, 218, 47 S.Ct. 357, 71 L.Ed. 612. See, also, Marine Transit Corporation v. Dreyfus, 284 U.S. 263, 52 S.Ct. 166, 76 L.Ed. 282, decided January 4, 1932. The Congress did not attempt to define questions of law, and the generality of the description leaves no doubt of the intention to reserve to the Federal court full authority to pass upon all matters which this Court had held to fall within that category. There is

thus no attempt to interfere with, but rather provision is made to facilitate, the exercise by the court of its jurisdiction to deny effect to any administrative finding which is without evidence, or "contrary to the indisputable character of the evidence," or where the hearing is "inadequate," or "unfair," or arbitrary in any respect. Interstate Commerce Commission v. Louisville R. R. Co., supra, at pages 91, 92 of 227 U.S., 33 S.Ct. 185; Tagg Bros. & Moorhead v. United States, supra.

As to determinations of fact, the distinction is at once apparent between cases of private right and those which arise between the government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments. The Court referred to this distinction in Murray's Lessee v. Hoboken Land & Improvement Company, supra, pointing out that "there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." Thus the Congress, in exercising the powers confided to it, may establish "legislative" courts (as distinguished from "constitutional courts in which the judicial power conferred by the Constitution can be deposited") which are to form part of the government of territories or of the District of Columbia, or to serve as special tribunals "to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it." But "the mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals." Ex parte Bakelite Corporation, 279 U.S. 438, 451, 49 S.Ct. 411, 413, 73 L.Ed. 789. Familiar illustrations of administrative agencies created for the determination of such matters are found in connection with the exercise of the congressional power as to interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions, and payments to veterans.

The present case does not fall within the categories just described, but is one of private right, that is, of the liability of one individual to another under the law as defined. But, in cases of that sort, there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges. On the common-law side of the federal courts, the aid of juries is not only deemed appropriate but is required by the Constitution itself. In cases of equity and admiralty, it is historic practice to call to the assistance of the courts, without the consent of the parties, masters, and commissioners or assessors, to pass upon certain classes of questions, as, for example, to take and state an account or to find the amount of damages. While the reports of mas-

ters and commissioners in such cases are essentially of an advisory nature, it has not been the practice to disturb their findings when they are properly based upon evidence, in the absence of errors of law, and the parties have no right to demand that the court shall redetermine the facts thus found. In admiralty, juries were anciently in use not only in criminal cases but apparently in civil cases also. The Act of February 26, 1845 (c. 20, 5 Stat. 726), purporting to extend the admiralty jurisdiction of the federal District Courts to certain cases arising on the Great Lakes, gave the right to "trial by jury of all facts put in issue in such suits, where either party shall require it." After the decision in the case of The Genesee Chief, supra, holding that the federal District Courts possessed general jurisdiction in admiralty over the lakes, and navigable waters connecting them, under the Constitution and the Judiciary Act of 1789 (chapter 20, § 9, 1 Stat. pp. 76, 77), this Court regarded the Enabling Act of 1845 as "obsolete and of no effect, with the exception of the clause which gives to either party the right of trial by jury when requested." The Eagle, 8 Wall. 15, 25, 19 L.Ed. 365. And this provision, the court said, was "rather a mode of exercising jurisdiction than any substantial part of it." See R. S. § 566, U. S. C., tit. 28, § 770, 28 USCA § 770. Chief Justice Taney, in delivering the opinion of the court in the case of The Genesee Chief, supra, referring to this requirement, thus broadly stated the authority of Congress to change the procedure in courts of admiralty.

"The power of Congress to change the mode of proceeding in this respect in its courts of admiralty, will, we suppose, hardly be questioned. The Constitution declares that the judicial power of the United States shall extend to 'all cases of admiralty and maritime jurisdiction.' But it does not direct that the court shall proceed according to ancient and established forms, or shall adopt any other form or mode of practice. The grant defines the subjects to which the jurisdiction may be extended by Congress. But the extent of the power as well as the mode of proceeding in which that jurisdiction is to be exercised, like the power and practice in all the other courts of the United States, are subject to the regulation of Congress, except where that power is limited by the terms of the Constitution, or by necessary implication from its language. In admiralty and maritime cases there is no such limitation as to the mode of proceeding, and Congress may therefore in cases of that description, give either party right of trial by jury, or modify the practice of the court in any other respect that it deems more conducive to the administration of justice."

It may also be noted that, while on an appeal in admiralty cases "the facts, as well as the law, would be subjected to review and retrial," this Court has recognized the power of the Congress "to limit the effect of an appeal to a review of the law as applicable to facts finally determined below." The Francis Wright, 105 U.S. 381, 386, 26 L.Ed. 1100; The Connemara (Sinclair v. Cooper) 108 U.S. 352, 359, 2

S.Ct. 754, 27 L.Ed. 751. Compare Luckenbach S. S. Co. v. United States, 272 U.S. 533, 536, 537, 47 S.Ct. 186, 71 L.Ed. 394.

In deciding whether the Congress, in enacting the statute under review, has exceeded the limits of its authority to prescribe procedure in cases of injury upon navigable waters, regard must be had, as in other cases where constitutional limits are invoked, not to mere matters of form, but to the substance of what is required. The statute has a limited application, being confined to the relation of master and servant, and the method of determining the questions of fact, which arise in the routine of making compensation awards to employees under the act, is necessary to its effective enforcement. The act itself, where it applies, establishes the measure of the employer's liability, thus leaving open for determination the questions of fact as to the circumstances, nature, extent, and consequences of the injuries sustained by the employee for which compensation is to be made in accordance with the prescribed standards. Findings of fact by the deputy commissioner upon such questions are closely analogous to the findings of the amount of damages that are made according to familiar practice by commissioners or assessors, and the reservation of full authority to the court to deal with matters of law provides for the appropriate exercise of the judicial function in this class of cases. For the purposes stated, we are unable to find any constitutional obstacle to the action of the Congress in availing itself of a method shown by experience to be essential in order to apply its standards to the thousands of cases involved, thus relieving the courts of a most serious burden while preserving their complete authority to insure the proper application of the law.[1]

NATIONAL LABOR RELATIONS ACT § 10(c)

29 U.S.C. § 160(c).

(c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, *including reinstatement of employees with or without back pay,* as will effectuate the policies of this chapter. Such order may further require such person to make reports from time to time showing the

[1] Footnotes of the court have been omitted. For remainder of this opinion, see *infra* at p. 785.

extent to which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. [Italics added]

EXCERPT FROM NATIONAL LABOR RELATIONS BOARD v. JONES AND LAUGHLIN STEEL CORP.

Supreme Court of the United States.
301 U.S. 1, 47–8, 57 S.Ct. 615, 629–30, 81 L.Ed. 893, 108 A.L.R. 1352 (1937).

The order of the Board required the reinstatement of the employees who were found to have been discharged because of their "union activity" and for the purpose of "discouraging membership in the union." That requirement was authorized by the act. Section 10(c), 29 U.S.C.A. § 160(c). In Texas & N. O. R. Co. v. Railway & S. S. Clerks, supra, a similar order for restoration to service was made by the court in contempt proceedings for the violation of an injunction issued by the court to restrain an interference with the right of employees as guaranteed by the Railway Labor Act of 1926. The requirement of restoration to service of employees discharged in violation of the provisions of that act was thus a sanction imposed in the enforcement of a judicial decree. We do not doubt that Congress could impose a like sanction for the enforcement of its valid regulation. The fact that in the one case it was a judicial sanction, and in the other a legislative one, is not an essential difference in determining its propriety.

Respondent complains that the Board not only ordered reinstatement but directed the payment of wages for the time lost by the discharge, less amounts earned by the employee during that period. This part of the order was also authorized by the act. Section 10(c). It is argued that the requirement is equivalent to a money judgment and hence contravenes the Seventh Amendment with respect to trial by jury. The Seventh Amendment provides that "In suits at common law, where the value in controversy shall exceed twenty dollars; the right of trial by jury shall be preserved." The amendment thus preserves the right which existed under the common law when the amendment was adopted. Shields v. Thomas, 18 How. 253, 262, 15 L.Ed. 368; In re Wood, 210 U.S. 246, 258, 28 S.Ct. 621, 52 L.Ed. 1046; Dimick v. Schiedt, 293 U.S. 474, 476, 55 S.Ct. 296, 79 L.Ed. 603, 95 A.L.R. 1150; Baltimore & Carolina Line v. Redman, 295 U.S. 654, 657, 55 S.Ct. 890, 891, 79 L.Ed. 1636. Thus it has no application to cases where recovery of money damages is an incident to equitable relief even though damages might have been recovered in an action

at law. Clark v. Wooster, 119 U.S. 322, 325, 7 S.Ct. 217, 30 L.Ed. 392; Pease v. Rathbun-Jones Engineering Co., 243 U.S. 273, 279, 37 S.Ct. 283, 61 L.Ed. 715, Ann.Cas.1918C, 1147. It does not apply where the proceeding is not in the nature of a suit at common law. Guthrie National Bank v. Guthrie, 173 U.S. 528, 537, 19 S.Ct. 513, 43 L.Ed. 796.

The instant case is not a suit at common law or in the nature of such a suit. The proceeding is one unknown to the common law. It is a statutory proceeding. Reinstatement of the employee and payment for time lost are requirements imposed for violation of the statute and are remedies appropriate to its enforcement. The contention under the Seventh Amendment is without merit.

Our conclusion is that the order of the Board was within its competency and that the act is valid as here applied. The judgment of the Circuit Court of Appeals is reversed and the cause is remanded for further proceedings in conformity with this opinion. It is so ordered.

Reversed and remanded.[j]

SECTION 2. THE NATURE OF THE HEARING REQUIRED [a]

A. The Elements of a Fair Hearing—In General

MORGAN v. UNITED STATES

Supreme Court of the United States.
298 U.S. 468, 56 S.Ct. 906, 80 L.Ed. 1288 (1936).

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

These are fifty suits, consolidated for the purpose of trial, to restrain the enforcement of an order of the Secretary of Agriculture, fixing the maximum rates to be charged by market agencies for buying and selling livestock at the Kansas City Stock Yards. Packers and Stockyards Act 1921, 42 Stat. 159, 7 U.S.C. §§ 181–229, 7 U.S.C.A. § 181 et seq.

The proceeding was instituted by an order of the Secretary of Agriculture in April, 1930, directing an inquiry into the reasonableness of

[j] See Agwilines, Inc. v. National Labor Relations Board, 87 F.2d 146, 150–1 (C.C.A.5th, 1936); *Cf.* Porter v. Warner Holding Co., 328 U.S. 395, 66 S.Ct. 1086, — L.Ed. — (1946) (In suit in U. S. District Court by Administrator under Emergency Price Control Act of 1942 to enjoin landlord from collecting excessive rents, court may also direct landlord to make restitution to tenants of excess rents previously collected)

[a] See Chapter V, Part II, Section 2, B, *supra*, p. 407.

existing rates. Testimony was taken and an order prescribing rates followed in May, 1932. An application for rehearing, in view of changed economic conditions, was granted in July, 1932. After the taking of voluminous testimony, which was concluded in November, 1932, the order in question was made on June 14, 1933. Rehearing was refused on July 6, 1933.

Plaintiffs then brought these suits attacking the order, so far as it prescribed maximum charges for selling livestock, as illegal and arbitrary and as depriving plaintiffs of their property without due process of law in violation of the Fifth Amendment of the Constitution. The District Court of three judges entered decrees sustaining the order and dismissing the bills of complaint. 8 F.Supp. 766. Motions for rehearing were denied, and, by stipulation, the separate decrees were set aside and a joint and final decree was entered to the same effect. Plaintiffs bring this direct appeal. 7 U.S.C. § 217, 7 U.S.C.A. § 217; 28 U.S.C. § 47, 28 U.S.C.A. § 47.

On the merits, plaintiffs assert that the ultimate basis for the reduction in commission rates is the Secretary's opinion that there are too many market agencies, too many salesmen, and too much competition in the business; that the Secretary has departed entirely from the evidence as to the actual cost of employing salesmen in selling cattle at these yards and has made an allowance for salaries which is based on pure speculation and is wholly inadequate to meet the cost of the service; that he has substituted in place of his accountants' figures as to actual expenditures, with respect to the item entitled "Business Getting and Maintaining Expense," a hypothetical allowance greatly less than actual cost; and that the Secretary has thus made findings without evidence and an order, essentially arbitrary, which prescribes unreasonable rates. The Government answers that, while the Secretary is not authorized expressly to prescribe or limit the number of firms that may engage in the market agency business, he is under a duty to take cognizance of evidence tending to show that, under present competitive conditions, certain costs actually incurred are unreasonable; that, in determining what are just and reasonable rates, he must give consideration to evidence of the excessiveness of costs, and, if such evidence shows that there are many market agencies not receiving a sufficient volume of business to entitle their costs to be regarded as reasonable, the Secretary must take cognizance of that fact; that it was in this view that the Secretary made certain findings as to the inadequacy of the present business at the stockyards to support economically all the firms now striving to make a profit; that his findings, supported by evidence, were directly pertinent to the determination of reasonable costs, and, so determining, the Secretary was authorized to fix the rates prescribed in his order.

Before reaching these questions, we meet at the threshold of the controversy plaintiffs' additional contention that they have not been accorded the hearing which the statute requires. They rightly assert

that the granting of that hearing is a prerequisite to the making of a valid order. The statute provides (42 Stat. 159, 166, § 310; 7 U.S.C. § 211, 7 U.S.C.A. § 211):

"Sec. 310. Whenever after full hearing upon a complaint made as provided in section 309 [section 210 of this chapter], or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—

"(a) May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what regulation or practice is or will be just, reasonable, and nondiscriminatory to be thereafter followed."

The allegations as to the failure to give a proper hearing are set forth in paragraph IV of the bill of complaint, quoted in full in the margin.[1] The allegations in substance are: That separate hearings

[1] Paragraph IV of the bill of complaint is as follows:

"Petitioner states that the Order is null and void in that this petitioner was denied a full hearing before the Secretary upon the matters and things referred to in the Order of Inquiry as provided for in said Packers and Stockyards Act, 1921, and the enforcement of the Order would take Petitioner's property without due process of law, in violation of the Fifth Amendment of the Constitution of the United States, in that:

"(a) The Secretary overruled and denied the request of this petitioner for a separate, individual and independent hearing apart from any other of the respondents named in said Notice of Inquiry to the prejudice of this petitioner.

"(b) This petitioner requested at the conclusion of the hearings held under said Notice of Inquiry before the said John C. Brooke, that said Examiner prepare a tentative report upon the evidence to be presented to the petitioner and the Secretary subject to oral argument as to any exceptions thereto which the petitioner might care to present, so that in this manner a hearing might be had before the Secretary without undue inconvenience to the Secretary, but said request was denied and no tentative report was exhibited to petitioner and no oral argument upon the issues presented by said Order of Inquiry and the evidence taken by said Examiner was at any time had before the Secretary.

"(c) The Secretary, without warrant or authority of law, delegated to the said R. W. Dunlap and Rexford G. Tugwell, purporting to be at the times hereinbefore named Acting Secretaries of Agriculture, authorities and powers vested solely in the Secretary involving the exercise of discretion and the determination of issues in respect to the justice, reasonableness and lawfulness of the rates and charges of this petitioner. At each and all of the times hereinabove referred to, when the said oral arguments were presented after the original hearing in said proceeding and after the re-hearing thereof, the then Secretary of Agriculture was in Washington, D. C., at his office in the Department of Agriculture, and at said time was neither sick, absent, nor from any other cause disabled in the performance of official duties of said Secretary of Agriculture, and a purported appointment of any other person as Act-

were not accorded to the respective respondents (plaintiffs here). That, at the conclusion of the taking of the testimony before an examiner, a request was made that the examiner prepare a tentative report, which should be subject to oral argument and exceptions, so that a hearing might be had before the Secretary without undue inconvenience to him, but that the request was denied, and no tentative report was exhibited to plaintiffs and no oral argument upon the issues presented by the order of inquiry and the evidence was at any time had before the Secretary. That the Secretary, without warrant of law, delegated to Acting Secretaries the determination of issues with respect to the reasonableness of the rates involved. That, when the oral arguments were presented after the original hearing, and after the rehearing, the Secretary was neither sick, absent, nor otherwise disabled, but was at his office in the Department of Agriculture, and the appointment of any other person as Acting Secretary was illegal. That the Secretary at the time he signed the order in question had not personally heard or read any of the evidence presented at any hearing in connection with the proceeding, and had not heard or considered oral arguments relating thereto or briefs submitted on behalf of the plaintiffs, but that the sole information of the Secretary with respect to the proceeding was derived from consultation with employees in the Department of Agriculture out of the presence of the plaintiffs or any of their representatives.

On motion of the government, the District Court struck out all the allegations in paragraph IV of the bill of complaint, and the plaintiffs were thus denied opportunity to require an answer to these allegations or to prove the facts alleged.

Certain facts appear of record. The testimony was taken before an examiner. At its conclusion, counsel for respondents stated "that he would continue to demand that the Secretary hear personally the argument of the evidence in behalf of the individual respondents, or

ing Secretary of Agriculture was illegal, null and void under the laws of the United States.

"(d) Petitioner states on information and belief, and, therefore, alleges the fact to be, that the Secretary at the time said Order was signed by him had not personally heard or read any of the evidence presented at any hearing in connection with this proceeding and had not heard or considered oral arguments relating thereto submitted on behalf of this petitioner and had (sic) read or considered any briefs submitted by petitioner in this proceeding, but that the sole information of said Secretary with respect to said proceeding was derived from consultation with employees in the Department of Agriculture, out of the presence of this petitioner or any representative of this petitioner.

"By reason of each and all of the foregoing facts, petitioner avers that said course of action so taken by the Secretary was without warrant and authority of law, and by reason of each and all of the acts and omissions in this paragraph referred to (including the denial of petitioner's request for a separate hearing and the overruling of objections) this petitioner has been denied the 'full hearing' before the Secretary to which the petitioner is entitled under said Packers and Stockyards Act, 1921, and under the Constitution of the United States."

at least have some definite course of procedure adopted whereby the examiner, or some one else, should formulate a report on the evidence so that the respondents could have the character of hearing and right to present their side of the issues in this case, which they believe the law entitles them to." The government does not suggest that this request was granted, and plaintiffs say that it was denied. Oral argument upon the evidence was had before the Acting Secretary of Agriculture. Subsequently, brief was filed on plaintiffs' behalf. Thereafter, reciting "careful consideration of the entire record in this proceeding," findings of fact and conclusions, and an order prescribing rates were signed by the Secretary of Agriculture.

First.—The Packers and Stockyards Act makes the provisions of all laws relating to the "suspending or restraining the enforcement" or the "setting aside" of the orders of the Interstate Commerce Commission applicable to the "jurisdiction, powers, and duties of the Secretary" in enforcing the provisions of the act. Section 316; 7 U.S.C. § 217, 7 U.S.C.A. § 217. These suits for the review of the administrative action were thus directly authorized, and appeal lies under the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 219, 220; 28 U.S.C. § 47, 28 U.S.C.A. § 47. Tagg Bros. & Moorhead v. United States, 280 U.S. 420, 443, 50 S.Ct. 220, 74 L.Ed. 524; Acker v. United States, 298 U.S. 426, 56 S.Ct. 824, 80 L.Ed. 1257, decided May 18, 1936. All questions touching the regularity and validity of the proceeding before the Secretary are open to review. United States v. Abilene & Southern Railway Co., 265 U.S. 274, 286–290, 44 S.Ct. 565, 68 L.Ed. 1016; Florida v. United States, 282 U.S. 194, 212–215, 51 S.Ct. 119, 75 L.Ed. 291. When the Secretary acts within the authority conferred by the statute, his findings of fact are conclusive. Tagg Bros. & Moorhead v. United States, supra; St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 56 S.Ct. 720, 80 L.Ed. 1033, decided April 27, 1936; Acker v. United States, supra. But, in determining whether in conducting an administrative proceeding of this sort the Secretary has complied with the statutory prerequisites, the recitals of his procedure cannot be regarded as conclusive. Otherwise the statutory conditions could be set at naught by mere assertion. If upon the facts alleged the "full hearing" required by the statute was not given, plaintiffs were entitled to prove the facts and have the Secretary's order set aside. Nor is it necessary to go beyond the terms of the statute in order to consider the constitutional requirement of due process as to notice and hearing. For the statute itself demands a full hearing, and the order is void if such a hearing was denied. Interstate Commerce Commission v. Louisville & Nashville R. R. Co., 227 U.S. 88, 91, 33 S.Ct. 185, 57 L.Ed. 431; United States v. Abilene & Southern Railway Co., supra; Florida v. United States, supra; United States v. Baltimore & O. R. R. Co., 293 U.S. 454, 464, 55 S.Ct. 268, 79 L.Ed. 587.

Second.—The outstanding allegation, which the District Court struck out, is that the Secretary made the rate order without having heard or read any of the evidence, and without having heard the oral arguments or having read or considered the briefs which the plaintiffs submitted. That the only information which the Secretary had as to the proceeding was what he derived from consultation with employees of the Department.

The other allegations of the stricken paragraph do not go to the root of the matter. Thus it cannot be said that the failure to hear the respondents separately was an abuse of discretion. Again, while it would have been good practice to have the examiner prepare a report and submit it to the Secretary and the parties, and to permit exceptions and arguments addressed to the points thus presented—a practice found to be of great value in proceedings before the Interstate Commerce Commission—we cannot say that that particular type of procedure was essential to the validity of the hearing. The statute does not require it, and what the statute does require relates to substance and not form.

Nor should the fundamental question be confused with one of mere delegation of authority. The government urges that the Acting Secretary who heard the oral argument was in fact the Assistant Secretary of Agriculture, whose duties are prescribed by the Act of February 9, 1889, § 2 (5 U.S.C. § 517, 5 U.S.C.A. § 517), providing for his appointment and authorizing him to perform such duties in the conduct of the business of the Department of Agriculture as may be assigned to him by the Secretary. If the Secretary had assigned to the Assistant Secretary the duty of holding the hearing, and the Assistant Secretary accordingly had received the evidence taken by the examiner, had heard argument thereon, and had then found the essential facts and made the order upon his findings, we should have had simply the question of delegation. But, while the Assistant Secretary heard argument, he did not make the decision. The Secretary who, according to the allegation, had neither heard nor read evidence or argument, undertook to make the findings and fix the rates. The Assistant Secretary, who had heard, assumed no responsibility for the findings or order, and the Secretary, who had not heard, did assume that responsibility.

We may likewise put aside the contention as to the circumstances in which an Acting Secretary may take the place of his chief. In the course of administrative routine, the disposition of official matters by an Acting Secretary is frequently necessary, and the integrity of administration demands that credit be given to his action in that capacity. We have no such question here. The Acting Secretary did not assume to make the order.

Third.—What is the essential quality of the proceeding under review, and what is the nature of the hearing which the statute prescribes?

The proceeding is not one of ordinary administration, conformable to the standards governing duties of a purely executive character. It is a proceeding looking to legislative action in the fixing of rates of market agencies. And, while the order is legislative and gives to the proceeding its distinctive character (Louisville & Nashville R. R. Co. v. Garrett, 231 U.S. 298, 307, 34 S.Ct. 48, 58 L.Ed. 229), it is a proceeding which by virtue of the authority conferred has special attributes. The Secretary, as the agent of Congress in making the rates, must make them in accordance with the standards and under the limitations which Congress has prescribed. Congress has required the Secretary to determine, as a condition of his action, that the existing rates are or will be "unjust, unreasonable, or discriminatory." If and when he so finds, he may "determine and prescribe" what shall be the just and reasonable rate, or the maximum or minimum rate, thereafter to be charged. That duty is widely different from ordinary executive action. It is a duty which carries with it fundamental procedural requirements. There must be a full hearing. There must be evidence adequate to support pertinent and necessary findings of fact. Nothing can be treated as evidence which is not introduced as such. United States v. Abilene & Southern Railway Co., supra. Facts and circumstances which ought to be considered must not be excluded. Facts and circumstances must not be considered which should not legally influence the conclusion. Findings based on the evidence must embrace the basic facts which are needed to sustain the order. Interstate Commerce Commission v. Louisville & Nashville R. R. Co., supra; Chicago Junction Case, 264 U.S. 258, 263, 44 S.Ct. 317, 68 L.Ed. 667; United States v. Abilene & Southern Railway Co., supra; Florida v. United States, supra; United States v. Baltimore & O. R. R. Co., supra.

A proceeding of this sort requiring the taking and weighing of evidence, determinations of fact based upon the consideration of the evidence, and the making of an order supported by such findings, has a quality resembling that of a judicial proceeding. Hence it is frequently described as a proceeding of a *quasi judicial* character. The requirement of a "full hearing" has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. The "hearing" is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The "hearing" is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given.

There is thus no basis for the contention that the authority conferred by section 310 of the Packers and Stockyards Act is given to the Department of Agriculture, as a department in the administra-

tive sense, so that one official may examine evidence, and another official who has not considered the evidence may make the findings and order. In such a view, it would be possible, for example, for one official to hear the evidence and argument and arrive at certain conclusions of fact and another official who had not heard or considered either evidence or argument to overrule those conclusions and for reasons of policy to announce entirely different ones. It is no answer to say that the question for the court is whether the evidence supports the findings and the findings support the order. For the weight ascribed by the law to the findings—their conclusiveness when made within the sphere of the authority conferred—rests upon the assumption that the officer who makes the findings has addressed himself to the evidence, and upon that evidence has conscientiously reached the conclusions which he deems it to justify. That duty cannot be performed by one who has not considered evidence or argument. It is not an impersonal obligation. It is a duty akin to that of a judge. The one who decides must hear.

This necessary rule does not preclude practicable administrative procedure in obtaining the aid of assistants in the department. Assistants may prosecute inquiries. Evidence may be taken by an examiner. Evidence thus taken may be sifted and analyzed by competent subordinates. Argument may be oral or written. The requirements are not technical. But there must be a hearing in a substantial sense. And to give the substance of a hearing, which is for the purpose of making determinations upon evidence, the officer who makes the determinations must consider and appraise the evidence which justifies them. That duty undoubtedly may be an onerous one, but the performance of it in a substantial manner is inseparable from the exercise of the important authority conferred.

The government presses upon our attention the case of Local Government Board v. Arlidge [1915] A.C. 120, reversing King v. Local Government Board [1914] 1 K.B. 160. That case has provoked much discussion, but we do not think it necessary to review it, as it relates to a different sort of administrative action and is not deemed to be pertinent to a proceeding under the statute before us and to the hearing which is required by the principles established by our decisions.

Our conclusion is that the District Court erred in striking out the allegations of paragraph IV of the bill of complaint with respect to the Secretary's action. The defendants should be required to answer these allegations, and the question whether plaintiffs had a proper hearing should be determined.

The decree is reversed and the cause is remanded for further proceedings in conformity with this opinion.

It is so ordered.

MORGAN v. UNITED STATES

Supreme Court of the United States.
304 U.S. 1, 58 S.Ct. 773, 999, 82 L.Ed. 1129 (1938).

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

This case presents the question of the validity of an order of the Secretary of Agriculture fixing maximum rates to be charged by market agencies at the Kansas City Stockyards. Packers and Stockyards Act 1921, 42 Stat. 159; 7 U.S.C. §§ 181–229, 7 U.S.C.A. § 181 et seq. The District Court of three judges dismissed the bills of complaint in fifty suits (consolidated for hearing) challenging the validity of the rates, and the plaintiffs bring this direct appeal. 7 U.S.C. § 217, 7 U.S.C.A. § 217; 28 U.S.C. § 47, 28 U.S.C.A. § 47.

The case comes here for the second time. On the former appeal we met, at the threshold of the controversy, the contention that the plaintiffs had not been accorded the hearing which the statute made a prerequisite to a valid order. The District Court had struck from plaintiffs' bills the allegations that the Secretary had made the order without having heard or read the evidence and without having heard or considered the arguments submitted, and that his sole information with respect to the proceeding was derived from consultation with employees in the Department of Agriculture. We held that it was error to strike these allegations, that the defendant should be required to answer them, and that the question whether plaintiffs had a proper hearing should be determined. 298 U.S. 468, 56 S.Ct. 906, 80 L.Ed. 1288.

After the remand, the bills were amended and interrogatories were directed to the Secretary which he answered. The court received the evidence which had been introduced at its previous hearing, together with additional testimony bearing upon the nature of the hearing accorded by the Secretary. This evidence embraced the testimony of the Secretary and of several of his assistants. The District Court rendered an opinion, with findings of fact and conclusions of law, holding that the hearing before the Secretary was adequate and, on the merits, that his order was lawful. On this appeal, plaintiffs again contend (1) that the Secretary's order was made without the hearing required by the statute; and (2) that the order was arbitrary and unsupported by substantial evidence.

The first question goes to the very foundation of the action of administrative agencies intrusted by the Congress with broad control over activities which in their detail cannot be dealt with directly by the Legislature. The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system by adherence to the basic principles that the Legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of a quasijudicial

character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand "a fair and open hearing," essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an "inexorable safeguard." St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 73, 56 S.Ct. 720, 735, 80 L.Ed. 1033; Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 304, 305, 57 S.Ct. 724, 730, 81 L.Ed. 1093; Railroad Commission of California v. Pacific Gas & Electric Co., 302 U.S. 388, 393, 58 S.Ct. 334, 338, 82 L.Ed. 319; Morgan v. United States, supra. And in equipping the Secretary of Agriculture with extraordinary powers under the Packers and Stockyards Act, the Congress explicitly recognized and emphasized this requirement by making his action depend upon a "*full hearing.*" Section 310.

In the record now before us the controlling facts stand out clearly. The original administrative proceeding was begun on April 7, 1930, when the Secretary of Agriculture issued an order of inquiry and notice of hearing with respect to the reasonableness of the charges of appellants for stockyards services at Kansas City. The taking of evidence before an examiner of the Department was begun on December 3, 1930, and continued until February 10, 1931. The Government and appellants were represented by counsel, and voluminous testimony and exhibits were introduced. In March, 1931, oral argument was had before the Acting Secretary of Agriculture and appellants submitted a brief. On May 18, 1932, the Secretary issued his findings and an order prescribing maximum rates. In view of changed economic conditions, the Secretary vacated that order and granted a rehearing. That was begun on October 6, 1932, and the taking of evidence was concluded on November 16, 1932. The evidence received at the first hearing was resubmitted, and this was supplemented by additional testimony and exhibits. On March 24, 1933, oral argument was had before Rexford G. Tugwell as Acting Secretary.

It appears that there were about 10,000 pages of transcript of oral evidence and over 1,000 pages of statistical exhibits. The oral argument was general and sketchy. Appellants submitted the brief which they had presented after the first administrative hearing and a supplemental brief dealing with the evidence introduced upon the rehearing. No brief was at any time supplied by the Government. Apart from what was said on its behalf in the oral argument, the Government formulated no issues and furnished appellants no statement or summary of its contentions and no proposed findings. Appellants' request that the examiner prepare a tentative report, to be submitted as a basis for exceptions and argument, was refused.

Findings were prepared in the Bureau of Animal Industry, Department of Agriculture, whose representatives had conducted the proceedings for the Government, and were submitted to the Secretary

who signed them, with a few changes in the rates, when his order was made on June 14, 1933. These findings, 180 in number, were elaborate. They dealt with the practices and facilities at the Kansas City livestock market, the character of appellants' business and services, their rates and the volume of their transactions, their gross revenues, their methods in getting and maintaining business, their joint activities, the economic changes since the year 1929, the principles which governed the determination of reasonable commission rates, the classification of cost items, the reasonable unit costs plus a reasonable amount of profits to be covered into reasonable commission rates, the reasonable amounts to be included for salesmanship, yarding salaries and expenses, offices salaries and expenses, business getting and maintaining expenses, administrative and general expenses, insurance, interest on capital, and profits, together with summary and the establishment of the rate structure. Upon the basis of the reasonable costs as thus determined, the Secretary found that appellants' schedules of rates were unreasonable and unjustly discriminatory, and fixed the maximum schedules of the just and reasonable rates thereafter to be charged.

No opportunity was afforded to appellants for the examination of the findings thus prepared in the Bureau of Animal Industry until they were served with the other. Appellants sought a rehearing by the Secretary, but their application was denied on July 6, 1933, and these suits followed.

The part taken by the Secretary himself in the departmental proceedings is shown by his full and candid testimony. The evidence had been received before he took office. He did not hear the oral argument. The bulky record was placed upon his desk and he dipped into it from time to time to get its drift. He decided that probably the essence of the evidence was contained in appellants' briefs. These, together with the transcript of the oral argument, he took home with him and read. He had several conferences with the Solicitor of the Department and with the officials in the Bureau of Animal Industry, and discussed the proposed findings. He testified that he considered the evidence before signing the order. The substance of his action is stated in his answer to the question whether the order represented his independent conclusion, as follows: "My answer to the question would be that that very definitely was my independent conclusion as based on the findings of the men in the Bureau of Animal Industry. I would say, I will try to put it as accurately as possible, that it represented my own independent reactions to the findings of the men in the Bureau of Animal Industry."

Save for certain rate alterations, he "accepted the findings."

In the light of this testimony there is no occasion to discuss the extent to which the Secretary examined the evidence, and we agree with the Government's contention that it was not the function of the court to probe the mental processes of the Secretary in reaching

his conclusions if he gave the hearing which the law required. The Secretary read the summary presented by appellants' briefs and he conferred with his subordinates who had sifted and analyzed the evidence. We assume that the Secretary sufficiently understood its purport. But a "full hearing"—a fair and open hearing—requires more than that. The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one. Those who are brought into contest with the Government in a quasijudicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command.

No such reasonable opportunity was accorded appellants. The administrative proceeding was initiated by a notice of inquiry into the reasonableness of appellants' rates. No specific complaint was formulated and, in a proceeding thus begun by the Secretary on his own initiative, none was required. Thus, in the absence of any definite complaint, and in a sweeping investigation, thousands of pages of testimony were taken by the examiner and numerous complicated exhibits were introduced bearing upon all phases of the broad subject of the conduct of the market agencies. In the absence of any report by the examiner or any findings proposed by the Government, and thus without any concrete statement of the Government's claims, the parties approached the oral argument.

Nor did the oral argument reveal these claims in any appropriate manner. The discussion by counsel for the Government was "very general," as he said, in order not to take up "too much time." It dealt with generalities both as to principles and procedure. Counsel for appellants then discussed the evidence from his standpoint. The Government's counsel closed briefly, with a few additional and general observations. The oral argument was of the sort which might serve as a preface to a discussion of definite points in a brief, but the Government did not submit a brief. And the appellants had no further information of the Government's concrete claims until they were served with the Secretary's order.

Congress, in requiring a "full hearing," had regard to judicial standards—not in any technical sense but with respect to those fundamental requirements of fairness which are of the essence of due process in a proceeding of a judicial nature. If in an equity cause a special master or the trial judge permitted the plaintiff's attorney to formulate the findings upon the evidence, conferred ex parte with the plaintiff's attorney regarding them, and then adopted his proposals without affording an opportunity to his opponent to know their contents and present objections, there would be no hesitation in setting aside the report or decree as having been made without a fair hearing. The requirements of fairness are not exhausted in the taking or consider-

ation of evidence, but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps.

The answer that the proceeding before the Secretary was not of an adversary character, as it was not upon complaint but was initiated as a general inquiry, is futile. It has regard to the mere form of the proceeding and ignores realities. In all substantial respects, the Government acting through the Bureau of Animal Industry of the Department was prosecuting the proceeding against the owners of the market agencies. The proceeding had all the essential elements of contested litigation, with the Government and its counsel on the one side and the appellants and their counsel on the other. It is idle to say that this was not a proceeding in reality against the appellants when the very existence of their agencies was put in jeopardy. Upon the rates for their services the owners depended for their livelihood and the proceeding attacked them at a vital spot. This is well shown by the fact that, on the merits, appellants are here contending that under the Secretary's order many of these agencies, although not found to be inefficient or wasteful, will be left with deficits instead of reasonable compensation for their services, and will be compelled to go out of business. And to this the Government responds that if as a result of the prescribed rates some agencies may be unable to continue, because through existing competition there are too many, that fact will not invalidate the order. While we are not now dealing with the merits, the breadth of the Secretary's discretion under our rulings applicable to such a proceeding, Tagg Bros. & Moorhead v. United States, 280 U.S. 420, 50 S.Ct. 220, 74 L.Ed. 524; Acker v. United States, 298 U.S. 426, 56 S.Ct. 824, 80 L.Ed. 1257, places in a strong light the necessity of maintaining the essentials of a full and fair hearing, with the right of the appellants to have a reasonable opportunity to know the claims advanced against them as shown by the findings proposed by the Bureau of Animal Industry.

Equally unavailing is the contention that the former Secretary of Agriculture had made an order in May, 1932, containing findings of fact and fixing a schedule of rates, of which appellants were apprised. Because of changes in economic conditions, the Secretary himself had set aside that order and directed a rehearing. This necessarily involved, as the Secretary found, a consideration "of changes both general and particular" which had "occurred since the year 1929" and brought up all the questions pertinent to the new situation to which the additional evidence upon the rehearing was directed. The former findings and order were no longer in effect, and it is with the conduct of the later proceeding that we are concerned.

The Government adverts to an observation in our former opinion that, while it was good practice—which we approved—to have the examiner, receiving the evidence in such a case, prepare a report as a basis for exceptions and argument, we could not say that that particular type of procedure was essential to the validity of the proceed-

ing. That is true, for, as we said, what the statute requires "relates to substance and not form." Conceivably, the Secretary, in a case the narrow limits of which made such a procedure practicable, might himself hear the evidence and the contentions of both parties and make his findings upon the spot. Again, the evidence being in, the Secretary might receive the proposed findings of both parties, each being notified of the proposals of the other, hear argument thereon, and make his own findings. But what would not be essential to the adequacy of the hearing if the Secretary himself makes the findings is not a criterion for a case in which the Secretary accepts and makes as his own the findings which have been prepared by the active prosecutors for the Government, after an ex parte discussion with them and without according any reasonable opportunity to the respondents in the proceeding to know the claims thus presented and to contest them. That is more than an irregularity in practice; it is a vital defect.

The maintenance of proper standards on the part of administrative agencies in the performance of their quasijudicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. On the contrary, it is in their manifest interest. For, as we said at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play.

As the hearing was fatally defective, the order of the Secretary was invalid. In this view, we express no opinion upon the merits. The decree of the District Court is reversed.

It is so ordered.

Reversed.

Mr. Justice BLACK dissents.[b]

On petition for rehearing.

PER CURIAM. The Solicitor General moves for a rehearing of this case upon two grounds:

First. The first ground is that the Court has reversed itself; that the present decision is "directly contrary to the law of the case" as established by the Court's decision on the former appeal (Morgan v. United States, 298 U.S. 468, 56 S.Ct. 906, 80 L.Ed. 1288); and that "a procedural omission" previously held "to be of no significance" is now regarded as "fatally defective".

[b] Footnotes of the court have been omitted.

These assertions are unwarranted. Not only are the two decisions consistent, but the rule announced in our former opinion was applied and was decisive of the present appeal. And the Government is in no position to claim surprise. The question whether there had been a fair hearing in the present case, in the light of the situation disclosed by the Secretary's testimony and the other evidence, was fully argued at the bar. Appellants presented both orally and in an elaborate brief, with copious references to the record, the contention which we sustained.

The first appeal was brought to this Court because the plaintiffs had been denied an opportunity to prove that the Secretary of Agriculture had failed to give them the full hearing which the statute required. Their allegations to that effect had been struck out by the District Court, 8 F.Supp. 766. We held its ruling to be erroneous and that the question whether the plaintiffs had a proper hearing should be determined, saying (page 912):

"But there must be a hearing in a substantial sense. And to give the substance of a hearing, which is for the purpose of making determinations upon evidence, the officer who makes the determinations must consider and appraise the evidence which justifies them."

The case was then tried by the District Court upon that issue. From the Secretary's frank disclosure it appeared that findings of fact necessary to sustain the order had not been made by him upon his own consideration of the evidence but as stated below. Because such action fails to satisfy the requirement of a full hearing stated in our first opinion and quoted above, we reversed the judgment of the District Court which sustained the order.

Testimony of the Secretary and his associates disclosed what had actually occurred. It appeared that the oral argument before the Assistant Secretary had been general and sketchy; that, aside from the oral argument, which did not reveal the claims of the Government in any appropriate manner, the Government had submitted no brief and no statement of its contentions had been furnished; that in this situation findings had been prepared in the Bureau of Animal Industry, Department of Agriculture, whose representatives had conducted the proceedings for the Government; that these findings, 180 in number, were elaborate, dealing with all phases of the practices and facilities at the Kansas City live-stock market, the services and methods of the plaintiffs, and the costs and profits which should be allowed them as reasonable. These findings, prepared not by the Secretary but by those who had prosecuted the case for the Government, were adopted by the Secretary with certain rate alterations. No opportunity was afforded to the plaintiffs for the examination of the findings thus prepared until they were served with the Secretary's order and their request for a rehearing was denied.

The statement made in the petition for rehearing that the present decision is contrary to the law of the case as declared in our first opin-

ion is wholly unfounded. Our decision was not rested upon the absence of an examiner's report. So far from departing from our former opinion, or from the statement that the mere matter of the presence or absence of an examiner's report was not itself determinative, we reiterated both that statement and the principle underlying it in our opinion on the present appeal. We said (page 776 of 58 S.Ct):

"Those who are brought into contest with the Government in a quasijudicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command.

"No such reasonable opportunity was accorded appellants. * * *

* * * * * * * * * *

"The Government adverts to an observation in our former opinion that, while it was good practice—which we approved—to have the examiner, receiving the evidence in such a case, prepare a report as a basis for exceptions and argument, we could not say that that particular type of procedure was essential to the validity of the proceeding. That is true, for, as we said, what the statute requires 'relates to substance and not form.' Conceivably, the Secretary, in a case the narrow limits of which made such a procedure practicable, might himself hear the evidence and the contentions of both parties and make his findings upon the spot. Again the evidence being in, the Secretary might receive the proposed findings of both parties, each being notified of the proposals of the other, hear argument thereon, and make his own findings."

And, then, pointing out the distinction and the serious defect in the procedure in the instant case, we added:

"But what would not be essential to the adequacy of the hearing if the Secretary himself makes the findings is not a criterion for a case in which the Secretary accepts and makes as his own the findings which have been prepared by the active prosecutors for the Government, after an ex parte discussion with them and without according any reasonable opportunity to the respondents in the proceeding to know the claims thus presented and to contest them. That is more than an irregularity in practice; it is a vital defect."

The distinction was again brought out in our recent decision in the case of National Labor Relations Board v. Mackay Radio & Telegraph Co., 304 U.S. 333, 58 S.Ct. 904, 82 L.Ed. 1381, May 16, 1938, where the mere absence of an examiner's report was found not to be controlling, as the record showed that in that case the contentions of the parties had been clearly defined and that there had been in the substantial sense a full and adequate hearing.

The effort to establish a case for rehearing, either because of an asserted inconsistency in our rulings or because of lack of opportunity for full argument, is futile.

Second. The second ground upon which a rehearing is sought is that there is impounded in the District Court a large sum representing

charges paid in excess of the rates fixed by the Secretary. The Solicitor General raises questions both of substance and procedure as to the disposition of these moneys. These questions are appropriately for the District Court and they are not properly before us upon the present record. We have ruled that the order of the Secretary is invalid because the required hearing was not given. We remand the case to the District Court for further proceedings in conformity with our opinion. What further proceedings the Secretary may see fit to take in the light of our decision, or what determinations may be made by the District Court in relation to any such proceedings, are not matters which we should attempt to forecast or hypothetically to decide.

The petition for rehearing is denied.

Mr. Justice BLACK dissents.

Mr. Justice CARDOZO and Mr. Justice REED took no part in the consideration of this petition.

UNITED STATES v. MORGAN

Supreme Court of the United States.
313 U.S. 409, 61 S.Ct. 999, 85 L.Ed. 1429 (1941).

Mr. Justice FRANKFURTER delivered the opinion of the Court.

This case originated eleven years ago. As a result of proceedings begun in April, 1930 under the Packers and Stockyards Act, 42 Stat. 159, 7 U.S.C. § 181 et seq., 7 U.S.C.A. § 181 et seq., the Secretary of Agriculture in June, 1933, issued an order setting maximum rates to be charged by market agencies for their services at the Kansas City Stockyards. The market agencies brought suit to set aside his order. The district court issued a temporary restraining order under which amounts charged in excess of the rates fixed by the order were impounded, and later it upheld the order. 8 F.Supp. 766. On appeal here, 7 U.S.C. § 217, 7 U.S.C.A. § 217; 28 U.S.C. §§ 44, 47a, 28 U.S.C.A. §§ 44, 47a, the case was sent back to the district court in order to determine on the issues raised by the pleadings whether the agencies had been denied the "full hearing" demanded by § 310 of the Act. 298 U.S. 468, 56 S.Ct. 906, 80 L.Ed. 1288. The district court thereupon decided that this requirement of the statute had been satisfied. 23 F.Supp. 380. The case was again brought here and the order of the Secretary was held invalid because of procedural defects. 304 U.S. 1, 58 S.Ct. 773, 82 L.Ed. 1129. Prior to this decision, the Secretary and the market agencies had agreed upon a higher schedule of rates to become effective on December 1, 1937. However, under the impounding order which had continued in effect until that date over half a million dollars had been deposited. The disposition of this fund was made a ground for a petition for rehearing after the second Morgan decision, but the petition was denied because that question was for the district

court. 304 U.S. 23, 26, 58 S.Ct. 999, 1001, 82 L.Ed. 1135. The secretary then reopened the original proceedings to determine reasonable rates during the impounding period. Before the Secretary had made a new order the district court directed that the impounded moneys be turned over to the market agencies. 24 F.Supp. 214. The case came here for the third time, and we reversed the district court and required its retention of the fund "until such time as the Secretary, proceeding with due expedition, shall have entered a final order in the proceedings pending before him". 307 U.S. 183, 198, 59 S.Ct. 795, 803, 83 L.Ed. 1211. This decision was rendered on May 15, 1939. A month later the Secretary issued a new schedule of rates for the impounding period based on elaborate findings. Accordingly, the Government moved the district court to distribute the funds in accordance with the Secretary's order, but that court, with one of its three judges dissenting, held the order invalid and directed that the funds be given to the market agencies. 32 F.Supp. 546. The case is now here for the fourth time.

The validity of the Secretary's order has undergone the closest scrutiny in elaborate briefs and extended oral arguments. Nothing has been overlooked. However, in the final stage of this long drawn out litigation, critical examination reveals only a few issues demanding attention.

When the matter was last here we defined the duty of the Secretary. He was to determine reasonable rates for the impounding period so that there could be just distribution of the funds which the court below had taken into its registry. The nature of the problem before the Secretary was a guide to its solution. The Secretary's task was not the usual enterprise of fixing rates for the future, so largely an exercise in prophecy. Unique circumstances made him in 1939 the arbiter of rates for a period between 1933 and 1937. But even such a retrospective determination does not present a mathematical problem. Doubts and difficulties incapable of exact resolution confront judgment. More than that, since the Secretary is the guardian of the public interest in regulating a business of public concern it is not for him merely to reflect the items on a profit and loss statement. He must consider whether these represent services which properly should be charged to the public. While, therefore, the Secretary in determining rates for the past could not deny himself the benefit of hindsight, he was not merely a bookkeeper posting items into a ledger. Rates to which these public agencies were entitled were not to be derived merely from their expenditures and actual income.

This Court defined the duty of the Secretary in its decision in the 307th U.S., 59 S.Ct. The record leaves no doubt that the Secretary, when he filed his order a month after that decision, appropriately discharged the duty. He served upon the market agencies the order of June 14, 1933, and the findings underlying it as the starting point of the inquiry. The market agencies protested against any order "nunc

pro tunc as of June 14, 1933", alleged that conditions had changed much since 1933, and asked for the appointment of an examiner to take new evidence. Because he deemed the earlier findings illuminating and helpful "as a working basis for this hearing", the Secretary refused to withdraw them. But he appointed an examiner to hear new evidence and denied "any intention of depriving the respondents of the opportunity of offering evidence concerning conditions affecting the reasonableness of their rates during the period subsequent to June 14, 1933". He further stated that the "forecasts of conditions" in the 1933 order "can now be checked in light of subsequent events". He neither purported to make nor did he make a nunc pro tunc order. The Secretary thus adopted a procedure which admitted whatever light was shed by change of circumstances after 1933. The market agencies freely availed themselves of this procedure; and the Secretary's findings leave no room for doubt that his conclusions represent a judgment of 1939 and not a prophecy of 1933. Having overruled the contention of Government counsel that evidence of conditions after 1933 was irrelevant, he took note of the fact that fewer livestock came to the market after 1933; that a larger number came by truck, thereby causing a decrease in the number of animals in an average consignment; that specific as well as general economic factors touching the market at Kansas City had changed; that statistics relevant in 1933 had become outmoded; and that he had before him evidence of expenses for "business getting and maintaining" and salesmanship not before him in 1933. The Secretary thus unequivocally avowed his intention to consider conditions after 1933 and his findings carry out his purpose. We must therefore reject the claim that the Secretary's judgment was founded on the misconception that he must shut his mind to everything that happened after 1933 and in 1939 fix rates in the imaginary world of 1933.

Another attack upon the Secretary's order is the conventional objection that the findings were not rooted in proof. To reexamine here with particularity the extensive findings made by the Secretary and to test them by a record of 1340 printed pages and thousands of pages of additional exhibits would in itself go a long way to convert a contest before the Secretary into one before the courts. Compare Litchfield v. Register and Receiver, 9 Wall. 575, 578, 19 L.Ed. 681. We have canvassed too fully in the past the duties respectively allotted to the Secretary of Agriculture and the courts in the enforcement of the Packers and Stockyards Act to justify extended discussion of the governing principles. Tagg Bros. & Moorhead v. United States, 280 U.S. 420, 50 S.Ct. 220, 74 L.Ed. 524; Acker v. United States, 298 U.S. 426, 56 S.Ct. 824, 80 L.Ed. 1257; see also United States v. Morgan, 307 U.S. 183, 190, 191, 59 S.Ct. 795, 799, 83 L.Ed. 1211. We are in the legislative realm of fixing rates. This is a task of striking a balance and reaching a judgment on factors beset with doubts and difficulties, uncertainty and speculation. On ultimate analysis the real question is

whether the Secretary or a court should make an appraisal of elements having delusive certainty. Congress has put the responsibility on the Secretary and the Constitution does not deny the assignment.

The objection that the proof does not support the findings is really a repetition in disguise of the unfounded claim that the Secretary misconceived his duty and made his order in 1939 as though he were acting in 1933. The bed rock of these variously phrased attacks upon the order is the contention that the Secretary was indifferent to events occurring after 1933. The short answer is that he was not. The conclusion which he drew from these events is another matter.

Specifically, it is urged that by the increase of rates for the future, to which the market agencies and the Secretary agreed in 1937, changes in circumstances were recognized, while the present order ignored these changes because its rates are at the same level as the original order. But the Secretary did not disregard changed market conditions during the impounding period. Evidence showing these changes was submitted by the market agencies. He was thus duly apprised of the changes and they entered into the findings. To be sure, in ascertaining the reasonable rates for the impounding period he did not attach to them the significance which the market agencies drew from them. As a result of an elaborate study of conditions prior to 1933 and evidence indicating no essential change in those conditions for the purpose at hand during the later years, the Secretary concluded that the market was overstaffed and that in the competitive setting of the business amounts had been spent not justified by that public interest which he is charged to protect. Actual expenses for salesmen's salaries and "business getting", the items chiefly in controversy, he found, did not furnish an adequate guide to the ascertainment of reasonable rates. Had the lower rates originally set by the Secretary in 1933 been tested by experience, audits of the market agencies under these rates would have reflected the practical operation of the policy of lowering costs under controlled conditions. But this source of experience was unavailable because the agencies throughout the impounding period continued to operate under the higher rates. Quite different considerations may properly have influenced the Secretary in fixing rates for the impounding period from those by which he determined a schedule of rates for the future. The existence of the differences is recognized in the agreement between the Secretary and the market agencies whereby the higher rates of the 1937 schedule were to be "without prejudice" either to the Government or to the agencies in the present litigation. It was further agreed in 1937 that after six months, and unless the rate order of 1933 was found invalid, the Secretary could at any time "without further hearing" reduce the rates for the future to the 1933 level. There were very great complexities in determining rates for an industry affected by the unstable conditions which surrounded the Kansas City market in 1937. And the expert tribunal charged with the task may well have felt a need for

flexibility in the prophecy involved in setting future rates which did not enter the judgment required in fixing rates for a past period. It is not for us to try to penetrate the precise course of the Secretary's reasoning. Our duty is at an end when we find, as we do find, that the Secretary was responsibly conscious of conditions at the market during the years following 1933, that he duly weighed them, and nevertheless concluded that rates similar to those in the 1933 order were proper.

But the market agencies go beyond saying that the record did not warrant what the Secretary found. They say that bias disqualified him. This serious charge derives from a letter written by the Secretary to the New York Times immediately following the decision of this Court in the second Morgan case, 304 U.S. 1, 58 S.Ct. 773, 82 L.Ed. 1129. By that decision, the Court had upset the order of 1933 because of procedural defects. Largely because of his assumption that this meant the return of the impounded funds to the market agencies, the Secretary in his letter vigorously criticized the decision. The market agencies in due course moved to disqualify the Secretary in the proceedings started by him to fix new rates. In denying their motion the Secretary wrote a patently sincere denial of bias. He stated that he had complained against a return of the impounded funds to the market agencies prior to a determination of the rates on the merits, that the denial of the petition for rehearing, 304 U.S. 23, 26, 58 S.Ct. 999, 1001, 82 L.Ed. 1135, had shown him the error of his assumption, that in his letter of criticism he made no prejudgment about the rates to be fixed, and that his only concern was to "see that the substantive rights of the parties are fairly determined". He added that "as a matter of expediency" he might have disqualified himself but for the fact that, while the market agencies were pressing his disqualification, they were simultaneously urging that none other than the Secretary had legal authority to make the rate order. Plainly enough, when it was thus suggested that he create a situation in which no order could be made, the Secretary was offered no escape from his duty even had he preferred to consult the comforts of personal convenience.

But, intrinsically, the letter did not require the Secretary's dignified denial of bias. That he not merely held but expressed strong views on matters believed by him to have been in issue, did not unfit him for exercising his duty in subsequent proceedings ordered by this Court. As well might it be argued that the judges below, who had three times heard this case, had disqualifying convictions. In publicly criticizing this Court's opinion the Secretary merely indulged in a practice familiar in the long history of Anglo-American litigation, whereby unsuccessful litigants and lawyers give vent to their disappointment in tavern or press. Cabinet officers charged by Congress with adjudicatory functions are not assumed to be flabby creatures any more than judges are. Both may have an underlying philosophy in approaching

a specific case. But both are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances. Nothing in this record disturbs such an assumption.

And so we conclude that the order of the Secretary furnishes "the appropriate basis for action in the district court in making distribution of the fund in its custody". United States v. Morgan, 307 U.S. 183, 198, 59 S.Ct. 795, 803, 83 L.Ed. 1211. But, finally, a matter not touching the validity of the order requires consideration. Over the Government's objection the district court authorized the market agencies to take the deposition of the Secretary. The Secretary thereupon appeared in person at the trial. He was questioned at length regarding the process by which he reached the conclusions of his order, including the manner and extent of his study of the record and his consultation with subordinates. His testimony shows that he dealt with the enormous record in a manner not unlike the practice of judges in similar situations, and that he held various conferences with the examiner who heard the evidence. Much was made of his disregard of a memorandum from one of his officials who, on reading the proposed order, urged considerations favorable to the market agencies. But the short of the business is that the Secretary should never have been subjected to this examination. The proceeding before the Secretary "has a quality resembling that of a judicial proceeding". Morgan v. United States, 298 U.S. 468, 480, 56 S.Ct. 906, 911, 80 L.Ed. 1288. Such an examination of a judge would be destructive of judicial responsibility. We have explicitly held in this very litigation that "it was not the function of the court to prove the mental processes of the Secretary". 304 U.S. 1, 18, 58 S.Ct. 773, 776, 82 L.Ed. 1129. Just as a judge cannot be subjected to such a scrutiny, compare Fayerweather v. Ritch, 195 U.S. 276, 306, 307, 25 S.Ct. 58, 67, 49 L.Ed. 193, so the integrity of the administrative process must be equally respected. See Chicago, B. & Q. Ry. v. Babcock, 204 U.S. 585, 593, 27 S.Ct. 326, 327, 51 L.Ed. 636. It will bear repeating that although the administrative process has had a different development and pursues somewhat different ways from those of courts, they are to be deemed collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other. United States v. Morgan, 307 U.S. 183, 191, 59 S.Ct. 795, 799, 83 L.Ed. 1211.

Reversed.

Mr. Justice REED did not participate in the consideration or decision of this case.

Mr. Justice ROBERTS. With much that is said in the opinion of the Court I agree, but I am compelled to dissent from the conclusion. Despite the fact that this litigation has extended over many years I still think that not only the rights of the market agencies but the principles involved require the Court to take care that the litigation is disposed of

in accordance with the principles it has laid down. The result now reached is not in accordance with those principles. A recital of the course of the litigation is necessary for an understanding of the case as now presented.

Rates for the market agencies at Kansas City were fixed by the Secretary of Agriculture July 24, 1923. By virtue of the statute these became the legal rates and the agencies were bound not to exceed them until the further order of the Secretary. April 7, 1930, the Secretary instituted an inquiry into the existing rates. June 14, 1933, he issued an order reducing them.

July 19, 1933, the market agencies brought suit to enjoin and set aside the order. The District Court entered a temporary injunction July 22, 1933, in connection with which it provided that the difference between the rates being charged by the agencies and those fixed by the order under attack should be impounded pending the outcome of the litigation. Upon the trial of the cause the court refused to consider an issue tendered by the agencies as to whether the Secretary had granted them a full hearing. Upon examination of the record, it held the order was supported by substantial evidence and, on October 29, 1934, dismissed the bill. This Court reversed, on May 25, 1936, holding that the District Court should have considered and decided the question whether the agencies had been afforded a full hearing.

On a further trial the District Court again upheld the order by a decree of July 2, 1937. The United States appealed from this decree. In the meantime, however, a significant thing occurred. On November 14, 1937, the Secretary approved new rates, effective November 1, 1937, in recognition of changed conditions existing in the business at Kansas City. The impounding order, therefore, ceased to operate November 1, 1937.

This Court reversed the second decree of the District Court because it found that the agencies had been denied a full hearing in the proceedings which eventuated in the order of 1933. Its decision was rendered April 25, 1938, and a rehearing was denied May 31, 1938.

The Secretary and his legal advisers evidently believed, and, as I think, correctly, that the old rates authorized in 1923 stood until a new order, lawfully made, superseded them for the future. The rates fixed for the future by the order of 1933 had not become effective and the Act contained no provision for altering rates charged in the past under authority of the existing and outstanding order of 1923, or granting reparation in respect of them. The Secretary seems to have thought that he could reach this situation by the entry of a nunc pro tunc order as of July 14, 1933. On June 2, 1938, therefore, he directed that the proceeding be reopened and that the "proceedings, findings of fact, conclusion and order" issued on June 14, 1933, be served upon the agencies as the "Tentative Findings of Fact, Conclusion and Proposed Order" of the Secretary, and he denominated them as "Tentative

Findings of Fact, Conclusion, and Proposed Order" *issued as of June 14, 1933*. It is plain that he proposed thus to cure what had been found to be the defect in the order by affording the market agencies an opportunity to file and argue exceptions, in an effort to show any infirmity in the findings and conclusion on which the 1933 order was based. If none was made to appear, he proposed to issue the order nunc pro tunc as of its original date. It is true that after exceptions were filed and upon the hearing before an examiner the agencies were permitted to offer evidence to show changed conditions supervening in the period between 1933 and 1937. It is also true that while the examiner retained all of the findings previously made as the foundation for the order of 1933 he added certain findings but he did not, in any material respect, alter the ultimate findings and, indeed, he retained the exact rates fixed in the earlier order and left undisturbed every finding as to cost (with one immaterial exception), even to the fourth decimal place, as it had stood in the original report.

Immediately after the reopening of the proceeding consequent upon the decision of this Court of May 31, 1938, the Secretary, on June 12, 1938, applied to the District Court for an order staying the distribution of the impounded funds pending his further decision and order. In his petition he said: "After a full hearing the Secretary will determine by an order as of June 14, 1933, what rates may reasonably be charged by petitioners to their clients for the services rendered them." The District Court denied the application.

The United States appealed from the decree. In its brief it stated: "The only purpose and effect * * * [of the reopened proceeding] is to determine whether and to what extent the appellees have been prejudiced by the procedural defect in the earlier proceeding."

Before the case had been decided here the reopened proceeding before the Secretary had so progressed that the evidence had been closed, a tentative report made by an examiner, exceptions filed, and argument heard by the Secretary. The record plainly discloses that up to the time of our final decision on this last appeal the Secretary had been content to take the data disclosed by his investigation of the market agencies' activities in the years 1929, 1930 and 1931, as the basis of any order and this was natural if, as he then supposed, he was justified in entering an order nunc pro tunc as of the date of his original 1933 order.

This Court rendered its opinion in the last appeal May 15, 1939. Speaking by a majority, the Court there held that as the District Court was acting as a court of equity in the premises the impounded funds should be disbursed according to the equities of the situation. It adverted to the fact that the rates fixed by the Secretary October 14, 1937, governed for the future until altered in accordance with law, but it held that the equities of the case required an investigation as to whether the rates charged in the interval between 1933 and 1937 had been unreasonable and, as a result, whether it would be inequita-

ble to withhold from the market agencies' customers and return to the market agencies all or any part of the impounded fund. The court was of the view that the Secretary was in a peculiarly favorable position to find the facts and advise the court upon this subject and that the court ought to cooperate with the Secretary to attain a just result.

At this juncture the reopened proceeding was under submission before the Secretary. It is to be noted that he had refused to consider the data in his own possession with respect to the actual experience of two of the market agencies which had conformed to the rates he fixed in 1933. It is further to be noted that the existence of changed conditions not only is shown by the uncontradicted evidence offered by the agencies but by the fact that the Secretary recognized such change in making his order of October 14, 1937.

The court below has found that conditions in the business had substantially, and in some respects radically changed since the completion of the original record on which the 1933 order was based. The court found the facts as to the changes which had increased the cost of doing the business. The government does not question the correctness of these findings. I think these increased costs cannot be ignored or dismissed with the comment that the Secretary considered them, when it is plain he did not. This Court did not intend by its decision in 1939 that the Secretary should shut his eyes to these changed conditions, and make a forecast in 1939 as of 1933 and upon the data available in 1933, as if he had before him only the experience prior to 1933 and were then acting. Of a similar situation this Court has said: "A forecast gives us one rate. A survey gives another. To prefer the forecast to the survey is an arbitrary judgment."

The Secretary had made a careful investigation of the operations of the market agencies in the years prior to 1933. The same data was available to him in 1939 for the period 1933 to 1937, but was not considered. What he should have done, in the light of this Court's decision, was again to reopen the cause and to investigate the fairness and reasonableness of the charges exacted from 1933 to 1937 in the light of actual experience. To assert that he did in fact pursue this course is to place an unjustified gloss upon the record now before the Court.

We ought not to conclude the parties by a strained construction of the record facts, or by applying to this inquiry technical rules of evidence and procedure which have no place in such a proceeding. On the contrary, we should require that to be done which the broad equities of the case demand. No less, it seems to me, will satisfy the mandate of this Court in its earlier pronouncement. I should, therefore, reverse the decree and direct that the Secretary ascertain the facts upon all available evidence, in accordance with the decisions of this Court when the case was last here.[*]

[*] Footnotes of the court have been omitted.

See also United States v. Morgan, 307 U.S. 183, 59 S.Ct. 795, 83 L.Ed. 1211 (1939).

NATIONAL LABOR RELATIONS BOARD v. MACKAY RADIO & TELEGRAPH CO.

Supreme Court of the United States
304 U.S. 333, 58 S.Ct. 904, 82 L.Ed. 1381 (1938).

Mr. Justice ROBERTS, delivered the opinion of the Court.

The Circuit Court of Appeals refused to decree enforcement of an order of the National Labor Relations Board. We granted certiorari because of an asserted conflict of decision, 303 U.S. 630, 58 S.Ct. 644, 82 L.Ed. 1090.

The respondent, a California corporation, is engaged in the transmission and receipt of telegraph, radio, cable, and other messages between points in California and points in other states and foreign countries. It maintains an office in San Francisco for the transaction of its business wherein it employs upwards of sixty supervisors, operators and clerks, many of whom are members of Local No. 3 of the American Radio Telegraphists Association, a national labor organization; the membership of the local comprising "point-to-point" or land operators employed by respondent at San Francisco. Affiliated with the national organization also were locals whose members are exclusively marine operators who work upon ocean-going vessels. The respondent, at its San Francisco office, dealt with committees of Local No. 3; and its parent company, whose headquarters were in New York, dealt with representatives of the national organization. Demand was made by the latter for the execution of agreements respecting terms and conditions of employment of marine and point-to-point operators. On several occasions when representatives of the union conferred with officers of the respondent and its parent company the latter requested postponement of discussion of the proposed agreements and the union acceded to the requests. In September, 1935, the union pressed for immediate execution of agreements and took the position that no contract would be concluded by the one class of operators unless an agreement were simultaneously made with the other. Local No. 3 sent a representative to New York to be in touch with the negotiations and he kept its officers advised as to what there occurred. The local adopted a resolution to the effect that if satisfactory terms were not obtained by September 23 a strike of the San Francisco point-to-point operators should be called. The national officers determined on a general strike in view of the unsatisfactory state of the negotiations. This fact was communicated to Local No. 3 by its representative in New York and the local officers called out the employees of the San Francisco office. At midnight Friday, October 4, 1935, all the men there employed went on strike. The respondent, in order to maintain service, brought employees from its Los Angeles office and others from the New York and Chicago offices of the parent company to fill the strikers' places.

Although none of the San Francisco strikers returned to work Saturday, Sunday, or Monday, the strike proved unsuccessful in other parts of the country and, by Monday evening, October 7th, a number of the men became convinced that it would fail and that they had better return to work before their places were filled with new employees. One of them telephoned the respondent's traffic supervisor Monday evening to inquire whether the men might return. He was told that the respondent would take them back and it was arranged that the official should meet the employees at a downtown hotel and make a statement to them. Before leaving the company's office for this purpose the supervisor consulted with his superior, who told him that the men might return to work in their former positions but that, as the company had promised eleven men brought to San Francisco they might remain if they so desired, the supervisor would have to handle the return of the striking employees in such fashion as not to displace any of the new men who desired to continue in San Francisco. A little later the supervisor met two of the striking employees and gave them a list of all the strikers together with their addresses, and the telephone numbers of those who had telephones, and it was arranged that these two employees should telephone the strikers to come to a meeting at the Hotel Bellevue in the early hours of Tuesday, October 8th. In furnishing this list the supervisor stated that the men could return to work in a body but he checked off the names of eleven strikers who he said would have to file applications for reinstatement which applications would be subject to the approval of an executive of the company in New York. Because of this statement the two employees, in notifying the strikers of the proposed meeting, with the knowledge of the supervisor, omitted to communicate with the eleven men whose names had been checked off. Thirty-six men attended the meeting. Some of the eleven in question heard of it and attended. The supervisor appeared at the meeting and reiterated his statement that the men could go back to work at once but read from a list the names of the eleven who would be required to file applications for reinstatement to be passed upon in New York. Those present at the meeting voted on the question of immediately returning to work and the proposition was carried. Most of the men left the meeting and went to the respondent's office Tuesday morning, October 8th, where on that day they resumed their usual duties. Then or shortly thereafter six of the eleven in question took their places and resumed their work without challenge. It turned out that only five of the new men brought to San Francisco desired to stay.

Five strikers who were prominent in the activities of the union and in connection with the strike, whose names appeared upon the list of eleven, reported at the office at various times between Tuesday and Thursday. Each of them was told that he would have to fill out an application for employment; that the roll of employees was complete, and that his application would be considered in connection with any va-

cancy that might thereafter occur. These men not having been reinstated in the course of three weeks, the secretary of Local No. 3 presented a charge to the National Labor Relations Board that the respondent had violated section 8(1) and (3) of the National Labor Relations Act. Thereupon the Board filed a complaint charging that the respondent had discharged and was refusing to employ the five men who had not been reinstated to their positions for the reason that they had joined and assisted the labor organization known as Local No. 3 and had engaged in concerted activities with other employees of the respondent for the purpose of collective bargaining and other mutual aid and protection; that by such discharge respondent had interfered with, restrained, and coerced the employees in the exercise of their rights guaranteed by section 7 of the National Labor Relations Act and so had been guilty of an unfair labor practice within the meaning of section 8(1) of the act. The complaint further alleged that the discharge of these men was a discrimination in respect of their hire and tenure of employment and a discouragement of membership in Local No. 3, and thus an unfair labor practice within the meaning of section 8(3) of the act.

The respondent filed an answer denying the allegations of the complaint, and moved to dismiss the proceeding on the ground that the act is unconstitutional. The motion was taken under advisement by the Board's examiner and the case proceeded to hearing. After the completion of its testimony the Board filed an amended complaint to comport with the evidence, in which it charged that the respondent had refused to re-employ the five operators for the reason that they had joined and assisted the labor organization known as Local No. 3 and engaged with other employees in concerted activities for the purpose of collective bargaining and other mutual aid and protection; that the refusal to re-employ them restrained and coerced the employees in the exercise of rights guaranteed by section 7, and so constituted an unfair labor practice within section 8(1) of the act. The amended complaint further asserted that the refusal to re-employ the men discriminated in regard to their hire and tenure of employment and discouraged membership in Local No. 3 and thus amounted to an unfair labor practice under section 8(3) of the act. The respondent entered a general denial to the amended complaint and presented its evidence. At the conclusion of the testimony the Board transferred the cause for further hearing before the members of the Board at Washington and, after oral argument and the filing of a brief, made its findings of fact. * * *

Eighth. The respondent was not denied a hearing with respect to the offense found by the Board. The respondent says that it was summoned to answer a complaint that it discriminated by discharging the five men and that, after all the evidence was in, this complaint was withdrawn and a new one presented asserting that its refusal to re-employ the five men was the head and front of its offending. Then it is

said that when the Board came to make its findings it reverted to the position that what the respondent did had not been a failure to employ but a wrongful discharge. Thus the respondent claims that it is found guilty of an unfair labor practice which was not within the issues upon which the case was tried. The position is highly technical. All parties to the proceeding knew from the outset that the thing complained of was discrimination against certain men by reason of their alleged union activities. If there was a current labor dispute the men were still employees by virtue of section 2(3), and the refusal to let them work was a discharge. The respondent says that as the Board failed to find, in so many words, that there was a current labor dispute its conclusion of fact that the men were discharged has no basis. But the Board found that the strike was called because the strikers were informed that the negotiations for a working agreement in New York were not proceeding satisfactorily. We think its action cannot be overturned for the mere reason that it failed to characterize the situation as a current labor dispute. The respondent further urges that, when the amended complaint was filed and the original one withdrawn, the charge it had to meet was a refusal to re-employ; that the phrase "re-employ" means "employ anew"; that if the Board had found a failure to employ the five men because of discrimination forbidden by the act, the findings would have followed the complaint, whereas the Board, in its conclusions of fact, referred to respondent's action as "refusal to reinstate to employment" and as a discharge; and the argument is that the findings do not follow the pleadings.

A review of the record shows that at no time during the hearings was there any misunderstanding as to what was the basis of the Board's complaint. The entire evidence, pro and con, was directed to the question whether, when the strike failed and the men desired to come back and were told that the strike would be forgotten and that they might come back in a body save for eleven men who were singled out for different treatment, six of whom, however, were treated like everyone else, the respondent did in fact discriminate against the remaining five because of union activity. While the respondent was entitled to know the basis of the complaint against it, and to explain its conduct, in an effort to meet that complaint, we find from the record that it understood the issue and was afforded full opportunity to justify the action of its officers as innocent rather than discriminatory.

At the conclusion of the testimony, and prior to oral argument before the examiner, the Board transferred the proceeding to Washington to be further heard before the Board. It denied respondent's motion to resubmit the cause to the trial examiner with directions to prepare and file an intermediate report. In the Circuit Court of Appeals the respondent assigned error to this ruling. It appears that oral argument was had and a brief was filed with the Board after which it made its findings of fact and conclusions of law. The respondent now asserts that the failure of the Board to follow its usual practice of the

submission of a tentative report by the trial examiner and a hearing on exceptions to that report deprived the respondent of opportunity to call to the Board's attention the alleged fatal variance between the allegations of the complaint and the Board's findings. What we have said sufficiently indicates that the issues and contentions of the parties were clearly defined and as no other detriment or disadvantage is claimed to have ensued from the Board's procedure the matter is not one calling for a reversal of the order. The Fifth Amendment guarantees no particular form of procedure; it protects substantial rights. Compare Morgan v. United States, 298 U.S. 468, 478, 56 S.Ct. 906, 910, 80 L.Ed. 1288. The contention that the respondent was denied a full and adequate hearing must be rejected.

Ninth. The other contentions of the respondent are overruled because foreclosed by earlier decisions of this court.

The judgment of the Circuit Court of Appeals is reversed, and the cause is remanded to that court for further proceedings in conformity with this opinion. So ordered.

Reversed and remanded.

Mr. Justice CARDOZO and Mr. Justice REED took no part in the consideration or decision of this case.

CONSOLIDATED EDISON CO. v. NATIONAL LABOR RELATIONS BOARD

Supreme Court of the United States.
305 U.S. 197, 59 S.Ct. 206, 83 L.Ed. 126 (1938).

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

The United Electrical and Radio Workers of America, affiliated with the Committee for Industrial Organization, filed a charge, on May 5, 1937, with the National Labor Relations Board that the Consolidated Edison Company of New York and its affiliated companies were interfering with the right of their employees to form, join or assist labor organizations of their own choosing and were contributing financial and other support, in the manner described, to the International Brotherhood of Electrical Workers, an affiliate of the American Federation of Labor. The Board issued its complaint and the employing companies, appearing specially, challenged its jurisdiction. On the denial of their request that this question be determined initially, the companies filed answers reserving their jurisdictional objections. After the taking of evidence before a trial examiner, the proceeding was transferred to the Board which on November 10, 1937, made its findings and order.

The order directed the companies to desist from labor practices found to be unfair and in violation of Section 8(1) and (3) of the National Labor Relations Act, directed reinstatement of six discharged employees with back pay, and required the posting of notices to the ef-

fect that the companies would cease the described practices and that their employees were free to join or assist any labor organization for the purpose of collective bargaining and would not be subject to discharge or to any discrimination by reason of their choice. 4 N.L.R.B. 71.

It appeared that between May 28, 1937, and June 16, 1937, the companies had entered into agreements with the International Brotherhood of Electrical Workers and its local unions, providing for the recognition of the Brotherhood as the collective bargaining agency for those employees who were its members, and containing various stipulations as to hours, working conditions, wages, etc., and for arbitration in the event of disputes. The Board found that these contracts were executed under such circumstances that they were invalid and required the companies to desist from giving them effect. Id. At the same time the Board decided that the companies had not engaged in unfair labor practices within the meaning of Section 8(2) of the Act. That clause makes it an unfair labor practice to "dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it". Accordingly the order dismissed the complaint, so far as it alleged a violation of Section 8(2), without prejudice. Id.

The companies petitioned the Circuit Court of Appeals to set aside the order and a petition for the same purpose was presented by the Brotherhood and its locals. These labor organizations had not been parties to the proceeding before the Board but intervened in the Circuit Court of Appeals as parties aggrieved by the invalidation of their contracts. The Board in turn asked the court to enforce the order. The United Electrical and Radio Workers of America appeared in support of the Board. The court granted the Board's petition. 2 Cir., 95 F.2d 390. We issued writs of certiorari upon applications of the companies (No. 19) and of the Brotherhood and its locals (No. 25). 304 U.S. 555, 58 S.Ct. 1038, 82 L.Ed. 1524; 304 U.S. 555, 58 S.Ct. 1041, 82 L.Ed. 1524, May 16, 1938.

The questions presented relate (1) to the jurisdiction of the Board; (2) to the fairness of the hearing; (3) to the sufficiency of the evidence to sustain the findings of the Board with respect to coercive practices, discrimination and the discharge of employees; and (4) to the invalidation of the contracts with the Brotherhood and its locals.

The pertinent facts will be considered in connection with our discussion of these questions. * * *

Second.—The fairness of the hearing,—procedural due process. Apart from the action of the Board with respect to the Brotherhood contracts, which we shall consider separately, the contentions under this head relate (1) to amendments of the complaint, (2) to the refusal to hear certain witnesses, and (3) to the transfer of the proceeding to the Board and its determination without an intermediate report or opportunity for hearing upon proposed findings.

The original complaint related to the discharge of five employees and alleged unfair labor practices in the employment of industrial spies and undercover operatives, in allowing employees to solicit membership in the Brotherhood during working hours and on the property of the companies, in compensating such employees while so engaged and in furnishing them office space and financial assistance while refusing such privileges to the United, and generally in coercion of the employees to join the Brotherhood. The amendments were made from time to time in the course of the hearing. In particular, they added another employee to those alleged to have been wrongfully discharged and supplied an omitted allegation that the other unfair labor practices affected commerce. At the close of the evidence the trial examiner granted a motion to conform the pleadings to the proof on the statement of the attorney for the Board that no important change was intended and that the amendment was sought merely to make more definite and certain what appeared in the complaint. These were discretionary rulings which afford no ground for challenging the validity of the hearing.

A more serious question grows out of the refusal to receive the testimony of certain witnesses. The taking of evidence began on June 3, 1937, and was continued from time to time until June 23d when the attorney for the Board unexpectedly announced that its case would probably be closed on the following day. At that time the Board completed its proof, with the reservation of one matter, and at the request of the companies' counsel the hearing was adjourned until July 6th in order that Mr. Carlisle, the chairman of the board of trustees of the Consolidated Edison Company, and Mr. Dean, the vice president of one of its affiliates, who were then unavailable, could testify. In response to the examiner's inquiry, the companies' counsel stated that the direct examination of all witnesses on their behalf would not occupy more than a day. On July 6th the testimony of Mr. Carlisle and Mr. Dean was taken and the companies also offered the testimony of two other witnesses (then present in the hearing room) in relation to the discharge of the employee with respect to whom the complaint had been amended as above stated. The examiner refused to receive this testimony following a ruling of the Board (made in the course of correspondence with the companies' counsel during the adjournment) to the effect that no other testimony than that of Mr. Carlisle and Mr. Dean would be received on the adjourned day. An offer of proof was made which showed the testimony to be highly important with respect to the reasons for the discharge. It was brief and could have been received at once without any undue delay in the closing of the hearing.

We agree with the Circuit Court of Appeals that the refusal to receive the testimony was unreasonable and arbitrary. Assuming, as the Board contends, that it had a discretionary control over the conduct of the proceeding, we cannot but regard this action as an abuse of discretion. But the statute did not leave the petitioners without

remedy. The court below pointed to that remedy, that is, to apply to the Circuit Court of Appeals for leave to adduce the additional evidence; on such an application and a showing of reasonable grounds the court could have ordered it to be taken. Section 10(e) (f). Petitioners did not avail themselves of this appropriate procedure.

Shortly after the evidence was closed, the counsel for the petitioning companies filed a brief with the trial examiner. Several weeks later, on September 29th, the proceeding was transferred to the Board. The examiner made no tentative report or findings and there was no opportunity for a hearing before the Board itself. It must be assumed, however, that the brief for the companies was transmitted to the Board and was considered by it in making its decision. The Board contends that the companies submitted their brief without asking for an oral argument, as contemplated by the Board's rule (Rule 29), or for an intermediate report, and hence that they are not in a position to complain on either score.

The Board also insists that after the transfer of the proceeding, it was within the discretion of the Board to adopt any one of the courses of procedure enumerated in its rule (Rule 38) of which petitioners were informed by the service of a copy of the Board's rules at the beginning of the proceeding. Petitioners say that at the very outset they had asked, on their special appearance, for a hearing before the Board upon the question of its jurisdiction and that all proceedings be transferred to the Board, and that the rules induced the belief that after the transfer to the Board at the close of the evidence there would be further proceedings at which they would be heard. But we cannot say that the rules justified that expectation or dispensed with the necessity, after the transfer, of a suitable request by the petitioners for such additional hearing as they desired. It does not appear that such request was made.

It cannot be said that the Board did not consider the evidence or the petitioners' brief or failed to make its own findings in the light of that evidence and argument. It would have been better practice for the Board to have directed the examiner to make a tentative report with an opportunity for exceptions and argument thereon. But, aside from the question of the Brotherhood contracts, we find no basis for concluding that the issues and contentions were not clearly defined and that the petitioning companies were not fully advised of them. National Labor Relations Board v. Mackay Radio & Telegraph Co., 304 U.S. 333, 350, 351, 58 S.Ct. 904, 912, 913, 82 L.Ed. 1381. The points raised as to the lack of procedural due process in this relation cannot be sustained. * * *

Fourth.—The Brotherhood contracts.—The findings of the Board that the contracts with the Brotherhood and its locals were invalid, and the Board's order requiring the companies to desist from giving effect to these contracts, present questions of major importance. We approach them in the light of three cardinal considerations. One is

that the Brotherhood and its locals are labor organizations independently established as affiliates of the American Federation of Labor and are not under the control of the employing companies. So far as there was any charge, under Section 8(2) of the Act, that the employing companies had dominated or interfered with the formation or administration of any labor organization or had contributed financial or other support to it, the charge was dismissed. Another consideration is that the contracts recognize the right of employees to bargain collectively; they recognize the Brotherhood as the collective bargaining agency for the employees who belong to it, and the Brotherhood agrees for itself and its members not to intimidate or coerce employees into membership in the Brotherhood and not to solicit membership on the time or property of the employers. The third consideration is that the contracts contain important provisions with regard to hours, working conditions, wages, sickness, disability, etc., and also provide against strikes or lockouts and for the adjustment and arbitration of labor disputes, thus constituting insurance against the disruption of the service of the companies to interstate or foreign commerce through an outbreak of industrial strife. It is not contended that these provisions are unreasonable or oppressive but on the contrary it was virtually conceded at the bar that they are fair to both the employers and employees. It also appears from the evidence, which was received without objection, that the Brotherhood and its locals comprised over 30,000, or 80 per cent of the companies' employees out of 38,000 eligible for membership.

The Brotherhood and its locals contend that they were indispensable parties and that in the absence of legal notice to them or their appearance, the Board had no authority to invalidate the contracts. The Board contests this position, invoking our decision in National Labor Relations Board v. Pennsylvania Greyhound Lines, 303 U.S. 261, 58 S. Ct. 571, 82 L.Ed. 831, 115 A.L.R. 307. That case, however, is not apposite, as there no question of contract between employer and employee was involved. The Board had found upon evidence that the employer had created and fostered the labor organization in question and dominated its administration in violation of Section 8(2). The statement that the "Association" so formed and controlled was not entitled to notice and hearing was made in that relation. Pages 262, 270, 271, 58 S.Ct. pages 572, 576. It has no application to independent labor unions such as those before us. We think that the Brotherhood and its locals having valuable and beneficial interests in the contracts were entitled to notice and hearing before they could be set aside. Russell v. Clark's Executors, 7 Cranch 69, 96, 3 L.Ed. 271; Mallow v. Hinde, 12 Wheat. 193, 198, 6 L.Ed. 599; Minnesota v. Northern Securities Co., 184 U.S. 199, 235, 22 S.Ct. 308, 322, 46 L.Ed. 499; Garzot v. Rios de Rubio, 209 U.S. 283, 297, 28 S.Ct. 548, 554, 52 L.Ed. 794; General Investment Co. v. Lake Shore & M. S. Railway Co., 260 U.S. 261, 285, 43 S.Ct. 106, 116, 67 L.Ed. 244. The rule, which was applied in the cases

cited to suits in equity, is not of a technical character but rests upon the plainest principle of justice, equally applicable here. See Mallow v. Hinde, supra.

The Board urges that the National Labor Relations Act does not contain any provision requiring these unions to be made parties; that Section 10(b) authorizes the Board to serve a complaint only upon persons charged with unfair labor practices and that only employers can be so charged. In that view, the question would at once arise whether the Act could be construed as authorizing the Board to invalidate the contracts of independent labor unions not before it and also as to the validity of the Act if so construed. But the Board contends that the Brotherhood had notice, referring to the service of a copy of the complaint and notice of hearing upon a local union of the Brotherhood on May 12, 1937, and of an amended notice of hearing on May 25, 1937. Petitioners rejoin that the service was not upon a local whose rights were affected but upon one whose members were not employees of the companies' system. The Board says, however, that the Brotherhood, and the locals which were involved, had actual notice and hence were entitled to intervene (Sec. 10(b) and chose not to do so. But neither the original complaint—which antedated the contracts—nor the subsequent amendments contained any mention of them and the Brotherhood and its locals were not put upon notice that the validity of the contracts was under attack. The Board contends that the complaint challenged the legality of the companies' "relations" with the Brotherhood. But what was thus challenged cannot be regarded as going beyond the particular practices of the employers and the discharges which the complaint described. In these circumstances it cannot be said that the unions were under a duty to intervene before the Board in order to safeguard their interests.

The Board urges further that the unions have availed themselves of the opportunity to petition for review of the Board's order in the Circuit Court of Appeals, and that due process does not require an opportunity to be heard before judgment, if defenses may be presented upon appeal. York v. Texas, 137 U.S. 15, 20, 21, 11 S.Ct. 9, 10, 34 L.Ed. 604; American Surety Company v. Baldwin, 287 U.S. 156, 168, 53 S.Ct. 98, 102, 77 L.Ed. 231, 86 A.L.R. 298; Moore Ice Cream Company v. Rose, 289 U.S. 373, 384, 53 S.Ct. 620, 624, 77 L.Ed. 1265. But this rule assumes that the appellate review does afford opportunity to present all available defenses including lack of proper notice to justify the judgment or order complained of. Id.

Apart from this question of notice to the unions, both the companies and the unions contend that upon the case made before the Board it had no authority to invalidate the contracts. Both insist that that issue was not actually litigated, and the record supports that contention. The argument to the contrary, that the contracts were necessarily in issue because of the charge of unfair labor practices against the companies, is without substance. Not only did the complaint as

amended fail to assail the contracts but it was stated by the attorney for the Board upon the hearing that the complaint was not directed against the Brotherhood; that "no issue of representation (was) involved in this proceeding"; and that the Board took the position that the Brotherhood was "a *bona fide* labor organization" whose legality was not attacked. But the Board says that on July 6th (the last of the contracts having been made on June 16th) the companies amended their answer stating that the making of the contracts had rendered the proceeding moot, and that this necessarily put the contracts in issue. We cannot so regard it. We think that the fair construction of the position thus taken on the last day of the hearings was entirely consistent with the view that the validity of the contracts had not been, and was not, in issue. And the counsel for the companies point to their brief before the Board, which they produce, as proceeding on the basis that the validity of the contracts had not been assailed.

Further, the Act gives no express authority to the Board to invalidate contracts with independent labor organizations. That authority, if it exists, must rest upon the provisions of Section 10(c). That section authorizes the Board, when it has found the employer guilty of unfair labor practices, to require him to desist from such practices "and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act [chapter]". We think that this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order.

The power to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act. The continued existence of a company union established by unfair labor practices or of a union dominated by the employer is a consequence or violation of the Act whose continuance thwarts the purposes of the Act and renders ineffective any order restraining the unfair practices. Compare National Labor Relations Board v. Pennsylvania Greyhound Lines, supra. Here, there is no basis for a finding that the contracts with the Brotherhood and its locals were a consequence of the unfair labor practices found by the Board or that these contracts in themselves thwart any policy of the Act or that their cancellation would in any way make the order to cease the specified practices any more effective.

The Act contemplates the making of contracts with labor organizations. That is the manifest objective in providing for collective bargaining. Under Section 7 the employees of the companies are entitled to self-organization, to join labor organizations and to bargain collec-

tively through representatives of their own choosing. The 80 per cent of the employees who were members of the Brotherhood and its locals, had that right. They had the right to choose the Brotherhood as their representative for collective bargaining and to have contracts made as the result of that bargaining. Nothing that the employers had done deprived them of that right. Nor did the contracts make the Brotherhood and its locals exclusive representatives for collective bargaining. On this point the contracts speak for themselves. They simply constitute the Brotherhood the collective bargaining agency for those employees who are its members. The Board by its order did not direct an election to ascertain who should represent the employees for collective bargaining. Section 9(c). Upon this record, there is nothing to show that the employees' selection as indicated by the Brotherhood contracts has been superseded by any other selection by a majority of employees of the companies so as to create an exclusive agency for bargaining under the statute, and in the absence of such an exclusive agency the employees represented by the Brotherhood, even if they were a minority, clearly had the right to make their own choice. Moreover, the fundamental purpose of the Act is to protect interstate and foreign commerce from interruptions and obstructions caused by industrial strife. This purpose appears to be served by these contracts in an important degree. Representing such a large percentage of the employees of the companies, and precluding strikes and providing for the arbitration of disputes, these agreements are highly protective to interstate and foreign commerce. They contain no terms which can be said to "affect commerce" in the sense of the Act so as to justify their abrogation by the Board. The disruption of these contracts, even pending proceedings to ascertain by an election the wishes of the majority of employees, would remove that salutary protection during the intervening period.

The Board insists that the contracts are invalid because made during the pendency of the proceeding. But the effect of that pendency would appropriately extend to the practices of the employers to which the complaint was addressed. See Jones v. Securities and Exchange Commission, 298 U.S. 1, 15, 56 S.Ct. 654, 657, 80 L.Ed. 1015. It did not reach so far as to suspend the right of the employees to self-organization or preclude the Brotherhood as an independent organization chosen by its members from making fair contracts on their behalf.

Apart from this, the main contention of the Board is that the contracts were the fruit of the unfair labor practices of the employers; that they were "simply a device to consummate and perpetuate" the companies' illegal conduct and constituted its culmination. But, as we have said, this conclusion is entirely too broad to be sustained. If the Board intended to make that charge, it should have amended its complaint accordingly, given notice to the Brotherhood, and introduced proof to sustain the charge. Instead it is left as a matter of mere conjecture to what extent membership in the Brotherhood was induced by

any illegal conduct on the part of the employers. The Brotherhood was entitled to form its locals and their organization was not assailed. The Brotherhood and its locals were entitled to solicit members and the employees were entitled to join. These rights cannot be brushed aside as immaterial for they are of the very essence of the rights which the Labor Relations Act was passed to protect and the Board could not ignore or override them in professing to effectuate the policies of the Act. To say that of the 30,000 who did join there were not those who joined voluntarily or that the Brotherhood did not have members whom it could properly represent in making these contracts would be to indulge an extravagant and unwarranted assumption. The employers' practices, which were complained of, could be stopped without imperiling the interests of those who for all that appears had exercised freely their right of choice.

We conclude that the Board was without authority to require the petitioning companies to desist from giving effect to the Brotherhood contracts, as provided in subdivision (f) of paragraph one of the Board's order.

Subdivision (g) of that paragraph, requiring the companies to cease recognizing the Brotherhood "as the exclusive representative of their employees" stands on a different footing. The contracts do not claim for the Brotherhood exclusive representation of the companies' employees but only representation of those who are its members, and the continued operation of the contracts is necessarily subject to the provision of the law by which representatives of the employees for the purpose of collective bargaining can be ascertained in case any question of "representation" should arise. Section 9. We construe subdivision (g) as having no more effect than to provide that there shall be no interference with an exclusive bargaining agency if one other than the Brotherhood should be established in accordance with the provisions of the Act. So construed, that subdivision merely applies existing law.

The provision of paragraph two of the order as to posting notices should be modified so as to exclude any requirement to post a notice that the existing Brotherhood contracts have been abrogated.

The decree of the Circuit Court of Appeals is modified so as to hold unenforceable the provision of subdivision (f) of paragraph one of the order and the application to that provision of paragraph two subdivision (c), and as so modified the decree enforcing the order of the Board is affirmed. It is so ordered.

Decree modified and, as modified, affirmed. * * *

Mr. Justice REED concurring in part, dissenting in part.

While concurring in general with the conclusions of the Court in Consolidated Edison Company v. National Labor Relations Board and International Brotherhood of Electrical Workers v. National Labor Relations Board, I find myself in disagreement with the conclusion

that the National Labor Relations Board was "without authority to require the petitioning companies to desist from giving effect to the Brotherhood contracts, as provided in subdivision (f) of paragraph one of the Board's order." * * *

The Board found that the Consolidated Edison Company and its affiliates, the respondents before the Board, "deliberately embarked upon an unlawful course of conduct, as described above, which enabled them to impose the I. B. E. W. upon their employees as their bargaining representative and at the same time discourage and weaken the United which they opposed. From the outset the respondents contemplated the execution of contracts with the I. B. E. W. locals which would consummate and perpetuate their plainly illegal course of conduct in interfering with, restraining, and coercing their employees in the exercise of the rights guaranteed to them under Section 7 of the Act. It is clear that the granting of the contracts to the I. B. E. W. by the respondents was a part of the respondents' unlawful course of conduct and as such constituted an interference with the rights of their employees to self-organization. The contracts were executed under such circumstances that they are invalid, notwithstanding that they are in express terms applicable only to members of the I. B. E. W. locals. If the contracts are susceptible of the construction placed upon them by the respondents, namely, that they were exclusive collective bargaining agreements, then, *a fortiori,* they are invalid."

The evidence upon which this finding is based is summarized in detail in 4 N. L. R. B., pages 83 to 94. * * *

The petitioners, however, aside from the merits, raise procedural objections. It is contended that before the Board could have authority to order the Edison companies to cease and desist from giving effect to their contracts with the unions, it was necessary that the unions as well as the Edison companies should have legal notice or should appear; that the unions were indispensable parties. This Court has held to the contrary in National Labor Relations Board v. Pennsylvania Greyhound Lines, 303 U.S. 261, 58 S.Ct. 571, 82 L.Ed. 831, 115 A.L.R. 307.

This case determined that where an employer has created and fostered a labor organization of employees, thus interfering with their right to self-organization, the employer can be required without notice to the organization, to withdraw all recognition of such organization as the representative of its employees. It is said that this case "is not apposite, as there no question of contract between employer and employee was involved. The Board had found upon evidence that the employer had created and fostered the labor organization in question and dominated its administration in violation of Section 8(2)." In the instant case it was found that no such domination existed. In the Greyhound Case, the Board found not only domination under Sec. 8(2) but also, as in this case, an unfair labor practice under Sec. 8(1). The company's violation of Sec. 8(1) was predicated on its interference

with self-organization. In the Greyhound Case it was said that the organization was not entitled to notice and hearing because "the order did not run against the Association." Here the unions are affected by the action on the contracts, exactly as the labor organization in the Greyhound Case was affected by the order to withdraw recognition. It would seem immaterial whether those contracts were violative of one or both or all the prohibited unfair labor practices.

A further procedural objection is found in the failure of the complaint, or any of its amendments, to seek specifically a cease and desist order against continued operation under the contracts. The companies were charged with allowing organization meetings on the company time and on company property, permitting solicitation of membership during company time, and paying overtime allowances to those engaged in soliciting or coercing workers to join the contracting unions. The complaint said that similar aid was not extended to a competing union and that office assistance was given to the effort to get members for the contracting unions. These charges made it obvious that the contracts were obtained from the unions which were improperly aided by the Edison companies in violation of the prohibitions against interference with self-organization. Contracts so obtained were necessarily at issue in an examination of the acts in question.

Certainly the Edison companies and the contracting unions could have been allowed on a proper showing a further hearing on the question of the companies continuing recognition of the contracts. By section 10 (f) the Edison companies and the unions could obtain a review of the Board's order. In that hearing either or both could show to the court [Sec. 10 (e)] that additional evidence as to the contracts was material and that it had not been presented because the aggrieved parties had not understood that the contracts were subject to a cease and desist order or had not known of the proceeding. The court could order the Board to take the additional evidence. This simple practice was not followed. Although all parties were before the lower court on the review, the petitioners chose to rely on the impotency of the Board to enter an order affecting the contracts.

In these circumstances the provision of the order requiring the Edison companies to cease from giving effect to their contracts with the contracting unions is proper. This order prevents the Edison companies from reaping an advantage from those acts of interference found illegal by the Board.

Mr. Justice BLACK concurs in this opinion.[a]

[a] The dissenting opinion of Mr. Justice Butler, in which Mr. Justice McReynolds joined, is omitted. All footnotes have likewise been omitted.

Cf. National Licorice Co. v. National Labor Relations Board, 309 U.S. 350, 60 S.Ct. 569, 84 L.Ed. 799 (1940); International Association of Machinists v. National Labor Relations Board, 311 U.S. 72, 61 S.Ct. 83, 85 L.Ed. 50 (1940).

RULES AND REGULATIONS OF NATIONAL LABOR RELATIONS BOARD, SERIES 3, ART. II, SEC. 5.

29 C.F.R. (Supp.1944) § 202.5.

Sec. 5. When and by whom issued; contents; service.—After a charge has been filed, if it appears to the Regional Director that formal proceedings in respect thereto should be instituted, he shall issue and cause to be served upon the respondent and the person or labor organization making the charge (hereinafter referred to as the "parties") a formal complaint in the name of the Board stating the charges and containing a Notice of Hearing before a Trial Examiner at a place therein fixed and at a time not less than ten days after the service of the complaint.

Whenever the complaint contains allegations under Section 8 (2) of the Act, any labor organization referred to in such allegations shall be duly served with a copy of the complaint and Notice of Hearing. Whenever any labor organization, not the subject of Section 8 (2) allegation in the complaint, is a party to any contract with the respondent the legality of which is put in issue by any allegation of the complaint, such labor organization shall be made a party to the proceeding.*

McFADDEN PUBLICATIONS, INC. v. FEDERAL TRADE COMMISSION

United States Court of Appeals for the District of Columbia.
37 F.2d 822, 59 App.D.C. 192 (1930).

MARTIN, Chief Justice. An appeal from a judgment of the lower court refusing to issue a writ of mandamus to compel the Federal Trade Commission to issue certain subpœnas duces tecum in a proceeding pending before it.

The record discloses that on April 30, 1929, a written complaint was filed with the Federal Trade Commission charging that appellant was using certain unfair methods of competition in interstate commerce in violation of the provisions of section 5 of the Act of Congress approved September 26, 1914, entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes." 38 Stat. 717 (15 U.S.C.A. §§ 41–51). The complaint charged that appellant was engaged in the business of publishing and distributing magazines, periodicals, and newspapers, and that it had adopted a practice of soliciting subscriptions therefor at prices which it falsely represented to be less than the regular subscription prices, whereas in fact the

* The second paragraph of this rule was originally added by National Labor Relations Board Rules and Regulations, Series 2, effective July 14, 1939; 4 F.R. 3136. Contrast with National Labor Relations Board Rules and Regulations, Series 1, Art. II, § 5 (29 C.F.R. § 202.5) in effect at the time when Consolidated Edison Co. v. National Labor Relations Board, *supra* at p. 489, was decided.

prices thus solicited were not less than such regular prices. Appellant, as respondent, answered, denying the charge, and the issue stood for trial.

Thereupon appellant made formal application to the Commission for the issuance of certain subpœnas duces tecum, to be used at the trial, and the same were issued. But afterwards the Commission, on the petition of some of the witnesses so subpœnaed, vacated the duces tecum clause requiring the production of the papers and documents therein specified. The respondent objected to this order, and moved that the subpœnas be reissued. But this motion was overruled by the Commission.

The respondent, as plaintiff, then filed a petition against the Commission and the various members thereof in the Supreme Court of the District of Columbia, setting out the foregoing facts, and praying that a writ of mandamus should issue, commanding the Commission to issue the writs of subpœna duces tecum, which the Commission had refused to issue as aforesaid. The case was heard by the lower court upon petition and answer, and judgment was entered against the petitioner. This appeal was then taken.

In our opinion the judgment of the lower court was correct. Section 5 of the Federal Trade Commission Act reads in part as follows (38 Stat. 720 [15 U.S.C.A. § 45]):

"Any party required by such order of the Commission to cease and desist from using such method of competition may obtain a review of such order in said Circuit Court of Appeals by filing in the court a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith served upon the Commission, and thereupon the Commission forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the Commission as in the case of an application by the Commission for the enforcement of its order, and the findings of the Commission as to the facts, if supported by testimony, shall in like manner be conclusive. * * *

"The jurisdiction of the Circuit Court of Appeals of the United States to enforce, set aside, or modify orders of the Commission shall be exclusive."

It may be noted that similar jurisdiction is vested in this court. Federal Trade Commission v. Klesner, 280 U.S. 19, 50 S.Ct. 1, 74 L.Ed. 138, 68 A.L.R. 838. It thus appears that the statute provides a plain, adequate, and exclusive method by judicial review for the correction of any error which the Commission may commit in such a proceeding. This being the case it follows that mandamus cannot be granted as an alternative or additional remedy, for it is well settled that the writ will not issue where there is any other adequate legal remedy. Nor can the writ be made to perform the office of an appeal or writ of error, or be used as a substitute for either. See 38 C.J. 558, § 31, with citations.

Therefore, without passing upon the merits of the case, we affirm the judgment of the lower court, refusing to issue a writ of mandamus upon the petition.

Judgment affirmed, with costs.

RULE XVI OF RULES OF PRACTICE OF FEDERAL TRADE COMMISSION

16 C.F.R. Part 2, as supplemented and amended; 10 F.R. 7384.

RULE XVI

SUBPOENAS

Subpoenas requiring the attendance of witnesses from any place in the United States, at any designated place of hearing, may be issued by any member of the Commission. Application therefor may be made either to the Secretary or to the presiding trial examiner.

Subpoenas for the production of documentary evidence will be issued only upon application in writing to the Commission. The application must specify, as exactly as possible, the documents desired, and show their competency, relevancy, and materiality. An application by a respondent shall be verified by oath or affirmation.

O'CARROLL v. CIVIL AERONAUTICS BOARD

United States Court of Appeals for the District of Columbia.
144 F 2d 993, 79 App D C. 233 (1944).

Before MILLER, EDGERTON and ARNOLD, Associate Justices.

PER CURIAM. This is a petition to review an order of the Civil Aeronautics Board under Section 646, 49 U.S.C.[1] The order appealed from suspended petitioner's commercial pilot's certificate on the ground that he had been negligent in taking off from a commercial air field. The appeal was primarily based on two grounds: (1) That there is no substantial evidence to support the findings of the Board; and (2) that petitioner was deprived of a fair trial because the trial examiner who had made the preliminary findings gave testimony at the Board's hearing.

As to the first point we have examined the record and find ample evidence to support the Board's finding of negligence. In support of the second point petitioner argues that a trial examiner who has been delegated to make preliminary findings of fact is in the position of a judge, and for that reason cannot testify or participate in a proceed-

[1] [Footnote omitted —Ed.]

ing to review its findings without depriving the hearing of the essential quality of due process even though the statute contains no express prohibition of such procedure. We need not decide this question because the examiner's participation in the hearing was limited to a few remarks concerning his interpretation of one of the Board's rules. He was cautioned by the Board that this was improper and no possible prejudice could have arisen because of this minor incident at the hearing.

The trial examiner also represented the Board in the argument before this court. While this was done with the consent of the petitioner the appearance of the trial examiner as an advocate was inconsistent with his former quasi judicial function. We do not think this should affect our decision in this case. We suggest, however, that in our opinion the Board was guilty of an impropriety in assigning an attorney to argue a case in which he had previously served as a trial examiner.

There is no merit in the other contentions of the petitioner.

The order of the Board will be

Affirmed.

ADMINISTRATIVE PROCEDURE ACT §§ 5(a)(b)(c), 6(c), 7(a)(b), 8, 9(b), 11

5 U.S.C.Supp. §§ 1004(a) (b) (c), 1005(c), 1006(a) (b), 1007, 1008(b), 1010.

Sec. 5. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives—

(a) Notice.—Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(b) Procedure.—The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, argu-

ments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 7 and 8.

(c) Separation of Functions.—The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency.

Sec. 6. * * *

(c) Subpenas.—Agency subpenas authorized by law shall be issued to any party upon request and, as many be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought. Upon contest the court shall sustain any such subpena or similar process or demand to the extent that it is found to be in accordance with law and, in any proceeding for enforcement, shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

Sec. 7. In hearings which section 4 or 5 requires to be conducted pursuant to this section —

(a) Presiding Officers.—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or

designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case.

(b) Hearing Powers.—Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act.

Sec. 8. In cases in which a hearing is required to be conducted in conformity with section 7—

(a) Action by Subordinates.—In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 5, any other officer or officers qualified to preside at hearings pursuant to section 7) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision except that in rule making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires.

(b) Submittals and Decisions.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision

of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

Sec. 9. In the exercise of any power or authority—

* * *

(b) Licenses.—In any case in which application is made for a license required by law the agency, with due regard to the rights or privileges of all the interested parties or adversely affected persons and with reasonable dispatch, shall set and complete any proceedings required to be conducted pursuant to sections 7 and 8 of this Act or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements. In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency.

Sec. 11. Subject to the civil-service and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 7 and 8, who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission (hereinafter called the Commission) after opportunity for hearing and upon the record thereof. Examiners shall receive compensation prescribed by the Commission independ-

ently of agency recommendations or ratings and in accordance with the Classification Act of 1923, as amended, except that the provisions of paragraphs (2) and (3) of subsection (b) of section 7 of said Act, as amended, and the provisions of section 9 of said Act, as amended, shall not be applicable. Agencies occasionally or temporarily insufficiently staffed may utilize examiners selected by the Commission from and with the consent of other agencies. For the purposes of this section, the Commission is authorized to make investigations, require reports by agencies, issue reports, including an annual report to the Congress, promulgate rules, appoint such advisory committees as may be deemed necessary, recommend legislation, subpena witnesses or records, and pay witness fees as established for the United States courts.[1]

B. The Elements of a Fair Hearing—Evidence

In INTERSTATE COMMERCE COMMISSION v. BAIRD, 194 U.S. 25, 24 S. Ct. 563, 48 L.Ed. 860 (1904), the Court, at p. 44 of 194 U.S. (p. 569 of 24 S.Ct.) said:

The inquiry of a board of the character of the Interstate Commerce Commission should not be too narrowly constrained by technical rules as to the admissibility of proof. Its function is largely one of investigation, and it should not be hampered in making inquiry pertaining to interstate commerce by those narrow rules which prevail in trials at common law, where a strict correspondence is required between allegation and proof.

In INTERSTATE COMMERCE COMMISSION v. LOUISVILLE & NASHVILLE RR., 227 U.S. 88, 33 S.Ct. 185, 57 L.Ed. 431 (1913), the Court, at p. 93 of 227 U.S. (pp. 187–8 of 33 S.Ct.), said:

The Commission is an administrative body and, even where it acts in a quasi judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties. Interstate Commerce Commission v. Baird, 194 U.S. 25, 48 L.Ed. 860, 24 Sup.Ct.Rep. 563. But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the Commissioners cannot act upon their own information, as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be

[1] See Final Report of the Attorney General's Committee on Administrative Procedure (G.P.O.1941) 45–60, 203–8, 248–50.

given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the findings; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown, but presumptively sufficient information to support the finding.[g]

UNITED STATES AND I.C.C. v. ABILENE & SOUTHERN RAILWAY CO.

Supreme Court of the United States.
265 U.S. 274, 44 S.Ct. 565, 68 L.Ed. 1016 (1924).

Mr. Justice BRANDEIS delivered the opinion of the Court.

This is an appeal by the United States and the Interstate Commerce Commission from a decree of the federal court for Kansas which perpetually enjoined the enforcement of an order made by the Commission, on August 9, 1922, under section 15(6) of the Interstate Commerce Act as amended by Transportation Act 1920, c. 91, § 418, 41 Stat. 456, 486 (Comp.St.Ann.Supp. 1923, § 8583). The order relates to the divisions of interstate joint rates on traffic interchanged, within the United States, by the Kansas City, Mexico & Orient system with 13 carriers whose lines make direct connection with it. The order provides that on all such interchanged traffic the existing divisions of these carriers shall be reduced by a fixed per cent., and that the Orient shall receive the amount so taken from its connections. The order also directed the Orient and the connecting carriers to make, at stated intervals, reports of the financial results of the divisions ordered, permitted any carrier to except itself from the order, in whole or in part, by proper showing, and retained jurisdiction in the Commission "to adjust on the basis of such reports the divisions herein prescribed or stated, if such adjustment shall to us seem proper." Kansas City, Mexico & Orient Division, 73 Interst. Com. Com'n R. 319, 329. The order was entered after an investigation into the financial needs of the Orient system, undertaken by the Commission in April, 1922, pursuant to an application of the receiver of the Kansas City, Mexico & Orient Railroad Co. and an affiliated Texas corporation. It appeared (and was not denied) that the public interest demanded continued operation of the railroad; that the revenues were insufficient to pay operating expenses; that the operation was being efficiently conducted; and that, unless relief were afforded by increasing the Orient's division of joint rates and/or otherwise, operation would have to be suspended

[g] For the remainder of this opinion, see *infra* at p. 755. See also Spiller v. Atchison, Topeka & Santa Fe Railway, 253 U.S. 117, 129–32, 40 S.Ct. 466, 471–2, 64 L.Ed. 810 (1920).

and the railroad abandoned. The 13 carriers who brought this suit participated in the investigation undertaken by the Commission, and supplied certain statistical information requested of them; but they introduced no evidence before the Commission, and the case was submitted there without argument. None of the connecting carriers made application to be excepted from the order. Nor did any of them apply for a rehearing. Before the effective date of the order, this suit was begun. On application for a temporary injunction, it was heard by three judges, pursuant to the Act of October 22, 1913, c. 32, 38 Stat. 208, 220, and a temporary injunction was granted. Upon final hearing, motions of the defendants to dismiss the bill were denied, the injunction was made permanent, and a rehearing was refused. 288 Fed. 102.

First. The Commission moved, in the District Court, to dismiss the bill on the ground that the suit was premature. The contention is that, under the rule of Prentis v. Atlantic Coast Line, 211 U.S. 210, 29 Sup.Ct. 67, 53 L.Ed. 150, orderly procedure required that, before invoking judicial review, the carriers should have exhausted the administrative remedy afforded by a petition for rehearing before the full Commission. The investigation and order were made, not by the whole Commission, but by division 4. The order of a division has "the same force and effect * * * as if made * * * by the Commission, subject to rehearing by the Commission." Interstate Commerce Act as amended, § 17(4) being Comp St.Ann.Supp.1923, § 8586. Any party may apply for such rehearing of any order or matter determined. Section 16a (Comp.St. § 8585). Meanwhile the order may be suspended either by the division or by the Commission. In this case, the order, by its terms, was not to become effective until 37 days after its entry. There was, consequently, ample time within which to apply for a rehearing and a stay, before the plaintiffs could have been injured by the order.

Division 4 consists of 4 members. There are 11 members on the full Commission. Under these circumstances, what is here called a rehearing resembles an appeal to another administrative tribunal. An application for a rehearing before the Commission would have been clearly appropriate. The objections to the validity of the order now urged are in part procedural. They include questions of joinder of parties, of the admissibility of evidence, and of failure to introduce formal evidence. Most of the objections do not appear to have been raised before the division. If they had been, alleged errors might have been corrected by action of that body or by the full Commission. The order involved also a far-reaching question of administrative power and policy, which, so far as appears, had never been passed upon by the full Commission, and was not discussed by these plaintiffs before the division. In view of these facts, the trial court would have been justified in denying equitable relief until an application had been made to the full Commission, and redress had been denied by it. But, in

the absence of a stay, the order of a division is operative, and the filing of an application for a rehearing does not relieve the carrier from the duty of observing an order. Despite the failure to apply for a rehearing, the court had jurisdiction to entertain this suit. Prendergast v. New York Telephone Co., 262 U.S. 43, 48, 49, 43 S.Ct. 466, 67 L.Ed. 853. Compare Chicago Rys. Co. v. Illinois Commerce Commission (D.C.) 277 F. 970, 974. Whether it should have denied relief until all possible administrative remedies had been exhausted was a matter which called for the exercise of its judicial discretion. We cannot say that, in denying the motion to dismiss, the discretion was abused.[h] * * *

Fourth. The plaintiffs contend that the order is void because it rests upon evidence not legally before the Commission. It is conceded that the finding rests, in part, upon data taken from the annual reports filed with the Commission by the plaintiff carriers pursuant to law; that these reports were not formally put in evidence; that the parts containing the data relied upon were not put in evidence through excerpts; that attention was not otherwise specifically called to them; and that objection to the use of the reports, under these circumstances, was seasonably made by the carriers and was insisted upon. The parts of the annual reports in question were used as evidence of facts which it was deemed necessary to prove, not as a means of verifying facts of which the Commission, like a court, takes judicial notice. The contention of the Commission is that, because its able examiner gave notice that "no doubt it will be necessary to refer to the annual reports of all these carriers," its Rules of Practice permitted matter in the reports to be used as freely as if the data had been formally introduced in evidence.

The mere admission by an administrative tribunal of matter which under the rules of evidence applicable to judicial proceedings would be deemed incompetent does not invalidate its order. Interstate Commerce Commission v. Baird, 194 U.S. 25, 44, 24 S.Ct. 563, 48 L.Ed. 860; Spiller v. Atchison, Topeka & Santa Fé Ry. Co., 253 U.S. 117, 131, 40 S.Ct. 466, 64 L.Ed. 810. Compare Bilokumsky v. Tod, 263 U.S. 149, 157, 44 S.Ct. 54, 68 L.Ed. 221. But a finding without evidence is beyond the power of the Commission. Papers in the Commission's files are not always evidence in a case. New England Divisions Case, 261 U.S. 184, 198, note 19, 43 Sup.Ct. 270, 67 L.Ed. 605. Nothing can be treated as evidence which is not introduced as such. Interstate Commerce Commission v. Louisville & Nashville R. Co., 227 U.S. 88, 91, 93, 33 Sup.Ct. 185, 57 L.Ed. 431; Chicago Junction Case, 264 U.S. 258, 44 S.Ct. 317, 68 L.Ed. 667. If the proceeding had been, in form, an adversary one commenced by the Orient system, that carrier could not, under rule XIII, have introduced the annual reports

[h] But *cf.* §§ 17(7) (8) (9) of the Interstate Commerce Act, as amended, 49 U.S.C.Supp. §§ 17(7) (8) (9).

as a whole. For they contain much that is not relevant to the matter in issue. By the terms of the rule, it would have been obliged to submit copies of such portions as it deemed material, or to make specific reference to the exact portion to be used. The fact that the proceeding was technically an investigation instituted by the Commission would not relieve the Orient, if a party to it, from this requirement. Every proceeding is adversary, in substance, if it may result in an order in favor of one carrier as against another. Nor was the proceeding under review any the less an adversary one, because the primary purpose of the Commission was to protect the public interest through making possible the continued operation of the Orient system. The fact that it was on the Commission's own motion that use was made of the data in the annual reports is not of legal significance.

It is sought to justify the procedure followed by the clause in rule XIII which declares that the "Commission will take notice of items in tariffs and annual or other periodical reports of carriers properly on file." But this clause does not mean that the Commission will take judicial notice of all the facts contained in such documents. Nor does it purport to relieve the Commission from introducing, by specific reference, such parts of the reports as it wishes to treat as evidence. It means that as to these items there is no occasion for the parties to serve copies. The objection to the use of the data contained in the annual reports is not lack of authenticity or untrustworthiness. It is that the carriers were left without notice of the evidence with which they were, in fact, confronted, as later disclosed by the finding made. The requirement that in an adversary proceeding specific reference be made, is essential to the preservation of the substantial rights of the parties.

The right of the carriers to insist that the consideration of matter not in evidence invalidates the order was not lost by their submission of the case without argument and by their acquiescing in the suggestion that the presentation of a tentative report by the examiner be omitted. While the course pursued denied to the Commission the benefit of that full presentation of the contentions of the parties which is often essential to the exercise of sound judgment, it cannot be construed as a waiver by the carriers of their legal rights. The general notice that the Commission would rely upon the voluminous annual reports is tantamount to giving no notice whatsoever. The matter improperly treated as evidence may have been an important factor in the conclusions reached by the Commission. The order must, therefore, be held void.

Fifth. A further objection of the carriers should be considered. They point out that the record does not contain any tariffs showing the individual joint rates, or any division sheets showing how these individual joint rates are divided, nor any information concerning the amount of service performed by the Orient and its several connections under such individual joint rates. As justification for this omission, it

ists. Accordingly there was offered in evidence a report on Daxol, made in February, 1919, by the chemist of the dairy and food department of the state of Ohio, one made by the Bureau of Chemistry of the United States Department of Agriculture in November, 1919, and one made in September, 1921, by Pitkin, Inc., of New York City.

Apparently no effort was made to identify or ascertain the origin of the substance submitted for analysis, further than that it was contained in a bottle labeled Daxol. The inference is necessarily that the Commission regarded the content of any bottle labeled Daxol as material to this issue, and it must also have been assumed that everything in a bottle labeled Daxol came from Proper. But there was no identification of what was analyzed as being Proper's product. On the assumptions made, and without any evidence as to the age of the preparation as analyzed, the inferences are irresistible either that the preparation known as Daxol was not stable, or that its composition varied.

The taking of opinion evidence extends over a field hitherto, we think, unknown in legal investigation. One of the chemists who had analyzed the contents of a Daxol bottle at the request of Bene had said that its use "on the human body would be attended with great danger." Whereupon another chemist was asked by the Commission's attorney whether he thought Daxol would be injurious when applied to the human body. Over objection he was permitted to testify on the ground that, "Well, it was a chemist that made that statement; that's the reason I think that he (the witness) is qualified." And examples of similar procedure might be multiplied.

The questions suggested by the foregoing references are whether the Commission, in its investigations, is restricted to the taking of legally competent and relevant testimony. We incline to think that it is not by the statute, and, having regard to the exigencies of administrative law, that it should not be so restricted.

We are of opinion that evidence or testimony, even though legally incompetent, if of the kind that usually affects fair-minded men in the conduct of their daily and more important affairs, should be received and considered; but it should be fairly done. The Trade Commission, like many other modern administrative legal experiments, is called upon simultaneously to enact the rôles of complainant, jury, judge, and counsel. This multiple impersonation is difficult, and the maintenance of fairness perhaps not easy; but we regard the methods pursued in showing Proper's diminution in sales as lacking in every evidential or testimonial element of value, and opposed to that sense of fairness which is almost instinctive.

We note that no finding of fact was made by the Commission to the effect that Proper's sales of Daxol in the aggregate diminished; but a finding was made ut supra that four chain store systems excluded Daxol from their counters. As to this finding the record contains no

evidence whatever justifying any reference to the Woolworth Company. The agent of Kresge testified plainly that Daxol did not sell, and that that was the reason "we discontinued carrying it." The buyer for McCrory declared that the chemical analysis would have had no effect on him, if there had been a large trade in Daxol, and averred that the reason why he did not continue buying it was because the demand slackened. The witness produced from the Kress Company was the only support of the Commission's substantial averment, namely, that these particular four chain stores dropped Daxol as a result of Bene's activities.

We cannot think that such testimony as this affords a foundation, either legal or reasonable, for the finding first above summarized. Having pointed out the infirmity of what was introduced as evidence, we shall not pause to inquire as to whether the order could be justified on all that is left of any probative value, to wit, the statement on behalf of the Kress Company, the various analyses, the admissions of the petitioner herein; for there is a much more important question presented by this record.

This proceeding has nothing to do with the various anti-trust acts. The only statute invoked is section 5 of the act creating the Commission. 38 Stat. 717–724 (Comp.St. § 8836e). Under this statute there are two points that must be made to appear before any complaint can issue: (1) That the person complained of "is using any unfair method of competition in commerce"; and (2) that a proceeding by the Commission in respect thereof would be "to the interest of the public."

It would seem elementary that whatever is necessary to justify a proceeding by the Commission must be proved in that proceeding by said Commission. Both these points are duly alleged in the complaint herein, but no finding has been made to the effect that the proceeding has been justified as being in the interest of the public. That the public interest is to be considered in proceedings of this kind is manifest from all the reports. But it is sufficient to cite the Winsted Hosiery Case, 258 U.S. 483, 42 Sup.Ct. 384, 66 L.Ed. 729. The court said, at page 493 (42 Sup.Ct. 385):

"The facts show that it is to the interest of the public that a proceeding to stop the practice be brought. * * * When misbranded goods attract customers by means of the fraud which they perpetrate, traded is diverted from the producer of truthfully marked goods."

The decision cited rests flatly on the proposition that the goods there complained of were misbranded, and therefore afforded an unfair method of competition with goods properly branded. But what the court said concerning the goods advertised under a name deemed to contain improper and indeed fraudulent implications is just as applicable to goods sought to be protected and the sale thereof advanced through a proceeding by the Trade Commission, but for the benefit

and advantage primarily of a complainant; in this case a single person, the manufacturer of Daxol.

The real meaning of this litigation is perfectly shown by the witness Kuhlman, who, after testifying that sales of Daxol had practically ceased at the time she testified, volunteered the statement that:

"The concerns to whom we have been selling this product have had no faith up to this time because of the analysis that has been forwarded to the different companies. If the decision is in our favor, we may be able to reinstate their faith in the product."

An objection by petitioner to this declaration was overruled, and the statement stands as a peculiarly frank exposition of the nature and purpose of the proceeding. We shall therefore consider, in the absence of any finding on the subject, whether it is true, as alleged in the answer, that what is imparted to the public by the label on the Daxol container is "false, fraudulent, and misleading."

The label on a Daxol bottle declares that it is a "new American antiseptic, stronger than peroxide." It is said to represent "the highest chemical skill in producing a most potent antiseptic, similar to the one in use at hospitals, at the European fronts, and recognized to be the greatest medical discovery of the age." In a special note the public is recommended: "To obtain the best results, use Daxol as often as possible." The directions for using this "potent antiseptic" are in part as follows:

"For cuts, open wounds, and ulcers, moisten thoroughly on lint or cotton and apply freely. For sore throat, gargle every half hour. For abscesses and boils, apply freely by moistening cotton. For sore and inflamed eyes, mix one teaspoonful to two tablespoons warm water and bathe eye."

And there are other directions of a similar nature too long to quote. Of the five analyses offered in evidence, all but one report lime as present in varying proportions, and the one that does not mention lime does not pretend to be fully quantitative. This analysis, put in evidence by the Commission, concludes thus:

"Product is principally chlorine water of a strength of .06 per cent. As a disinfectant, free chlorine is only equal to hydrogen peroxide, so, to be as strong, this solution should be 3 per cent. Misbranded. Statement on label is false."

So far as chlorine is concerned, the proportions of that chemical found in the samples submitted vary enormously, viz. from .11 per cent. to .058 per cent.; while as for calcium hypochlorite (bleaching powder) it is present in a majority of the specimens submitted. The record contains no attack upon the accuracy of the several analyses. It follows necessarily that we have here a compound either chemically unstable, which is a point no chemist testified upon, or varying in composition, which is a point any layman can ascertain and understand from the evidence herein.

Finally, the record contains no contradiction of the evidence given from a highly qualified physician and surgeon, who testified from all the analyses, and his own experience with disinfectants and antiseptics. This uncontradicted and unimpeached witness went through the label from which we have quoted above, and pointed out that most of the purposes for which the proprietor so highly recommended Daxol meant the free application of this solution to mucous membrane both healthy and diseased. He gave it as his professional opinion that such applications of Daxol would invariably produce "an irritating caustic effect," and he heartily agreed with the Ohio food department that Daxol was a misbranded article.

From this evidence we deduce as findings of fact:

First. Daxol is a product of varying composition, and misbranded, in that the public is by its label requested to use it for purposes for which it is medically unfit.

Second. The public has no interest in the protection of such an article.

As a conclusion of law, we hold that, there being no proof of a public interest herein, or of its being to the interest of the public that this proceeding should have been begun, or the order complained of made, said order must be reversed; and it is reversed accordingly.

CONSOLIDATED EDISON CO. v. NATIONAL LABOR RELATIONS BOARD

Supreme Court of the United States.
305 U.S. 197, 225–6, 59 S.Ct. 206, 215, 83 L.Ed. 126 (1938).

See *supra* at pp. 489, 491–2.

BRIDGES v. WIXON

Supreme Court of the United States.
326 U.S. 135, 65 S.Ct. 1443, 89 L.Ed. 2103 (1945).

See at p. 320, *supra*.[j]

[j] Note that the Attorney General "reviewed the decision of the Board and rendered an opinion in which he made findings, . . . and ordered Harry Bridges to be deported." See *supra* at p. 321 (326 U.S. at 140, 65 S.Ct. at 1446). *Cf.* 326 U.S. at 152–3, 65 S.Ct. at 1451–2, *supra* at p. 323. Is not the Attorney General, then, the authority who made the decision? Had he heard Bridges within the meaning of the Morgan cases, *supra* at pp. 460, 468, 476, and National Labor Relations Board v. Mackay, *supra* at p. 485?

AMERICAN TRUCKING ASSOCIATIONS, INC., v. UNITED STATES

Supreme Court of the United States.
326 U.S. 77, 65 S.Ct. 1499, 89 L.Ed. 2065 (1945).

Mr. Justice REED delivered the opinion of the Court.

This appeal involves the applicability by the Interstate Commerce Commission of the legal criteria for the issuance of certificates of convenience and necessity for motor truck operation by a railroad which were discussed in the opinion in Interstate Commerce Commission et al. v. Parker et al., 326 U.S. 60, 65 S.Ct. 1490, 89 L.Ed. 2051.

In these applications Legh R. Powell and Henry W. Anderson, Receivers of the Seaboard Air Line Railway Company, sought certificates of convenience and necessity under Sections 206(a) and 207(a), Motor Carrier Act, 1935, 49 Stat. 551, as amended by the Transportation Act of 1940, Interstate Commerce Act, part II, 54 Stat. 923, 49 U.S.C.A. §§ 306(a), 307(a), for the operation of motor trucks as auxiliary to and supplemental of the railroad operation of Seaboard. These motor routes were sought to improve the delivery of less-than-carload freight to way stations of the railroad. Fourteen applications are involved. The routes in issue paralleled the main line of the Seaboard for the greater portion of the distance between Richmond, Virginia, and Jacksonville, Florida. Other controverted routes served shorter railway lines in North Carolina, South Carolina and Florida. Still other similar motor routes are operated by the Seaboard under orders of the Commission which are not now in controversy. Well above a hundred way stations will be served by the proposed applications. Objections to the applications were made by existing motor carriers along the routes and by various trucking organizations.

The Commission set the applications for hearing before joint boards pursuant to its interpretation of Section 205(b), Motor Carrier Act of 1935, as amended, Section 20(c), Transportation Act of 1940. Diverse recommended reports and orders were issued by the joint boards. A number of the applications were consolidated for argument before the Commission; others were dealt with on the exceptions to the joint board reports or by individual hearing. As the Seaboard was the only applicant and the issues were similar, the applications were disposed of as a single proceeding. Seaboard A. L. Ry. Co. M. Operation—Gaston-Garnett, S. C., 17 M.C. 413; 21 M.C.C. 773; 28 M.C.C. 5; 34 M.C.C. 441.

The Commission granted the applications upon a finding that the proposed motor operations were a specialized type coordinated with rail operations. See Thomson v. United States, 321 U.S. 19, 64 S.Ct. 392, 88 L.Ed. 513. The specially constituted District Court, 56 F. Supp. 394, affirmed the order of the Commission against attack because the certificates were granted without regard to their effect on

existing motor carriers—a ground considered today in Interstate Commerce Commission v. Parker, supra, and over the additional objections that the joint boards were improperly constituted, that material evidence on the effect of the proposed operations on the existing or over-the-road motor truck service was excluded by the joint boards and the Commission and that the Seaboard was exempted from the tariff provisions of Section 217 and the accounts and record provision of Section 220 and the regulations thereunder. The appellees asserted that laches barred the court proceedings to enjoin the order of the Commission. The same issues are here. Nothing more need be said as to the contentions which were discussed in the Parker case. The district court proceedings and this appeal are authorized by 28 U.S.C. § 41(28) and §§ 43–48 and § 345, 28 U.S.C.A. §§ 41(28), 43–48, 345.

Joint Boards. From the earliest hearing, objection was made to the composition of the joint boards. Section 205(a), so far as pertinent here, provides:

"The Commission shall, when operations of motor carriers or brokers conducted or proposed to be conducted involve not more than three States, * * * refer to a joint board for appropriate proceedings thereon, any of the following matters arising in the administration of this part with respect to such operations * * *: Applications for certificates, permits, or licenses. * * * The joint board to which any such matter is referred shall be composed solely of one member from each State within which the motor-carrier or brokerage operations involved in such matter are or are proposed to be conducted * * *."

The applications were for short routes of varying lengths up to nearly two hundred miles. Many were contiguous. Some crossed state lines. Others were wholly within a state. The Commission referred each application to a joint board composed of one member from the state or states in which the route involved in the particular application was situated.

As the series of applications cover continuous motor routes for a large portion of the railroad, appellants contend that the Commission should have consolidated these applications, constituted a board and made its reference as though there were only a single application for motor carrier service which was to be fully integrated with the Seaboard system in the six states which the railroad traverses or at least Virginia, North Carolina, South Carolina and Florida, in which states are located all the routes for which applications are made. If this position is correct the joint boards should have had four or six members instead of the one or two members who actually composed them. We are of the opinion that the statute does not support appellant.

It will be noted that Section 205(a) requires that applications for certificates be referred to joint boards composed solely of members from the state within which the operations are proposed to be conducted. In these applications the proposal is to conduct operations in

a single state or in some instances in two states. The only source of knowledge for the Commission as to proposed operations were the applications. It seems necessary for it, therefore, to rely on the representations in the applications in determining their scope and in designating the joint boards to hear them.

The Commission has so interpreted the act. See Argo and Collier Truck Lines Common Carrier Application, 27 M.C.C. 563, 566; Atlantic Coast Line Railroad Company Extension of Operation, 30 M.C.C. 490, 491–2. These applications did not disclose or propose any interchange or unification of the traffic among the respective routes. Any one of them, or all except one, might have been refused by the Commission. Consequently, the Commission properly referred each application to a board having a member solely from the state or states in which the application proposes to conduct operations.

But the appellant contends that the grant of appellee's applications allows a unified service in three states and that appellee may have intended this result when it filed the several applications. Assuming this to be true, it does not make the Commission's action in the designation of separate boards unlawful. It is impossible for the Commission to predict accurately such a result or determine the existence of such an intent at the time an application is filed—at which time the Commission must designate a board for hearings. In most instances the intent or purpose of the applicant would become apparent only when hearings were held on the applications. Thus the appellant's position would require reassignment of cases to differently constituted joint boards as the scope of the application was narrowed or expanded by the testimony and arguments of the parties or conclusion of the joint boards or the Commission in the course of the hearing. See Seaboard Air Line Railway Company Motor Operations—Gaston-Garnett, S. C., 17 M.C.C. 413, 416–17. It may be that in the light of our ruling on the admissibility of certain evidence the Commission may wish to consolidate hearings on the applications, but that is a matter for administrative discretion.

Excluded Evidence. Appellants throughout the proceedings have sought to introduce evidence both before the joint boards and the Commission as to the economic effort on the existing motor carriers of the proposed railway operation of motor trucks and have persisted in their objections at each stage of the proceedings. The joint boards refused to permit evidence as to conditions on any route except that covered by the application under consideration. Protestants made repeated efforts before the Commission to secure consolidation of the joint board hearings but were unsuccessful. After the grant of the certificates with the limitation of operations to a prior or subsequent movement by rail on July 11, 1939, 17 M.C.C. 413, and February 17, 1940, 21 M.C.C. 773, the proceedings were reopened to consider the modification of the rail movement requirement in prior orders. Substitution of the key point requirement or its equivalent for rail move-

ment was made on January 24, 1941, Kansas City S. Transport Co., Inc., Com. Car Application, 28 M.C.C. 5. On October 3, 1941, all applications were reopened solely for reexamination of Condition 3, the key point condition, as to whether it "should be modified and, if so, the extent of such modification." This hearing was on all applications and before an examiner of the Commission alone. At that hearing the protestants pressed for the introduction and admission of further evidence as set up in their petition to which reference is about to be made. 34 M.C.C. 441, 442. This petition sought permission to introduce evidence as to the economic effect on the independent trucking industry and a direction to the Seaboard to furnish statistics as to the traffic it proposed to handle by truck. The petition was denied without a statement as to the Commission's reasons for the denial. 34 M.C.C. 441, 442. This we think was erroneous.

The bill of complaint sets up in sections VIII and XI numerous types or items of evidence which it alleges were excluded by the joint boards or the Examiner. Some of these items, such as "The refusal of the railroad to enter into arrangements with the independent motor carriers" or "Use of railroad facilities and employees," hardly require proof. They are admitted by all parties. Other items have had considerable proof introduced and more may be deemed by the Commission cumulative or unnecessary. "Cost of operations" would be an example. There is considerable overlapping of some categories of proposed evidence. For instance one item is "The economic effect on existing motor carriers" and "Destructive competition flowing from subsidized truck operations." Therefore we do not determine that all the items of evidence as set out by appellants, either in their bill of complaint or the petition before the Commission, were improperly excluded.

We think that it is sufficient to say that the joint boards and the Commission should have admitted evidence of the flow of traffic by truck from points covered in one application to points covered by other applications and evidence of the effect of the motor traffic, developed or prospective on all Seaboard routes for which applications are pending or already granted, on the over-the-road motor carriers. Furthermore other competent and material evidence which the protestants may produce as to the economic effect on the non-rail motor carriers should be received. The applicant will of course be required to furnish needed statistical evidence which is reasonably available to it and will have opportunity to submit evidence upon its own part. This specification of admissible evidence shall not be deemed to restrict the discretion of the Commission or the joint boards in receiving other evidence deemed by them or either of them material to aid in the solution of the issues between the parties.

While as pointed out by the brief of the Seaboard none of this evidence goes "to the inherent nature of auxiliary motor service performed by rail carriers," it may be decisive in the Commission's deter-

mination of whether to grant the applications. We have just said in the Parker case that the Commission must weigh the advantages of improved rail traffic against the injury to the over-the-road motor carriers to determine where public convenience and necessity lies. It is a difficult task to appraise these conflicting interests. It is a problem which should be solved only after the receipt by the Commission under its usual rules of admissibility, of all available material evidence as to the probable effect of the proposals on the operations both of the proponents of and the protestants against the applications. Interstate Commerce Comm. v. Louisville & Nash. R. R. 227 U.S. 88, 91, 33 S.Ct. 185, 186, 57 L.Ed. 431; Chicago Junction Case, 264 U.S. 258, 264, 265, 44 S.Ct. 317, 319, 68 L.Ed. 667. It is not enough that the railroad's motor operations are found by the Commission to be of a different character from over-the-road motor operations because they are integrated with railroad operation. The Commission must also consider the disadvantage to the public of a serious impairment of the non-rail motor carriers. Those affected are entitled to fully develop the bearing of the proposals on the transportation agencies which are involved. The discretion of the Commission should be exercised after consideration of all relevant information.

Appellants have other objections to the order of the Commission which have been considered and a few words need to be said about only two of them. It is objected that the railroad as a motor carrier has been permitted through other proceedings to file illegal tariffs, violative of Section 217 of part II of the Interstate Commerce Act, and has been improperly exempted by the Commission from certain accounting requirements of Section 220 of the same part to which the other motor carriers are subject. These are obviously not grounds upon which appellants can base an argument against the grant of a certificate of convenience and necessity.

Appellees on their part suggest that the Commission's grant of the requested certificates should be sustained because of laches. The final certificate was issued on November 30, 1942, and this suit was brought October 21, 1943, eleven months later. The appellees' evidence as to change of position in reliance upon the certificate is not impressive. There was no specific proof of the purchase of equipment in reliance on the certificate or of failure to purchase other equipment, such as railroad cars, in reliance on the use of trucks. There was some testimony of minor adjustments in methods of operation. A number of the routes had not been put in operation and others were abandoned. The question of laches was not passed on by the district court.

In view of this evidence, we do not feel the defense of laches should be sustained.

As some trucks are being operated under certificates which were issued on these applications, because of the present war emergency we direct that the mandate herein be stayed until August 1, 1945, to

allow opportunity for such steps as the respective parties may deem advisable. See Yonkers v. United States, 320 U.S. 685, 321 U.S. 745, 64 S.Ct. 517, 88 L.Ed. 1048; Public Service Commission v. United States, 323 U.S. 675, 65 S.Ct. 130.

Reversed.

Mr. Justice BLACK, Mr. Justice DOUGLAS, and Mr. Justice RUTLEDGE concur for the reasons stated in the dissenting opinion in Interstate Commerce Commission v. Parker, 326 U.S. 60, 65 S.Ct. 1490, 89 L.Ed. 2051.[k]

ADMINISTRATIVE PROCEDURE ACT § 7(c) (d)

5 U.S.C.Supp. § 1006(c) (d).

Sec. 7. In hearings which section 4 or 5 requires to be conducted pursuant to this section—

* * *

(c) Evidence.—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(d) Record.—The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

[k] Footnotes of the court have been omitted.

PART III. ENFORCEMENT PROCEEDINGS IN THE COURTS

SECTION 1. ORIGINAL PROCEEDINGS IN THE COURTS

Apart from the enforcement of administrative orders by judicial action, regulatory statutes commonly make provision for the enforcement of some or all of their provisions and of rules and regulations issued thereunder, by original proceedings, civil or criminal, in the courts, instituted by the administrative agency, prosecuting attorneys, or private persons who have been injured.

INTERSTATE COMMERCE ACT § 10(1)

49 U.S.C. § 10(1).

Sec. 10. (1) That any common carrier subject to the provisions of this part, or, whenever such common carrier is a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, who, alone or with any other corporation, company, person, or party, shall willfully do or cause to be done, or shall willingly suffer or permit to be done, any act, matter, or thing in this part prohibited or declared to be unlawful, or who shall aid or abet therein, or shall willfully omit or fail to do any act, matter, or thing in this part required to be done, or shall cause or willingly suffer or permit any act, matter, or thing so directed or required by this part to be done not to be so done, or shall aid or abet any such omission or failure, or shall be guilty of any infraction of this part for which no penalty is otherwise provided, or who shall aid or abet therein, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any district court of the United States within the jurisdiction of which such offense was committed, be subject to a fine of not to exceed five thousand dollars for each offense: *Provided,* That if the offense for which any person shall be convicted as aforesaid shall be an unlawful discrimination in rates, fares, or charges for the transportation of passengers or property or the transmission of intelligence, such person shall, in addition to the fine hereinbefore provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court.[a]

[a] Cf. Securities Act of 1933 § 24, 15 U.S.C. § 77x; Federal Trade Commission Act § 14, 15 U.S.C. § 54; National Labor Relations Act § 12, 29 U.S.C. § 162.

SECURITIES EXCHANGE ACT OF 1934 § 21 (e) (f)

15 U.S.C. § 78u(e) (f).

(e) Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this title, or of any rule or regulation thereunder, it may in its discretion bring an action in the proper district court of the United States, the Supreme Court of the District of Columbia, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General, who may, in his discretion, institute the necessary criminal proceedings under this title.

(f) Upon application of the Commission the district courts of the United States, the Supreme Court of the District of Columbia, and the United States courts of any Territory or other place subject to the jurisdiction of the United States, shall also have jurisdiction to issue writs of mandamus commanding any person to comply with the provisions of this title or any order of the Commission made in pursuance thereof or with any undertaking contained in a registration statement as provided in subsection (d) of section 15 of this title.[b]

THE HECHT CO. v. BOWLES, PRICE ADMINISTRATOR

Supreme Court of the United States.
321 U.S. 321, 64 S.Ct. 587, 88 L.Ed. 754 (1944).

Mr. Justice DOUGLAS delivered the opinion of the Court.

Sec. 205(a) of the Emergency Price Control Act of 1942, 56 Stat. 23, 50 U.S.C.App. Supp. II, §§ 901 et seq., 925, 50 U.S.C.A. Appendix, §§ 901 et seq., 925, provides: "Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, * * * he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond." The question in this case is whether the Administra-

[b] *Cf.* Interstate Commerce Act § 20 (9), 49 U.S.C. § 20(9); Federal Trade Commission Act § 13, 15 U.S.C. § 53.

tor, having established that a defendant has engaged in acts or practices violative of § 4 of the Act is entitled as of right to an injunction restraining the defendant from engaging in such acts or practices or whether the court has some discretion to grant or withhold such relief.

Sec. 4 (a) of the Act makes it unlawful for a person to sell or deliver any commodity in violation of specified orders or regulations of the Administrator. A regulation issued under § 2 of the Act and effective in May, 1942 (7 Fed.Reg. 3153) provided that no person should sell or deliver any commodity at a price higher than the authorized maximum price (§ 1499.1) as fixed or determined by the regulation.[1] Since maximum prices were fixed with reference to earlier base periods, the regulation also provided for the preservation and examination of existing records.[2] And provision was likewise made for the keeping of current records reflecting sales made under the regulation [3] and for the filing of maximum prices with the Administrator.[4]

There is no substantial controversy over the facts. Petitioner operates a large department store in Washington, D. C., and did a business of about $20,000,000 in 1942. There are 107 departments in the store and each sells a separate line of merchandise. In the fall of 1942 the Administrator started an investigation to determine whether petitioner was complying with the Act and the regulation. The investigation was a "spot check", confined to seven departments. In each of the seven departments violations were disclosed. As a result this suit was brought. The complaint charged violations of the maximum price provisions of the regulation and violations of the regulations governing the keeping of records and reporting to the Administrator. The Administrator prayed for an injunction enjoining petitioner from selling, delivering or offering for sale or delivery any commodity in violation of the regulation and from failing to keep complete and accurate records as required by the regulation. In its answer petitioner pleaded among other things that any failure or neglect to comply with the regulation was involuntary and was corrected as soon as discovered.

Numerous violations both as respects prices and records were discovered. Thus in six of the seven departments investigated there had occurred between May and October, 1942 some 3700 sales in excess of the maximum prices with overcharges of some $4600. The statements filed with the Administrator were deficient, some 400 items of merchandise being omitted. And there were over 300 items with respect to which no records were kept showing how the maximum prices had been determined.

There is no doubt, however, of petitioner's good faith and diligence. The District Court found that the manager of the store had offered it as a laboratory in which the Administrator might experiment with

[1] [Footnote omitted.—Ed.]
[2] [Footnote omitted.—Ed.]
[3] [Footnote omitted.—Ed.]
[4] [Footnote omitted.—Ed.]

any regulation which might be issued. Prior to the promulgation of the regulation the petitioner had created a new section known as the price control office. That office undertook to bring petitioner into compliance with the requirements of the regulation in advance of its effective date. The head of that office together with seven assistants devoted full time to that endeavor. But the store had about 2,000 employees and over one million two hundred thousand articles of merchandise. In the furniture departments alone there were over fifty-four thousand transactions in the first ten months of 1942. Difficulties were encountered in interpreting the regulation, in determining the exact nature of an article and whether it had been previously sold and at what price, etc. The absence of adequate records made it difficult to ascertain prices during the earlier base-period. Misunderstanding of the regulation, confusion on the part of employees not trained in such problems of interpretation and administration, the complexity of the problem, and the fallibility of humans all combined to produce numerous errors. But the District Court concluded that the "mistakes in pricing and listing were all made in good faith and without intent to violate the regulations."

The District Court also found that the mistakes brought to light "were at once corrected, and vigorous steps were taken by The Hecht Company to prevent recurrence of these mistakes or further mistakes in the future." The company increased its price control office to twenty-eight employees. New methods of internal control were instituted early in November, 1942 with the view of avoiding future violations. That new system of control "greatly improved" the situation. Petitioner undertook to make repayment of all overcharges brought to light by the investigation in case of customers who could be identified. It proposed to contribute the remaining amount of such overcharges to some local charity. The District Court concluded that the issuance of an injunction would have "no effect by way of insuring better compliance in the future" and would be "unjust" to petitioner and not "in the public interest". It accordingly dismissed the complaint. Brown v. Hecht Co., 49 F.Supp. 528. On appeal the Court of Appeals for the District of Columbia reversed that judgment, one judge dissenting. 137 F.2d 689. That court held that the findings of the District Court were supported by substantial evidence, except that it did not consider whether the evidence supported the findings that an injunction would not insure better compliance in the future and would be unjust to petitioner. In its view the latter findings were immaterial. For it construed § 205 (a) of the Act to require the issuance of an injunction or other order as a matter of course, once violations were found.

The case is here on a petition for a writ of certiorari which we granted because of the importance of the problem in the administration of the Act.

Respondent insists that the mandatory character of § 205(a) is clear from its language, history and purpose. He argues that "shall be granted" is not permissive, that since the same section provides that the Administrator "may" apply for an injunction and that, if so, the injunction "shall" be granted, "may" and "shall" are each used in the ordinary sense. It is pointed out that when the bill (for which the Act in its final form was substituted) passed the House, § 205(a) provided that "upon a proper showing" an injunction or other order "shall be granted without bond." [5] The words "upon a proper showing" were stricken in the Senate and were replaced by the words "upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices." And the Senate Report in its analysis of § 205(a) stated that "upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices, a temporary or permanent injunction, restraining order or other order is to be granted without bond." S.Rep. No. 931, 77th Cong., 2d Sess., p. 25. Further support for the view that the issuance of an injunction is mandatory once violations are shown is sought in the pattern of federal legislation which provides relief by injunction in aid of law enforcement. Some of those statutes [6] contain provisions quite close to the language of § 205(a). Others provide that an injunction or restraining order shall be granted "upon a proper showing" [7] or that federal district courts shall have jurisdiction to restrain violations "for cause shown".[8] The argument is that when Congress desired to give the district courts discretion to grant or withhold relief by injunction it chose apt words to make its desire plain.

We agree that the cessation of violations, whether before or after the institution of a suit by the Administrator, is no bar to the issuance of an injunction under § 205(a). But we do not think that under all circumstances the court must issue the injunction or other order which the Administrator seeks.

It seems apparent on the face of § 205(a) that there is some room for the exercise of discretion on the part of the court. For the requirement is that a "permanent or temporary injunction, restraining order, or other order" be granted. Though the Administrator asks for an injunction, some "other order" might be more appropriate, or at least so appear to the court. Thus in the present case one judge in the Court of Appeals felt that the District Court should not have dis-

[5] [Footnote omitted.—Ed.]

[6] "Upon a showing that such person has engaged or is about to engage in any such act or practice, a permanent or temporary injunction or decree or restraining order shall be granted without bond." Investment Company Act of 1940, 54 Stat. 842, 15 U.S.C. § 80a-41, 15 U.S.C.A. § 80a—41; Investment Advisers Act of 1940, 54 Stat. 853, 15 U.S.C. § 80b–9, 15 U.S.C.A. § 80b—9.

[7] Securities Act of 1933, 48 Stat. 86, 15 U.S.C. § 77t(b), 15 U.S.C.A. § 77t(b); Securities Exchange Act of 1934, 48 Stat. 899, 15 U.S.C. § 78u(e), 15 U.S.C.A. § 78u(e).

[8] Fair Labor Standards Act, 52 Stat. 1069, 29 U.S.C. § 217, 29 U.S.C.A. § 217.

missed the complaint but should have entered an order retaining the case on the docket with the right of the Administrator, on notice, to renew his application for injunctive relief if violations recurred. It is indeed not difficult to imagine that in some situations that might be the fairest course to follow and one which would be as practically effective as the issuance of an injunction. Such an order, moreover, would seem to be a type of "other order" which a faithful reading of § 205(a) would permit a court to issue in a compliance proceeding. However that may be, it would seem clear that the court might deem some "other order" more appropriate for the evil at hand than the one which was sought. We cannot say that it lacks the power to make that choice. Thus it seems that § 205(a) falls short of making mandatory the issuance of an injunction merely because the Administrator asks it.

There is, moreover, support in the legislative history of § 205(a) for the view that "shall be granted" is less mandatory than a literal reading might suggest. We have already referred to a portion of the Senate Report which lends some support to the position of the Administrator. But in another portion of that Report there is the following reference to suits to enjoin violations of the Act: "In common with substantially all regulatory statutes, the bill authorizes the official charged with the duty of administering the act to apply to any appropriate court, State or Federal, for an order enjoining any person who has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of the bill. Such courts are given jurisdiction to issue whatever order to enforce compliance is proper in the circumstances of each particular case." S.Rep. No. 931, supra, p. 10. A grant of jurisdiction to issue compliance orders hardly suggests an absolute duty to do so under any and all circumstances. We cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made.

We do not stop to compare the provisions of § 205(a) with the requirements of other federal statutes governing administrative agencies which, it is said, make it mandatory that those agencies take action when certain facts are shown to exist.[9] We are dealing here with the requirements of equity practice with a background of several hundred years of history. Only the other day we stated that "An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity." Meredith v. City of Winter Haven, 320 U.S. 228, 235, 64 S.Ct. 7, 11. The historic injunctive process was designed to deter, not to punish. The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of

[9] National Labor Relations Act, 49 Stat. 453, 29 U.S.C. § 160(c), 29 U.S.C.A. § 160(c); Clayton Act, 38 Stat. 734, 15 U.S.C. § 21, 15 U.S.C.A. § 21; Federal Trade Commission Act, 38 Stat. 719, 15 U.S.C. § 45(b), 15 U.S.C.A. § 45(b).

the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims. We do not believe that such a major departure from that long tradition as is here proposed should be lightly implied. We do not think the history or language of § 205(a) compel it. It should be noted, moreover, that § 205(a) governs the procedure in both federal and state courts. For § 205(c) gives the state courts concurrent jurisdiction with federal district courts of civil enforcement proceedings. It is therefore even more compelling to conclude that, if Congress desired to make such an abrupt departure from traditional equity practice as is suggested, it would have made its desire plain. Hence we resolve the ambiguities of § 205(a) in favor of that interpretation which affords a full opportunity for equity courts to treat enforcement proceedings under this emergency legislation in accordance with their traditional practices, as conditioned by the necessities of the public interest which Congress has sought to protect. United States v. Morgan, 307 U.S. 183, 194, 59 S.Ct. 795, 801, 83 L.Ed. 1211, and cases cited.

We do not mean to imply that courts should administer § 205(a) grudgingly. We repeat what we stated in United States v. Morgan, supra, 307 U.S. page 191, 59 S.Ct. page 799, 83 L.Ed. 1211, respecting judicial review of administrative action: "* * * court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through co-ordinated action. Neither body should repeat in this day the mistake made by the courts of law when equity was struggling for recognition as an ameliorating system of justice; neither can rightly be regarded by the other as an alien intruder, to be tolerated if must be, but never to be encouraged or aided by the other in the attainment of the common aim." The Administrator does not carry the sole burden of the war against inflation. The courts also have been entrusted with a share of that responsibility. And their discretion under § 205(a) must be exercised in light of the large objectives of the Act. For the standards of the public interest not the requirements of private litigation measure the propriety and need for injunctive relief in these cases. That discretion should reflect an acute awareness of the Congressional admonition that "of all the consequences of war, except human slaughter, inflation is the most destructive" (S.Rep. No. 931, supra, p. 2) and that delay or indifference may be fatal. Whether the District Court abused its discretion in dismissing the complaint is a question which we do not reach. The judg-

ment must be reversed and the cause remanded to the Court of Appeals for that determination.

Reversed.

Mr. Justice FRANKFURTER agrees that § 205(a) of the Emergency Price Control Act, apart from dispensing with any requirement for a bond, does not change the historic conditions for the exercise by courts of equity of their power to issue injunctions, according to which the Court of Appeals should now dispose of this cause.

Mr. Justice ROBERTS is of opinion that the judgment of the Court of Appeals should be reversed and that of the District Court affirmed.

SECURITIES EXCHANGE ACT OF 1934 § 18

15 U.S.C. § 78r.

Sec. 18. (a) Any person who shall make or cause to be made any statement in any application, report, or document filed pursuant to this title or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 15 of this title, which statement was at the time and in the light of the circumstances under which it was made false or misleading with respect to any material fact, shall be liable to any person (not knowing that such statement was false or misleading) who, in reliance upon such statement, shall have purchased or sold a security at a price which was affected by such statement, for damages caused by such reliance, unless the person sued shall prove that he acted in good faith and had no knowledge that such statement was false or misleading. A person seeking to enforce such liability may sue at law or in equity in any court of competent jurisdiction. In any such suit the court may, in its discretion, require an undertaking for the payment of the costs of such suit, and assess reasonable costs, including reasonable attorneys' fees, against either party litigant.

(b) Every person who becomes liable to make payment under this section may recover contribution as in cases of contract from any person who, if joined in the original suit, would have been liable to make the same payment.

(c) No action shall be maintained to enforce any liability created under this section unless brought within one year after the discovery of the facts constituting the cause of action and within three years after such cause of action accrued.[e]

[e] *Cf.* Interstate Commerce Act §§ 9, 10(4), 49 U.S.C. §§ 9, 10(4); Securities Act of 1933 §§ 11, 12, 15 U.S.C. §§ 77k, 77l.

SECTION 2. JUDICIAL ENFORCEMENT OF ADMINISTRATIVE ORDERS

A. Orders in the Nature of Refusals or Revocations of Licenses

Characteristically, statutes which provide for administrative orders in the nature of grants or refusals of licenses are so drawn that action taken in defiance of an order denying or revoking permission to engage in a designated course of conduct will directly violate a prohibitory provision of the statute itself. A proceeding to check or punish the offender will thus take the form of a proceeding to enforce the statutory prohibition rather than the order. See, for example, the statutory provisions set forth *supra* in Part II, Section 1, C, of this Chapter, at pp. 430 to 438.

B. Orders to Pay Money

See the material *supra* in Part II, Section 1, D, of this Chapter, at pp. 439 to 460.

C. Other "Quasi-Judicial" Orders, and "Legislative" Orders of Particular Applicability [a]

(1) Enforcement through Proceedings for Forfeitures or Penalties

INTERSTATE COMMERCE ACT § 16(8) (9) (10)

49 U.S.C. § 16(8) (9) (10).

Sec. 16. * * *

(8) Any carrier, any officer, representative, or agent of a carrier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of sections 3, 13, or 15 of this part shall forfeit to the United States the sum of $5,000 for each offense. Every distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense.

(9) The forfeiture provided for in this part shall be payable into the Treasury of the United States, and shall be recoverable in a civil suit in the name of the United States, brought in the district where the carrier has its principal operating office, or in any district through which the road of the carrier runs.

[a] See discussion *supra* at pp. 390–1 and p. 427.

(10) It shall be the duty of the various district attorneys, under the direction of the Attorney-General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

FEDERAL TRADE COMMISSION ACT § 5(*l*)

15 U.S.C. § 45(*l*).

Sec. 5. (*l*) Any person, partnership, or corporation who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States.[b]

(2) Enforcement by Equitable Decree

INTERSTATE COMMERCE ACT § 16(12)

49 U.S.C. § 16(12).

Sec. 16. * * *

(12) If any carrier fails or neglects to obey any order of the Commission other than for the payment of money, while the same is in effect, the Interstate Commerce Commission or any party injured thereby, or the United States, by its Attorney-General, may apply to any district court of the United States of competent jurisdiction for the enforcement of such order. If, after hearing, such court determines that the order was regularly made and duly served, and that the carrier is in disobedience of the same, such court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it or them obedience to the same.[c]

[b] See, also, the third paragraph of § 10 of Federal Trade Commission Act, 15 U.S.C. § 50, *supra* at p. 217.

[c] See, also, 28 U.S.C.Supp. § 41(27); *Cf.* Public Utility Holding Company Act of 1935 § 18(f) (g), 15 U.S.C. § 79r(f) (g); Securities Exchange Act of 1934 § 21(f), 15 U.S.C. § 78u(f), *supra* at p. 525.

NATIONAL LABOR RELATIONS ACT § 10(e)

29 U.S.C. § 160(e).

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the district court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).

L. B. SILVER COMPANY v. FEDERAL TRADE COMMISSION

Circuit Court of Appeals of the United States, Sixth Circuit.
292 F 752 (1923).

PER CURIAM. In due time after the filing of the opinion herein, a mandate was sent to the Commission, in the usual form of mandates which go to District Courts. We directed a modification of the Commission's order in certain respects, and in other respects affirmed it. The Commission now asks that this mandate be recalled, and that this court enter its decree enjoining the Silver Company from further continuing those practices as to which we had affirmed the Commission's order. The ground of this application is that there must be an order of this court before there can be any enforcement of the Commission's order through punishment for violation; that if the application in this matter had been by the Commission for enforcement, instead of by the Silver Company for vacation, the court would have entered such an injunction order; and that, to avoid unnecessary forms and proceedings, such an order should likewise be entered when a petition for vacation is denied. It is said that this practice was pursued by the Circuit Court of Appeals of the Second Circuit in the Beech Nut Case, when the court entered its decree, pursuant to the mandate from the Supreme Court (257 U.S. 441, 42 S.Ct. 150, 66 L.Ed. 307, 19 A.L.R. 882), sustaining the Commission's order in the essential particulars, but modifying it somewhat.

It does not necessarily follow that the court should take the same action upon a petition by a respondent to set aside the Commission's order as upon a petition of the Commission to enforce; but, even if not, it would have been entirely proper for the Commission to couple with its answer in this case a cross-petition asking enforcement, and thus to present the question with all formality; and, if it were necessary, we would be inclined to permit, now, an amendment of the pleadings for that purpose.

Upon its merits, the question of the form which our order should take depends upon whether our jurisdiction is appellate or original. If the former, under our established practice we would affirm or reverse and remand, and in either case the judgment or decree to be enforced would continue to be that of the court below. If the latter, we would naturally enter our own decree, fixing the rights of the parties and in such form that it would be enforceable by us.

We are satisfied that our jurisdiction in matters of this class is original, even though the facts may have been so found as to be beyond controversy. The questions of law involved are presented to us for the first time to any court, and the jurisdiction is no more appellate than is the jurisdiction of the District Courts to vacate orders of the Interstate Commerce Commission. Hence it would seem that our decrees should be upon the lines adopted by courts of equity generally in hearing suits for injunction.

It is the general practice in such cases that if the defendant is continuing or threatening unlawful acts there will be an injunction; but if whatever was unlawful ceased long before the bill was filed, and as soon as it was brought to the attention of the defendant by complaint, and there is no reason to apprehend its renewal, the bill will be dismissed without prejudice. In the present case it is not claimed that any act which was found by this court to be unlawful was, after the Commission's order to desist, by the Silver Company so continued that there would have been any basis for a proceeding by the Commission to enforce its order, excepting only as the Silver Company continued to claim that the O. I. C. breed was traceable back to a "Mammoth White." This, in the opinion of a majority of the court, was a relatively trifling incident, pertaining to the substantial claim that the O. I. C. was a separate breed. As to this substantial claim, we have held that the Silver Company should not be enjoined. The situation, then, is that, as to the only substantial respect in which the Silver Company ever disobeyed the Commission's order, and as to which its enforcement could have been asked by the Commission, it has turned out that the Silver Company was substantially right, while as to the other matters of importance involved the practices complained of were discontinued long before the Commission's order, and there is no reason to apprehend a renewal. Hence the majority of us think that the situation does not call for any injunction.

In the Beech Nut Case, it is to be assumed that the Beech Nut Company continued to follow the practices finally forbidden (and at first approved by the Circuit Court of Appeals) until the Supreme Court's decree. There was, therefore, basis for petition by the Commission to have its order enforced, and satisfactory reason for such a decree as would have been entered on such a petition.

The customary form of mandate which was used in this case is not completely appropriate to these views; but, as it takes practical effect here, the form is not prejudicial, and there is no sufficient occasion to change it.

The motion to recall is denied.[d]

[d] *Cf.* Hecht v. Bowles, 321 U.S. 321, 64 S.Ct. 587, 88 L.Ed. 754 (1944) *supra* at p. 525; see Stone, C. J., concurring in National Labor Relations Board v. Cheney California Lumber Company, 327 U.S. 385, 389, 66 S.Ct. 553, 555, 90 L.Ed. —, 162 A.L.R. 700 (1946), *infra* at p. 670.

FEDERAL TRADE COMMISSION v. FAIRYFOOT PRODUCTS COMPANY

Circuit Court of Appeals of the United States, Seventh Circuit.
94 F.2d 844 (1938).

TREANOR, Circuit Judge. In cause No. 5426, entitled Fairyfoot Products Company, a Corporation, Petitioner, v. Federal Trade Commission, Respondent, the petitioner sought a review of a "cease and desist" order of the Federal Trade Commission. This court concluded that the "cease and desist" order was a proper one and stated its decision in the following language: "The order of the Commission is affirmed."

The Federal Trade Commission now files its petition praying that a rule issue against the Fairyfoot Products Company to show cause why it should not be adjudged in contempt for an alleged violation of the aforesaid order or decree.

The Fairyfoot Products Company, the respondent in the instant proceedings, has filed its motion to dismiss the petition for a rule to show cause and in support of its motion to dismiss urges the following grounds:

"(1) It is not shown or claimed that any order or decree of this honorable court has been violated.

"(2) The final order or decree entered by this court on December 23, 1935, was merely one of affirmance and not an order or decree of enforcement, and that affirmance was in accord with the opinion of this court (Fairyfoot Products Co. v. Federal Trade Commission, 7 Cir., 80 F.2d 684, at page 687)."

It is elementary that a court is without power to adjudge one to be in contempt for violation of a court order or decree unless the alleged contemnor has violated a judicial decree, or order, which by its coercive force, acting directly upon the person, lawfully restrains the alleged contemnor from doing the acts complained of.

Under the terms of the Federal Trade Commission Act, as amended, 15 U.S.C.A. § 41 et seq., the Circuit Court of Appeals possesses a twofold function. At the request of one against whom the "cease and desist" order has been directed it has the power to review the proceedings of the Commission to determine whether the order should be affirmed, modified, or set aside. The effect of affirmance is to adjudicate the validity of the order of the Commission and to decree its effectiveness in the sense that disobedience of it by the one against whom it is directed would constitute an unlawful act. But it does not follow that the unlawful act of disobedience can be made the basis of a contempt proceeding in this court, even though the order of affirmance of this court, in a sense, gives legal vitality to the order of the Federal Trade Commission. For the lawfulness of the order of the

Commission derives ultimately from the act of Congress and not from this court's adjudication of its lawfulness.

Also by the terms of the Federal Trade Commission Act the Circuit Court of Appeals has the power to enforce valid orders of the Commission. In respect to this power of enforcement the act does not purport to grant any new power to the Circuit Court of Appeals, but assumes the existence of the equity power of coercion and obviously contemplates the use of this power. Consequently, federal courts have concluded that the decree of enforcement "should be upon the lines adopted by courts of equity generally in hearing suits for injunction."

The language of authorization to the Commission to apply for enforcement of its order does not prescribe or authorize any particular type of enforcement procedure, and apparently it was the intention of Congress that the Circuit Court of Appeals should utilize the usual practice adopted by courts of equity in hearing suits for injunction and formulating decrees therein.

Different Circuit Courts of Appeals have had to decide what method of procedure should be followed after the Federal Trade Commission has entered an order with which it alleges the respondent is not complying; and when the respondent has had no opportunity to present evidence that it is not violating the order, and when no proof has been taken before the Commission on that question.

In Federal Trade Commission v. Standard Education Society, the following facts appeared: The Federal Trade Commission after duly entering an order "to cease and desist" filed its petition in the Circuit Court of Appeals, Seventh Circuit, for an order of enforcement of the previously entered order. In the petition there was an allegation that the respondent had failed and neglected to obey the "cease and desist" order. The respondent answered with a denial that it had failed and neglected to obey the order and the petitioner moved to strike out all of the answer relating to such denial. It was the opinion of this court that it could not act upon the merits of the application for the enforcement of the Commission's order until it should be established as a fact that the respondent had failed or neglected "to obey such order of the Commission." Consequently, the motion to strike out was overruled for the reason that the answer of denial of failure and neglect to obey the Commission's order made a proper issue of fact. Yet it is clear from the provisions of section 5 of the Federal Trade Commission Act that the question of "failure or neglect to obey the order of the Commission" will not be an issue in a proceeding in this court based upon a petition by an aggrieved party to set aside an order to "cease and desist." In fact, in the original proceedings in cause No. 5426 this court entered an order of affirmance of the Commission's order although there was no suggestion of any violation of the "cease and desist" order, and when it appeared that the petitioner in fact had desisted from the objectionable practices long prior to the issuance of the "cease and desist" order.

The necessary conclusion from the decisions of this circuit and we believe from a proper construction of section 5, is that a general order of affirmance is not equivalent to a decree of enforcement; and that a decree of enforcement should be of the general nature and form of a decree of injunction, definitely fixing the duties of the party against whom the "cease and desist" order has been issued.

Nothing that has been said in this opinion is intended to question, or restrict, the wide discretion of the Circuit Court of Appeals to determine in one proceeding the various questions which section 5 authorizes the aggrieved party and the Commission to present to the Circuit Court of Appeals.

In Q. R. S. Music Co. v. Federal Trade Commission, the petitioner asked this court to set aside an order of the Federal Trade Commission. The Federal Trade Commission asked for an order of enforcement. This court disposed of all the issues presented and made the following order: "Petitioner's petition is denied. The application of respondent for an enforcement order is granted. The clerk will enter an order identical with the one entered by the commission." The legal effect of denial of petitioner's petition was to affirm the order of the Commission. This court did not consider such affirmance the equivalent of an enforcement decree, but, on the contrary, felt that it was necessary not only to formally grant the application for an enforcement order, but to specifically direct the clerk to enter an original order of this court identical with the one entered by the Commission.

We conclude that the entry of general affirmance by this court in cause No. 5426 was not in legal effect an enforcement decree of this court embodying the prohibitions of the "cease and desist" order of the Commission and enjoining the petitioner from violating the injunctive order of this court.

The motion of the respondent herein, Fairyfoot Products Company, to dismiss the petition of the Federal Trade Commission for rule to show cause is sustained, and the petition is dismissed.[e]

[e] Footnotes of the court have been omitted.

The fourth paragraph of section 5 of the Federal Trade Commission Act, as originally enacted (Act of Sept. 26, 1914, c. 311, § 5, 38 Stat. 717, 720) provided in part:

"*If any such person . . . fails or neglects to obey such order of the commission while the same is in effect,* the commission may apply to the circuit court of appeals of the United States * * * for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding * * * Upon such filing * * * the court shall cause notice thereof to be served upon such person * * * and thereupon shall have jurisdiction of the proceeding * * * and shall have power to make and enter * * * a decree *affirming, modifying or setting aside* the order of the commission." [Italics supplied.]

Contrast the foregoing provision with section 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e), *supra* at p. 534. Contrast it also with § 5(b) of the Federal Trade Commission Act, as amended in 1938, 15 U.S.C. § 45(b); and

FEDERAL TRADE COMMISSION v. BALTIMORE PAINT AND COLOR WORKS

Circuit Court of Appeals of the United States, Fourth Circuit.
41 F.2d 474 (1930).

NORTHCOTT, Circuit Judge. This is a proceeding under the provisions of the Federal Trade Commission Act, § 5 (38 Stat. 717, 719, U.S.Code, tit. 15, § 45 [15 U.S.C.A. § 45]), for the enforcement of an order issued by the Commission June 30, 1925, requiring the respondent, Baltimore Paint & Color Works, Inc., to cease and desist from certain practices found by the Commission to constitute unfair methods of competition forbidden by the act.

The act provides:

"Sec. 5. That unfair methods of competition in commerce are hereby declared unlawful.

"The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.

"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 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. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the commission, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission. If upon such hearing the commission shall be of the opinion that the method of competition 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. * * *

with § 5(*l*) of the Act as amended, 15 U.S.C. § 45(*l*), *supra* at p. 533. Contrast, also, the fifth paragraph of § 5 of the original Act of Sept. 26, 1914, c. 311, 38 Stat. 720, with § 5(c) of the Act as amended, 15 U.S.C. § 45(c), and with § 10(f) of the National Labor Relations Act, 29 U.S.C. § 160(f).

"If such person, partnership, or corporation fails or neglects to obey such order of the commission while the same is in effect, the commission may apply to the circuit court of appeals of the United States, within any circuit where the method of competition in question was used or where such person, partnership, or corporation resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, partnership, or corporation and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission. The findings of the commission as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission, the court may order such additional evidence to be taken before the commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code. * * *

"The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission shall be exclusive.

"Such proceedings in the circuit court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited."

The Commission's order was entered after a compliance with provisions of the statute, and was entered upon a stipulated statement of facts, with which statement the Commission's findings are practically identical.

At the October, 1929, term of this court, the Commission filed an application for enforcement of its order, which application, after stating the facts and setting out the order, contains the following allegation:

"Said respondent has failed and neglected to obey said order of the commission, and has continued, and is continuing, to conduct its business in violation thereof."

The Commission then prays that this court, after notice to the respondent, "shall take jurisdiction of the proceeding and of the questions determined therein, and make and enter upon the pleadings and proceedings set forth in such transcript a decree affirming said order of the commission, and commanding the respondent, its officers, agents, representatives, and employees, to cease and desist from the acts and methods charged in said complaint and against which said order of the commission is directed."

The respondent filed an answer to the application of the Commission, in which answer the respondent admits the validity of the Commission's order, but denies "that it has failed and neglected to obey the order of the Commission, and denies that since the passage of said order that it has conducted its business in violation thereof."

The question presented is as to the method of procedure that should be followed by the Circuit Courts of Appeals after the Federal Trade Commission has entered an order with which it alleges the respondent is not complying, but where the respondent has had no opportunity to present evidence that it is not violating the order, and where no proof had been taken before the Commission on that question. This same question has been decided by two Circuit Courts of Appeals. In the Seventh Circuit, in Federal Trade Commission v. Standard Education Society, 14 F.2d 947, it is held that the court will not take jurisdiction until after proof of violation of the Commission's order, and in the Second Circuit, in Federal Trade Commission v. Balme, 23 F.2d 615, it is held that the court will take jurisdiction and refer the question of whether the respondent is violating the order to the Federal Trade Commission for a finding of fact on that point.

The Commission alleges in its petition that its order is being violated, and the respect due by the courts to an independent agency of the government forbids the presumption that this allegation of the Commission is not made in good faith and based upon substantial grounds. It is inconceivable that the Commission could make this application to this court without having good ground upon which to make it, and the Commission is certainly to be presumed to be acting in good faith.

The order of the Commission is not enforceable until affirmed by this court, and it would be a useless thing for the Commission to try the question of whether its order is being violated before affirmation of the order by this court. In event of a trial before affirmation no penalty could be imposed upon the respondent, because there is no way to enforce the order until it is affirmed. If a trial were necessary before affirmation, another trial would be necessary after affirmation, because no punishment could be inflicted, except by this court, and

only in the event that the order was violated after it had been affirmed. Why should there be a trial at a time when there is no ruling of the court making the practice complained of a violation of law? Until the court has spoken in a particular case as to whether or not the order of the Commission is valid, there is no violation of law punishable in any way.

We agree with the conclusion of the Circuit Court of Appeals of the Second Circuit, in case of Federal Trade Commission v. Balme, supra.

This court has no machinery for investigating or ascertaining the fact as to the compliance or noncompliance with an order of the Commission. The Commission has such machinery and is the proper body to pass upon that question.

It is therefore the conclusion of the court that the order of the Federal Trade Commission, requiring the respondent, Baltimore Paint & Color Works, Inc., to cease and desist from certain practices found by the Commission to constitute unfair methods of competition, be, and the same is, affirmed. The question of the violation of the order, the enforcement of which is asked in the petition, is referred to the Federal Trade Commission, with opportunity for the respondent to answer and submit proof, and with direction to the Commission to report its conclusions to this court.

Ordered accordingly.

FEDERAL TRADE COMMISSION v. HOBOKEN WHITE LEAD AND COLOR WORKS, INC.

Circuit Court of Appeals of the United States, Second Circuit.
67 F.2d 551 (1933).

MANTON, Circuit Judge. The Federal Trade Commission, acting under the authority of section 5 of the Act of Congress approved September 26, 1914, 38 Stat. 717, 719 (15 U.S.C.A. § 45), on June 10, 1929, served upon the respondent its order to cease and desist in a proceeding before the Commission entitled "In the Matter of Hoboken White Lead & Color Works, Inc., Docket No. 1565." This proceeding was based upon a complaint, issued February 19, 1929, pursuant to the statute, which charged the respondent with the practice of misbranding and misrepresenting its paint materials and paint pigments, sold and transported in interstate commerce in violation of the act declaring unfair methods of competition to be unlawful. In the same proceeding, on January 19, 1931, this court, upon consent of the parties, entered the following order:

"It is now further ordered, adjudged and decreed that the respondent, Hoboken White Lead and Color Works, Inc., its officers, agents, representatives, servants, and employees, cease and desist in the

course or conduct of the sale of paint material or paint pigment in interstate commerce—

"(1) From using the words 'White Lead,' or word or words of like import, upon the containers of, or with which to brand, label, represent, advertise, or describe, any such paint material or paint pigment which contains less than 50% white lead, lead carbonate, or lead sulphate; and, if and when said paint material or paint pigment is not composed wholly of white lead or of lead carbonate or lead sulphate or of the two in combination, but contains white lead, lead carbonate, or lead sulphate as its principal and predominant ingredient to the extent of not less than 50% by weight of the product, from similarly using said words 'White Lead,' or word or words of like import, unless immediately preceded in equally conspicuous form and color by a word or words clearly indicating that said paint material or paint pigment is not composed wholly of white lead.

"(2) From using the words 'Zinc Lead,' or word or words of like import, upon the containers of, or with which to advertise, brand, label, represent, or describe any such paint material or paint pigment when said product is not in fact zinc lead or is not in fact wholly composed of zinc in combination with lead carbonate or lead sulphate."

Service of a copy of this order was made January 21, 1931.

Since that time, it is charged, the respondent has directly and indirectly caused its paint materials and paint pigments to be sold and transported in interstate commerce, to wit, from the state of New Jersey to the state of New York, under brands and labels in violation of this order. It is established by affidavits that on March 26, May 7, July 3, September 28, and October 15, 1931, it sold and transported in interstate commerce, from New Jersey to New York, to retail paint dealers, in sealed containers, paint materials under various brands and labels affixed by respondent to such cans [describing the contents as "Zinc Lead" or "White Lead"—Ed.].

It also established that the zinc lead product manufactured by the respondent in New Jersey (and which respondent caused to be marketed to and by the dealers in the state of New York, was a paint material or paint pigment which was not in fact zinc lead. * * *

To violate the order of this court, it is essential that it be established that the sale of the paint material be found to be in interstate commerce. Soliciting agents, in the name of the New York corporation, took orders from retail dealers in New York for respondent's products which it delivered to the New York corporation by interstate transportation from its manufacturing plant in New Jersey, and the New York corporation delivered the product to the several retail dealers from whom orders had been procured. The respondent's agents, officers, and employees, who organized the New York corporation and attempted to carry on the business in the manner described, are expressly enjoined by this court along with the respondent corporation. The respondent may act only through its officers, agents,

and employees. Their acts are its acts when done in furtherance of respondent's business.

The answer filed expressly admits that the New York corporation was created by respondent's officers to deliver respondent's product, which respondent could not itself deliver in New York under the label "Zinc Lead," without violating the order of the court. It is apparent that the respondent transports its containers and false labels separately to the office of its subsidiary in New York, there to be attached, and by this means they furnish to retailers a quality of merchandise which deceives the purchasing public. It is no defense that the interstate sale and delivery of respondent's produce under these unlawful labels is accomplished by means of a new corporation which the respondent created for that purpose. Prang Co. v. American Crayon Co., 58 F.2d 715 (C.C.A.3).

It is likewise clear that the respondent sells and delivers its product to the New York corporation in interstate commerce. The New York corporation is used merely as an instrumentality of the respondent, and makes delivery for it. The sales and the delivery of the product by the respondent to the dealers constituted interstate commerce. The paint thus sold and transported is in a continuous process of interstate shipment from the time it leaves the respondent's factory until it reaches the several purchasers. An intervening sale would not terminate the interstate character of the transaction. Greater N. Y. Live Poultry Chamber of Commerce v. United States, 47 F.2d 156 (C.C.A.2); Binderup v. Pathe Exchange, 263 U.S. 291, 309, 44 S.Ct. 96, 68 L.Ed. 308. Nor did a temporary stoppage in the New York corporation's place of business, and the subsequent transfer to other trucks for transportation, change the character of that interstate commerce. Hughes Bros. Timber Co. v. Minnesota, 272 U.S. 469, 47 S.Ct. 170, 71 L.Ed. 359, Wagner v. Covington, 251 U.S. 95, 104, 40 S.Ct. 93, 64 L.Ed. 157, 168.

Moreover, a device created for the purpose of changing transportation from interstate to intrastate commerce, between the factory of the respondent and the place of business of its several purchasers, to an effort to evade the terms of the decree of this court, is legally ineffectual for that purpose. Baltimore & O. S. W. Ry. v. Settle, 260 U.S. 166, 43 S.Ct. 28, 67 L.Ed. 189.

The disobedience of the decree of this court thus entered constitutes a contempt with the inherent power of the court to administer punishment. The decree of this court bound the respondent perpetually in relation to the prohibited conduct not only within this circuit, but throughout the United States. Leman Adm'r v. Krentler-Arnold Hinge Last Co., 284 U.S. 451, 52 S.Ct. 238, 76 L.Ed. 389. It is guilty of contempt by its willful conduct. A fine of $500 is accordingly imposed.

Motion granted.

INTERSTATE COMMERCE COMMISSION v. BRIMSON

Supreme Court of the United States.
154 U.S. 447, 14 S.Ct. 1125, 38 L.Ed. 1047 (1894).

See *supra* at p. 191.

SECURITIES AND EXCHANGE COMMISSION v. THE PENFIELD COMPANY OF CALIFORNIA

Circuit Court of Appeals of the United States, Ninth Circuit.
157 F.2d 65 (1946).

DENMAN, Circuit Judge. This is an appeal by the Securities and Exchange Commission, hereinafter called the Commission, from an order of the district court made on the motion of the Commission which, though it held appellee Young, an officer of the Penfield Company, in contempt for failing to comply with an order to produce documents for the inspection of the Commission's examiner and fined Young $50.00, failed to enforce the disobeyed order by committing Young unless he complied. Young paid the fine. The motion and order were made in the same proceeding in which the disobeyed order was made. Penfield Co. v. S. E. C., 143 F.2d 746, 154 A.L.R. 1027 (C.C.A.9). It is an appealable order. Clarke v. Federal Trade Commission, 128 F.2d 542, 543 (C.C.A.9).

Young did not appeal from the order holding him in contempt. That decision is final and the only question before us is the extent of the remedy to which the Commission is entitled.

Appellees contend that there is no obligation on the district court to commit Young until he has complied with the court's order because it is discretionary with that court either to fine or to imprison and that, since Young has paid the fine, the case is moot. We do not agree. We consider it at least an abuse of discretion not to grant the full relief to the Commission which the statute intended, namely, the access to the books and records in question.

The proceeding for the required access is civil in character and refusal to commit until the order is obeyed, frustrates the remedial purpose of the legislation creating the right to secure access to the documents.[1] As was said in Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 450 and 442, 31 S.Ct. 492, 55 L.Ed. 797, 34 L.R.A.,N.S., 874,

"* * * the power of courts to punish for contempts is a necessary and integral part of the independence of the judiciary, and is absolutely essential to the performance of the duties imposed on them by law. Without it they are mere boards of arbitration whose judgments and decrees would be only advisory."

[1] 15 U.S.C. 77t.

"* * * Imprisonment for civil contempt is ordered where the defendant has refused to do an affirmative act required by the provisions of an order which, either in form or substance, was mandatory in its character. Imprisonment in such cases is not inflicted as a punishment, but is intended to be remedial by coercing the defendant to do what he had refused to do. The decree in such cases is that the defendant stand committed unless and until he performs the affirmative act required by the court's order. * * * If imprisoned, as aptly said in In re Nevitt, 117 F.R. 448, 451, 'he carries the keys of his prison in his own pocket.' He can end the sentence and discharge himself at any moment by doing what he had previously refused to do." Parker v. United States, 153 F.2d 66, 70 (C.C.A.1); In re Kahn, 204 F. 581, 582 (C.C.A.2).

Appellees also contend that the contempt proceeding was moot because, since the disobeyed order, there had been a trial of appellees for certain violations of the Securities and Exchange Act in which these documents and records would have been relevant evidence. There is no merit in this contention since the records well may have disclosed other offenses against the Securities and Exchange Act.

The order is reversed and the case remanded to the district court for an order requiring Young's imprisonment to compel his obedience to the order to produce the documents in question. "If he complies, or shows that compliance is impossible, he must be released, for his confinement is not as punishment for an offense of a public nature." Parker v. United States, 153 F.2d 66, 70 (C.C.A.1).

The order of the district court is

Reversed.

INTERNATIONAL UNION OF MINE, MILL AND SMELTER WORKERS, ETC. v. EAGLE-PICHER MINING & SMELTING COMPANY

Supreme Court of the United States.
325 U.S. 335, 65 S.Ct. 1166, 89 L.Ed. 1649 (1945).

Mr. Justice ROBERTS delivered the opinion of the Court.

The question presented is whether the National Labor Relations Board after seeking and obtaining a court order of enforcement of its own order, in the absence of fraud or mistake induced by the respondent, and after expiration of the term, is entitled to have the provisions of the decree prescribing the nature of the remedy set aside and the case remanded to it, for the prescription of relief it deems more appropriate to enforce the policy of the National Labor Relations Act.

In a proceeding instituted by the petitioner unions the Board found that the respondent companies had been guilty of unfair labor practices in violation of Sections 8(1) and 8(3) of the Act. The hear-

ings were protracted both as to the alleged discrimination and as to the remedy which should be adopted. With all relevant data open to it, the Board ordered the employers to cease and desist from certain practices and to reinstate 209 employees with back pay. Based on the Board's understanding as to the opportunity for reinstatement of the 209 men in question and all others eligible for reemployment, it devised a formula for the calculation of back pay for the members of the class to whom the award was made.

The employers were dissatisfied with the order and sought a review by the Circuit Court of Appeals. Thereupon the Board filed a transcript of the record in the same court and sought enforcement of its order. The Unions, who are petitioners in this court, were permitted to intervene and were heard in support of the Board's order. The court modified the order as to matters not here relevant and decreed enforcement. Two paragraphs of the decree thus obtained by the Board with the assistance of the present petitioners specified the method of computing back pay to the claimants whom the Board had found entitled. This decree was entered June 27, 1941. The companies proceeded to compute back pay due the claimants in accordance with the terms of the decree and tendered the amount they ascertained to be due thereunder. The Board, by its agents, examined the corporate records and reached the conclusion that a different method of compensation to the claimants should have been adopted in the original proceeding.

February 4, 1943, nearly two years after the final decree, and after attempted compliance by the employers, the Board petitioned the Circuit Court of Appeals to vacate that portion of its decree which dealt with the award of back pay and to remand the cause to the Board. The petitioner labor unions were permitted to intervene and to support the Board's petition.

It is somewhat difficult to characterize the allegations of the petition. It does not accuse the companies of fraud, but indicates that certain evidence produced by them created a wrong impression on the mind of the Board which could have been corrected had they gone into greater detail and disclosed certain facts within their knowledge, and it avers that the Board prescribed its remedy in reliance upon a mistaken understanding of conditions touching possible reemployment of the claimants. To this petition the employers replied challenging the jurisdiction of the court to vacate its decree, moved to dismiss the petition, and answered on the merits, categorically denying the averments of the petition. Thereupon the Board moved for judgment on its motion. The matter was heard. The court held that there had been no showing that the order and decree were obtained by misrepresentation or wrongful conduct of the employers or that any mistake of the Board had resulted in a decree which was unfair, and consequently held that there was no justification for revocation or remand of the portion of the decree involved. The petition of the Board was

accordingly dismissed. The Board did not apply for certiorari but the intervening unions whose petition had also been dismissed applied for the writ. The Board was made a respondent in this court but appeared in support of the petition.

The employers made a persuasive showing that, as respects material elements of the problem of back pay, the record of the Board's hearing, and the decision of the Circuit Court of Appeals enforcing the Board's order, demonstrate that all the facts now relied upon by the Board for revocation and reformation of its order sufficiently appeared prior to the entry of the order. In the view we take, it is unnecessary to consider this matter.

They also attack the standing of the petitioners to seek review by this court when the Board, the body charged with the enforcement of the National Labor Relations Act, has elected not to seek review. We think that, in the circumstances disclosed, the petitioners, though they could not have instituted enforcement proceedings, had standing to seek review of the order denying the Board's petition.

The important question presented is whether, despite a decree entered at the Board's behest, prescribing the method of enforcement of the relief granted by the Board, that body retains a continuing jurisdiction to be exercised whenever, in its judgment, such exercise is desirable and may, therefore, oust the jurisdiction of the court and recall the proceeding for further hearing and action.

It will be noted that this is not a bill of review based upon fraud or mistake. If it were to be treated as such obviously the relief prayed could not be granted without a trial, in view of the issues made by the employers' answer. The Board's insistence is that, upon its petition, the averments of which are denied, it is entitled to an opening of the decree and the remand of the cause upon its mere statement that it now thinks the relief originally granted was inappropriate to the situation as the Board now conceives it.

We are not dealing here with an administrative proceeding. That proceeding has ended and has been merged in a decree of a court pursuant to the directions of the National Labor Relations Act. The statute provides that if, in the enforcement proceeding, it appears that any further facts should be developed the court may remand the cause to the Board for the taking of further evidence and for further consideration. (§ 10(e). But it is plain that the scheme of the Act contemplates that when the record has been made and is finally submitted for action by the Board the judgment "shall be final." It is to have all the qualities of any other decree entered in a litigated cause upon full hearing, and is subject to review by this court on certiorari as in other cases. (§ 10(e) supra). The position of the petitioners is, and necessarily must be, that, while the court's decree is final as respects the matter of the alleged unfair labor practices found by the Board, it is never final as respects the relief prescribed by the Board. It

must follow that at any time, however remote, and for any reason satisfactory to the Board, it may recall the proceeding from the Circuit Court of Appeals insofar as concerns the relief granted and start afresh as if an enforcement decree had never been entered.

Finality to litigation is an end to be desired as well in proceedings to which an administrative body is a party as in exclusively private litigation. The party adverse to the administrative body is entitled to rely on the conclusiveness of a decree entered by a court to the same extent that other litigants may rely on judgments for or against them. The petitioners' contention is that the nature and extent of the back pay remedy are primarily and peculiarly matters lying within the administrative discretion of the Board, (see Phelps Dodge Corporation v. National Labor Relations Board, 313 U.S. 177, 194, 61 S.Ct. 845, 852, 85 L.Ed. 1271, 133 A.L.R. 1217; National Labor Relations Board v. Link-Belt Co., 311 U.S. 584, 600, 61 S.Ct. 358, 366, 85 L.Ed. 368) and that a court's function is limited to imparting legal sanction to the back pay remedy once it has determined that the Board has acted within the confines of its authority, since a court is prohibited from exercising the discretion reposing exclusively in the Board; and it can, therefore, neither affirm nor reverse a Board order relating to back pay on the basis of its own conception of effectuating the policies of the Act.

All this is true, and we have allowed the Board great latitude in devising remedies which it deems necessary to effectuate the purposes of the Act. But it is not we who essay to interfere with the discretion of an administrative body; it is the Board which is seeking to vacate a court order. The Board had exercised its discretion and devised a remedy. It gave long consideration to the problem of adequate relief for the employees discriminated against, and now asserts that it made a mistake. That is all that it asserts—not even the Board claims that the court below is usurping its functions. What the Board complains of is that it is not permitted to exercise its admittedly wide discretion a second time, or any number of times it may choose.

Administrative flexibility and judicial certainty are not contradictory; there must be an end to disputes which arise between administrative bodies and those over whom they have jurisdiction. This does not mean that the Board could not frame an order which by its terms required modifications should conditions change. But here the order was definite and complete; it contemplated only arithmetical computation. The conditions remained the same; what had changed was the Board's awareness of them. Discussion of the Board's peculiar administrative ability serves no end where the matter is one of simple mistake. It rings hollow when it refers to what on the whole is little more than a mistake in arithmetic, and, in one instance, is just that.

Not only has this Court allowed large scope to the discretion of administrators, but the National Labor Relations Act specifically gives the Board wide powers of modification. Until the transcript of a

case is filed in court, the Board may, after reasonable notice, modify any finding or order in whole or in part. After the case has come under the jurisdiction of the court, either party may apply to the court for remand to the Board. There is no dearth of discretion or opportunity for its exercise, but opportunities should not be unlimited. If the petitioners are right, it must follow that in any case in which the court refuses to remand, the Board need merely wait until the "final" decree is entered and then proceed to resume jurisdiction, ignore the court's decree, and come again to it, asking its imprimatur on a new order.

Petitioners place great reliance on American Chain & Cable Co. v. Federal Trade Commission, 4 Cir., 142 F.2d 909, but far from supporting them, that case emphasizes the lack of statutory authority here for what was permitted there. There, the court ordered the Federal Trade Commission to consider a petition that the Commission ask the court to vacate its enforcing decree because of war conditions. But the statute in that case reads: "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." This statute specifically allows the Commission to modify its order after it has become final. And the court merely held that it was reasonable to suppose that Congress intended the Commissioner's power to extend to cases where its order had become final by court decree as well as to cases where the order had become final by failure to appeal. The National Labor Relations Board is vested with no such power. Section 10(d) of the Act provides: "Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it."

There is no question that the Act intended to vest exclusive jurisdiction in the courts once the Board in the exercise of its discretion had reached its determination and applied for enforcement. This prevents conflict of authority. Ford Motor Co. v. National Labor Relations Board, 305 U.S. 364, 59 S.Ct. 301, 83 L.Ed. 221. In the Ford case, we said, "The authority conferred upon the Board by Section 10(d) of the National Labor Relations Act * * *, to modify or set aside its findings and order, ended with the filing in court of the transcript of record." 305 U.S. 364, 368, 59 S.Ct. 301, 304, 83 L.Ed. 221. But the petitioners and the Board contend that although the court has entered its decree, the Board may resume jurisdiction in the same case when it pleases, disregarding the court's decree. This

would, indeed, be a peculiar scheme of jurisdiction, devised to prevent interference with the court while it is deliberating to determine what its decree shall be, but allowing the decree to be ignored after it is entered.

The circumstances of the case show how unfair it would be to hold with the petitioners. The employers challenged the Board's order in the original enforcement proceeding, not only as it affected the charged unfair labor practices, but as touching the appropriate relief. When the Circuit Court of Appeals modified and affirmed the order the companies had an opportunity to apply to this court for review, or to comply with the decree as modified by the court. They elected to follow the latter course only to be confronted, years later, with an attempt to rewrite a portion of that decree at a time when their right of review of other portions of it had expired.

We are dealing here with a decree of a court entered in a judicial proceeding. The term at which the decree was entered has long since expired. The only recourse open to the Board is the same that would be open to any other litigant, namely, a bill of review. If the petition disclosed any basis for such a review the answer of the employers sharply raised issues of fact which required resolution before any relief in the nature of a review could be granted. Unless the National Labor Relations Act so requires, the Board was not entitled, as of right, to have the decree it had procured set aside in part and the cause remanded for trial de novo in part. There is nothing in the Act to indicate that such a decree is dual in character; part of it final and part of it subject to vacation and reexamination by the Board regardless of the showing made to the court and regardless of the view the court holds as to the propriety of such vacation.

The judgment is affirmed.

Affirmed.[†]

[†] The footnotes of the court, and the dissenting opinion of Mr. Justice Murphy, in which Mr. Justice Black, Mr. Justice Douglas and Mr. Justice Rutledge joined, have been omitted.

PART IV. WHO MAY INITIATE ENFORCEMENT PROCEEDINGS

FEDERAL TRADE COMMISSION v. KLESNER

Supreme Court of the United States.
280 U.S. 19, 50 S.Ct. 1, 74 L.Ed. 138, 68 A.L.R. 838 (1929).

Mr. Justice BRANDEIS delivered the opinion of the Court.

This case is here on certiorari, for the second time. It was brought in the Court of Appeals of the District of Columbia by the Federal Trade Commission under section 5 of the Act of September 26, 1914, c. 311, 38 Stat. 717, 719 (15 U.S.C.A. § 45), to enforce an order entered by it. The order directs Klesner, an interior decorator, who does business in Washington under the name of Hooper & Klesner, to "cease and desist from using the words 'Shade Shop' standing alone or in conjunction with other words as an identification of the business conducted by him, in any manner of advertisement, signs, stationery, telephone, or business directories, trade lists or otherwise." That court dismissed the suit on the ground that, unlike United States Circuit Courts of Appeals, it lacked jurisdiction to enforce orders of the Federal Trade Commission. 6 F.2d 701, 56 App.D.C. 3. On the first certiorari, we reversed the decree and directed that the cause be remanded for further proceedings. Federal Trade Commission v. Klesner, 274 U.S. 145, 47 S.Ct. 557, 71 L.Ed. 972. Then the case was reargued before the Court of Appeals, on the pleadings and a transcript of the record before the Commission, and was dismissed on the merits, with costs. 25 F.2d 524, 58 App.D.C. 100. This second writ of certiorari was thereupon granted. 278 U.S. 591, 49 S.Ct. 30, 73 L.Ed. 524. We are of opinion that the decree of the Court of Appeals should be affirmed—not on the merits, but upon the ground that the filing of the complaint before the Commission was not in the public interest.

The conduct which the Commission held to be an unfair method of competition practiced within the District had been persisted in by Klesner ever since December, 1915. The complaint before the Commission was filed on December 18, 1920. The order sought to be enforced was entered June 23, 1922. This suit was begun on May 13, 1924. The evidence before the Commission, which occupies 394 pages of the printed record in this court, is conflicting only to a small extent. The findings of the Commission are in substance as follows:

Sammons has for many years done business in Washington as maker and seller of window shades, under the name of "The Shade Shop." Prior to 1914, that name had, by long use, come to signify to the buying public of the District the business of Sammons. The concern known as Hooper & Klesner has also been in business in Wash-

ington for many years. Prior to 1915, its trade had consisted mainly of painting and of selling and hanging wallpaper. It had dealt also, to some extent, in window shades, taking orders which it had executed either by Sammons or some other maker of window shades. In 1914, Hooper & Klesner leased a new store pursuant to an arrangement with Sammons, and sublet to him a part of it. There Sammons continued his business of making and selling window shades as an independent concern under the name of "The Shade Shop." His gross sales there were at the rate of $60,000 a year. On a Sunday in November, 1915, he removed all his effects from those premises and established his business in another building four doors away.

Sammons' removal was in confessed violation of his agreement with Hooper & Klesner. An acrimonious controversy ensued. Threats of personal violence led to Sammons having Klesner arrested. and this to bitter animosity. Out of spite to Sammons, and with the purpose and intent of injuring him and getting his trade, Hooper & Klesner decided to conduct on its own account, in the premises which Sammons had vacated, the business of making and selling window shades. It placed upon its show windows, and also upon its letterheads and billheads, the words "Shade Shop," and listed its business in the local telephone directory as "Shade Shop, Hooper & Klesner" and as "Shade Shop." A like sign was placed on its delivery trucks. This use by Hooper & Klesner of the term "Shade Shop" has caused, and is causing, "confusion to the window-shade purchasing public throughout the District," and, on certain occasions, customers who entered Hooper & Klesner's shop were deceived by employees, being led to believe that it was Sammons.' Meanwhile, Klesner had become the sole owner of the business.

Such were the findings of the Commission. The Court of Appeals concluded that there was no showing either that Klesner was attempting to dispose of his goods under the pretense that they were the goods of Sammons, or that he was attempting to deceive or entice any of Sammons' customers; that the evidence introduced to show deception went no further than that some of the public may have purchased from Klesner under a mistaken belief that they were dealing with Sammons; that the words "Shade Shop" were being used by Klesner always in connection with the words Hooper & Klesner; and that the term "Shade Shop," as used by Klesner, merely indicated that his store was a place where window shades were made and sold. The Court of Appeals ruled that these words, being descriptive of a trade or business, were incapable of exclusive appropriation as a legal trade-mark or trade-name, and that there was nothing in the facts to justify the charge of unfair competition. It, therefore, dismissed the suit on the merits, the ground of decision being that there was a lack of those facts which, in a court of law or of equity, are essential to the granting of relief for alleged acts of unfair competition.

We need not decide whether the Court of Appeals was justified in all of its assumptions of fact or in its conclusions on matters of law. For we are of opinion that the decree should be affirmed on a preliminary ground which made it unnecessary for that court to enquire into the merits. Section 5 of the Federal Trade Commission Act does not provide private persons with an administrative remedy for private wrongs. The formal complaint is brought in the Commission's name; the prosecution is wholly that of the government; and it bears the entire expense of the prosecution. A person who deems himself aggrieved by the use of an unfair method of competition is not given the right to institute before the Commission a complaint against the alleged wrongdoer. Nor may the Commission authorize him to do so. He may of course bring the matter to the Commission's attention and request it to file a complaint.[1] But a denial of his request is final. And if the request is granted and a proceeding is instituted, he does not become a party to it or have any control over it.[2]

The provisions in the Federal Trade Commission Act (15 U.S.C.A. §§ 41–51) concerning unfair competition are often compared with those of the Interstate Commerce Act (49 U.S.C.A. § 1 et seq.) dealing with unjust discrimination. But in their bearing upon private rights, they are wholly dissimilar. The latter act imposes upon the carrier many duties; and it creates in the individual corresponding rights. For the violation of the private right it affords a private administrative remedy. It empowers any interested person deeming himself aggrieved to file, as of right, a complaint before the Interstate Commerce Commission; and it requires the carrier to make answer. Moreover, the complainant there, as in civil judicial proceedings, bears the expense of prosecuting his claim.[3] The Federal Trade Commission Act contains no such features.

[1] The rules of practice adopted by the Commission require that the application be in writing and "contain a short and simple statement of the facts constituting the alleged violation of law and the name and address of the applicant and of the party complained of." Rules of Practice, No. II. See Annual Report of the Federal Trade Commission for 1928, pp. 17, 18, 41, 42; and Exhibit 5, p. 132. As to changes made in the procedure and policy March 17, 1925, and September 17, 1928, see Id., Exhibit 1, pp. 117–119.

[2] The sole privilege conferred upon private persons is contained in the following provision of section 5: "Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission, to intervene and appear in said proceeding by counsel or in person." 38 Stat. 719.

[3] Prior to the Act of June 18, 1910, c. 309, § 11, 36 Stat. 539, 550 (49 USCA § 13) which in terms conferred upon the Interstate Commerce Commission power to issue orders in proceedings initiated by it, orders were, with a few exceptions, entered only on complaints filed by shippers or others. Even after the Act of June 29, 1906, c. 3591, 34 Stat. 584, it was asserted that the Commission was without power to enter orders in proceedings initiated by it. Report of the House Committee on Interstate and Foreign Commerce, April 1, 1910, 61st Cong. 2d Sess. No. 923, pp. 3, 10; 45 Cong.Rec.Appendix, p. 88. Compare In the Matter of Allowances for Transfer of Sugar, 14 I.C.C. 619, 627. It had been stated earlier

While the Federal Trade Commission exercises under section 5 the functions of both prosecutor and judge, the scope of its authority is strictly limited. A complaint may be filed only "if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public." This requirement is not satisfied by proof that there has been misapprehension and confusion on the part of purchasers, or even that they have been deceived—the evidence commonly adduced by the plaintiff in "passing off" cases in order to establish the alleged private wrong. It is true that in suits by private traders to enjoin unfair competition by "passing off," proof that the public is deceived is an essential element of the cause of action. This proof is necessary only because otherwise the plaintiff has not suffered an injury. There, protection of the public is an incident of the enforcement of a private right. But to justify the Commission in filing a complaint under section 5, the purpose must be protection of the public. The protection thereby afforded to private persons is the incident. Public interest may exist although the practice deemed unfair does not violate any private right. In Federal Trade Commission v. Beech-Nut Packing Co., 257 U.S. 441, 42 S.Ct. 150, 66 L.Ed. 307, 19 A.L.R. 882, a practice was suppressed as being against public policy, although no private right either of a trader or of a purchaser appears to have been invaded. In Federal Trade Commission v. Winsted Hosiery Co., 258 U.S. 483, 42 S.Ct. 384, 66 L.Ed. 729, an unfair practice was suppressed because it affected injuriously a substantial part of the purchasing public, although the method employed did not involve invasion of the private right of any trader competed against.

In determining whether a proposed proceeding will be in the public interest the Commission exercises a broad discretion. But the mere fact that it is to the interest of the community that private rights shall be respected is not enough to support a finding of public interest. To justify filing a complaint the public interest must be specific and substantial. Often it is so, because the unfair method employed threatens the existence of present or potential competition. Sometimes, because the unfair method is being employed under circumstances which involve flagrant oppression of the weak by the strong. Sometimes, because, although the aggregate of the loss entailed may be so serious and widespread as to make the matter one of public consequence, no private suit would be brought to stop the unfair con-

(Interstate Commerce Com. v. Detroit, etc., Ry. [C.C.] 57 F. 1005, 1008) that the power existed, and its existence was assumed in Interstate Commerce Com. v. Northern Pacific Ry. Co., 216 U.S. 538, 542, 30 S.Ct. 417, 54 L.Ed. 608.

Both the United States Shipping Board Act of September 7, 1916, c. 451, § 22, 39 Stat. 728, 736 (46 USCA § 821), and the Packers and Stockyards Act of August 15, 1921, c. 64, §§ 308, 309, 42 Stat. 159, 165 (7 USCA §§ 209, 210), confer upon private individuals the right to institute proceedings and upon the administrative tribunal the power to award reparations.

duct, since the loss to each of the individuals affected is too small to warrant it.

The alleged unfair competition here complained of arose out of a controversy essentially private in its nature. The practice was persisted in largely out of hatred and malice engendered by Sammons' act. It is not claimed that the article supplied by Klesner was inferior to that of Sammons, or that the public suffered otherwise financially by Klesner's use of the words "Shade Shop." It is significant that the complaint before the Commission was not filed until after the dismissal, in 1920, of a suit which had been brought by Sammons in 1915, in the Supreme Court of the District, to enjoin Klesner's use of the words "Shade Shop." When the Commission directed the filing of the complaint Hooper & Klesner had been using those words in its business for five years. They had been used for nearly seven years before the order here in question was made; and for nearly nine years before this suit to enforce it was begun. Whatever confusion had originally resulted from Klesner's use of the words must have been largely dissipated before the Commission first took action If members of the public were in 1920, or later, seriously interested in the matter, it must have been because they had become partisans in the private controversy between Sammons and Klesner.

The order here sought to be enforced was entered upon a complaint which had in terms been authorized by a resolution of the Commission. The resolution declared, in an appropriate form, both that the Commission had reason to believe that Klesner was violating section 5 and that it appeared to the Commission that a proceeding by it in respect thereof would be to the interest of the public. Thus, the resolution was sufficient to confer upon the Commission jurisdiction of the complaint. Section 5 makes the Commission's findings of facts conclusive, if supported by evidence. Its preliminary determination that institution of a proceeding will be in the public interest, while not strictly within the scope of that provision, will ordinarily be accepted by the courts. But the Commission's action in authorizing the filing of a complaint, like its action in making an order thereon, is subject to judicial review. The specific facts established may show, as a matter of law, that the proceeding which it authorized is not in the public interest, within the meaning of the act. If this appears at any time during the course of the proceeding before it, the Commission should dismiss the complaint. If, instead, the Commission enters an order, and later brings suit to enforce it, the court should, without enquiry into the merits, dismiss the suit.

The undisputed facts, established before the Commission, at the hearings on the complaint, showed affirmatively the private character of the controversy. It then became clear (if it was not so earlier) that the proceeding was not one in the interest of the public; and that the resolution authorizing the complaint had been improvidently entered. Compare Gerard C. Henderson, The Federal Trade

Commission, pp. 52–54, 174, 228, 229, 337. It is on this ground that the judgment dismissing the suit is

Affirmed.[a]

AMALGAMATED UTILITY WORKERS (C.I.O.) v. CONSOLIDATED EDISON CO. OF NEW YORK

Supreme Court of the United States.
309 U.S. 261, 60 S.Ct. 561, 84 L.Ed. 738 (1940).

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

The National Labor Relations Board ordered the Consolidated Edison Company of New York and its affiliated companies to desist from certain labor practices found to be unfair and to take certain affirmative action. The Circuit Court of Appeals granted the Board's petition for enforcement of the order, and its decree, as modified, was affirmed by this Court. Consolidated Edison Co. v. National Labor Relations Board, 305 U.S. 197, 59 S.Ct. 206, 83 L.Ed. 126. Petitioner, Amalgamated Utility Workers, brought the present proceeding before the Circuit Court of Appeals to have the Consolidated Edison Company and its affiliated companies adjudged in contempt for failure to comply with certain requirements of the decree.

The Board, in response to the motion, asserted its willingness to participate in an investigation to ascertain whether acts in violation of the decree had been committed and suggested that the court direct such investigation as might be deemed appropriate.

The Court of Appeals denied the application upon the ground that petitioner had "no standing to press a charge of civil contempt, if contempt has been committed". The court held that under the National Labor Relations Act "the Board is the proper party to apply to the court for an order of enforcement and to present to the court charges that the court's order has not been obeyed". 2 Cir., 106 F.2d 991. In view of the importance of the question in relation to the proper administration of the National Labor Relations Act, we granted certiorari. 308 U.S. 541, 60 S.Ct. 123, 84 L.Ed. 456. October 16, 1939.

Petitioner contends that the National Labor Relations Act[1] "creates private rights"; that the Act recognizes the rights of labor organizations; and that it gives the parties upon whom these rights are conferred status in the courts for their vindication. In support of its alleged standing, petitioner urges that under its former name (United Electrical and Radio Workers of America) it filed with the National Labor Relations Board charges against the respondent companies,

[a] *Cf.* Federal Trade Commission v. Royal Milling Company, 288 U.S. 212, 53 S.Ct. 335, 77 L.Ed. 706 (1933).

Footnotes of the court, except footnotes 1, 2 and 3, have been omitted.

[1] 49 Stat. 449, 29 U.S.C. § 151, et seq., 29 U.S.C.A. § 151 et seq.

and that it was upon these charges that he Board issued its complaint and held the hearing which resulted in the order in question. Also, that petitioner was permitted to intervene in the proceedings before the Circuit Court of Appeals where the companies had moved to set aside the Board's order and the Board had moved to enforce it; and that the petitioner had also been heard in this Court in the certiorari proceedings for review of the decree of enforcement.

Petitioner invokes the statement in Section 1 of the Act of "findings and policy", with respect to the effect of the denial by employers of the right of employees to organize and to bargain collectively, and in particular the provision of Section 7 [2] that

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection".

Neither this provision, nor any other provision of the Act, can properly be said to have "created" the right of self-organization or of collective bargaining through representatives of the employees' own choosing. In National Labor Relations Board v. Jones & Laughlin Steel Corporation, 301 U.S. 1, 33, 34, 57 S.Ct. 615, 622, 81 L.Ed. 893, 108 A.L.R. 1352, we observed that this right is a fundamental one; that employees "have as clear a right to organize and select their representatives for lawful purposes" as the employer has "to organize its business and select its own officers and agents"; that discrimination and coercion "to prevent the free exercise of the right of employees to self-organization and representation" was a proper subject for condemnation by competent legislative authority. We noted that "long ago" we had stated the reason for labor organizations,—that through united action employees might have "opportunity to deal on an equality with their employer", referring to what we had said in American Steel Foundries v. Tri-City Central Trades Council, 257 U.S. 184, 209, 42 S.Ct. 72, 78, 66 L.Ed. 189, 27 A.L.R. 360. And in recognition of this right, we concluded that Congress could safeguard it in the interest of interstate commerce and seek to make appropriate collective action "an instrument of peace rather than of strife". To that end Congress enacted the National Labor Relations Act.

To attain its object Congress created a particular agency, the National Labor Relations Board, and established a special procedure. The aim, character and scope of that special procedure are determinative of the question now before us. Within the range of its constitutional power, Congress was entitled to determine what remedy it would provide, the way that remedy should be sought, the extent to which it should be afforded, and the means by which it should be made effective.

[2] 29 U.S.C. § 157, 29 U.S.C.A. § 157.

Congress declared that certain labor practices should be unfair, but it prescribed a particular method by which such practices should be ascertained and prevented. By the express terms of the Act, the Board was made the exclusive agency for that purpose. Section 10(a) provides: [3]

"The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [158]) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise."

The Act then sets forth a definite and restricted course of procedure. A charge of an unfair labor practice may be presented to the Board, but the person or group making the charge does not become the actor in the proceeding. It is the Board, and the Board alone or its designated agent, which has power to issue its complaint against the person charged with the unfair labor practice. If complaint is issued, there must be a hearing before the Board or a member thereof or its agent. The person against whom the complaint is issued may answer and produce testimony. Other persons may be allowed to intervene and present testimony, but only in the discretion of the Board, or its member or agent conducting the hearing. Section 10 (b).[4] The hearing is under the control of the Board. The determination whether or not the person named in the complaint has engaged or is engaging in the unfair labor practice rests with the Board. If the Board is of the opinion that the unfair labor practice has been shown, the Board must state its findings of fact and issue its "cease and desist" order with such affirmative requirements as will effectuate the policy of the Act. Section 10(c).[5]

So far, it is apparent that Congress has entrusted to the Board exclusively the prosecution of the proceeding by its own complaint, the conduct of the hearing, the adjudication and the granting of appropriate relief. The Board as a public agency acting in the public interest, not any private person or group, not any employee or group of employees, is chosen as the instrument to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce.

When the Board has made its order, the Board alone is authorized to take proceedings to enforce it. For that purpose the Board is empowered to petition the Circuit Court of Appeals for a decree of enforcement. The court is to proceed upon notice to those against whom the order runs and with appropriate hearing. If the court, upon application by either party, is satisfied that additional evidence

[3] 29 U.S.C. § 160(a), 29 U.S.C.A. § 160 (a).

[4] 29 U.S.C. § 160(b), 29 U.S.C.A. § 160 (b).

[5] 29 U.S.C. § 160(c), 29 U.S.C.A. § 160 (c).

should be taken, it may order the Board, its member or agent, to take it. The Board may then modify its findings of fact and make new findings. The jurisdiction conferred upon the court is exclusive and its decree is final save as it may be reviewed in the customary manner. Section 10(e).[6] Again, the Act gives no authority for any proceeding by a private person or group, or by any employee or group of employees, to secure enforcement of the Board's order. The vindication of the desired freedom of employees is thus confided by the Act, by reason of the recognized public interest, to the public agency the Act creates. Petitioner emphasizes the opportunity afforded to private persons by Section 10(f).[7] But that opportunity is given to a person aggrieved by a final order of the Board which has granted or denied in whole or in part the relief sought. That is, it is an opportunity afforded to *contest* a final order of the Board, not to *enforce* it. The procedure on such a contest before the Circuit Court of Appeals is assimilated to that provided in Section 10(e) when the Board seeks an enforcement of its order. But that assimilation does not change the nature of the proceeding under Section 10(f), which seeks not to require compliance with the Board's order but to overturn it.

What Congress said at the outset, that the power of the Board to prevent any unfair practice as defined in the Act is exclusive, is thus fully carried out at every stage of the proceeding. The text of the Act is so clear in this respect that there is no need to comment upon its legislative history. But this puts in a strong light the legislative intent. In the Senate, the Committee on Education and Labor in its report on the bill said:[8]

"Section 10(a) gives the National Labor Relations Board exclusive jurisdiction to prevent and redress unfair labor practices, and, taken in conjunction with section 14, establishes clearly that this bill is paramount over other laws that might touch upon similar subject matters. Thus it is intended to dispel the confusion resulting from dispersion of authority and to establish a single paramount administrative or quasi-judicial authority in connection with the development of the Federal American law regarding collective bargaining".

And the Committee on Labor of the House of Representatives in its report stated:[9]

"The Board is empowered, according to the procedure provided in section 10, to prevent any person from engaging in any unfair labor practice listed in section 8 'affecting commerce' as that term is defined in section 2(7). This power is vested exclusively in the Board and is not to be affected by any other means of adjustment or pre-

[6] Section 160(e).

[7] 29 U.S.C. § 160(f), 29 U.S.C.A. § 160(f).

[8] Sen.Rep. No. 573, 74th Cong., 1st sess., p. 15.

[9] H.R.Rep. No. 972, 74th Cong., 1st sess., p. 21.

vention. The Board is thus made the paramount agency for dealing with the unfair labor practices described in the bill".

After referring to the suitable adaptation of the Board's orders to the needs of particular cases, and especially to the power to reinstate employees with or without back pay, the Committee continued:

"No private right of action is contemplated. Essentially the unfair labor practices listed are matters of public concern, by their nature and consequences, present or potential; the proceeding is in the name of the Board, upon the Board's formal complaint. The form of injunctive and affirmative order is necessary to effectuate the purpose of the bill to remove obstructions to interstate commerce which are by the law declared to be detrimental to the public weal".

In both Houses of Congress, the Committees were careful to say that the procedure provided by the bill was analogous to that set up by the Federal Trade Commission Act, section 5,[10] which was deemed to be "familiar to all students of administrative law." That procedure, which was found to be prescribed in the public interest as distinguished from provisions intended to afford remedies to private persons, was fully discussed by this Court in Federal Trade Commission v. Klesner, 280 U.S. 19, 25, 50 S.Ct. 1, 2, 3, 74 L.Ed. 138, 68 A.L.R. 838, where it was said:

"Section 5 of the Federal Trade Commission Act does not provide private persons with an administrative remedy for private wrongs. The formal complaint is brought in the Commission's name; the prosecution is wholly that of the government; and it bears the entire expense of the prosecution. A person who deems himself aggrieved by the use of an unfair method of competition is not given the right to institute before the Commission a complaint against the alleged wrongdoer. Nor may the Commission authorize him to do so. He may of course bring the matter to the Commission's attention and request it to file a complaint. But a denial of his request is final. And if the request is granted and a proceeding is instituted, he does not become a party to it or have any control over it."

That sort of procedure concerning unfair competition was contrasted with that provided by the Interstate Commerce Act in relation to unjust discrimination. We said that "in their bearing upon private rights" they are "wholly dissimilar". The Interstate Commerce Act, 49 U.S.C.A. § 1 et seq., imposes upon the carrier many duties and creates in the individual corresponding rights. For the violation of the private right it affords "a private administrative remedy". The interested person can file as of right a complaint before the Interstate Commerce Commission and the carrier is required to make answer. We said that the Federal Trade Commission Act, 15 U.S.C.A. §§ 41–51, "contains no such features". Id., 280 U.S. at page 26, 50 S.Ct. at page

[10] 38 Stat. 719, 15 U.S.C. § 45, 15 U.S.C.A. § 45

3, 74 L.Ed. 138, 68 A.L.R. 838. The present Act, drawn in analogy to the Federal Trade Commission Act, contains no such features.

As Congress has in this instance created a public agency entrusted by the terms of its creation with the exclusive authority for the enforcement of the provisions of the Act, decisions dealing with the legal obligations arising under the Railway Labor Act [11] cannot be regarded as apposite. Texas & New Orleans R. Co. v. Brotherhood of Railway & S. S. Clerks, 281 U.S. 548, 569, 570, 50 S.Ct. 427, 433, 74 L.Ed. 1034; Virginian Railway Company v. System Federation No. 40, 300 U.S. 515, 543, 544, 57 S.Ct. 592, 597, 81 L.Ed. 789.

We think that the provision of the National Labor Relations Act conferring exclusive power upon the Board to prevent any unfair labor practice, as defined,—a power not affected by any other means of "prevention that has been or may be established by agreement, code, law, or otherwise", necessarily embraces exclusive authority to institute proceedings for the violation of the court's decree directing enforcement. The decree in no way alters, but confirms, the position of the Board as the enforcing authority. It is the Board's order on behalf of the public that the court enforces. It is the Boards' right to make that order that the court sustains. The Board seeks enforcement as a public agent, not to give effect to a "private administrative remedy". Both the order and the decree are aimed at the prevention of the unfair labor practice. If the decree of enforcement is disobeyed, the unfair labor practice is still not prevented. The Board still remains as the sole authority to secure that prevention. The appropriate procedure to that end is to ask the court to punish the violation of its decree as a contempt. As the court has no jurisdiction to enforce the order at the suit of any private person or group of persons, we think it is clear that the court cannot entertain a petition for violation of its decree of enforcement save as the Board presents it. As the Conference Report upon the bill stated,[12] in case the unfair labor practice is resumed, "there will be immediately available to the Board an existing court decree to serve as a basis for contempt proceedings".

The order of the Court of Appeals denying petitioner's motion is affirmed.

Affirmed.[b]

[11] 45 U.S.C. § 151 et seq., 45 U.S.C.A. § 151 et seq. See 50 Harvard Law Review 1089, 1090.

[12] Conference Report, Cong.Rec., 74th Cong., 1st sess., pt. 9, p. 10,299.

[b] But *cf.* International Union of Mine, Mill and Smelter Workers, etc. v. Eagle-Picher Mining & Smelting Co., 325 U.S. 335, 338-9, 65 S.Ct. 1166, 1168, 89 L.Ed. 1649 (1945), *supra* at pp. 547, 549.

VIRGINIAN RAILWAY COMPANY v. SYSTEM FEDERATION NO. 40

Supreme Court of the United States.
300 U.S. 515, 57 S.Ct. 592, 81 L.Ed. 789 (1937).

Mr. Justice STONE delivered the opinion of the Court.

This case presents questions as to the constitutional validity of certain provisions of the Railway Labor Act of May 20, 1926, c. 347, 44 Stat. 577, as amended by the Act of June 21, 1934, c. 691, 48 Stat. 1185, 45 U.S.C. §§ 151–163 (45 U.S.C.A. §§ 151–163), and as to the nature and extent of the relief which courts are authorized by the act to give.

Respondents are System Federation No. 40, which will be referred to as the Federation, a labor organization affiliated with the American Federation of Labor and representing shop craft employees of petitioner railway, and certain individuals who are officers and members of the System Federation. They brought the present suit in equity in the District Court for Eastern Virginia, to compel petitioner, an interstate rail carrier, to recognize and treat with respondent Federation, as the duly accredited representative of the mechanical department employees of petitioner, and to restrain petitioner from in any way interfering with, influencing, or coercing its shop craft employees in their free choice of representatives, for the purpose of contracting with petitioner with respect to rules, rates of pay, and working conditions, and for the purpose of considering and settling disputes between petitioner and such employees.

The history of this controversy goes back to 1922, when, following the failure of a strike by petitioner's shop employees affiliated with the American Federation of Labor, other employees organized a local union known as the "Mechanical Department Association of the Virginian Railway." The Association thereupon entered into an agreement with petitioner, providing for rates of pay and working conditions, and for the settlement of disputes with respect to them, but no substantial grievances were ever presented to petitioner by the Association. It maintained its organization and held biennial elections of officers, but the notices of election were sent out by petitioner and all Association expenses were paid by petitioner.

In 1927 the American Federation of Labor formed a local organization, which, in 1934, demanded recognition by petitioner of its authority to represent the shop craft employees, and invoked the aid of the National Mediation Board, constituted under the Railway Labor Act, as amended, to establish its authority. The Board, pursuant to agreement between the petitioner, the Federation, and the Association, and in conformity to the statute, held an election by petitioner's shop craft employees to choose representatives for the purpose of collective bargaining with petitioner. As the result of the election, the Board

certified that the Federation was the duly accredited representative of petitioner's employees in the six shop crafts.

Upon this and other evidence, not now necessary to be detailed, the trial court found that the Federation was the duly authorized representative of the mechanical department employees of petitioner, except the carmen and coach cleaners; that the petitioner, in violation of section 2 of the Railway Labor Act (45 U.S.C.A. §§ 151a, 152), had failed to treat with the Federation as the duly accredited representative of petitioner's employees; that petitioner had sought to influence its employees against any affiliation with labor organizations other than an association maintained by petitioner, and to prevent its employees from exercising their right to choose their own representative; that for that purpose, following the certification, by the National Mediation Board, of the Federation, as the duly authorized representative of petitioner's mechanical department employees, petitioner had organized the Independent Shop Craft Association of its shop craft employees, and had sought to induce its employees to join the independent association, and to put it forward as the authorized representative of petitioner's employees.

Upon the basis of these findings, the trial court gave its decree applicable to petitioner's mechanical department employees except the carmen and coach cleaners. It directed petitioner to "treat with" the Federation and to "exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise. * * *" It restrained petitioner from "entering into any contract, undertaking or agreement of whatsoever kind concerning rules, rates of pay or working conditions affecting its Mechanical Department employees, * * * except * * * with the Federation," and from "interfering with, influencing or coercing" its employees with respect to their free choice of representatives "for the purpose of making and maintaining contracts" with petitioner "relating to rules, rates of pay and working conditions or for the purpose of considering and deciding disputes between the Mechanical Department employees" and petitioner. The decree further restrained the petitioner from organizing or fostering any union of its mechanical department employees for the purpose of interfering with the Federation as the accredited representative of such employees. (D.C.) 11 F.Supp. 621.

On appeal the Circuit Court of Appeals for the Fourth Circuit approved and adopted the findings of the District Court and affirmed its decree. 84 F.2d. 641. This Court granted certiorari to review the cause as one of public importance. 299 U.S. 529, 57 S.Ct. 43, 81 L.Ed. 389.

Petitioner here, as below, makes two main contentions: First, with respect to the relief granted, it maintains that section 2, Ninth, of

the Railway Labor Act (45 U.S.C.A. § 152, subd. 9), which provides that a carrier shall treat with those certified by the Mediation Board to be the representatives of a craft or class, imposes no legally enforceable obligation upon the carrier to negotiate with the representative so certified, and that in any case the statute imposes no obligation to treat or negotiate which can be appropriately enforced by a court of equity. Second, that section 2, Ninth, in so far as it attempts to regulate labor relations between petitioner and its "back shop" employees, is not a regulation of interstate commerce authorized by the commerce clause because, as it asserts, they are engaged solely in intrastate activities; and that so far as it imposes on the carrier any obligation to negotiate with a labor union authorized to represent its employees, and restrains it from making agreements with any other labor organization, it is a denial of due process guaranteed by the Fifth Amendment. Other minor objections to the decree, so far as relevant to our decision, will be referred to later in the course of this opinion.

The concurrent findings of fact of the two courts below are not shown to be plainly erroneous or unsupported by evidence. We accordingly accept them as the conclusive basis for decision, Texas & N. O. R. Co. v. Brotherhood of Railway & S. S. Clerks, 281 U.S. 548, 558, 50 S.Ct. 427, 429, 74 L.Ed. 1034; Pick Mfg. Co. v. General Motors Corporation, 299 U.S. 3, 4, 57 S.Ct. 1, 2, 81 L.Ed. 4, and address ourselves to the questions of law raised on the record.

First. The Obligation Imposed by the Statute. By title III of the Transportation Act of February 28, 1920, c. 91, 41 Stat. 456, 469 (45 U.S.C.A. §§ 131–146), Congress set up the Railroad Labor Board as a means for the peaceful settlement, by agreement or by arbitration, of labor controversies between interstate carriers and their employees. It sought "to encourage settlement without strikes, first by conference between the parties, failing that, by reference to adjustment boards of the parties' own choosing and, if this is ineffective, by a full hearing before a national board." Pennsylvania R. Co. v. United States Railroad Labor Board, 261 U.S. 72, 79, 43 S.Ct. 278, 281, 67 L.Ed. 536. The decisions of the Board were supported by no legal sanctions. The disputants were not "in any way to be forced into compliance with the statute or with the judgments pronounced by the Labor Board, except through the effect of adverse public opinion." Pennsylvania Railroad System & Allied Lines Federation v. Pennsylvania R. Co., 267 U.S. 203, 216, 45 S.Ct. 307, 311, 69 L.Ed. 574.

In 1926 Congress, aware of the impotence of the Board, and of the fact that its authority was generally not recognized or respected by the railroads or their employees, made a fresh start toward the peaceful settlement of labor disputes affecting railroads, by the repeal of the 1920 Act and the adoption of the Railway Labor Act (44 Stat. 577). Report, Senate Committee on Interstate Commerce, No. 222, 69th Cong., 1st Sess. Texas & N. O. R. Co. v. Brotherhood of Railway & S. S. Clerks, supra, 281 U.S. 548, 563, 50 S.Ct. 427, 431, 74 L.Ed 1034.

By the new measure Congress continued its policy of encouraging the amicable adjustment of labor disputes by their voluntary submission to arbitration before an impartial board, but it supported that policy by the imposition of legal obligations. It provided means for enforcing the award obtained by arbitration between the parties to labor disputes. Section 9 (45 U.S.C.A. § 159). In certain circumstances it prohibited any change in conditions, by the parties to an unadjusted labor dispute, for a period of thirty days, except by agreement. Section 10 (45 U.S.C.A. § 160). It recognized their right to designate representatives for the purposes of the act "without interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other." Section 2, Third. 44 Stat. 577. Under the last-mentioned provision this Court held, in the Railway Clerks Case, supra. that employees were free to organize and to make choice of their representatives without the "coercive interference" and "pressure" of a company union organized and maintained by the employer; and that the statute protected the freedom of choice of representatives, which was an essential of the statutory scheme, with a legal sanction which it was the duty of courts to enforce by appropriate decree.

The prohibition against such interference was continued and made more explicit by the amendment of 1934. Petitioner does not challenge that part of the decree which enjoins any interference by it with the free choice of representatives by its employees, and the fostering, in the circumstances of this case, of the company union. That contention is not open to it in view of our decision in the Railway Clerks Case, supra, and of the unambiguous language of section 2, Third, and Fourth, of the act, as amended (45 U.S.C.A. § 152, subds. 3, 4).

But petitioner insists that the statute affords no legal sanction for so much of the decree as directs petitioner to "treat with" respondent Federation "and exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes whether arising out of the application of such agreements or otherwise." It points out that the requirement for reasonable effort to reach an agreement is couched in the very words of section 2, First (45 U.S.C.A. § 152, subd. 1), which were taken from section 301 of the Transportation Act (45 U.S.C.A. § 132), and which were held to be without legal sanction in that act. Pennsylvania Railroad System & Allied Lines Federation v. Pennsylvania R. Co., supra, 267 U.S. 203, 215, 45 S.Ct. 307, 310, 69 L.Ed. 574. It is argued that they cannot now be given greater force as reenacted in the Railway Labor Act of 1926, and continued in the 1934 amendment. But these words no longer stand alone and unaided by mandatory provision of the statute as they did when first enacted. The amendment of the Railway Labor Act added new provisions in section 2, Ninth (45 U.S.C.A. § 152, subd. 9), which makes it the duty

of the Mediation Board, when any dispute arises among the carrier's employees, "as to who are the representatives of such employees," to investigate the dispute and to certify, as was done in this case, the name of the organization authorized to represent the employees. It commands that "upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act [chapter]."

It is, we think, not open to doubt that Congress intended that this requirement be mandatory upon the railroad employer, and that its command, in a proper case, be enforced by the courts. * * *

In considering the propriety of the equitable relief granted here, we cannot ignore the judgment of Congress, deliberately expressed in legislation, that where the obstruction of the company union is removed, the meeting of employers and employees at the conference table is a powerful aid to industrial peace. Moreover, the resources of the Railway Labor Act are not exhausted if negotiation fails in the first instance to result in agreement. If disputes concerning changes in rates of pay, rules, or working conditions, are "not adjusted by the parties in conference," either party may invoke the mediation services of the Mediation Board, section 5, First (45 U.S.C.A. § 155, subd. 1), or the parties may agree to seek the benefits of the arbitration provision of section 7 (45 U.S.C.A. § 157). With the coercive influence of the company union ended, and in view of the interest of both parties in avoiding a strike, we cannot assume that negotiation, as required by the decree, will not result in agreement, or lead to successful mediation or arbitration, or that the attempt to secure one or another through the relief which the district court gave is not worth the effort.

More is involved than the settlement of a private controversy without appreciable consequences to the public. The peaceable settlement of labor controversies, especially where they may seriously impair the ability of an interstate rail carrier to perform its service to the public, is a matter of public concern. That is testified to by the history of the legislation now before us, the reports of committees of Congress having the proposed legislation in charge, and by our common knowledge. Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved. Pennsylvania v. Williams, 294 U.S. 176, 185, 55 S.Ct. 380, 385, 79 L.Ed. 841, 96 A.L.R. 1166; Central Kentucky Natural Gas Co. v. Railroad Commission of Kentucky, 290 U.S. 264, 270–273, 54 S.Ct. 154, 156, 157, 78 L.Ed. 307; City of Harrisonville v. W. S. Dickey Clay Mfg. Co., 289 U.S. 334, 338, 53 S.Ct. 602, 603, 77 L.Ed. 1208; Beasley v. Texas & Pac. Ry. Co., 191 U.S. 492, 497, 24 S.Ct. 164, 48 L.Ed. 274; Joy v. St. Louis, supra, 138 U.S. 1, 47, 11 S.Ct. 243, 34 L.Ed. 843; Texas & Pac. Ry. Co. v. Marshall, 136 U.S. 393, 405, 406, 10 S.Ct. 846, 34 L.Ed. 385; Conger v. New York, West

Shore & Buffalo R. Co., 120 N.Y. 29, 32, 33, 23 N.E. 983. The fact that Congress has indicated its purpose to make negotiation obligatory is in itself a declaration of public interest and policy which should be persuasive in inducing courts to give relief. It is for similar reasons that courts, which traditionally have refused to compel performance of a contract to submit to arbitration, Tobey v. Bristol, supra, enforce statutes commanding performance of arbitration agreements, Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 119, 121, 44 S.Ct. 274, 275, 276, 68 L.Ed. 582; Marine Transit Corp. v. Dreyfus, 284 U.S. 263, 278, 52 S.Ct. 166, 170, 76 L.Ed. 282.

The decree is authorized by the statute and was granted in an appropriate exercise of the equity powers of the court. * * *

There remains to be considered petitioner's contentions that the certificate of the National Mediation Board is invalid and that the injunction granted is prohibited by the provisions of the Norris-LaGuardia Act, of March 23, 1932, c. 90, 47 Stat. 70, 29 U.S.C. §§ 101–115 (29 U.S.C.A. §§ 101–115).[c]

Validity of the Certificate of the National Mediation Board. In each craft of petitioner's mechanical department a majority of those voting cast ballots for the Federation. In the case of the blacksmiths the Federation failed to receive a majority of the ballots of those eligible to vote, although a majority of the craft participated in the election. In the case of the carmen and coach cleaners, a majority of the employees eligible to vote did not participate in the election. There has been no appeal from the ruling of the District Court that the designation of the Federation as the representative of the carmen and coach cleaners was invalid. Petitioner assails the certification of the Federation as the representative of the blacksmiths because less than a majority of that craft, although a majority of those voting, voted for the Federation.

Section 2, Fourth, of the Railway Labor Act (45 U.S.C.A. § 152, subd. 4) provides: "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act [chapter]." Petitioner construes this section as requiring that a representative be selected by the votes of a majority of eligible voters. It is to be noted that the words of the section confer the right of determination upon a majority of those eligible to vote, but is silent as to the manner in which that right shall be exercised. Election laws providing for approval of a proposal by a specified majority of an electorate have been generally construed as requiring only the consent of the specified majority of those participating in the election. Carroll County v. Smith, 111 U.S. 556, 4 S.Ct. 539, 28 L.Ed. 517; Douglass v. Pike County, 101 U.S. 677, 25 L.Ed. 968; Louisville & Nashville R. Co. v. County Court

[c] *Cf.* Switchmen's Union of North America v. National Mediation Board, 320 U.S. 297, 64 S.Ct. 95, 88 L.Ed. 61 (1943), *infra* at p. 726.

of Davidson County, 1 Sneed.(Tenn.) 637, 62 Am.Dec. 424; Montgomery County Fiscal Court v. Trimble, 104 Ky. 629, 47 S.W. 773, 42 L.R.A. 738 Those who do not participate "are presumed to assent to the expressed will of the majority of those voting." County of Cass v. Johnston, 95 U.S. 360, 369, 24 L.Ed. 416, and see Carroll County v. Smith, supra.

We see no reason for supposing that section 2, Fourth (45 U.S.C.A. § 152, subd. 4), was intended to adopt a different rule. If, in addition to participation by a majority of a craft, a vote of the majority of those eligible is necessary for a choice, an indifferent minority could prevent the resolution of a contest, and thwart the purpose of the act, which is dependent for its operation upon the selection of representatives. There is the added danger that the absence of eligible voters may be due less to their indifference than to coercion by the employer. The opinion of the trial court discloses that the Mediation Board scheduled an election to be determined by a majority of the eligible voters, but that the Federation's subsequent protest that the Railway was influencing the men not to vote caused the Board to hold a new election to be decided by the ballots of a majority of those voting.

It is significant of the congressional intent that the language of section 2, Fourth, was taken from a rule announced by the United States Railroad Labor Board, acting under the labor provisions of the Transportation Act of 1920, Decision No. 119, International Association of Machinists et al. v. Atchison, Topeka & Santa Fe Ry. et al., 2 Dec. U.S.Railroad Labor Board, 87, 96, par. 15. Prior to the adoption of the Railway Labor Act, this rule was interpreted by the Board, in Decision No. 1971, Brotherhood of Railway & S. S. Clerks v. Southern Pacific Lines, 4 Dec.U.S.Railroad Labor Board 625, where it appeared that a majority of the craft participated in the election. The Board ruled, p. 639, that a majority of the votes cast was sufficient to designate a representative. A like interpretation of section 2, Fourth, was sustained in Association of Clerical Employees v. Brotherhood of Railway & S. S. Clerks (C. C. A.) 85 F.2d 152.

The petitioner also challenges the validity of the certificate of the National Mediation Board in this case because it fails to state the number of eligible voters in each craft or class. The certificate states that respondent "has been duly designated and authorized to represent the mechanical department employees" of petitioner. It also shows on its face the total number of votes cast in each craft in favor of each candidate, but omits to state the total number of eligible voters in each craft. Petitioner insists that this is a fatal defect in the certificate, upon the basis of those cases which hold that where a finding of fact of an administrative officer or tribunal is prerequisite to the making of a rule or order, the finding must be explicitly set out. See Panama Refining Co. v. Ryan, 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446; United States v. Chicago, Milwaukee, St. Paul & P. R. Co., 294

U.S. 499, 55 S.Ct. 462, 79 L.Ed. 1023; Atchison, Topeka & Santa Fe Ry. Co. v. United States, 295 U.S. 193, 55 S.Ct. 748, 79 L.Ed. 1382.

The practice contended for is undoubtedly desirable, but it is not required by the present statute or by the authorities upon which petitioner relies. The National Mediation Board makes no order. The command which the decree of the court enforces is that of the statute, not of the Board. Its certificate that the Federation is the authorized representative of the employees is the ultimate finding of fact prerequisite to enforcement by the courts of the command of the statute. There is no contention that this finding is conclusive in the absence of a finding of the basic facts on which it rests—that is to say, the number of eligible voters, the number participating in the election and the choice of the majority of those who participate. Whether the certification, if made as to those facts, is conclusive, it is unnecessary now to determine. But we think it plain that if the Board omits to certify any of them, the omitted fact is open to inquiry by the court asked to enforce the command of the statute. See Dismuke v. United States, 297 U.S. 167, 171–173, 56 S.Ct. 400, 403, 404, 80 L.Ed. 561. Such inquiry was made by the trial court which found the number of eligible voters and thus established the correctness of the Board's ultimate conclusion. The certificate which conformed to the statutory requirement, was prima facie sufficient, and was not shown to be invalid for want of the requisite supporting facts. * * *

Affirmed.[d]

L. SINGER & SONS v. UNION PACIFIC R. CO.

Supreme Court of the United States.
311 U.S. 295, 61 S.Ct. 254, 85 L.Ed. 198 (1940).

Mr. Justice McREYNOLDS delivered the opinion of the Court.

Undertaking to proceed under Paragraphs 18, 20 and 21, Section 402, Transportation Act, 1920, 41 Statutes 456, 477, U.S.C. Title 49, § 1, 49 U.S.C.A. § 1, petitioners, by bill filed December 30, 1938, in the United States District Court, Western District of Missouri, 26 F.Supp. 721, asked a decree enjoining respondent from constructing or operating an alleged extension.

The bill describes them thus:—"Plaintiffs are engaged in the business of buying and selling at wholesale and retail, fruits, vegetables and other food products within and adjacent to the so-called City Market of Kansas City, Missouri, located at and near the intersection

[d] See section 2, Tenth of the Railway Labor Act, as amended, 45 U.S.C. § 152, Tenth, which makes it a misdemeanor for a carrier to refuse to comply with the terms of the third, fourth, fifth, seventh or eighth paragraph of section 2. No such sanction is provided, however, for violations of section 2, Ninth, 45 U.S.C. § 152, Ninth.

Footnotes of the court have been omitted.

of Fourth and Walnut Streets in said City, or are directly interested in or connected with said business. Said market has been in existence at said location for more than seventy-five years serving greater Kansas City and vicinity as a wholesale and retail produce market, and also serving numerous territories in other states to and from which perishable and other produce bought and sold in said market is transported. The City of Kansas City, Missouri, is now engaged in the construction of new wholesale and retail market buildings and facilities in said vicinity at a cost of approximately $500,000.00. Sail market is now and for a long period of time has been served by existing transportation facilities of various trunk line railroads, and said existing transportation facilities are suitable, convenient and adequate to meet the requirements of the market. The market is easily accessible to its customers through the facilities of said railroads and also by the use of streets and hard-surfaced highways radiating in every direction therefrom."

Answering, the respondent alleged that petitioners were not parties "in interest" within Paragraph 20, Sec. 402, Transportation Act and had no right to sue. The District Court sustained this defense and dismissed the bill. Upon appeal its action was affirmed. The matter is here by certiorari.

The Circuit Court of Appeals, 8 Cir., 109 F.2d 493, 495, made the following summation of the bill—"The complaint of the plaintiffs shows that they are commission merchants doing business on the Kansas City, Missouri, produce market, an old and well-established market which adequately serves the consuming public in its vicinity and receives produce from, and ships produce to, other states; that Kansas City, Missouri, is now engaged in constructing new market buildings for this market at a cost of about $500,000; that the market has suitable and adequate transportation facilities of all kinds; that the adjoining city of Kansas City, Kansas, proposes to build and is building a 'food Terminal' or produce market on a tract of land which it owns, at a cost of about $4,000,000, of which $1,710,000 is a grant from the Public Works Administration of the United States, and that the balance of the necessary funds will be procured by a sale of the City's bonds to the defendant railroad company; that the defendant proposes, at an expense of some $500,000, to furnish trackage to serve this Kansas City, Kansas, market; that this trackage constitutes an extension of the defendant's lines of railroad, for the construction of which it has procured no certificate of convenience and necessity from the Interstate Commerce Commission as required by law; that the construction and operation of the proposed extension in Kansas City, Kansas, will adversely affect and will destroy the business and properties of the plaintiffs and the large investments which they have made in and adjacent to the Kansas City, Missouri, produce market; that it will create an unnecessary and uncalled for rival market at an inconvenient place without creating any more produce to

be handled or any more customers to be served; that it will result in the unnecessary duplication of railroad facilities at a cost of $500,000 without increasing the amount of freight to be handled; that it will divert traffic from other railroads which are now adequately handling the traffic to the Kansas City, Missouri, produce market, and will cause destructive competition between the defendant and other railroads and will cause a wasteful and needless expenditure of money by the defendant; that 'for each and all of the reasons aforesaid, the construction and operation, or the construction, or the operation of the said extension or extensions of railroad by the defendant to said proposed produce market in Kansas City, Kansas, will directly and adversely affect the property interests of the plaintiffs and the public generally by bringing about a material change in the transportation situation, and will constitute an unnecessary burden upon interstate commerce, directly and adversely affecting the welfare of plaintiffs and the public interest.' "

It is not alleged that the respondent has ever served the produce market in Kansas City, Missouri, or that petitioners make or receive shipments over its lines or that the proposed extension will deprive them of any shipping facilities. Evidently the real purpose was to obstruct construction of a competitor and the theory upon which the proceeding rests would permit petitioners to sue if any railroad should extend its lines to any market competing with the market at Kansas City, Missouri.

Concerning the purport of the allegations of the bill, the Circuit Court of Appeals rightly said: "It is obvious that the only basis for the plaintiffs' claim that the alleged extension of the lines of the defendant to the Kansas City, Kansas, market will particularly injure them is that they do business upon the Kansas City, Missouri, market, and that if the proposed rival market in Kansas City, Kansas, functions, it will divert business from the market upon which they operate and will thus hurt them, their business, and their investments in Kansas City, Missouri, and that, since the proposed extension of its tracks by the defendant is necessary to enable the rival market to function, such extension will therefore injure the plaintiffs. It seems equally obvious that, except for the fact that the proposed extension is essential to the operation of the rival market in Kansas, it could not possibly have any direct or immediate effect upon the plaintiffs, their property or their business in Missouri, other than the effect which a wasteful expenditure by the defendant of its money would have upon the public generally. The proximate cause of the injury to the plaintiffs will be the competition created by the construction and operation of the rival market, and not the construction or operation of the transportation facilities furnished to it by the defendant or by others engaged in the transportation business."

It declared that the question whether petitioners were "parties in interest" within Paragraph 20 must be determined upon consideration

of Western Pacific California R. Co. v. Southern Pacific, 284 U.S. 47, 52 S.Ct. 56, 76 L.Ed. 160, and concluded—"The plaintiffs have no definite legal right which is threatened. They are, however, persons whose welfare may be adversely affected by the bringing about of a material change in the transportation situation, in the sense that the extension proposed by the defendant, if built and operated, will enable a competitive market to function to their detriment. In that sense, we think it may safely be said that the proposed extension of defendant's lines may adversely affect the plaintiffs' welfare. We are of the opinion, however, that their complaint discloses that their welfare cannot be directly, but only indirectly and consequentially, affected by the proposed extension. They are not in competition with the defendant. They are not engaged in the transportation business. Their only peculiar interest in that business is in the effect which changes in it may have upon the market where they do business and upon rival markets now or hereafter established in the territory which the plaintiffs serve. * * * We conclude that the statute is not to be so liberally construed as to enable those who fear adverse effects upon their business from the establishment of competitive enterprises requiring transportation facilities, to maintain suits to enjoin railroads from constructing what are claimed to be unauthorized extensions to serve such enterprises." * * *

The Transportation Act, 1920 was designed to protect the public against action which might endanger its interest. In order to aid that general purpose, Paragraph 20, Section 402, provides that suit for an injunction may be instituted by the United States, the Commission (I.C.C.), any Commission or Regulative Body of the state or states affected, or any "party in interest." Such a suit cannot be instituted by an individual unless he "possesses something more than a common concern for obedience to law." The general or common interest finds protection in the permission to sue granted to public authorities. An individual may have some special and peculiar interest which may be directly and materially affected by alleged unlawful action. See Detroit & M. Ry. v. Boyne City, etc., Co., D.C., 286 F. 540. If such circumstances are shown he may sue; he is then "party in interest" within the meaning of the statute. In the absence of these circumstances he is not such a party.

We cannot think Congress supposed that the development and maintenance of an adequate railway system would be aided by permitting any person engaged in business within or adjacent to a public market to demand an injunction against a carrier seeking only to serve a competing market by means of an extension not authorized by the interstate Commerce Commission.

The right to sue under the statute is individual. Petitioners are not helped by uniting.

The Circuit Court of Appeals after reviewing all the facts reached the conclusion that the welfare of petitioners could only be indi-

rectly and consequentially affected by the proposed extension; that their interest in the transportation situation "is in the effect which changes in it may have upon the market where they do business and upon rival markets now or hereafter established in the territory which the plaintiffs serve." It held this was not enough. We agree, A mere extension to the plant of a competitor which in no other way affects the complaining parties in no proper sense brings about a material change in the transportation system directly affecting their peculiar interest which they have the right to prevent by suit.

The challenged judgment must be affirmed.

Affirmed.

Kansas City, Mo. v. L. Singer & Sons et al.

No. 35.

The City of Kansas City, Missouri, sought to intervene in No. 34. The District Court denied its motion. The Circuit Court of Appeals affirmed. In view of what we have decided in No. 34 this denial necessarily must be affirmed.

Affirmed.

Mr. Justice FRANKFURTER.

I quite agree with my Brother STONE that unfair loss may be cast upon a community by the unjustified extension of a railroad line, and that such loss is one consequence of the evils of unregulated railroad building which the Transportation Act was intended to check. But our immediate problem is to determine how a community can challenge such a proposed improper extension. Can a city, in other words, come into a Federal Court and urge its special relation to an alleged violation of § 1(18–22), of the Transportation Act, 1920, 41 Stat. 456, 477, 49 U.S.C. § 1(18–22), 49 U.S.C.A. § 1(18–22)? The answer, of course, depends on the scheme of enforcement that Congress has devised for the Act. After making administrative provisions for securing a certificate from the Interstate Commerce Commission as a prerequisite to the construction of an "extension", the Act subjects any construction in violation of its licensing system to an injunction "at the suit of the United States, the commission, any commission or regulating body of the State or States affected, or any party in interest". § 1(20).

A city deeming itself adversely affected by a proposed illegal extension would naturally turn to its state commission to assert its interests. If, for any reason, the state agency does not employ its power under § 1(20) on behalf of the city's claims, the latter can invoke the law-enforcing authority of the Interstate Commerce Commission and also enlist the power of the Attorney General to initiate litigation. It is reading § 1(20) without illumination of the scheme and purposes of the Transportation Act to expand the categories of public agencies explicitly named by Congress for enforcing § 1(18)

by including a city as a "party in interest". To do so would disregard recognition of a state utility commission as the special repository of all the interests of a state in this particular field, and of the Interstate Commerce Commission as the national organ for enforcing the body of interstate commerce acts. Clearly, therefore, Kansas City can not be deemed a "party in interest" for the litigious purposes of that phrase in § 1(20).

But it would indeed be strange to find that while the city was not given power to resort to a court, a private and more limited sufferer from the same economic threat may have such legal standing. Such a paradox exposes the appropriate scope of "party in interest" in § 1 (20). The guiding considerations in the application of that section are to be found in the reach of the functions of the Interstate Commerce Commission and of its state analogues. They are relied on for the enforcement of railroad legislation neither grudgingly nor with scepticism. In these agencies are lodged the resources for compounding the manifold ingredients of "the public interest". To entrust the vindication of this public interest to a private litigant professing a special stake in the public interest is to impinge on the responsibility of the public authorities designated by Congress. If there be insufficient assurance that unlawful railroad construction will be resisted by a state commission representing all the interests of a state that are affected, the Interstate Commerce Commission may be moved to enjoin illegality.

Who then is a "party in interest"? As a part of the very system through which the national policy is to be achieved, a railroad has been deemed by this Court a "party in interest" to effectuate the railroad policy introduced by the licensing system of the Transportation Act. Texas & Pac. Ry. v. Gulf, etc., Ry., 270 U.S. 266, 277, 46 S.Ct. 263, 266, 70 L.Ed. 578; Western Pacific California R. Co. v. Southern Pac. Co., 284 U.S. 47, 52 S.Ct. 56, 76 L.Ed. 160. And one who in a proceeding initiated before the Interstate Commerce Commission has been treated by it as a party to the litigation, cf. Los Angeles Passenger Terminal Cases, 100 I. C. C. 421; Id., 142 I. C. C. 489; Atchison Ry. v. Railroad Comm., 283 U.S. 380, 393, 394, 51 S.Ct. 553, 556, 557, 75 L.Ed. 1128, may perhaps be deemed a "party in interest" in the further pursuit of claims before a court after adverse action by the Commission. Compare Interstate Commerce Comm. v. Oregon-Washington R. R., 288 U.S. 14, 53 S.Ct. 266, 77 L.Ed. 588 and Federal Communications Commission v. Sanders Radio Station, 309 U.S. 470, 60 S. Ct. 693, 84 L.Ed. 869. But to allow any private interest to thresh out the complicated questions that arise out of § 1(18–22)—as, for instance, whether a proposed construction is an "extension" or a "spur", compare Texas & Pac. Ry. v. Gulf, etc., Ry., 270 U.S. 266, 46 S.Ct. 263, 70 L.Ed. 578—is to invite dislocation of the scheme which Congress has devised for the expert conduct of the litigation of such issues. It also would put upon the district courts the task of drawing fine lines

in determining when a private claim is so special that it may be set apart from the general public interest and give the claimant power to litigate a public controversy. These inquiries are so harassing and unprofitable as to be avoided, unless Congress has explicitly cast the duty upon the courts. Against any such implication, in the absence of rather plain language, the whole course of federal railroad legislation and the relation of the Interstate Commerce Commission to it admonishes. The interests of merely private concerns are amply protected even though they must be channelled through the Attorney General or the Interstate Commerce Commission or a state commission.

Therefore, the court below made proper dispositions of these cases.

Mr. Justice ROBERTS, Mr. Justice BLACK, Mr. Justice DOUGLAS, and Mr. Justice MURPHY having concurred in the Court's opinion, also join in these views.

Mr. Justice STONE (dissenting).

I think that the complainants, petitioners in No. 34, are proper parties to maintain this suit, that the decree should be reversed and, on the remand, the petition of Kansas City for intervention should be considered in light of that conclusion and of §§ 212 and 213 of the Judicial Code, 28 U.S.C. § 45a, 28 U.S.C.A. § 45a, and of Rule 24 of the Rules of Civil Procedure, 28 U.S.C.A. following section 723c.

On the pleadings it stands conceded that the proposed extension of respondent's line is unauthorized and unlawful, and the sole question we have to decide is whether the interests of petitioners in maintaining this suit, as disclosed by their pleadings, satisfies the requirement of the statute which authorizes it to be brought by "any party in interest".

Section 1(18) of the Transportation Act of 1920, 41 Stat. 474, 477, 49 U.S.C. § 1(18), 49 U.S.C.A. § 1(18), forbids the extension of its line by a railroad without a certificate of the Interstate Commerce Commission that "the present or future public convenience and necessity require or will require" the construction of the extension. Similarly it prohibits the abandonment of any portion of a line of railroad without a like certificate permitting the abandonment. Section 1(19) requires the Commission to give notice of application for a certificate to the governor of the state in which the proposed extension is to be constructed and to publish the notice in each county through which the line of railroad is constructed or operated. By § 1(20) the Commission is authorized to attach to its certificate such "conditions as in its judgment the public convenience and necessity may require", and authorizes any court of competent jurisdiction to enjoin the prohibited construction or abandonment "at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; * * *." By § 1(22) spur, industrial, side tracks and the like are excluded from the authority of the

Commission and the railroad may build them without applying for a certificate.

The interest of petitioners in maintaining the suit as shown by the pleadings is derived from the injury to the public which, it is specifically alleged, will result from the proposed extension through the injury to the community in Kansas City, Missouri, and vicinity, of which community petitioners are a part and in which they are property owners, and the consequent injury alleged to affect them individually. The public injury, it is alleged, will be caused by (a) the loss or serious impairment in utility of the Kansas City public produce market and the destruction or serious diminution of values of property and business and of financial investments in and about the market, which will be brought about by the extension, through the creation of a rival market and the diversion of traffic to it at a point in Kansas City, Kansas, far removed from the center of population of Kansas City, Missouri, and to the inconvenience of the great majority of the citizens of both cities who are served by the existing market, which is adequate to the needs of the community; (b) by the unnecessary duplication of railroad facilities in the Kansas City district at large cost, with wasteful and needless expenditures by respondent and no increase in freight to be handled; and (c) by the diversion of traffic to respondent railroad from other railroads and destructive competition between the railroads operating in the vicinity.

Special injury is shown to complainants (petitioners in No. 34) by the allegations that they are owners of business property and investments in the existing market area and vicinity, and that their property will be reduced in value in consequence of the diversion of traffic to the rival market. The petitioner, Kansas City, Missouri, in intervention, in No. 35, alleges the like injury to the public which it represents and sets up specifically the threatened loss in value and utility of a large public market structure which it is now building at great cost, and the threatened loss to it of taxes through diminution in property values in the city.

The statute does not define the "parties in interest" whom it permits to sue to restrain an unauthorized extension. It cannot be assumed that the phrase is meaningless or that the statute should be read as though the words were omitted. Obviously the parties intended must have, as do petitioners, an interest in the outcome of the litigation other than the "common concern for obedience to law". See Massachusetts v. Mellon, 262 U.S. 447, 488, 43 S.Ct. 597, 601, 67 L.Ed. 1078. And as the language of the statute plainly indicates, and as we have held, they may be, as are petitioners, others than the public bodies named in the statute as appropriate plaintiffs. Atchison Ry. v. Railroad Commission, 283 U.S. 380, 393, 394, 51 S.Ct. 553, 556, 557, 75 L.Ed. 1128. And they may maintain the suit although the injury which they allege is not strictly an actionable wrong independently of

the paragraphs in question. Western Pacific R. Co. v. Southern Pacific Co., 284 U.S. 47, 52 S.Ct. 56, 76 L.Ed. 160.

The statute draws no distinction between direct and indirect injury as the test of plaintiff's interest. Nor is any reason advanced for saying that his interest is more significant because the injury which he suffers is labeled "direct" rather than "indirect." In any case that suffered by petitioners does not seem to be any the less direct than that which an extension may inflict upon a competing railroad which admittedly may sue to enjoin it. Western Pacific California R. Co. v. Southern Pacific Co., supra; cf. Claiborne-Annapolis Ferry Co. v. United States, 285 U.S. 382, 52 S.Ct. 440, 76 L.Ed. 808. If the statute imposes any requirements other than those indicated by the phrase *"party in interest", they must be implied from the purposes of the statute*, its context, and from the reasons for permitting others than the public bodies named in it to bring the suit. Cf. New York Central Securities Corp. v. United States, 287 U.S. 12, 24, 53 S.Ct. 45, 48, 77 L. Ed. 138. On the other hand if maintenance of the present suit by petitioners is consistent with those purposes and aids them and is in harmony with the reasons for allowing any party in interest to sue, the conclusion would seem inescapable that petitioners are proper plaintiffs.

It is not denied that the statutory language and the legislative history of the paragraphs in question require consideration by the Commission of the interests of cities, towns and communities which are adversely affected by a proposed extension of a line of railroad, in order to determine whether "public convenience and necessity" require the extension. The phrase "public convenience and necessity" has long been used to signify the final result of the balancing of the consequences which flow from the proposed action to all those matters of public concern which are affected by it. Cf. Chesapeake & O. Ry. Co. v. United States, 283 U.S. 35, 42, 51 S.Ct. 337, 339, 75 L.Ed. 824; United States v. Lowden, 308 U.S. 225, 60 S.Ct. 248, 84 L.Ed. 208. And we have held that in the administration of the cognate provision relating to abandonment of railroad lines the Commission must consider as a part of the public convenience and necessity the interests of local communities affected by the proposed abandonment. Colorado v. United States, 271 U.S. 153, 168, 46 S.Ct. 452, 455, 70 L.Ed. 878. A community may suffer injury through the loss of railroad service and diversion of traffic resulting from the construction and operation of a railroad extension without any compensating public advantage which is comparable in kind and amount with injury sustained by the abandonment of a line of railroad. One as well as the other should receive the consideration of the Commission in determining whether it should grant or withhold a certificate. Such appears to be its settled practice on applications for a certificate authorizing extension. * * *

But it has never held, unless it has done so now, that the public concern in protecting large communities from destruction of their busi-

ness and financial interests by diversion of traffic to rival communities by railroad extensions, is not included in that public convenience *and necessity which the Commission must consider in granting or* withholding a certificate; or that one not a railroad who is a member of a community adversely affected and whose own business or property interests are so adversely affected is not a "party in interest" within the meaning of the statute. * * *

Just as Congress gave authority to a railroad to sue to enjoin an unauthorized extension by its competitor in order to effect the railroad policy of the Act, it gave like authority to complainants to effect its public policy with respect to a community injuriously affected by an unlawful railroad extension. The statute gives no warrant for saying that the one may bring suit but that the other can only ask some public body to bring it and neither interferes with the functions which the Commission is authorized to perform and which, as we have seen, are distinct from those assigned to the court by § 1(20).

Maintenance of the suit by complainants is thus within the fair meaning of the words of the statute. It aids rather than obstructs the administration of the Act; it effectuates the public policy of the Act and is within the reason for permitting others than public agencies to bring the suit. They are "parties in interest" to which the statute refers.

Since the suit was properly brought the district court should entertain and decide the petition of Kansas City for intervention in the light of 28 U.S.C. § 45a, 28 U.S.C.A. § 45a, and Rule 24 of the Rules of Civil Procedure.

The CHIEF JUSTICE and Mr. Justice REED concur in this opinion.[e]

INTERSTATE COMMERCE ACT § 13(1)

49 U.S.C. § 13(1).

Sec. 13. (1) That any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this part, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made *shall be forwarded* by the Commission to such common carrier, *who shall be called upon* to satisfy the complaint, or to answer the same in writing, within a reasonable time

[e] Footnotes of the court have been omitted.

But *Cf.* Texas & Pacific Railway Company v. Gulf, Coronado & Santa Fe Railway Company, 270 U.S. 266, 46 S.Ct. 263 70 L.Ed. 578 (1926), *infra* at p. 609, n. a

to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, *or* there shall appear to be any reasonable ground for investigating said complaint, *it shall be the duty* of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.[f] [Italics added.]

INTERSTATE COMMERCE ACT § 204(c)

49 U.S.C.Supp. § 304(c).

Sec. 204. * * * (c) Upon complaint in writing to the Commission by any person, State board, organization, or body politic, or upon its own initiative without complaint, the Commission *may investigate* whether any motor carrier or broker has failed to comply with any provision of this part, or with any requirement established pursuant thereto. If the Commission, after notice and hearing, finds upon any such investigation that the motor carrier or broker has failed to comply with any such provision or requirement, the Commission shall issue an appropriate order to compel the carrier or broker to comply therewith. *Whenever the Commission is of opinion that any complaint does not state reasonable grounds for investigation and action on its part, it may dismiss such complaint.*[g] [Italics added.]

INTERSTATE COMMERCE COMMISSION v. UNITED STATES EX REL. HUMBOLDT STEAMSHIP COMPANY

Supreme Court of the United States.
224 U.S. 474, 32 S.Ct. 556, 56 L.Ed. 849 (1912).

Mr. Justice McKENNA delivered the opinion of the court:

The ultimate question in the case is whether Alaska is a territory of the United States within the meaning of the interstate commerce act as amended.

The Interstate Commerce Commission resolved the question in the negative and dismissed the petition of the Humboldt Steamship Company, the relator, which alleged violations of the act by the White Pass & Yukon Railway Company, operating in Alaska, applying its decision

[f] See also Interstate Commerce Act § 16(1) (2), 49 U.S.C. § 16(1) (2), *supra* at p. 489; *cf.* Communications Act of 1934, §§ 208, 209, 47 U.S.C. §§ 208, 209.

[g] See, to similar effect, Civil Aeronautics Act of 1938 § 1002(a), 49 U.S.C.Supp. § 642(a).

in Re Jurisdiction Over Rail & Water Carriers Operating in Alaska, 19 Inters.Com.Rep. 81.

The steamship company instituted an action in the supreme court of the District of Columbia, praying for a mandamus against the Commission to require it to take jurisdiction and proceed as required by the act and grant the relief for which the steamship company had petitioned, hereinafter specifically mentioned. The proceeding was dismissed. The court expressed the view that the Commission had "ample authority to assume jurisdiction over common carriers in Alaska, the same as in any other territory, and over those carriers operating between the state of Washington and Alaska, and between Alaska and Canada, and if they took jurisdiction no one could successfully question their right to do so." The court, however, held that it had no power "to require the Interstate Commerce Commission to act contrary to its own judgment in a matter wherein, after investigation, it had reached a conclusion, honestly and fairly, which might be contrary to the conclusion which the court would reach."

The court of appeals, to which court the case was taken by the steamship company, entertained the same view of the interstate commerce act as that expressed by the supreme court, but took a different view of the power of the courts to compel action upon the part of the Commission, and reversed the judgment of the supreme court and remanded the cause, "with directions to issue a peremptory writ of mandamus directed to the Interstate Commerce Commission, requiring it to take jurisdiction of said cause and proceed therein as by law required." To this ruling the Interstate Commerce Commission prosecutes this writ of error.

The proceedings before the Commission were instituted by the steamship company filing a petition (No. 2,578) against the White Pass & Yukon Route, consisting of the Pacific & Arctic Railway & Navigation Company, British Columbia-Yukon Railway Company, British-Yukon Railway Company, and British-Yukon Navigation Company, to require said companies to file with the Commission, in the form prescribed by the act to regulate commerce, and to print and keep open for public inspection, schedules showing their rates and charges for transportation of passengers and property between points in Alaska and points in the Dominion of Canada and other places; to establish through routes and joint rates in conjunction with the petitioner between certain named places in Alaska and Seattle, in the state of Washington; to afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines; and to cease and desist from preventing by sundry devices the carriage of freights from being continuous from place of shipment to place of destination when such freight is originated or in any wise handled by the Humboldt Steamship Company.

The companies proceeded against filed answers. There were intervening companies on both sides of the controversy.

A hearing was assigned and had in October, 1909, and subsequently, July 6, 1910, the Commission decided that it was "without jurisdiction to make the order sought by complainant," resting its ruling upon the authority of its decision in Re Jurisdiction Over Rail & Water Carriers Operating in Alaska, supra. * * *

If we may venture to reduce to a single proposition an elaborate discussion of elements and considerations, we may say that the Commission gave to the word "territory" the signification of "organized territory," the chief and determining feature of which is a local legislature, as distinguished from a territory having a more rudimentary and less autonomous form of government which it considered Alaska possessed.

To this signification and distinction the arguments of counsel are addressed, and much of the reasoning of the lower courts. That field, however, has been traversed by cases in this court, and it need not again be passed over. We may accept and apply the conclusions which have been reached and expressed.

In the case of The Coquitlam v. United States, 163 U.S. 346, 41 L.Ed. 184, 16 S.Ct. 1117, the relation of the courts of Alaska to the Federal judicial system, and the applicability of certain statutes concerning the same, were decided, after a review of those statutes and those defining the status of Alaska. * * *

The case needs no comment. It clearly defines the relation of Alaska to the rest of the United States. It was not a description of a definite area of land or "landed possession," but of a political unit, governing and being governed as such. * * *

It is next contended by the Commission that "mandamus is not a proper proceeding to correct an error of law like that alleged in the petition."

The general principle which controls the issue of a writ of mandamus is familiar. It can be issued to direct the performance of a ministerial act, but not to control discretion. It may be directed against a tribunal or one who acts in a judicial capacity, to require it or him to proceed, the manner of doing so being left to his or its discretion. It is true there may be a jurisdiction to determine the possession of jurisdiction. Ex parte Harding, 219 U.S. 363, 55 L.Ed. 252, 31 S.Ct. 324. But the full doctrine of that case cannot be extended to administrative officers. The Interstate Commerce Commission is purely an administrative body. It is true it may exercise and must exercise quasi judicial duties, but its functions are defined, and, in the main, explicitly directed, by the act creating it. It may act of its own motion in certain instances,—it may be petitioned to move by those having rights under the act. It may exercise judgment and discretion, and, it may be, cannot be controlled in either. But if it absolutely refuse to act, deny its power, from a misunderstanding of the law, it cannot be said to exercise discretion. Give it that latitude and yet give it the power to nullify its most essential duties, and how would its nonaction be re-

viewed? The answer of the Commission is, by "a reversal by the tribunal of appeal." And such a tribunal, it is intimated, is the United States commerce court.

But the proposition is plainly without merit, even although it be conceded, for the sake of argument, that the commerce court is by law vested with the exclusive power to review any and every act of the Commission taken in the exertion of the authority conferred upon it by statute; that is, to exclusively review, not only affirmative orders of the Commission granting relief, but also the action of that body in refusing to award relief on the ground that an application was not entitled to relief. * * *

In the case at bar the Commission refused to proceed at all, though the law required it to do so; and to so do as required—that is, to take jurisdiction, not in what manner to exercise it—is the effect of the decree of the court of appeals, the order of the court being that a peremptory writ of mandamus be issued directing the Commission "to take jurisdiction of said cause and proceed therein as by law required." In other words, to proceed to the merits of the controversy, at which point the Commission stopped because it was "constrained to hold," as it said, "upon authority of the decision recently announced in Re Jurisdiction over Rail & Water Carriers operating in Alaska, 19 Inters. Com.Rep. 81, that the Commission is without jurisdiction to make the order sought by complainant," the steamship company.

Judgment affirmed.

UNITED STATES EX REL. LOUISVILLE CEMENT CO. v. INTERSTATE COMMERCE COMMISSION

Supreme Court of the United States.
246 U.S. 638, 38 S.Ct 408, 62 L Ed. 914 (1918).

Mr. Justice CLARKE delivered the opinion of the Court.

The facts of this case are not disputed and are as follows:

By mistake in printing its tariff, the published rate of the Louisville & Nashville Railroad Company on coal from mines in Kentucky to Speeds, Ind., was increased on July 29, 1906, to $1.10 per ton from $1, which had been the rate before.

The mistake was not noticed and the old rate was charged and paid by relator (plaintiff in error) on shipments until the following February, when, the increased published rate being discovered, it was charged and collected until the next April, when the former rate was restored.

Promptly on April 19, 1907, the relator wrote the Interstate Commerce Commission, explaining the circumstances, and requesting that the railroad company be authorized to refund the overcharges paid, February 11 to April 10, 1907, amounting to $595.65.

The Commission replied to this letter, that if the railroad company would file with the Commission an admission that the rate had been increased through error and would ask for authority to make the refund, the subject would receive consideration.

This statement of the Commission was immediately communicated to the railroad company, but it refused to make the required admission of mistake and to request authority to make the refund until the full published rate was paid on shipments made before the mistake was discovered. This led to dispute and delay, with the result that these excess charges ($1,335.25) were not paid until February 1, 1911.

In the following November the relator filed its petition with the Commission asking for an order permitting the railroad company to refund the entire amount, in excess of the former rate, paid under the mistakenly published tariff.

The railroad company admitted that it never intended to increase the rate and consented that the reparation order prayed for should be issued.

The Commission found, as a matter of fact, that the mistakenly published rate of $1.10 was unreasonable to the extent that it exceeded $1 per ton, and then, holding that all complaints for the recovery of damages must be filed with the Commission within two years from the date of the delivery of the shipment, it ruled that the letter of the relator to the Commission of April 19, 1907, making claim for the overcharges which had been paid between February 11 and April 10, 1907, was sufficient to satisfy the law, and ultimately issued to the railroad company authority to pay this amount to the relator; but the Commission further held that the complaint for the recovery of the overcharges for the period prior to February 11th, although filed within nine months of the date of their payment, was not in time to meet the requirement of section 16 of the act that "all complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after," and that "they (the overcharges) are, therefore, barred from our consideration."

The relator filed its petition for a writ of mandamus in the Supreme Court of the District of Columbia, which petition was denied, and the judgment of the Court of Appeals for the District affirming this holding is here for review.

The lower courts arrived at their conclusion by holding that the Commission entertained jurisdiction over the portion of the relator's claim which was rejected; that in the exercise of that jurisdiction it held the claim to be barred and that this was an exercise of discretion committed by law to the Commission which is not subject to control by the writ of mandamus.

We think the courts fell into error in thus interpreting the language used by the Commission in its report.

As to the portion of the claim which we are considering, the report of the Commission is as follows:

"The only question left for determination is whether the claim is barred, in whole or in part, by the following limitation of the act: 'All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after.'

"The Commission holds that the date when the cause of action accrues is the date of the delivery of the shipment. Blinn Lumber Co. v. Southern Pacific Co., 18 Interst.Com.Com'n R. 430. * * * No complaint was filed by complainant [relator] with reference to shipments made before February 1st, 1907, until the petition here in question was filed on November 15th, 1911, and these shipments had all been delivered more than four years before the filing of that petition. They [the overcharges] are therefore barred from our consideration." * * *

It is thus made very clear that the holding of the Commission was, not that, having jurisdiction over the claim upon consideration thereof, is was found to be barred by a statute of limitation, but that the language of the two-year provision of the act was jurisdictional, and placed it so beyond its power that it could not be considered at all, and that, for this reason, the petition, to the extent it related to the overcharges paid on February 1, 1911, was dismissed.

We agree with this conclusion of the Commission, that the two-year provision of the act is not a mere statute of limitation, but is jurisdictional—is a limit set to the power of the Commission as distinguished from a rule of law for the guidance of it in reaching its conclusion. * * *

That the Supreme Court of the District of Columbia, in a proper case, has power to direct the Commission by mandamus to entertain and proceed to adjudicate a cause which it has erroneously declared to be not within its jurisdiction is decided in Interstate Commerce Commission v. Humboldt Steamship Co., 224 U.S. 474, 32 S.Ct. 556, 56 L. Ed. 849. * * *

There remains the question, Did the Commission place an erroneous interpretation upon the scope of its jurisdiction under this two-year provision in section 16 of the act, in excluding the claim which we have before us from its consideration? * * *

But this two-year provision, obviously enough, relates only to the recovery of money damages, and if Congress had intended that the cause of action of the shipper to recover damages for unreasonable charges should accrue when the shipment was received, or when it was delivered by the carrier, we cannot doubt that a simple and obvious form for expressing that intention would have been used, instead of the expression "from the time the cause of action accrues." And in this connection we cannot fail to recognize that when the statute was enacted the time when a cause of action accrues had been settled by repeated decisions of this court to be when a suit may first be legally instituted

upon it (Amy v. Dubuque, 98 U.S. 470, 474, 25 L.Ed. 228; United States v. Taylor, 104 U.S. 216, 222, 26 L.Ed. 721; Rice v. United States, 122 U.S. 611, 617, 7 S.Ct. 1377, 30 L.Ed. 793), and, since no clearly controlling language to the contrary is used, it must be assumed that Congress intended that this familiar expression should be given the well-understood meaning which had been given to it by this court. We therefore conclude, as was held, without special discussion of the point, in Phillips v. Grand Trunk Western R. R. Co., 236 U.S. 662, 666, 668, 35 S.Ct. 444, 59 L.Ed. 774, which in this respect really rules the case before us, that the proper construction of this jurisdictional provision requires that the cause of action of the shipper in this case shall be held not to have accrued until payment had been made of the unreasonable charges, and that, therefore, the interpretation which the Commission placed upon its jurisdictional power is erroneous.

The unusual and purely fortuitous circumstance, that the character of this jurisdictional limitation on the power of the Commission chances to be such that the giving of a correct construction to it must result in determining the character of the decision which the Commission must render when the case is returned to it, cannot affect the power of this court or that of the lower courts to define what that jurisdiction is under the act of Congress or the duty of the Commission to accept and act upon such definition when announced.

It results that the judgment of the Court of Appeals must be reversed and that the case must be remanded to the Supreme Court of the District of Columbia, with direction that a writ of mandamus issue to the Commission, directing that it proceed to dispose of the claim in controversy under the construction placed upon its jurisdiction by this opinion.

Reversed.[h]

JACOBSEN v. NATIONAL LABOR RELATIONS BOARD

Circuit Court of Appeals of the United States, Third Circuit.
120 F.2d 96 (1941).

BIGGS, Circuit Judge. Argument was had in this case before a three-judge court on January 8, 1941. Because of the importance of the questions of jurisdiction involved, it was deemed advisable to have the case reargued before the court en banc. The facts are as follows:

[h] *Cf.* Interstate Commerce Act § 205 (g), 49 U.S.C.Supp. § 305(g). Suppose that the Interstate Commerce Commission, after preliminary and informal consideration of a complaint, should decline to undertake an investigation on the ground that it lacked the necessary personnel or funds, or on the ground that the investigation of such complaint would require the diversion thereto of personnel and funds required to investigate other complaints which appeared to be more meritorious or to have greater public importance? Would *mandamus* lie to compel the investigation? *Cf.* Third Annual Report of the Securities and Exchange Commission (1937) 43, *supra* at pp. 413–14, 415.

On December 5, 1935, charges were filed by Thomas J. Wohlan and others with the National Labor Relations Board which issued its complaint against Protective Motor Service Company alleging that that company had engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) and Section 8(1) and (3) of the National Labor Relations Act, 29 U.S.C.A. §§ 152(6) and (7) and 158(1) and (3). * * *

On March 12, 1940, the Board filed its new decision and order now subject to review in this court. * * *

In concluding its findings of fact the Board states as follows: "We are of the opinion that the facts set forth in the record are not sufficiently developed to afford a basis for determining whether or not the operations of the respondent affect commerce, within the meaning of the Act. Under such circumstances we ordinarily would dismiss the complaint without prejudice. However, in view of the long period of time which has elapsed since the filing of the charges and the nature of the proceedings heretofore had, the Board, acting within the discretion granted it by Section 10 of the Act, does not deem it advisable to reopen the record upon this point. We shall, therefore, dismiss the complaint in its entirety." The Board thereupon ordered the complaint dismissed. On June 1, 1940, the petitioners herein filed a petition with the Board to reopen the case and to hear further testimony. This petition was denied by the Board on June 7, 1940. The petitioners then filed their petition in this court to review and set aside the final order of the Board dismissing the complaint and for an order of this court directing the Board to take further testimony upon the issue of whether Protective Motor Service Company's operations affected interstate commerce within the meaning of the Act. * * *

It will be noted that the jurisdiction of the Board is not a compulsory jurisdiction. Assuming that all circumstances looked to by the Act are in existence, none the less we are of the opinion that the Board does not have to cause a complaint to be issued against the employer or proceed to prohibit any unfair labor practices complained of. The course to be pursued rests in the sound discretion of the Board and is the concern of expert administrative policy. That discretion is not a legal discretion at least in so far that upon the abuse of it the several circuit courts of appeals might compel the Board to issue a complaint. The jurisdiction of the courts of appeals to review the actions of the National Labor Relations Board is conferred by statute and review of the Board's actions must rest within the statutory power granted to the reviewing courts under Sections 9 and 10 of the Act, 29 U.S.C.A. §§ 159 and 160. American Federation of Labor v. Labor Board, 308 U.S. 401, 406, 60 S Ct. 300, 84 L.Ed. 347. It follows that in the case at bar the Board could have disregarded the charges made by Wohlan. The Board, however, heeded the charges, issued its complaint, held hearings, granted relief to the petitioning employees, and then withdrew that relief. The Board having taken jurisdiction of the cause and hav-

ing entered a final order dismissing the complaint, we are of the opinion that this court, pursuant to the provisions of Section 10(f) of the Act, 29 U.S.C.A. § 160(f), has jurisdiction upon the petition of those aggrieved by that order to review it.

Section 10(f) states in part, "Upon such filing [of a petition by the aggrieved person], the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing * * * or setting aside in whole or in part the order of the Board." Subsection (f) is controlling in the case at bar, but it provides that upon the filing of the petition the court shall proceed in the same manner as in the case of an application by the Board under subsection (e). Subsection (e) provides, inter alia, "If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board * * * the court may order such additional evidence to be taken before the Board * * *". We conclude that upon petition for review of a final order of the Board either party may petition the court for leave to adduce additional evidence upon any pertinent issue and the court may excuse the failure of the party to adduce such evidence if it is material and that there were reasonable grounds for the failure of the party to adduce it before the Board. In so holding we are not unmindful of the express provisions of subsection (c) which state that after hearing "* * * in its discretion, the Board upon notice may take further testimony or hear argument." These words are in aid of the Board and we think that they were included by Congress in subsection (c) so that there should be no doubt of the Board's power to reopen a hearing. That subsection cannot limit the power of a court of appeals, acting pursuant to the provisions of subsections (e) or (f), to require the Board to take additional evidence. In short, we conclude that the discretion conferred upon the Board by subsection (c) is a legal discretion and if it has been abused is subject to review by the several courts of appeals acting pursuant to the provisions of subsections (e) or (f). * * *

Accordingly a decree will be entered setting aside the order of the Board and remanding the cause with directions to reinstate the complaint, to allow the petitioners a reasonable opportunity to present the evidence referred to in their petitions, and to determine the issue of interstate commerce, and if it be found that the operations of Protective Motor Service do affect commerce within the purview of the act, to determine whether or not that company has engaged in unfair labor practices and to issue an appropriate order in respect thereto.

Chapter VII

THE RESPECTIVE SPHERES OF ADMINISTRATIVE AND JUDICIAL RESPONSIBILITY: JUDICIAL CONTROL OVER ADMINISTRATIVE ACTION

INTRODUCTORY

FEDERAL COMMUNICATIONS COMMISSION v. POTTSVILLE BROADCASTING CO.

Supreme Court of the United States.
309 U.S. 134, 60 S.Ct. 437, 84 L.Ed. 656 (1940).

Mr. Justice FRANKFURTER delivered the opinion of the Court.

The court below issued a writ of mandamus against the Federal Communications Commission, and, because important issues of administrative law are involved, we brought the case here. 308 U.S. 535, 60 S.Ct. 107, 84 L.Ed. 451. We are called upon to ascertain and enforce the spheres of authority which Congress has given to the Commission and the courts, respectively, through its scheme for the regulation of radio broadcasting in the Communications Act of 1934, c. 652, 48 Stat. 1064, as amended by the Act of May 20, 1937, c. 229, 50 Stat. 189, 47 U.S.C. § 151 et seq., 47 U.S.C.A. § 151 et seq.

Adequate appreciation of the facts presently to be summarized requires that they be set in their legislative framework. In its essentials the Communications Act of 1934 derives from the Federal Radio Act of 1927, c. 169, 44 Stat. 1162, as amended, 46 Stat. 844. By this Act Congress, in order to protect the national interest involved in the new and far-reaching science of broadcasting, formulated a unified and comprehensive regulatory system for the industry. The common factors in the administration of the various statutes by which Congress had supervised the different modes of communication led to the creation, in the Act of 1934, of the Communications Commission. But the objectives of the legislation have remained substantially unaltered since 1927.

Congress moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field. To avoid this Congress provided for a system of permits and licenses. Licenses were not to be granted for longer than three years. Communications Act of 1934, Title iii, § 307(d). No license was to be "construed to create any right, beyond the terms, conditions, and periods of the license." Ibid. § 301. In granting or withholding permits for the construction of stations, and in granting, denying, modifying or revoking licenses for the

operation of stations, "public convenience, interest, or necessity" was the touchstone for the exercise of the Commission's authority. While this criterion is as concrete as the complicated factors for judgment in such a field of delegated authority permit, it serves as a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy. Necessarily, therefore, the subordinate questions of procedure in ascertaining the public interest, when the Commission's licensing authority is invoked—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—were explicitly and by implication left to the Commission's own devising, so long, of course, as it observes the basic requirements designed for the protection of private as well as public interest. Ibid., Title I, § 4(j), 47 U.S.C.A. § 154 (j). Underlying the whole law is 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. Thus, it is highly significant that although investment in broadcasting stations may be large, a license may not be issued for more than three years; and in deciding whether to renew the license, just as in deciding whether to issue it in the first place, the Commission must judge by the standard of "public convenience, interest, or necessity." The Communications Act is not designed primarily as a new code for the adjustment of conflicting private rights through adjudication. Rather it expresses a desire on the part of Congress to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission.

Against this background the facts of the present case fall into proper perspective. In May, 1936, The Pottsville Broadcasting Company, respondent here, sought from the Commission a permit under § 319 Ibid., Title iii, for the construction of a broadcasting station at Pottsville, Pennsylvania. The Commission denied this application on two grounds: (1) that the respondent was financially disqualified; and (2) that the applicant did not sufficiently represent local interests in the community which the proposed station was to serve. From this denial of its application respondent appealed to the court below. That tribunal withheld judgment on the second ground of the Commission's decision, for it did not deem this to have controlled the Commission's judgment. But, finding the Commission's conclusion regarding the respondent's lack of financial qualification to have been based on an erroneous understanding of Pennsylvania law, the Court of Appeals reversed the decision and ordered the "cause * * * remanded to the * * * Communications Commission for reconsideration in accordance with the views expressed." Pottsville Broadcasting Co. v. Federal Communications Commission, 69 App.D.C. 7, 98 F.2d 288.

Following this remand, respondent petitioned the Commission to grant its original application. Instead of doing so, the Commission set

for argument respondent's application along with two rival applications for the same facilities. The latter applications had been filed subsequently to that of respondent and hearings had been held on them by the Commission in a consolidated proceeding, but they were still undisposed of when the respondent's case returned to the Commission. With three applications for the same facilities thus before it, and the facts regarding each having theretofore been explored by appropriate procedure, the Commission directed that all three be set down for argument before it to determine which, "on a comparative basis" "in the judgment of the Commission will best serve public interest." At this stage of the proceedings, respondents sought and obtained from the Court of Appeals the writ of mandamus now under review. That writ commanded the Commission to set aside its order designating respondent's application "for hearing on a comparative basis" with the other two, and "to hear and reconsider the application" of The Pottsville Broadcasting Company "on the basis of the record as originally made and in accordance with the opinions" of the Court of Appeals in the original review (69 App.D.C. 7, 98 F.2d 288), and in the mandamus proceedings. Pottsville Broadcasting Co. v. Federal Communications Commission, 70 App.D.C. 157, 105 F.2d 36.

The Court of Appeals invoked against the Commission the familiar doctrine that a lower court is bound to respect the mandate of an appellate tribunal and cannot reconsider questions which the mandate has laid at rest. See In re Sanford Fork & Tool Co., Petitioner, 160 U. S. 247, 255, 256, 16 S.Ct. 291, 293, 40 L.Ed. 414. That proposition is indisputable, but it does not tell us what issues were laid at rest. Compare Sprague v. Ticonic Bank, 307 U.S. 161, 59 S.Ct. 777, 83 L.Ed. 1184. Nor is a court's interpretation of the scope of its own mandate necessarily conclusive. To be sure the court that issues a mandate is normally the best judge of its content, on the general theory that the author of a document is ordinarily the authoritative interpreter of its purposes. But it is not even true that a lower court's interpretation of its mandate is controlling here. Compare United States v. Morgan, 307 U.S. 183, 59 S.Ct. 795, 83 L.Ed. 1211. Therefore, we would not be foreclosed by the interpretation which the Court of Appeals gave to its mandate, even if it had been directed to a lower court.

A much deeper issue, however, is here involved. This was not a mandate from court to court but from a court to an administrative agency. What is in issue is not the relationship of federal courts inter se—a relationship defined largely by the courts themselves—but the due observance by courts of the distribution of authority made by Congress as between its power to regulate commerce and the reviewing power which it has conferred upon the courts under Article III of the Constitution, U.S.C.A. A review by a federal court of the action of a lower court is only one phase of a single unified process. But to the extent that a federal court is authorized to review an administrative act, there is superimposed upon the enforcement of legislative policy

through administrative control a different process from that out of which the administrative action under review ensued. The technical rules derived from the interrelationship of judicial tribunals forming a hierarchical system are taken out of their environment when mechanically applied to determine the extent to which Congressional power, exercised through a delegated agency, can be controlled within the limited scope of "judicial power" conferred by Congress under the Constitution.

Courts, like other organisms, represent an interplay of form and function. The history of Anglo-American courts and the more or less narrowly defined range of their staple business have determined the basic characteristics of trial procedure, the rules of evidence, and the general principles of appellate review. Modern administrative tribunals are the outgrowth of conditions far different from those.[3] To a large degree they have been a response to the felt need of governmental supervision over economic enterprise—a supervision which could effectively be exercised neither directly through self-executing legislation nor by the judicial process. That this movement was natural and its extension inevitable, was a quarter century ago the opinion of eminent spokesmen of the law.[4] Perhaps the most striking characteristic of this movement has been the investiture of administrative agencies with power far exceeding and different from the conventional judicial modes for adjusting conflicting claims—modes whereby interested litigants define the scope of the inquiry and determine the data on which the judicial judgment is ultimately based. Administrative agencies have power themselves to initiate inquiry, or, when their authority is invoked, to control the range of investigation in ascertaining what is to satisfy the requirements of the public interest in relation to the needs of vast regions and sometimes the whole nation in the enjoyment of facilities for transportation, communication and other essential public services. These differences in origin and function preclude wholesale transplantation of the rules of procedure, trial and review which have evolved from the history and experience of courts. Thus, this Court has recognized that bodies like the Interstate Commerce Commission, into whose mould Congress has cast more recent administrative agen-

[3] See Maitland, The Constitutional History of England, pp. 415–18; Landis, The Administrative Process, passim.

[4] See, for instance, the address of Elihu Root as President of the American Bar Association: "There is one special field of law development which has manifestly become inevitable. We are entering upon the creation of a body of administrative law quite different in its machinery, its remedies, and its necessary safeguards from the old methods of regulation by specific statutes enforced by the courts. * * * There will be no withdrawal from these experiments. * * * We shall go on; we shall expand them, whether we approve theoretically or not, because such agencies furnish protection to rights and obstacles to wrong doing which under our new social and industrial conditions cannot be practically accomplished by the old and simple procedure of legislatures and courts as in the last generation." 41 A.B.A.Rep. 355, 368–69.

cies, "should not be too narrowly constrained by technical rules as to the admissibility of proof," Interstate Commerce Commission v. Baird, 194 U.S. 25, 44, 24 S.Ct. 563, 568, 569, 48 L.Ed. 860, 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. Compare New England Divisions Case, 261 U.S. 184, 43 S.Ct. 270, 67 L. Ed. 605. To be sure, the laws under which these agencies operate prescribe the fundamentals of fair play. They require that interested parties be afforded an opportunity for hearing and that judgment must express a reasoned conclusion. But to assimilate the relation of these administrative bodies and the courts to the relationship between lower and upper courts is to disregard the origin and purposes of the movement for administrative regulation and at the same time to disregard the traditional scope, however far-reaching, of the judicial process. Unless these vital differentiations between the functions of judicial and administrative tribunals are observed, courts will stray outside their province and read the laws of Congress through the distorting lenses of inapplicable legal doctrine.

Under the Radio Act of 1927 as originally passed, the Court of Appeals was authorized in reviewing action of the Radio Commission to "alter or revise the decision appealed from and enter such judgment as to it may seem just." § 16 of the Radio Act of 1927, 44 Stat. 1169. Thereby the Court of Appeals was constituted "a superior and revising agency in the same field" as that in which the Radio Commission acted. Federal Radio Comm. v. General Electric Co., 281 U.S. 464, 467, 50 S.Ct. 389, 390, 74 L.Ed. 969. Since the power thus given was administrative rather than judicial, the appellate jurisdiction of this Court could not be invoked. Federal Radio Comm. v. General Electric Co., supra. To lay the basis for review here, Congress amended § 16 so as to terminate the administrative oversight of the Court of Appeals. c. 788, 46 Stat. 844. In "sharp contrast with the previous grant of authority" the court was restricted to a purely judicial review. "Whether the commission applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond it, whether its proceedings satisfy the pertinent demands of due process, whether, in short, there is compliance with the legal requirements which fix the province of the commission and govern its action, are appropriate questions for judicial decision." Federal Radio Comm'n v. Nelson Bros. Co., 289 U.S. 266, 276, 53 S.Ct. 627, 632, 77 L.Ed. 1166, 89 A.L.R. 406.

On review the court may thus correct errors of law and on remand the Commission is bound to act upon the correction. Federal Power Comm'n v. Pacific Co., 307 U.S. 156, 59 S.Ct. 766, 83 L.Ed. 1180. 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. Cf. Ford Motor Co. v. Labor Board, 305 U.S. 364, 59 S.Ct. 301, 83 L.Ed. 221.

The Commission's responsibility at all times is to measure applications by the standard of "public convenience, interest, or necessity." The Commission originally found respondent's application inconsistent with the public interest because of an erroneous view regarding the law of Pennsylvania. The Court of Appeals laid bare that error, and, in compelling obedience to its correction, exhausted the only power which Congress gave it. At this point the Commission was again charged with the duty of judging the application in the light of "public convenience, interest, or necessity." The fact that in its first disposition the Commission had committed a legal error did not create rights of priority in the respondent, as against the later applicants, which it would not have otherwise possessed. Only Congress could confer such a priority. It has not done so. The Court of Appeals cannot write the principle of priority into the statute as an indirect result of its power to scrutinize legal errors in the first of an allowable series of administrative actions. Such an implication from the curtailed review allowed by the Communications Act is at war with the basic policy underlying the statute. It would mean that for practical purposes the contingencies of judicial review and of litigation, rather than the public interest, would be decisive factors in determining which of several pending applications was to be granted.

It is, however, urged upon us that if all matters of administrative discretion remain open for determination on remand after reversal, a succession of single determinations upon single legal issues is possible with resulting delay and hardship to the applicant. It is always easy to conjure up extreme and even oppressive possibilities in the exertion of authority. But courts are not charged with general guardianship against all potential mischief in the complicated tasks of government. The present case makes timely the reminder that "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." Missouri, Kansas & Texas Ry. Co. v. May, 194 U.S. 267, 270, 24 S.Ct. 638, 639, 48 L.Ed. 971. Congress which creates and sustains these agencies must be trusted to correct whatever defects experience may reveal. Interference by the courts is not conducive to the development of habits of responsibility in administrative agencies. Anglo-American courts as we now know them are themselves in no small measure the product of a historic process.

The judgment is reversed, with directions to dissolve the writ of mandamus and to dismiss respondent's petition.

Reversed.[a]

[a] Footnotes of the court, except footnotes 3 and 4, have been omitted.

PART I. WHEN JUDICIAL INTERVENTION MAY BE INVOKED

SECTION 1. APPLICATION FOR JUDICIAL ACTION PRIOR TO ANY ADMINISTRATIVE ACTION—PRIMARY JURISDICTION OF THE ADMINISTRATIVE AGENCY

TEXAS & PACIFIC RAILWAY CO. v. ABILENE COTTON OIL COMPANY

Supreme Court of the United States.
204 U.S. 426, 27 S.Ct. 350, 51 L.Ed. 553, 9 Ann.Cas. 1075 (1907).

Mr. Justice WHITE delivered the opinion of the court:

The oil company, the defendant in error, sued to recover $1,951.83. It was alleged that, on shipments of car loads of cotton seed, made in September and October, 1901, over the line of the defendant's road from various points in Louisiana east of Alexandria, in that state, to Abilene, Texas, the carrier had exacted, over the protest of the oil company, on the delivery of the cotton seed, the payment of an unjust and unreasonable rate, which exceeded, in the aggregate, by the sum sued for, a just and reasonable charge. There were, moreover, averments that the rate exacted was discriminatory, constituted an undue preference, and amounted to charging more for a shorter than for a longer haul. Besides a general traverse, the railway company defended on the ground that the shipments were interstate, and were, therefore, covered by the act of Congress to regulate commerce. It was averred that, as the rate complained of was the one fixed in the rate sheets which the company had established, filed, published, and posted, as required by that act, the state court was without jurisdiction to entertain the cause, and, even if such court had jurisdiction, it could not, without disregarding the act to regulate commerce, grant relief upon the basis that the established rate was unreasonable, when it had not been found to be so by the Interstate Commerce Commission.

The trial court made findings of fact. * * *

From the facts found the court stated the following as its conclusions:

"1st. The facts so found show that this was an interstate shipment.

"2d. The facts so found show that the defendant complied with the interstate commerce law, and said rates and classifications were thereby properly established and in force, except that the rate charged on cotton seed in car load lots was unreasonable and excessive.

"3d. I find that the rate charged by the defendant was that established under the interstate commerce law."

As nothing in these conclusions relates to the averments of discrimination, undue preference, or a greater charge for a shorter than for a longer haul, those subjects, it may be assumed, were considered to have been eliminated in the course of the trial.

There was judgment for the railway company. When the controversy came to be disposed of by the court of civil appeals, to which the cause was taken, that court deemed there was only one question presented for decision; that is, whether, consistently with the act to regulate commerce, there was power in the court to grant relief upon the finding that the rate charged for an interstate shipment was unreasonable, although such rate was the one fixed by the duly published and filed rate sheet, and when the rate had not been found to be unreasonable by the Interstate Commerce Commission. * * *

Proceeding in an elaborate opinion to dispose of the question thus stated to be the only one for consideration, the conclusion was reached that jurisdiction to grant relief existed, and that to do so was not repugnant to the act to regulate commerce. Applying these conclusions to the findings of fact, the relief prayed was allowed. The court said:

"We therefore adopt the trial court's findings of fact, and, applying thereto the principles of law we have deduced, reverse the judgment, and here render judgment in appellant's favor for the said sum of $1,951.83, excessive freights charged, together with interest. * * *"

The assigned errors are addressed exclusively to the operation of the act to regulate commerce upon the jurisdiction of the court below to entertain the controversy, and its power in any event to afford relief to the oil company, based upon the alleged unreasonableness of the rate under the circumstances disclosed. Before we take up the consideration of that subject, however, two questions must be disposed of: * * *

We are thus brought to the underlying proposition in the case,—*viz.*, the effect of the act to regulate commerce upon the claim asserted by the oil company. As presented below and pressed at bar, the question takes a seemingly two-fold aspect,—the jurisdiction of the court below as affected by the act to regulate commerce and the right to the relief sought consistently with that act, even if jurisdiction existed. We say that these questions are only seemingly different, because they present but different phases of the fundamental question, which is the scope and effect of the act to regulate commerce upon the right of a shipper to maintain an action at law against a common carrier to recover damages because of the exaction of an alleged unreasonable rate, although the rate collected and complained of was the rate stated in the schedule filed with the Interstate Commerce Commission and published according to the requirements of the act to regulate commerce, and which it

was the duty of the carrier under the law to enforce as against shippers. We come, therefore, first, to the consideration of that subject.

Without going into detail, it may not be doubted that, at common law, where a carrier refused to receive goods offered for carriage except upon the payment of an unreasonable sum, the shipper had a right of action in damages. It is also beyond controversy that, when a carrier accepted goods, without payment of the cost of carriage or an agreement as to the price to be paid, and made an unreasonable exaction as a condition of the delivery of the goods, an action could be maintained to recover the excess over a reasonable charge. And it may further be conceded that it is now settled that even where, on the receipt of goods by a carrier, an exorbitant charge is stated, and the same is coercively exacted, either in advance or at the completion of the service, an action may be maintained to recover the overcharge. 2 Kent, Com. 599, and note a; 2 Smith. Lead. Cas. pt. 1, 8th ed. (Hare & W. notes) p. 457.

As the right to recover, which the court below sustained, was clearly within the principles just stated, and as it is conceded that the act to regulate commerce did not, in so many words, abrogate such right, it follows that the contention that the right was taken away by the act to regulate commerce rests upon the proposition that such result was accomplished by implication. In testing the correctness of this proposition we concede that we must be guided by the principle that repeals by implication are not favored, and, indeed, that a statute will not be construed as taking away a common-law right existing at the date of its enactment, unless that result is imperatively required; that is to say, unless it be found that the pre-existing right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory.

Both parties concede that the question for decision has not been directly passed upon by this court, and that its determination is only persuasively influenced by adjudications of other courts. They both, hence, mainly rely upon the text of the act to regulate commerce as it existed at the time the shipments in question were made. The case, therefore, must rest upon an interpretation of the text of the act and is measurably one of first impression.

Let us, without going into detail, give an outline of the general scope of that act, with the object of fixing the rights which it was intended to conserve or create, the wrongs which it proposed to redress, and the remedies which the act established to accomplish the purposes which the lawmakers had in view.

The act made it the duty of carriers subject to its provisions to charge only just and reasonable rates. To that end the duty was imposed of establishing and publishing schedules of such rates. It forbade all unjust preferences and discriminations, made it unlawful to

depart from the rates in the established schedules until the same were changed as authorized by the act, and such departure was made an offense punishable by fine or imprisonment, or both, and the prohibitions of the act and the punishments which it imposed were directed not only against carriers but against shippers, or any person who, directly or indirectly, by any machination or device, in any manner whatsoever, accomplished the result of producing the wrongful discriminations or preferences which the act forbade. It was made the duty of carriers subject to the act to file with the Interstate Commerce Commission created by that act copies of established schedules, and power was conferred upon that body to provide as to the form of the schedules, and penalties were imposed for not establishing and filing the required schedules. The Commission was endowed with plenary administrative power to supervise the conduct of carriers, to investigate their affairs, their accounts, and their methods of dealing, and generally to enforce the provisions of the act. To that end it was made the duty of the district attorneys of the United States, under the direction of the Attorney General, to prosecute proceedings commenced by the Commission to enforce compliance with the act. The act specially provided that whenever any common carrier subject to its provisions "shall do, cause to be done, or permit to be done, any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act. * * *" [24 Stat. at L. 382, chap. 104, § 8, U.S.Comp.Stat.1901, p. 3159.] Power was conferred upon the Commission to hear complaints concerning violations of the act, to investigate the same, and, if the complaints were well founded, to direct not only the making of reparation to the injured persons, but to order the carrier to desist from such violation in the future. In the event of the failure of a carrier to obey the order of the Commission, that body, or the party in whose favor an award of reparation was made, was empowered to compel compliance by invoking the authority of the courts of the United States in the manner pointed out in the statute, prima facie effect in such courts being given to the findings of fact made by the Commission. By the 9th section of the act it was provided as follows:

"That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission, as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must, in each case, elect which one of the two methods of procedure herein provided for he or they will adopt * * *."

And by § 22, which we shall hereafter fully consider, existing appropriate common law and statutory remedies were saved.

When the act to regulate commerce was enacted there was contrariety of opinion whether, when a rate charged by a carrier was in and of itself reasonable, the person from whom such a charge was exacted had at common law an action against the carrier because of damage asserted to have been suffered by a discrimination against such person or a preference given by the carrier to another. Parsons v. Chicago & N. W. R. Co., 167 U.S. 447, 455, 42 L.Ed. 231, 234, 17 S.Ct. 887; Interstate Commerce Commission v. Baltimore & O. R. Co., 145 U.S. 263, 275, 36 L.Ed. 699, 703, 4 Inters.Com.Rep. 92, 12 S.Ct. 844. That the act to regulate commerce was intended to afford an effective means for redressing the wrongs resulting from unjust discrimination and undue preference is undoubted. Indeed, it is not open to controversy that to provide for these subjects was among the principal purposes of the act. Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co., 167 U.S. 479, 494, 42 L.Ed. 243, 251, 17 S.Ct. 896. And it is apparent that the means by which these great purposes were to be accomplished was the placing upon all carriers the positive duty to establish schedules of reasonable rates which should have a uniform application to all, and which should not be departed from so long as the established schedule remained unaltered in the manner provided by law. Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 184, 40 L.Ed. 935, 5 Inters.Com.Rep. 391, 16 S.Ct. 700, 167 U.S. 479, 42 L.Ed. 243, 17 S.Ct. 896.

When the general scope of the act is enlightened by the considerations just stated it becomes manifest that there is not only a relation, but an indissoluble unity, between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against preferences and discrimination. This follows, because, unless the requirement of a uniform standard of rates be complied with, it would result that violations of the statute as to preferences and discrimination would inevitably follow. This is clearly so, for if it be that the standard of rates fixed in the mode provided by the statute could be treated on the complaint of a shipper by a court and jury as unreasonable, without reference to prior action by the Commission, finding the established rate to be unreasonable, and ordering the carrier to desist in the future from violating the act, it would come to pass that a shipper might obtain relief upon the basis that the established rate was unreasonable, in the opinion of a court and jury, and thus such shipper would receive a preference or discrimination not enjoyed by those against whom the schedule of rates was continued to be enforced. This can only be met by the suggestion that the judgment of a court, when based upon a complaint made by a shipper without previous action by the Commission, would give rise to a change of the schedule rate and thus cause the new rate resulting from the action of the court to be applicable in future as to all. This suggestion, however,

is manifestly without merit, and only serves to illustrate the absolute destruction of the act and the remedial provisions which it created which would arise from a recognition of the right asserted. For if, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that, unless all courts reached an identical conclusion, a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. Indeed, the recognition of such a right is wholly inconsistent with the administrative power conferred upon the Commission, and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed. Equally obvious is it that the existence of such a power in the courts, independent of prior action by the Commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination, and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted. Indeed, no reason can be perceived for the enactment of the provision endowing the administrative tribunal which the act created with power, on due proof, not only to award reparation to a particular shipper, but to command the carrier to desist from violation of the act in the future, thus compelling the alteration of the old or the filing of a new schedule, conformably to the action of the Commission, if the power was left in courts to grant relief on complaint of any shipper, upon the theory that the established rate could be disregarded and be treated as unreasonable, without reference to previous action by the Commission in the premises. This must be, because, if the power existed in both courts and the Commission to originally hear complaints on this subject, there might be a divergence between the action of the Commission and the decision of a court. In other words, the established schedule might be found reasonable by the Commission in the first instance and unreasonable by a court acting originally, and thus a conflict would arise which would render the enforcement of the act impossible.

Nor is there merit in the contention that § 9 of the act compels to the conclusion that it was the purpose of Congress to confer power upon courts primarily to relieve from the duty of enforcing the established rate by finding that the same as to a particular person or corporation was so unreasonable as to justify an award of damages. True it is that the general terms of the section, when taken alone, might sanction such a conclusion, but, when the provision of that section is read in connection with the context of the act, and in the light of the considerations which we have enumerated, we think the broad construction contended for is not admissible. And this becomes particu-

larly cogent when it is observed that the power of the courts to award damages to those claiming to have been injured, as provided in the section, contemplates only a decree in favor of the individual complainant, redressing the particular wrong asserted to have been done, and does not embrace the power to direct the carrier to abstain in the future from similar violations of the act; in other words, to command a correction of the established schedules, which power, as we have shown, is conferred by the act upon the Commission in express terms. In other words, we think that it inevitably follows from the context of the act that the independent right of an individual originally to maintain actions in courts to obtain pecuniary redress for violations of the act, conferred by the 9th section, must be confined to redress of such wrongs as can, consistently with the context of the act, be redressed by courts without previous action by the Commission, and, therefore, does not imply the power in a court to primarily hear complaints concerning wrongs of the character of the one here complained of. Although an established schedule of rates may have been altered by a carrier voluntarily or as the result of the enforcement of an order of the Commission to desist from violating the law, rendered in accordance with the provisions of the statute, it may not be doubted that the power of the Commission would nevertheless extend to hearing legal complaints of, and awarding reparation to, individuals for wrongs unlawfully suffered from the application of the unreasonable schedule during the period when such schedule was in force.

And the conclusion to which we are thus constrained by an original consideration of the text of the statute finds direct support, first, in adjudged cases in lower Federal courts, and in the construction which the act has apparently received from the beginning in practical execution; and, second, is persuasively supported by decisions of this court, which, whilst not dealing directly with the question here presented, yet necessarily concern the same. * * *

But it is insisted that, however cogent may be the views previously stated, they should not control, because of the following provision contained in § 22 of the act to regulate commerce, *viz.*: "* * * Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies." This clause, however, cannot in reason be construed as continuing in shippers a common-law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself. The clause is concerned alone with rights recognized in or duties imposed by the act, and the manifest purpose of the provision in question was to make plain the intention that any specific remedy given by the act should be regarded as cumulative, when other appropriate common-law or statutory remedies existed for the redress of the particular grievance or wrong dealt with in the act.

The proposition that, if the statute be construed as depriving courts generally, at the instance of shippers, of the power to grant redress upon the basis that an established rate was unreasonable without previous action by the Commission great harm will result, is only an argument of inconvenience which assails the wisdom of the legislation or its efficiency, and affords no justification for so interpreting the statute as to destroy it. Even, however, if, in any case, we were at liberty to depart from the obvious and necessary intent of a statute upon considerations of expediency, we are admonished that the suggestions of expediency here advanced are not shown on this record to be justified. As we have seen, although the act to regulate commerce has been in force for many years, it appears that, by judicial exposition and in practical execution, it has been interpreted and applied in accordance with the construction which we give it. That the result of such long-continued, uniform construction has not been considered as harmful to the public interests is persuasively demonstrated by the fact that the amendments which have been made to the act have not only not tended to repudiate such construction, but, on the contrary, have had the direct effect of strengthening and making, if possible, more imperative, the provisions of the act requiring the establishment of rates and the adhesion by both carriers and shippers to the rates as established until set aside in pursuance to the provisions of the act. Thus, by § 1 of the act approved February 19, 1903, commonly known as the Elkins act [32 Stat. at L. 847, chap. 708, U.S.Comp.Stat.Supp.1905, p. 599], which, although enacted since the shipments in question, is yet illustrative, the wilful failure upon the part of any carrier to file and publish "the tariffs or rates and charges," as required by the act to regulate commerce and the acts amendatory thereof, "or strictly to observe such tariffs until changed according to law," was made a misdemeanor, and it was also made a misdemeanor to offer, grant, give, solicit, accept, or receive any rebate from published rates or other concession or discrimination. And in the closing sentence of § 1 it was provided as follows:

"Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the act to regulate commerce or acts amendatory thereof, or participates in any rates so filed or published, that rate, as against such carrier, its officers, or agents, in any prosecution begun under this act, shall be conclusively deemed to be the legal rate, and any departure from such rate or any offer to depart therefrom shall be deemed to be an offense under this section of this act."

And, by § 3, power was conferred upon the Interstate Commerce Commission to invoke the equitable powers of a circuit court of the United States to enforce an observance of the published tariffs.

Concluding, as we do, that a shipper seeking reparation predicated upon the unreasonableness of the established rate must under the act to regulate commerce, primarily invoke redress through the Interstate

tract, that company had canceled the contract to buy the ties. And the amount sought to be recovered was alleged to be the loss resulting to the tie company consequent on such cancelation, together with punitive damages based on the "wilful, wanton, and malicious" conduct on the part of the railway company, and a reasonable attorney's fee.

The railway company, besides denying generally the allegations of the amended petition, alleged that its joint through lumber tariff did not include a rate on oak railway cross-ties, but that cross-ties were a separate and distinct and well-recognized freight commodity, and that at the time mentioned in the petition it had not filed with the Interstate Commerce Commission any tariff under which it could lawfully accept for interstate shipment, at a through rate, the cross-ties offered by the tie company. The answer further denied that its failure to have in effect such a rate was a discrimination against cross-ties or the tie company or any locality, and alleged that oak cross-ties had never before been offered to it in Arkansas and Louisiana for shipment to interstate points on its lines or connections so as to render it advisable to establish such a rate. It was averred that when the railway company first learned, in September, 1907, of the purpose of the tie company to ship cross-ties, it at once notified the tie company that it had no through rate on ties, and therefore would not be able to offer such a rate, but would seek to establish a through rate of 50 cents per hundredweight if sufficient time was allowed it to give the public notices of the filing of the tariff as required by the statute. It was then alleged that thereafter the first intimation that the railway company had of the purposes of the tie company was a letter transmitted to one of its officers from the Interstate Commerce Commission, informing the railway company of the fact that the tie company had filed an informal complaint with the Commission on the ground that, although the railway company's tariff on lumber embraced cross-ties, it had announced its intention not to receive them under the lumber schedule, and protesting in advance against permitting the railway company to file a specific tariff on cross-ties at 50 cents per hundredweight, because, as compared with the 24-cent lumber rate, it would be unreasonable. That at once, to avoid difficulty, the railway company applied to the Interstate Commerce Commission to be allowed immediately to put into effect a cross-tie rate at 24 cents per 100 pounds, the same as the lumber rate, and such request was refused by the Commission. Request was then made to put in such a rate after five days' notice, which was likewise refused, and thereupon in January, 1908, the railway company issued and filed with the Interstate Commerce Commission a joint through lumber tariff amended so as to include at the lumber rate "wood railroad cross-ties, all kinds, carloads." The answer then charged that at no time until such tariff became effective, February 13, 1908, could the railway company have lawfully accepted and carried oak railway cross-ties under the provisions of the act to regulate commerce. Referring to an averment in the petition concerning the ac-

ceptance of three cars of cross-ties at about this time for shipment at the lumber rate, the answer averred that if the facts were true, it furnished no basis for recovery, as the receipt of the ties inadvertently or otherwise, in the absence of a rate, would have been a violation of law, and afforded no ground for inferring the obligation to continue to do so, and, besides, did not aid the plaintiff's case, which was based upon the refusal of the railway company to take freight at an established and existing rate, not upon any supposed obligation by estoppel to do so when there was no established rate. And by an amendment to the answer it was insisted that under § 9 of the act to regulate commerce [1] the plaintiff could not prosecute its action because, by making a complaint, as it had done, to the Interstate Commerce Commission, concerning the failure to treat the lumber tariff as embracing a rate on cross-ties, the plaintiff had elected to proceed before the Commission.

The evidence at the trial tended to support the allegations of the amended petition as to the making of the contract with the Union Pacific Railway Company, the accumulation of cross-ties at the several stations on the railway's line, the request for cars for the shipment of the ties to Linwood, Kansas, the refusal of the railway to provide the cars, the cancelation of the contract by the Union Pacific Railway Company, and the consequent loss to the tie company. The railway company's joint through lumber tariff was introduced in evidence, and it was not disputed that by it a rate of 24 cents per 100 pounds was established on oak lumber, and that oak railway cross-ties were not specifically mentioned. The railway company also introduced in evidence the correspondence between it and the Interstate Commerce Commission, showing, among other things, the request to be allowed to put immediately into effect the cross-tie rate, and the refusal of the Commission to grant the request, and the other facts and circumstances stated in the answer. It is not disputable that the pivotal question in the case was whether oak railway cross-ties were included in the filed tariff fixing a through lumber rate of 24 cents per hundredweight, and so far as the solution of that inquiry depended upon the views of men engaged in the lumber and railroad business, as developed in the testimony, it is equally indisputable that there was an irreconcilable conflict. And this conflict at once leads to a consideration of the principle which dominates the controversy, and upon which its decision, therefore, depends.

There is no room for controversy that the law required a tariff, and therefore, if there was no tariff on cross-ties, the making and filing of such tariff conformably to the statute was essential. And it is equally clear that the controversy as to whether the lumber tariff included cross-ties was one primarily to be determined by the Commission in the exercise of its power concerning tariffs and the authority to regulate conferred upon it by the statute. Indeed, we think it is indisputable that that subject is directly controlled by the authorities which estab-

[1] [Footnote omitted—Ed.]

lish that, for the preservation of the uniformity which it was the purpose of the act to regulate commerce to secure, the courts may not, as an original question, exert authority over subjects which primarily come with the jurisdiction of the Commission. Texas & P. R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 51 L.Ed. 553, 27 S.Ct. 350, 9 Ann. Cas. 1075; Baltimore & O. R. Co. v. United States, 215 U.S. 481, 54 L. Ed. 292, 30 S.Ct. 164; Robinson v. Baltimore & O. R. Co., 222 U.S. 506, 56 L.Ed. 288, 32 S.Ct. 114; Mitchell Coal & Coke Co. v. Pennsylvania R. Co., 230 U.S. 247, 57 L.Ed. 1472, 33 S.Ct. 916; Morrisdale Coal Co. v. Pennsylvania R. Co., 230 U.S. 304, 57 L.Ed. 1494, 33 S.Ct. 938. No question is made as to the controlling effect of the doctrine as a general rule, but it is urged that it is not applicable to this case for the following reasons:

(a) The foundation upon which the doctrine rests, it is insisted, is the necessity of a uniform enforcement of the interstate commerce act and the danger of diversity and conflict arising if questions concerning the existence of tariffs or their reasonableness, of discriminations and preferences, were left to be originally determined by courts of general jurisdiction, thus giving rise to the possibility of one rule in one jurisdiction and another in another. But the argument proceeds to insist that upon the principle that where the reason for the application of a law ceases to exist the law itself ceases to apply, the settled construction of the act to regulate commerce, announced and enforced in the Abilene and other cases, has here no application because it is so plain that oak cross-ties were included in the lumber rate as fixed in the tariff of the railway company that there is no reason for proceeding primarily before the Commission, as there is no possibility of difference on the subject if left to the consideration of the courts. We need not pause to point out the palpable error of law which the proposition involves, since, on the face of the record, it is apparent that the assumption of fact upon which it rests is absolutely without foundation. We say this because nothing could more clearly demonstrate such result than does the conflict and confusion in the testimony concerning whether cross-ties were included in the filed lumber tariff. And indeed, the same demonstration arises from a consideration of some decided cases; as, for instance, American Tie & Timber Co. v. Kansas City Southern R. Co., 99 C.C.A. 44, 175 F. 28, 33, presumably a report of this case, where it appears that at the first hearing the trial judge was so clearly of the opinion that cross-ties were not lumber that he so charged the jury, and directed a verdict for the railroad company. * * *

(c) Because the railway company, by loading and carrying the three cars of ties under the 24-cent rate, had itself recognized the applicability of the lumber rate to cross-ties, and was concluded thereby. But, without stopping to consider the tendency of the proof establishing the want of foundation for the proposition, we think it is wanting in merit for this obvious reason: If, as we have seen, the question of whether

cross-ties were embraced in the filed tariff concerning lumber was involved in such conflict and doubt as to require the action of the Interstate Commerce Commission, the situation was such that the railway company could not do by indirection that which the statute permitted it to do only by compliance with the law; that is, filing its tariffs in the regular way. * * *

It results that error was committed by the court in declining to sustain the motion to dismiss for want of jurisdiction, and therefore it is our duty to reverse.

Reversed.

Mr. Justice PITNEY dissents.[a]

GREAT NORTHERN RAILWAY CO. v. MERCHANTS ELEVATOR COMPANY

Supreme Court of the United States.
259 U.S. 285, 42 S.Ct. 477, 66 L.Ed. 943 (1922).

Mr. Justice BRANDEIS delivered the opinion of the Court.

This action was brought by the Merchants' Elevator Company in a state court of Minnesota against the Great Northern Railway Company and the Director General to recover $80 alleged to have been exacted in violation of the carrier's tariff. That sum had been demanded by the carrier, under rule 10 of its tariff, as a reconsignment charge, at the rate of $5 a car, for 16 cars of corn shipped from points in Iowa and Nebraska to Willmar, Minn., and after inspection there rebilled to Anoka, a station beyond. The tariff rate from the points of origin via Willmar to Anoka was the same as to Willmar. Willmar had been named as destination in the original bill of lading, only because it is the place at which grain coming into the state by this route is inspected and graded under the laws of Minnesota and of the United States, and the carrier knew, or should have known, that fact. Immediately after inspection, disposition orders were given, and the original bills of lading were surrendered in exchange for billing to Anoka. Rule 10 read:

[a] *To same effect.* Northern Pacific Railway Co. v. Solum, 247 U.S. 477, 38 S.Ct. 550, 62 L.Ed. 1221 (1918); Director General of Railroads v. The Viscose Company, 254 U.S. 498, 41 S.Ct. 151, 65 L.Ed. 372 (1921). But *cf.* Texas & Pacific Railway Co. v. Gulf, Coronado & Santa Fe Railway Co., 270 U.S. 266, 46 S.Ct. 263, 70 L.Ed. 578 (1926) (defendant railway sought to construct additional trackage without obtaining a certificate of public convenience and necessity from the Interstate Commerce Commission, on the ground that the new trackage would constitute an "industrial track" and not an "extension". Suit by plaintiff, a competing railway, to enjoin the construction, held maintainable without prior resort to the Interstate Commerce Commission for determination whether the trackage constituted an "extension".) In this connection, see also the dissenting opinion of Mr. Justice Stone in L. Singer & Sons v. Union Pacific R. R., 311 U.S. 295, 313–4, 61 S.Ct. 254, 262, 85 L.Ed. 198 (1940), *supra* at p. 577.

"Diversion or reconsignment to points outside switching limits before placement: If a car is diverted, reconsigned or reforwarded on orders placed with the local freight agent or other designated officer after arrival of car at original destination, but before placement for unloading, * * * a charge of $5.00 per car will be made if car is diverted, reconsigned or reforwarded to a point outside of switching limits of original destination."

The shipper contended that the case was within the exception known as exception (a), as amended by supplement 1, which provided that rules (including rule 10) shall not apply to:

"(a) Grain, seed (field), seed (grass), hay or straw, carloads, held in cars on track for inspection and disposition orders incident thereto at billed destination or at point intermediate thereto."

Whether the charge was payable depended solely upon a question of construction; that is, whether the body of the rule or the exception to it applied. On this question there was room for reasonable difference of opinion. The carrier, relying particularly upon Texas & Pacific Ry. Co. v. American Tie & Timber Co., 234 U.S. 138, 34 S.Ct. 885, 58 L.Ed. 1255, and Loomis v. Lehigh Valley R. R. Co., 240 U.S. 43, 36 S.Ct. 228, 60 L.Ed. 517, claimed seasonably that until the true construction of the tariff had been determined by the Interstate Commerce Commission, the trial court was without jurisdiction. That court overruled the objection, construed the exception to mean that cars of grain are exempted from rule 10 if held on track at billed destination for inspection and for "disposition orders" incident to such inspection, held that the disposition order may be an order to make disposition by way of reconsignment to another destination and that forwarding to Anoka was such disposition, and entered judgment for the shipper. That judgment was affirmed by the Supreme Court of the state on the authority of Reliance Elevator Co. v. Chicago, Milwaukee & St. Paul Ry. Co., 139 Minn. 69, 165 N.W. 867. The case is here on writ of certiorari. Merritt v. United States, 255 U.S. 567, 41 S.Ct. 375, 65 L.Ed. 789. The tariff containing the rule under which the $5 charge was made was the only governing tariff. It had been duly filed with the Interstate Commerce Commission. The validity of the tariff, including the rule and exception, was admitted, and there was no dispute concerning the facts. The question argued before us is not whether the state courts erred in construing or applying the tariff, but whether any court had jurisdiction of the controversy, in view of the fact that the Interstate Commerce Commission had not passed upon the disputed question of construction.

The contention that courts are without jurisdiction of cases involving a disputed question of construction of an interstate tariff, unless there has been a preliminary resort to the Commission for its decision, rests in the main, upon the following argument: The purpose of the Act to Regulate Commerce (Comp.St. § 8563 et seq.) is to secure and preserve uniformity. Hence, the carrier is required to file tariffs establishing uniform rates and charges, and is prohibited from exacting

or accepting any payment not set forth in the tariff. Uniformity is impossible, if the several courts, state or federal, are permitted, in case of disputed construction, to determine what the rate or charge is which the tariff prescribes. To insure uniformity the true construction must, in case of dispute, be determined by the Commission.

This argument is unsound. It is true that uniformity is the paramount purpose of the Commerce Act. But it is not true that uniformity in construction of a tariff can be attained only through a preliminary resort to the Commission to settle the construction in dispute. Every question of the construction of a tariff is deemed a question of law; and where the question concerns an interstate tariff it is one of federal law. If the parties properly preserve their rights, a construction given by any court, whether it be federal or state, may ultimately be reviewed by this court either on writ of error or on writ of certiorari; and thereby uniformity in construction may be secured. Hence, the attainment of uniformity does not require that in every case where the construction of a tariff is in dispute, there shall be a preliminary resort to the Commission.

Whenever a rate, rule, or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission. Sometimes this is required because the function being exercised is in its nature administrative in contradistinction to judicial. But ordinarily the determining factor is not the character of the function, but the character of the controverted question and the nature of the enquiry necessary for its solution. To determine what rate, rule or practice shall be deemed reasonable for the future is a legislative or administrative function. To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function. Preliminary resort to the Commission is required alike in the two classes of cases. It is required because the inquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable, and such acquaintance is commonly to be found only in a body of experts. But what construction shall be given to a railroad tariff presents ordinarily a question of law which does not differ in character from those presented when the construction of any other document is in dispute.

When the words of a written instrument are used in their ordinary meaning, their construction presents a question solely of law. But words are used sometimes in a peculiar meaning. Then extrinsic evidence may be necessary to determine the meaning of words appearing in the document. This is true where technical words or phrases not commonly understood are employed, or extrinsic evidence may be necessary to establish a usage of trade or locality which attaches pro-

visions not expressed in the language of the instrument. Where such a situation arises, and the peculiar meaning of words, or the existence of a usage, is proved by evidence, the function of construction is necessarily preceded by the determination of the matter of fact. Where the controversy over the writing arises in a case which is being tried before a jury, the decision of the question of fact is left to the jury, with instructions from the court as to how the document shall be construed, if the jury finds that the alleged peculiar meaning or usage is established.[1] But where the document to be construed is a tariff of an interstate carrier, and before it can be construed it is necessary to determine upon evidence the peculiar meaning of words or the existence of incidents alleged to be attached by usage to the transaction, the preliminary determination must be made by the Commission; and not until this determination has been made, can a court take jurisdiction of the controversy. If this were not so, that uniformity which it is the purpose of the Commerce Act to secure could not be attained. For the effect to be given the tariff might depend, not upon construction of the language—a question of law—but upon whether or not a particular judge or jury had found, as a fact, that the words of the document were used in the peculiar sense attributed to them or that a particular usage existed.

It may happen that there is a dispute concerning the meaning of a tariff which does not involve, properly speaking, any question of construction. The dispute may be merely whether words in the tariff were used in their ordinary meaning, or in a peculiar meaning. This was the situation in the American Tie & Timber Co. Case, supra. The legal issue was whether the carrier did or did not have in effect a rate covering oak ties. The only matter really in issue was whether the word "lumber" which was in the tariff, had been used in a peculiar sense. The trial judge charged the jury:

"If you believe from the evidence that oak railway cross-ties are lumber within the meaning and usage of the lumber and railroad business, then you are charged the defendant had in effect a rate applying on the ties offered for shipment."

This question was obviously not one of construction; and there is not to be found in the opinion in this court, or in the proceedings in either of the lower courts, a suggestion that the case involved any disputed question of construction. The only real question in the case was one of fact; and upon this question of fact "the views of men engaged in the lumber and railroad business, as developed in the testimony" were in "irreconcilable conflict." 234 U.S. 146, 34 S.Ct. 888, 58 L.Ed. 1255. As that question, unlike one of construction, could not be settled ultimately by this court, preliminary resort to the Commission was necessary to insure uniformity. The situation in Loomis v. Lehigh Valley R. R., supra, was similar. There the question to be decided did not re-

[1] [Footnote omitted.—Ed.]

quire the consideration of voluminous conflicting evidence; but it involved the exercise of administrative judgment. The carrier had been requested by a shipper of grain, fruits and vegetables to supply cars for loading. In order to load ordinary box cars to the minimum capacity on which the freight rates are based and to the maximum to which the shipper is entitled, it is necessary that they should be equipped with grain doors or transverse bulkheads, so that they may safely contain the load and enable unloading to be done without waste and inconvenience. Those sent lacked the inside doors and bulkheads. The carrier having refused to furnish these, the shipper was obliged to do so and sought reimbursement. The tariff was silent on the subject. The controverted question was not how the tariff should be construed, but what character of equipment should be deemed reasonable. To determine this inquiry the court held that preliminary resort to the Commission must be had, because "an adequate consideration of the * * * controversy would require acquaintance with many intricate facts of transportation and a consequent appreciation of the practical effect of any attempt to define services covered by a carrier's published tariffs, or character of equipment which it must provide, or allowances which it may make to shippers for instrumentalities supplied and services rendered."

In the case at bar the situation is entirely different from that presented in the American Tie & Timber Co. Case, or in the Loomis Case. Here no fact, evidential or ultimate, is in controversy, and there is no occasion for the exercise of administrative discretion. The task to be performed is to determine the meaning of words of the tariff which were used in their ordinary sense and to apply that meaning to the undisputed facts. That operation was solely one of construction; and preliminary resort to the Commission was, therefore, unnecessary. The petition for certiorari was asked for on the ground that the decision of the Supreme Court of Minnesota in this case was in conflict with the above decisions of this court and also that the decisions in several state courts and in the lower federal courts were in serious conflict on the question involved. In the brief and argument on the merits, it was also asserted that some recent decisions of this court are in conflict with the rule declared and applied in the American Tie & Timber Co. Case, supra, and the Loomis Case, supra. If in examining the cases referred to [2] there is borne in mind the distinction above dis-

[2] In the following cases in which the jurisdiction of the court was sustained without preliminary resort to the Commission, the question involved was solely one of construction of a tariff, or otherwise a question of law, and not one of administrative discretion: (1) Louisville & Nashville R. R. Co. v. F. W. Cook Brewing Co., 223 U.S. 70, 84, 32 S.Ct. 189, 56 L.Ed 355; Pennsylvania R. Co. v. International Coal Co., 230 U.S. 184, 196, 33 S.Ct. 893, 57 L.Ed. 1446, Ann.Cas.1915A. 315; Pennsylvania R. R. Co. v. Puritan Coal Co., 237 U.S. 121, 134, 35 S.Ct. 484, 59 L.Ed. 867; Eastern Ry. Co. v. Littlefield, 237 U.S. 140, 35 S.Ct. 489, 59 L.Ed. 878; Illinois Central R. R. Co. v. Mulberry Coal Co., 238 U.S. 275, 35 S.Ct. 760, 59 L.Ed. 1306; Pennsylvania R. Co. v. Sonman Coal Co., 242 U.S. 120, 37 S.Ct.

cussed between controversies which involve only questions of law and those which involve issues essentially of fact or call for the exercise of administrative discretion, it will be found that the conflict described does not exist and that the decisions referred to are in harmony also with reason.

Affirmed.

ORDER OF RAILWAY CONDUCTORS v. PITNEY

Supreme Court of the United States.
326 U.S. 561, 66 S.Ct. 322, 90 L.Ed. — (1946).

Mr. Justice BLACK delivered the opinion of the Court.

This case requires us to consider to what extent a Federal District Court having charge of a railroad reorganization has power to adjudicate a jurisdictional dispute involving the railroad and two employee accredited bargaining agents in view of the provisions in the Railway Labor Act, 45 U.S.C., § 151 et seq., 45 U.S.C.A. § 151 et seq., giving such power to the administrative agencies established thereunder. Each union claims that its respective collective bargaining agreement entitles it to supply conductors for five daily freight trains operated

46, 61 L.Ed. 188; Pennsylvania R. R. Co. v. Kittanning Iron & Steel Mfg. Co., 253 U.S. 319, 40 S.Ct. 532, 64 L.Ed. 928. See also Swift & Co. v. Hocking Valley Ry. Co., 243 U.S. 281, 37 S.Ct. 287, 61 L.Ed. 722; St. Louis, Iron Mountain & Southern Ry. Co. v. Hasty, 255 U.S. 252, 256, 41 S.Ct. 269, 65 L.Ed. 614. (2) Hite v. Central R. R. of N. J., 171 F. 370, 372, 96 C.C.A. 326; Gimbel Bros., Inc., v. Barrett (D.C.) 215 F. 1004 (D.C.) 218 F. 880; Barrett v. Gimbel Bros., 226 F. 623, 141 C.C.A. 379; National Elevator Co. v. Chicago, M. & St. P. Ry. Co., 246 F. 588, 158 C.C.A. 558; J. C. Francesconi & Co. v. Baltimore & Ohio R. R. Co. (D.C.) 274 F. 687, 691. Compare Empire Refineries v. Guaranty Trust Co. (C.C.A.) 271 F. 668. (3) Kansas City Southern Ry. Co. v. Tonn, 102 Ark. 20, 26, 143 S.W. 577; Western & Atlantic R. Co. v. White Provision Co., 142 Ga. 246, 82 S.E. 644; Gustafson v. Michigan Central R. R. Co., 296 Ill. 41, 129 N.E. 516; Wolverine Brass Works v. Southern Pacific Co., 187 Mich. 393, 396, 153 N.W. 778; Reliance Elevator Co. v. Chicago, M. & St. P. Ry. Co., 139 Minn. 69, 165 N.W. 867; St. Louis, San Francisco & Texas Ry. Co. v. Roff Oil & Cotton Co., 61 Tex.Civ.App 190, 192, 128 S.W. 1194; Southern Pacific Co. v. Frye, 82 Wash. 9, 143 P. 163. Compare Hardaway v. Southern Ry. Co., 90 S.C. 475, 73 S.E. 1020, Ann.Cas.1913D, 266. See, contra, Cheney v. Boston & Maine R. R., 227 Mass. 336, 116 N.E. 411. Compare Poor v. Western Union Tel. Co., 196 Mo. App. 557, 564, 196 S.W. 28.

In the following cases, where the court refused to take jurisdiction because there had not been preliminary resort to the Commission, the question presented either was one of fact or called for the exercise of administrative discretion: Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 27 S.Ct. 350, 51 L.Ed. 553, 9 Ann.Cas. 1075; Baltimore & Ohio R. R. Co. v. Pitcairn Coal Co., 215 U.S. 481, 30 S.Ct. 164, 54 L.Ed. 292; Mitchell Coal Co. v. Pennsylvania R. Co., 230 U.S. 247, 33 S.Ct. 916, 57 L. Ed. 1472; Morrisdale Coal Co. v. Pennsylvania R. R. Co., 230 U.S. 304, 33 S.Ct. 938, 57 L.Ed. 1494; Northern Pacific Ry. Co. v. Solum, 247 U.S. 477, 483, 38 S.Ct. 550, 62 L.Ed. 1221; Director General v. Viscose Co, 254 U.S. 498, 41 S.Ct. 151, 65 L.Ed. 372. See also United States v. Pacific & Arctic Co, 228 U S. 87, 33 S. Ct 443, 57 L Ed. 742

within the Elizabeth Port, New Jersey, yards of the railroad and both pressed their contentions on the reorganization trustees appointed under the provisions of § 77 of the Bankruptcy Act, 11 U.S.C. § 205, 11 U.S.C.A. § 205. The two unions are the Order of Railway Conductors (O. R. C.), which represents road conductors who ordinarily operate trains outside the yards, and the Brotherhood of Railroad Trainmen (B. R. T.), which represents yard conductors who ordinarily operate trains inside the yards. But here, the practice over a period of years had been that at times yard conductors manned some trains outside the yard and road conductors manned some trains within the yard, including the five freight trains here involved. In 1940 the railroad in response to pressure by the O. R. C. agreed that thereafter only road conductors would man the outside trains. However, O. R. C. conductors continued to operate the five daily freight trains within the yard. In 1943 the railroad was prevailed upon by the B. R. T. to agree to substitute B. R. T. yard conductors for the O. R. C. conductors operating these five trains.

Thereupon O. R. C. brought this suit in the reorganization court. It alleged that its members had for the past 35 years operated the trains in issue as a result of negotiations as to rules, rates of pay and working conditions between it and the railroad and that the 1940 contract specifically provided that this situation would not be changed without further agreement. Thus, the proposed displacement of O. R. C. conductors would violate § 6 of the Railway Labor Act which makes it unlawful for a carrier or employee representatives to change "pay, rules, or working conditions," unless 30 days written notice of the intended change shall have been given and the controversy has been finally acted upon by the Mediation Board.[1] The O. R. C. asked the court to instruct its trustees not to displace road conductors and to enjoin them permanently from taking such action so long as O. R. C.'s contracts with the road were not altered in accordance with the provisions of the Railway Labor Act.

Answers were filed by the trustees and the B. R. T. as intervenor. The case was referred to a Master who, after a hearing, found that O.

[1] "Sec. 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

R. C.'s collective bargaining contracts did not provide that its conductors were to operate the five freight trains and that the B. R. T. contract allotted these lines to its members. The District Court sustained these findings and accordingly dismissed the petition on the merits. The Circuit Court of Appeals held that the petition should be dismissed on jurisdictional grounds because it thought that the remedies of the Railway Labor Act for the settlement of disputes such as here involved are exclusive. 145 F.2d 351. It further stated that if it should be mistaken on the jurisdictional question, then it agreed with the District Court that the road conductors must lose on the merits.

Section 77, sub. n of the Bankruptcy Act provides that "No judge or trustee acting under this Act shall change the wages or working conditions of railroad employees except in the manner prescribed in the Railway Labor Act, * * *." 47 Stat. 1481, 11 U.S.C.A. § 205, sub. n. Section 1 of the Railway Labor Act defines a carrier, subject to it, as including "any receiver, *trustee,* or *other individual* or *body, judicial* or otherwise, when in *the possession of the business of any such 'carrier'* * * *." And § 2, Seventh, of the Act provides that "no carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, *as embodied in agreements* except in the manner prescribed in such agreement or in § 6 of this Act." Section 6, as we have seen, prohibits such changes unless notice is first given and its requirements are otherwise complied with. Section 2, Tenth, of the Act makes it a misdemeanor, punishable by both fine and imprisonment for a carrier wilfully to violate § 6.

These sections make it clear that the only conduct which would violate § 6 is a change of those working conditions which are "embodied" in agreements. But the answers here specifically denied that the O. R. C. agreements provided that road conductors operate the five trains in question. This put in issue the meaning of the contracts that allegedly embodied the working conditions which the trustees were about to change. The court, therefore, had to interpret these contracts before it could find that § 6 had been violated.

In interpreting the contracts the court might act in two distinct capacities. First, it might do so in the capacity of a "judicial" "body" in the "possession of the business," or a "carrier" within the meaning of § 1 of the Railway Labor Act. As such it would have to interpret the contracts in order to exercise the jurisdiction conferred by the Bankruptcy Act [2] to control its trustees so as to insure the preservation and proper administration of the debtor's estate. But such instructions, while binding on the trustees and, just as any other order, subject to appellate review, amount to no more than the decision any other carrier would sooner or later make about the course it must fol-

[2] See especially Subdivision c of § 77 of the Act which provides that action of trustees in administering an estate shall be "subject to the control of the judge."

low and, therefore, can not finally settle the dispute between Union and employer.

Finally to settle that dispute the reorganization court would have to act in the further capacity of a tribunal empowered to grant the equitable relief sought, even though granting that relief requires interpretation of these contracts. But Congress has specifically provided for a tribunal to interpret contracts such as these in order finally to settle a labor dispute. Section 3 First (i) of the Railway Labor Act provides that disputes between a carrier and its employees "growing out of * * * the interpretation or application of agreements concerning rates of pay, rules, or working conditions * * * may be referred by either party to * * * the Adjustment Board." The Board can not only order reinstatement of the employees, should they actually be discharged, but it can also under § 3, First (*o*) and (p) grant a money award subject to judicial review with an allowance for attorney's fees should the award be sustained. Not only has Congress thus designated an agency peculiarly competent to handle the basic question here involved, but as we have indicated in several recent cases in which we had occasion to discuss the history and purpose of the Railway Labor Act, it also intended to leave a minimum responsibility to the courts.

Of course, where the statute is so obviously violated that "a sacrifice or obliteration of a right which Congress * * * created" to protect the interest of individuals or the public is clearly shown a court of equity could, in a proper case, intervene. Texas & N. O. R. Co. v. Brotherhood of Ry. & Steamship Clerks, 281 U.S. 548, 50 S.Ct. 427, 74 L.Ed. 1034; Virginian Ry. Co. v. System Federation No. 40, 300 U.S. 515, 57 S.Ct. 592, 81 L.Ed. 789. But here it does not clearly appear whether the statute has been violated or complied with or that the threatened action "would be prejudicial to the public interest." Commonwealth of Pennsylvania v. Williams, 294 U.S. 176, 185, 55 S.Ct. 380, 385, 79 L.Ed. 841, 96 A.L.R. 1166. We have seen that in order to reach a final decision on that question the court first had to interpret the terms of O. R. C.'s collective bargaining agreements. The record shows, however, that interpretation of these contracts involves more than the mere construction of a "document" in terms of the ordinary meaning of words and their position. See Brown Lumber Co. v. L. & N. R. Co., 299 U.S. 393, 396, 57 S.Ct. 265, 266, 81 L.Ed. 301; Great Northern Ry. Co. v. Merchants Elevator Co., 259 U.S. 285, 291, 42 S.Ct. 477, 479, 66 L.Ed. 943. For O. R. C.'s agreements with the railroad must be read in the light of others between the railroad and B.R.T. And since all parties seek to support their particular interpretation of these agreements by evidence as to usage, practice and custom that too must be taken into account and properly understood. The factual question is intricate and technical. An agency especially competent and specifically designated to deal with it has been created by Congress. Under these circumstances the court should exercise

equitable discretion to give that agency the first opportunity to pass on the issue. Certainly the extraordinary relief of an injunction should be withheld, at least, until then. See Thompson v. Magnolia Petroleum Co., 309 U.S. 478, 483–484, 60 S.Ct. 628, 630, 631, 84 L.Ed. 876; Burford v. Sun Oil Co., 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424. Only after the Adjustment Board acts, but not until then, can it plainly appear that such relief is necessary to insure compliance with the statute. Until such time, O. R. C. can not show irreparable loss and inadequacy of the legal remedy. The court of equity should, therefore, in the exercise of its discretion stay its hand. Lawrence v. St. Louis-San Francisco Ry. Co., 274 U.S. 588, 592–3, 47 S.Ct. 720, 722, 71 L.Ed. 1219; and other cases cited in Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 51, note 9, 58 S.Ct. 459, 463, 464, 82 L.Ed. 638; Natural Gas Co. v. Slattery, 302 U.S. 300, 58 S.Ct. 199, 82 L.Ed. 276.

We hold that the District Court had supervisory power to instruct its trustees as it did. And a review of the evidence persuades us that the court's findings on which such instructions were based are not clearly erroneous. To the extent that its order constitutes instructions to its trustees, it is affirmed. Of course, in this respect it is no more binding on the Adjustment Board than the action of any other carrier. But the court should not have interpreted the contracts for purposes of finally adjudicating the dispute between the unions and the railroad. The dismissal of the cause should therefore be stayed by the District Court, so as to give an opportunity for application to the Adjustment Board for an interpretation of the agreements. Any rights clearly revealed by such an interpretation might then, if the situation warrants, be protected in this proceeding.

It is so ordered.

Judgment in accordance with opinion.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

Mr. Justice RUTLEDGE, dissenting in part.

I agree that the District Court should retain jurisdiction of the cause pending interpretation of the agreements in the procedure provided by the Railway Labor Act for submitting such questions to the Adjustment Board. Section 77, sub. n of the Bankruptcy Act, 11 U.S.C.A. § 205, sub. n was not intended, I think, to give the District Court jurisdiction to determine whether a "change in agreements affecting rates of pay, rules, or working conditions" within the meaning of § 6 has, in fact, taken place. Its sole effect is to require a bankruptcy court to follow the procedure set up by the Railway Labor Act.

In my opinion, however, petitioners are entitled to immediate temporary relief, pending the determination of the Adjustment Board, in order to assure compliance with § 6, if the Board should decide in their favor.

Section 6 enjoins a clear and positive duty on the part of carriers and employees, a duty which is judicially enforceable, since no other remedy is provided. The opinion of the Court so rules as I understand it, for otherwise there would be no reason for holding the cause. But if, pending the Board's determination, the change forbidden by § 6 takes place and the Board's decision turns out to be in favor of the petitioners, the very purpose of § 6 will have been defeated. Its object is to maintain the status quo, pending the expiration of the period provided by the section for allowing the processes of negotiation, mediation and conciliation to have play. It is to prevent changes being made until these processes have been exhausted or the prescribed waiting period has expired without bringing them into effect. See Brotherhood of R. Trainmen v. Toledo, P. & W. R. Co., 321 U.S. 50, 64 S.Ct. 413, 150 A.L.R. 810, 88 L.Ed. 534; cf. Elgin, J. & E. R. Co. v. Burley, 325 U.S. 711, 65 S.Ct. 1282, 89 L.Ed. 1886.

The decision of the Board will not restore this rightful status quo for the period required for making its determination, including the time now gone by, or in fact for any later period. The only relief the Board can give is either "an administrative declaratory determination" or an award of money damages, subject to the special provision for judicial review. Although the latter remedy would afford partial vindication of private rights, it does not safeguard the public interest, in accordance with the primary design of § 6. And in many cases it may be impossible for a court to effectuate the Board's decision for the future with adequate restorative measures.

Accordingly I think the District Court should grant temporary relief to O. R. C., as was done at the beginning of this cause, until the rights of the parties have been ascertained and permanent relief is given or denied. Petitioners have made a prima facie case, not only for holding the cause pending the outcome of the proceedings before the Adjustment Board but also for temporary injunctive relief pending that decision. Without such relief the public interest will not be adequately protected nor will the court's jurisdiction be preserved, in the sense of power to afford the full relief required by the policy of the Act.[b]

THOMPSON v. TEXAS MEXICAN RY. CO.

Supreme Court of the United States.
328 U.S. 134, 66 S.Ct. 937, — L.Ed. — (1946).

Mr. Justice DOUGLAS delivered the opinion of the Court.

Brownsville (The St. Louis, Brownsville and Mexico Railway Co.) and Tex-Mex (The Texas Mexican Railway Co.) are interstate carriers by railroad and subject to the provisions of the Interstate Commerce

[b] Footnotes of the court, except footnotes 1 and 2 of the majority opinion, have been omitted.

Act. 24 Stat. 379, 41 Stat. 474, 49 Stat. 543, 54 Stat. 899, 49 U.S.C. § 1 et seq., 49 U.S.C.A. § 1 et seq. On November 1, 1904, they entered into a written contract whereby, for payment of specified rentals, Tex-Mex granted Brownsville the right to operate its trains over the tracks of Tex-Mex between Robstown and Corpus Christi, Texas, and to make use of terminal facilities of Tex-Mex at Corpus Christi. The contract provided that it was to continue for a term of 50 years from its date unless sooner terminated by the parties. And it contained the following provision, "It is further agreed that this contract may be terminated without giving any reason therefor, by either party, upon giving twelve months notice of such intent to terminate the lease."

In 1933 Brownsville filed its petition for reorganization under § 77 of the Bankruptcy Act, 11 U.S.C.A. § 205. The petition was approved and petitioner Thompson was appointed as trustee in the proceeding. Shortly thereafter the bankruptcy court entered stay orders to which we will later refer. In October, 1940 Tex-Mex notified petitioners that it was exercising its right to terminate and cancel the trackage contract, effective twelve months after November 1, 1940. The trustee, however, continued to operate over the Tex-Mex and to use the Tex-Mex facilities after November 1, 1941. Tex-Mex informed him that a charge of $500 per day would be made for the use of these facilities—an amount in excess of the rental under the contract. The trustee refused to pay any rental other than that specified in the contract.

Thereupon this suit was instituted by Tex-Mex in the Texas courts to enjoin Brownsville and its trustee from using the tracks or other facilities without the consent of Tex-Mex and to recover $500 a day damages for such use or alternatively the reasonable value of the use of the property. The trial court overruled pleas to its jurisdiction and tried the case on the merits. It denied an injunction. It held that the 1904 contract had been terminated and awarded Tex-Mex damages in the amount of $184,929.85. The Court of Civil Appeals affirmed. 181 S.W.2d 895. The Supreme Court of Texas refused an application for a writ of error. The case is here on a petition for a writ of certiorari which we granted because of the importance of the problems in the administration of the Interstate Commerce Act and of the Bankruptcy Act. 324 U.S. 838, 65 S.Ct. 1023. * * *

Second. Prior to the rendition of judgment on the merits the decision of the Interstate Commerce Commission was necessary on two phases of the controversy—one under § 77 of the Bankruptcy Act, the other under provisions of the Interstate Commerce Act.

(1) As we have said, the right to terminate a contract pursuant to its terms survives the bankruptcy of the other contracting party. And that general bankruptcy rule is applicable in § 77 proceedings by reason of § 77 sub. *l*, which, as we have said, incorporates into § 77 the rules governing the duties of debtors and the rights and liabilities of creditors so far as they are "consistent with the provisions" of § 77.

We have considered the meaning of that qualification in No. 384, Smith v. Hoboken Railroad, W. & S. C. Co., 328 U.S. 123, 66 S.Ct. 947, —— L.Ed. ——. We there held that a covenant of forfeiture in a lease of railroad tracks and facilities should not be enforced by the bankruptcy court prior to a determination by the Commission that such step would be consistent with the reorganization requirements of the debtor. The Commission has the primary responsibility for formulating plans of reorganization under § 77. See § 77 sub. d. Forfeiture of leases by the court in advance of a determination by the Commission of the nature of the plan of reorganization which is necessary or desirable for the debtor may seriously interfere with the performance by the Commission of the functions entrusted to it.

We think that the same considerations are applicable to a determination that the trackage agreement in this case should be terminated pending formulation of a reorganization plan. By § 77, sub. b, the plan of reorganization may adopt or reject executory contracts of the debtor as well as unexpired leases. And the adoption of either an executory contract or of a lease by the trustee does not preclude a rejection of it in the plan. Moreover, trackage agreements like leases of railroad tracks and facilities are means by which railroad systems have been assembled. The retention or the sloughing off of trackage agreements may assume importance in the fashioning of a plan of reorganization by the Commission. The problem is kin to that involved in Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island & P. Ry. Co., 294 U.S. 648, 55 S.Ct. 595, 79 L.Ed. 1110. In that case the Court sustained the power of the reorganization court to enjoin under § 77 creditors, who held collateral notes of the debtor railroad secured by its bonds and bonds of its subsidiaries, from selling the collateral under a power of sale in the notes, where the sale would so hinder, obstruct or delay the plan of reorganization as would likely defeat it. The Court stated 294 U.S. at pp. 676, 679, 55 S.Ct. at page 606, that a proceeding under § 77 is a "special proceeding which seeks only to bring about a reorganization, if a satisfactory plan to that end can be devised. And to prevent the attainment of that object is to defeat the very end the accomplishment of which was the sole aim of the section, and thereby to render its provisions futile." The Court concluded, in view of the complexity of the problems involved in the reorganization, "that without the maintenance of the status quo for a reasonable length of time no satisfactory plan could be worked out."

That decision prevented in the interests of a reorganization the enforcement of the provisions of the contracts of the debtor according to their terms. We think like reasons make it important that the status quo of this trackage agreement be maintained pending decision by the Commission as to the proper treatment of it in the reorganization plan. The Commission may decide that it should be adopted. Or the Commission may conclude that the trackage agreement should be rejected or that its termination pursuant to its terms should be

allowed. These matters involve not only the interests of the two parties to the trackage agreement but phases of the public interest as well. A court which enforced the termination clause of the agreement pursuant to its terms would be narrowing the choice of the Commission and perhaps embarrassing it in the performance of the functions with which it has been entrusted. For these and like reasons which we have discussed in Smith v. Hoboken Railroad, W. & S. C. Co., supra, we think the court erred in holding that the trackage agreement had been or should be terminated.

(2) The Commission has further functions to perform apart from determining under § 77 whether it would be consistent with the reorganization requirements of the debtor to terminate the trackage agreement.

By § 1(18) of the Interstate Commerce Act it is provided that "no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment." Carriers being reorganized under § 77 of the Bankruptcy Act are not exempt from that provision. § 77, sub. *o*, 11 U.S.C. § 205, sub. *o*, 11 U.S.C.A. § 205, sub. *o;* Warren v. Palmer, 310 U.S. 132, 137, 138, 60 S.Ct. 865, 867, 84 L.Ed. 1118. Whatever may be the powers of the Commission under the Interstate Commerce Act, rather than § 77, over the terms of the trackage agreement, Abandonment of Chicago, R. I. & P. Ry. Co., 131 I.C.C. 421; Kansas City So. Ry. Co. v. Kansas City Terminal Ry. Co., 211 I.C.C. 291, it is clear that the Commission has jurisdiction over the operations. Sec. 1(18) embraces operations under trackage contracts, as well as other types of operations. See Chicago & Alton R. Co. v. Toledo, Peoria & W. Ry. Co., 146 I.C.C. 171, 179–181. And the fact that the trackage contract was entered into in 1904 prior to the passage of the Act is immaterial; the provisions of the Act, including § 1(18), are applicable to contracts made before as well as after its enactment. See Louisville & Nashville R. Co. v. Mottley, 219 U.S. 467, 482, 31 S.Ct. 265, 270, 55 L.Ed. 297, 34 L.R.A.,N.S., 671. Though the contract were terminated pursuant to its terms, a certificate would still be required under § 1(18). Brownsville or its trustee could, of course, make the application for abandonment of operations. But the fact that they might be content with the existing arrangement and fail or refuse to move does not mean that Tex-Mex would be burdened with a trackage arrangement in perpetuity. Tex-Mex might invoke the Commission's jurisdiction under § 1(18) and make application for abandonment of operations by Brownsville or its trustee. There is no requirement in § 1(18) that the application be made by the carrier whose operations are sought to be abandoned. It has been recognized that persons other than carriers "who have a proper interest in the subject-matter" may take the initiative. See Atchison, T. & S. F. Ry. Co. v. Railroad Commission,

283 U.S. 380, 393, 394, 51 S.Ct. 553, 556, 557, 75 L.Ed. 1128. An application by a city and county for abandonment of a part of the Colorado & Southern line was indeed entertained. Colorado & Southern Ry. Co. Abandonment, 166 I.C.C. 470. Tex-Mex has even a more immediate interest in the operations over this line. Its property is involved; and the amount being paid for the use of its property is deemed by it insufficient. The Commission is as much concerned with its financial condition as it is with that of Brownsville. Tex-Mex therefore has the standing necessary to invoke § 1(18).

Tex-Mex, however, points out that in 1941 it made application to the Commission "for authority to cancel trackage agreements" with Brownsville and that the Secretary of the Commission returned the application saying "The Commission is without authority to consider an application of the nature submitted by you. Its jurisdiction under Section 1(18) of the Interstate Commerce Act would extend only to abandonment of operation by the St. Louis, Brownsville & Mexico Railway Company." We need not consider whether the application was in proper form for one authorizing and requiring abandonment of operations by Brownsville. In any event, the secretary of the Commission was without authority to bind the Commission in the matter. Cf. Minneapolis & St. Louis R. Co. v. Peoria & P. U. Ry. Co., 270 U.S. 580, 585, 46 S.Ct. 402, 404, 70 L.Ed. 743.

(3) The jurisdiction of the Commission is not restricted, however, to determining whether or no operations of Brownsville over the tracks of Tex-Mex should be abandoned. Prior to the Transportation Act of 1940 the Commission had some jurisdiction over trackage agreements of the character involved in this case. Transit Commission v. United States, 289 U.S. 121, 53 S.Ct. 536, 77 L.Ed. 1075. But by that Act the Commission received new, explicit powers over trackage rights. Sec. 5(2) (a) (ii), 49 U.S.C.A. § 5(2) (a) (ii), provides: "It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) * * * for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto." Trackage rights acquired without the consent and approval of the Commission are unlawful. § 5(4).

The authority of the Commission under § 5(2) (a) extends to fixing terms and conditions, including rentals for any trackage agreements entered into subsequent to the effective date of the Transportation Act of 1940. If, therefore, the two carriers had voluntarily terminated the 1904 trackage contract and had entered into a new one without the approval of the Commission, they would have violated the Act. There would be no difference in result merely because the trackage contract expired by its terms or was terminated by operation of an escape clause. Until abandonment is authorized, operations must continue. While they continue, trackage rights are being

enjoyed. In absence of administrative control, the law would under those circumstances imply a contract for the use of another's property and award reasonable compensation. Thus trackage rights would be acquired on such terms as the court and jury determined. But § 5(2) (a) vests in the Commission, not the courts, the power to determine the terms and conditions under which trackage rights may be acquired. The jurisdiction of the Commission is exclusive. Transit Commission v. United States, supra. In that case the Commission had approved a trackage agreement between two carriers and the Court held that the Commission's jurisdiction being exclusive, approval by a state commission was not necessary. The court below thought that case was not controlling here, in view of the fact that the Interstate Commerce Commission had not acted. But in a long line of cases beginning with Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 27 S.Ct. 350, 51 L.Ed. 553, 9 Ann.Cas. 1075, it has been held that where the reasonableness or legality of the practices of the parties was subject to the administrative authority of the Interstate Commerce Commission, the court should stay its hand until the Commission had passed on the matter. See General American Tank Car Corp. v. El Dorado Terminal Co., 308 U.S. 422, 60 S.Ct. 325, 84 L.Ed. 361, and cases cited. That course is singularly appropriate here. It is the function of the Commission to determine the terms and conditions under which trackage rights are acquired. If the parties were allowed to by-pass the Commission and litigate the question in the courts, the power to fix the rental under trackage agreements would be shifted from the Commission to the courts and juries. Moreover, one jury would determine the amount of compensation due for the period here in question and another jury the amount due for a subsequent period. But a major concern of Congress in dealing with this problem was that neither inadequate rentals nor extortionate nor unreasonable exactions would be made for trackage rights. Transit Commission v. United States, supra, 289 U.S. at p. 128, 53 S.Ct. at page 538. Those questions intimately relate to the financial strength of carriers. And it is one of the Commission's high functions to protect the public interest against unfair or oppressive financial practices which in the past led to such great havoc and disaster. That policy would be undermined if the carriers could repair to courts for determination of the conditions under which trackage rights could be secured. Then jury verdicts or settlements would take the place of the expert and informed judgment of the Commission.

It is suggested, however, that the Commission is empowered to fix the rental only for the future and that it has no power to make an award with retroactive effect. But on this phase of the case we are not dealing with the problem of reparations. In any case where application is made for trackage rights the terms and conditions fixed by the Commission are applicable when the certificate of public convenience and necessity takes effect. If operations do not start until

that time, no problem is presented. But frequently there will be applications for renewal of trackage agreements which have expired. Operations may not be discontinued until a certificate of abandonment is obtained. If new trackage rights are granted, they run from the expiration of the old and their terms and conditions are applicable to the full term. Once the Commission has acted, the court may then proceed to enter judgment in conformity with the terms and conditions specified by the Commission. See El Dorado Oil Works v. United States, 328 U.S. 12, 66 S.Ct. 843, —— L.Ed. ——.

It is argued, however, that the trackage rights envisioned by § 5(2) (a) of the Act are consensual arrangements between the parties; and that the Commission is not granted authority to force a trackage agreement on a carrier. We do not decide what may be the full reach of the power of the Commission under § 5(2) (a). We are dealing here with an existing operation, not with a case where one carrier seeks to initiate a new one by acquiring the right to run its trains over the tracks of another. The Commission has the power under § 1(18) to refuse to allow abandonment of the operations. If it so refuses, trackage rights continue to be enjoyed by Brownsville. The question of what would be the amount of a fair rental to be paid by Brownsville would be highly relevant to a decision by the Commission on the issue of abandonment. We conclude that at least in that situation the Commission has the power under § 5(2) to fix a reasonable rental for the use of the facility by Brownsville regardless of the consent of Tex-Mex. Denial of that power to the Commission is not required by the language of § 5(2) (a). And this construction of § 5(2) (a) is in harmony with the power of the Commission under § 1(18) to refuse to authorize the abandonment of operations. If operations must continue, it is more consistent with this scheme of regulation for the Commission rather than courts or juries to determine the amount of the rental. Any legal, including constitutional, rights of Tex-Mex are protected by the review which Congress has granted the orders of the Commission.

Third. If the Commission granted trackage rights, Tex-Mex could then recover judgment, as we have said, for the amount of the rental fixed by the Commission. If, on the other hand, the Commission authorizes the operations to be abandoned, it "may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require." § 1(20). The Commission could permit abandonment unless Brownsville paid such reasonable compensation for the use of Tex-Mex's property as the Commission should fix. In that case, too, the court would have an administrative finding as a guide to the judgment it would enter. In case abandonment were authorized without more, respondent would then be free to move in this proceeding for judgment and to apply to the bankruptcy court for compliance with the Commission's order. In all those situations suits to recover the amounts due for use of the

tracks of Tex-Mex could be maintained in the state court under the principles announced in Central New England Ry. Co. v. Boston & Albany R. Co., 279 U.S. 415, 420, 49 S.Ct. 358, 359, 73 L.Ed. 770. If, however, the Commission decided that the trackage agreement should be dealt with in the plan, the state court would not have power to proceed further. For respondent's rights would be protected by the provisions of the plan which may be reviewed only by the reorganization court. § 77, sub. e.

Thus, however the case may be viewed, the court below should have stayed its hand and remitted the parties to the Commission for a determination of the administrative phases of the questions involved. Until that determination is had, it cannot be known with certainty what issues for judicial decision will emerge. Until that time, judicial action is premature. The judgment will be reversed and the cause remanded so that the case may be held pending the conclusion of appropriate administrative proceedings.

Reversed.[c]

STATE OF GEORGIA v. PENNSYLVANIA RAILROAD CO.

Supreme Court of the United States.
324 U.S. 439, 65 S.Ct. 716, 89 L.Ed. 1051 (1945).

Mr. Justice DOUGLAS delivered the opinion of the Court.

The State of Georgia by this motion for leave to file a bill of complaint seeks to invoke the original jurisdiction of this Court under Art. III, Sec. 2 of the Constitution. See Judicial Code § 233, 28 U.S.C. § 341, 28 U.S.C.A. § 341. The defendants are some twenty railroad companies. On November 6, 1944, we issued a rule to show cause why Georgia should not be permitted to file its bill of complaint. Returns to the rule have been made and oral argument had.

Georgia sues in four capacities only two of which we need mention: (1) In her capacity as a quasi-sovereign or as agent and protector of her people against a continuing wrong done to them; and (2) in her capacity as a proprietor to redress wrongs suffered by the State as the owner of a railroad and as the owner and operator of various institutions of the State.

The essence of the complaint is a charge of a conspiracy among the defendants in restraint of trade and commerce among the States. It alleges that they have fixed arbitrary and noncompetitive rates and charges for transportation of freight by railroad to and from Georgia so as to prefer the ports of other States over the ports of Georgia. It

[c] Footnotes of the court have been omitted.

See, to similar effect, Smith v. Hoboken Railroad, Warehouse & Steamship Connecting Co., 328 U.S. 123, 66 S.Ct. 947, —— L.Ed. —— (1945).

charges that some sixty rate bureaus, committees, conferences, associations and other private rate-fixing agencies have been utilized by defendants to fix these rates; that no road can change joint through rates without the approval of these private agencies; that this private rate-fixing machinery which is not sanctioned by the Interstate Commerce Act, 49 U.S.C.A. § 1 et seq., and which is prohibited by the anti-trust Acts has put the effective control of rates to and from Georgia in the hands of the defendants. The complaint alleges that these practices in purpose and effect give manufacturers, sellers and other shippers in the North an advantage over manufacturers, shippers and others in Georgia. It alleges that the rates so fixed are approximately 39 per cent higher than the rates and charges for transportation of like commodities for like distances between points in the North. It alleges that the defendants who have lines wholly or principally in the South are generally dominated and coerced by the defendants who have northern roads and therefore that even when the southern defendants desire, they cannot publish joint through rates between Georgia and the North when the northern carriers refuse to join in such rates.

It is alleged that the rates as a result of the conspiracy are so fixed as

"(a) to deny to many of Georgia's products equal access with those of other States to the national market;

"(b) to limit in a general way the Georgia economy to staple agricultural products, to restrict and curtail opportunity in manufacturing, shipping and commerce, and to prevent the full and complete utilization of the natural wealth of the State;

"(c) to frustrate and counteract the measures taken by the State to promote a well-rounded agricultural program, encourage manufacture and shipping, provide full employment, and promote the general progress and welfare of its people; and

"(d) to hold the Georgia economy in a state of arrested development."

The complaint alleges that the defendants are not citizens of Georgia; that Georgia is without remedy in her own courts, as the defendants are outside her jurisdiction; that she has no administrative remedy, the Interstate Commerce Commission having no power to afford relief against such a conspiracy; that the issues presented constitute a justiciable question.

The prayer is for damages and for injunctive relief. * * *

Cause of Action. It is argued that the complaint fails to state a cause of action. (1) It is pointed out that under the principle of the Abilene case no action for damages on the basis of unjust, unreasonable, or discriminatory railroad rates may be maintained without prior resort to the Interstate Commerce Commission. Texas & Pac. R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 27 S.Ct. 350, 51 L.Ed. 553, 9 Ann.Cas. 1075; Great Northern R. Co. v. Merchants' Elevator Co., 259 U.S. 285, 42 S.Ct. 477, 66 L.Ed. 943. (2) It is said that an

injunction may not be granted to restrain rates alleged to be unreasonable or discriminatory where there has been no prior determination of the matter by the Commission and that the only way a State or any other person may obtain a judicial determination of the legality of a rate is by review of the Commission's order. Baltimore & Ohio R. Co. v. United States ex rel. Pitcairn Coal Co., 215 U.S. 481, 30 S.Ct. 164, 54 L.Ed. 292; State of North Dakota v. Chicago & N. W. R. Co., 257 U.S. 485, 42 S.Ct. 170, 66 L.Ed. 329; State of Texas v. Interstate Commerce Commission, 258 U.S. 158, 42 S.Ct. 261, 66 L.Ed. 531. (3) It is said that damages under the anti-trust laws may not be recovered against railroad carriers though the rates approved by the Commission were fixed pursuant to a conspiracy. Keogh v. Chicago & N. W. R. Co., 260 U.S. 156, 43 S.Ct. 47, 67 L.Ed. 183. (4) It is said that persons other than the United States are barred from enjoining violations of the anti-trust laws by virtue of § 16 of the Clayton Act. 38 Stat. 737, 15 U.S.C. § 26, 15 U.S.C.A. § 26. See Central Transfer Co. v. Terminal R. Ass'n, 288 U.S 469, 473–475, 53 S.Ct. 444, 445, 446, 77 L.Ed. 899; Terminal Warehouse Co. v. Pennsylvania R. Co., 297 U.S. 500, 513, 56 S.Ct. 546, 551, 80 L.Ed. 827. (5) It is argued that Georgia cannot maintain an action on common law principles based upon a conspiracy among carriers to fix rates.

We think it is clear from the Keogh case alone that Georgia may not recover damages even if the conspiracy alleged were shown to exist. That was a suit for damages under § 7 of the Sherman Act, 26 Stat. 210, 7 U.S.C.A. § 15 note. The Court recognized that although the rates fixed had been found reasonable and nondiscriminatory by the Commission, the United States was not barred from enforcing the remedies of the Sherman Act. 260 U.S. at pages 161, 162, 43 S.Ct. at page 49, 67 L.Ed. 183. It held, however, that for purposes of a suit for damages a rate was not necessarily illegal because it was the result of a conspiracy in restraint of trade. The legal rights of a shipper against a carrier in respect to a rate are to be measured by the published tariff. That rate until suspended or set aside was for all purposes the legal rate as between shipper and carrier and may not be varied or enlarged either by the contract or tort of the carrier. And it added: "This stringent rule prevails, because otherwise the paramount purpose of Congress—prevention of unjust discrimination—might be defeated. If a shipper could recover under section 7 of the Anti-Trust Act for damages resulting from the exaction of a rate higher than that which would otherwise have prevailed, the amount recovered might, like a rebate, operate to give him a preference over his trade competitors." 260 U.S. at page 163, 43 S.Ct. at page 49, 67 L.Ed. 183. The reasoning and precedent of that case apply with full force here. But it does not dispose of the main prayer of the bill, stressed at the argument, which asks for relief by way of injunction.

It is clear that a suit could not be maintained here to review, annul, or set aside an order of the Interstate Commerce Commission. Congress has prescribed the method for obtaining that relief. It is exclusive of all other remedies, including a suit by a State in this Court. State of North Dakota v. Chicago & N. W. R. Co., supra; State of Texas v. Interstate Commerce Commission, supra. The same result obtains where the basis for attacking an order of the Commission is a violation of the anti-trust laws, save in the case where the United States is the complainant. For § 16 of the Clayton Act which gives relief by way of injunction against threatened loss or damage through violation of the anti-trust laws provides that no one except the United States shall be entitled to bring such suits against common carriers subject to the Interstate Commerce Act "in respect of any matter subject to the regulation, supervision, or other jurisdiction" of the Commission. Central Transfer Co. v. Terminal R. Ass'n, supra, indicates that if Georgia in the present proceeding sought to set aside the rates of the defendants, leave to file would have to be denied. In that case the Commission had approved certain rate schedules which entailed abandoning certain "off-track" stations and the employment by the carriers of a single transfer company to do inter-station hauling. The carriers proceeded to make an agreement to carry out the program which had been submitted to the Commission and which was later approved by it. Suit was brought by a private company to enjoin performance of the contract on the ground that it created a monopoly in violation of the anti-trust laws. The Court held that the suit was barred by § 16 of the Clayton Act. The Court pointed out that the purpose of § 16 was "to preclude any interference by injunction with any business or transactions of interstate carriers of sufficient public significance and importance to be within the jurisdiction of the Commission, except when the suit is brought by the government itself." 288 U.S. at page 475, 53 S.Ct. at page 446, 77 L.Ed. 899. It added (288 U.S. at page 476, 53 S.Ct. at page 446, 77 L.Ed. 899): "True, a contract may precede and have existence apart from the several acts required to perform it, and conceivably all of those acts might be done if no contract or agreement to perform them had ever existed. But when they are done in performance of an agreement, there is no way by which the agreement itself can be assailed by injunction except by restraining acts done in performance of it. That, in this case, the statute forbids, not because the contract is within the jurisdiction of the Interstate Commerce Commission, but because the acts done in performance of it, which must necessarily be enjoined if any relief is given, are matters subject to the jurisdiction of the Commission." The policy behind these restrictions placed on suitors by the Congress was aptly stated in Terminal Warehouse Co. v. Pennsylvania R. Co., supra, 297 U.S. at page 513, 56 S.Ct. at page 551, 80 L.Ed. 827, as follows: "If a sufferer from the discriminatory acts of carriers by rail or by water may sue for an injunction under the Clayton Act

without resort in the first instance to the regulatory commission, the unity of the system of regulation breaks down beyond repair." We adhere to these decisions. But we do not believe they or the principles for which they stand are a barrier to the maintenance of this suit by Georgia.

The relief which Georgia seeks is not a matter subject to the jurisdiction of the Commission. Georgia in this proceeding is not seeking an injunction against the continuance of any tariff; nor does she seek to have any tariff provision cancelled. She merely asks that the alleged rate-fixing combination and conspiracy among the defendant-carriers be enjoined. As we shall see, that is a matter over which the Commission has no jurisdiction. And an injunction designed to put an end to the conspiracy need not enjoin operation under established rates as would have been the case had an injunction issued in Central Transfer Co. v. Terminal R. Ass'n, supra.

These carriers are subject to the anti-trust laws. United States v. Southern Pacific Co., 259 U.S. 214, 42 S.Ct. 496, 66 L.Ed. 907. Conspiracies among carriers to fix rates were included in the broad sweep of the Sherman Act. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 17 S.Ct. 540, 41 L.Ed. 1007; United States v. Joint Traffic Ass'n, 171 U.S. 505, 19 S.Ct. 25, 43 L.Ed. 259. Congress by § 11 of the Clayton Act entrusted the Commission with authority to enforce compliance with certain of its provisions "where applicable to common carriers" under the Commission's jurisdiction. It has the power to lift the ban of the anti-trust laws in favor of carriers who merge or consolidate (New York Central Securities Corp. v. United States, 287 U.S. 12, 25, 26, 53 S.Ct. 45, 48, 49, 77 L.Ed. 138) and the duty to give weight to the anti-trust policy of the nation before approving mergers and consolidations. McLean Trucking Co. v. United States, 321 U.S. 67, 64 S.Ct. 370, 88 L.Ed. 544. But Congress has not given the Commission comparable authority to remove rate-fixing combinations from the prohibitions contained in the anti-trust laws. It has not placed these combinations under the control and supervision of the Commission. Nor has it empowered the Commission to proceed against such combinations and through cease and desist orders or otherwise to put an end to their activities. Regulated industries are not per se exempt from the Sherman Act. United States v. Borden Co., 308 U.S. 188, 198 et seq., 60 S.Ct. 182, 188 et seq., 84 L.Ed. 181. It is true that the Commission's regulation of carriers has greatly expanded since the Sherman Act. See Arizona Grocery Co. v. Atchison, T. & S. F. R. Co., 284 U.S. 370, 385, 386, 52 S.Ct. 183, 184, 185, 76 L.Ed. 348. But it is elementary that repeals by implication are not favored. Only a clear repugnancy between the old law and the new results in the former giving way and then only pro tanto to the extent of the repugnancy. United States v. Borden Co., supra, 308 U.S. at pages 198, 199, 60 S.Ct. at pages 188, 189, 84 L.Ed. 181. None of the powers acquired by the Commission since the enactment

of the Sherman Act relates to the regulation of rate-fixing combinations. Twice Congress has been tendered proposals to legalize rate-fixing combinations. But it has not adopted them. In view of this history we can only conclude that they have no immunity from the anti-trust laws. * * *

These considerations emphasize the irrelevancy to the present problem of the fact that the Commission has authority to remove discriminatory rates of the character alleged to exist here. Under § 3(1) of the Act rates are declared unlawful which give "any undue or unreasonable preference or advantage" to any port, region, district, territory and the like. And the Commission has taken some action in that regard. See State of Alabama v. New York C. R. Co., 235 I.C.C. 255; Id., 237 I.C.C. 515; Live Stock to and from the South, 253 I.C.C. 241. The present bill does not seek to have the Court act in the place of the Commission. It seeks to remove from the field of rate-making the influences of a combination which exceed the limits of the collaboration authorized for the fixing of joint through rates. It seeks to put an end to discriminatory and coercive practices. The aim is to make it possible for individual carriers to perform their duty under the Act, so that whatever tariffs may be continued in effect or superseded by new ones may be tariffs which are free from the restrictive, discriminatory, and coercive influences of the combination. That is not to undercut or impair the primary jurisdiction of the Commission over rates. It is to free the rate-making function of the influences of a conspiracy over which the Commission has no authority but which if proven to exist can only hinder the Commission in the tasks with which it is confronted. * * *

Mr. Chief Justice STONE, dissenting.

Mr. Justice ROBERTS, Mr. Justice FRANKFURTER, Mr. Justice JACKSON, and I think that the application of the State of Georgia for leave to file its amended bill of complaint in this Court should be denied (1) because in its judicial discretion, this Court should, without deciding the merits, leave the State to its remedy, if any, in the district court; (2) because the State lacks standing to present the only substantial issue in the case; and (3) because in the present posture of the case, the bill of complaint, for several reasons, fails to state a cause of action for which a court of equity can give effective relief. * * *

But even if, as the Court decides, Georgia has standing to maintain this suit, either in its own right or as parens patriae, and this Court has jurisdiction of the suit and should, in the exercise of its discretion, entertain it rather than remit the parties to the district court, the more important question remains whether the present suit is one in which a court of equity can give any effective relief.

The suit, so far as the Court allows its prosecution, is in equity to restrain an alleged conspiracy by the defendant rail carriers to fix and maintain unjust, unlawful, excessive, and discriminatory freight rates

in violation of the antitrust laws. Section 16 of the Clayton Act, 15 U.S.C. § 26, 15 U.S.C.A. § 26, authorizes "any person" to maintain a suit to restrain violations of the antitrust laws, and the State of Georgia, suing for its own injuries, is a person within the meaning of that section. State of Georgia v. Evans, 316 U.S. 159, 62 S.Ct. 972, 86 L.Ed. 1346. The section provides that the relief to be given is an injunction "against threatened loss or damage by a violation of the anti-trust laws * * *, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings * * *." And even though, as asserted, the suit be maintainable in the federal courts independently of the Clayton Act, the controlling principles governing the maintenance of the suit are the same in either case. The plaintiff must show threatened injury, Vicksburg Waterworks Co. v. Vicksburg, 185 U.S. 65, 82, 22 S.Ct. 585, 592, 46 L.Ed. 808; Paine Lumber Co. v. Neal, 244 U.S. 459, 471, 37 S.Ct. 718, 720, 61 L.Ed. 1256; Duplex Printing Press Co. v. Deering, 254 U.S. 443, 464, 465, 41 S.Ct. 172, 175, 176, 65 L.Ed. 349, 16 A.L.R. 196; compare State of Texas v. Florida, 306 U.S. 398, 406–412, 59 S.Ct. 563, 567–571, 830, 83 L.Ed. 817, 121 A.L.R. 1179, with Commonwealth of Massachusetts v. Missouri, supra, 308 U.S. 15, 16, 60 S.Ct. 42, 84 L.Ed. 3, for which he is without other adequate remedy, Matthews v. Rodgers, 284 U.S. 521, 525, 526, 52 S.Ct. 217, 219, 220, 76 L.Ed. 447, and cases cited; Schoenthal v. Irving Trust Co., 287 U.S. 92, 94, 53 S.Ct. 50, 51, 77 L.Ed. 185; Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50–52, 58 S.Ct. 459, 463–465, 82 L.Ed. 638, and cases cited, and for which a court of equity is able to provide a remedy.

Georgia is threatened with injury only as the alleged conspiracy will result in the defendants' charging freight rates other than those which would exist in the absence of the conspiracy. That is, Georgia is not injured unless other rates than those now in force would be charged if the alleged conspiracy were to cease. While threatened damage in that sense could be assumed in a free competitive market, freight rates are not, under the Interstate Commerce Act, arrived at by the processes of free competition. The requirements of the Act are, as we will see, that the rates be just and reasonable and that they accord with the national transportation policy; the determination, in the first instance, whether the rates conform to those standards is left by Congress to the Interstate Commerce Commission, not to the courts. And unless Georgia can show that the present rates are unlawful, or that some other rate structure, which could be substituted for that now in force, would be just and reasonable, which Georgia cannot do without prior resort to the Commission, it can not show that any other structure could lawfully exist or that any injury to it is threatened by the conspiracy. * * *

Here, by the terms of § 16 of the Clayton Act, as well as the principles generally governing equitable relief in the federal courts, the

State, in order to secure the aid of equity, must show injury caused or threatened by the alleged unlawful acts of which it complains. Since the wrongful acts relied upon are a conspiracy to adopt and maintain unjust, unlawful, excessive or discriminatory freight rates, the only threatened injury to the State or its inhabitants, resulting from the conspiracy, is that which is or may be caused by such unlawful rates.

But the Interstate Commerce Act requires all interstate rail carriers, before putting into effect rates or charges for interstate transportation to adopt and file with the Commission just and reasonable rates. Section 1(4) (5) (6), 6(1) (3), 49 U.S.C. § 1(4) (5) (6), 6(1) (3), 49 U.S.C.A. § 1(4–6), 6(1, 3). It confers on the Commission exclusive jurisdiction to determine the lawfulness of all rates appearing in the filed tariffs, and authority to suspend rates, and to order the railroad to cease and desist from charging other than the lawful rates. Section 15(1) (7), 49 U.S.C. § 15(1) (7), 49 U.S.C.A. § 15 (1, 7). The Commission's determination is to be in accordance with the "national transportation policy", to develop and preserve a national transportation system, see Railroad Commission of State of Wisconsin v. Chicago, B. & Q. R. Co., 257 U.S. 563, 585, 42 S.Ct. 232, 236, 66 L.Ed. 371, 22 A.L.R. 1086; New England Divisions Case (Akron, C. & Y. R. Co. v. United States), 261 U.S. 184, 189, 190, 43 S.Ct. 270, 273, 67 L.Ed. 605; Railroad Commission v. Southern Pacific Co., 264 U.S. 331, 341, 342, 44 S.Ct. 376, 377, 378, 68 L.Ed. 713, and to establish and maintain "reasonable charges * * *, without * * * unfair or destructive competitive practices * * *." Transportation Act of 1940, c. 722, 54 Stat. 899, § 1, 49 U.S.C.A. note preceding § 1.

The Commission is directed to consider the effect of rates on the movement of traffic, and the need of adequate and efficient railway transportation service at low cost, as well as the carriers' need of revenues sufficient to enable them to provide that service. Interstate Commerce Act, as amended, § 15a, 49 U.S.C. § 15a, 49 U.S.C.A. § 15a. In fixing rates or divisions, the Commission's determination may take account of the financial needs of the weaker carriers, by giving them a larger share of divisions, or by a general rate increase. New England Divisions Case, supra, 261 U.S. 189–195, 43 S.Ct. 273–275, 67 L.Ed. 605; Beaumont, S. L. & W. R. Co. v. United States, 282 U.S. 74, 51 S.Ct. 1, 75 L.Ed. 221; cf. Ann Arbor R. Co. v. United States, 281 U.S. 658, 50 S.Ct. 444, 74 L.Ed. 1098. It may fix minimum as well as maximum rates, § 15, 49 U.S.C. § 15, 49 U.S.C.A. § 15, thus permitting it to prevent cut-throat competition and to protect weaker competitors. It may consider the effect of competing means of transportation, or other relevant circumstances and conditions attending the transportation service. See Barringer & Co. v. United States, 319 U.S. 1, 729, 63 S.Ct. 967, 87 L.Ed. 1171, and authorities cited; and on the considerations upon which the Commission fixes rates, see Sharfman, The Interstate Commerce Commission, Volume III-B. These and many other controlling factors, which enter the Commission's determination of rates,

may be irrelevant to decision in an ordinary Sherman Act case, but are inextricably interwoven with the present suit, in which the State must establish that injury to it is threatened by the conspiracy to fix freight rates.

The Commission's orders are enforceable by injunctions in the district courts. Section 16(12), 49 U.S.C. § 16(12), 49 U.S.C.A. § 16(12). And the administrative remedy is exclusive of any which may be afforded by courts, at least until the Commission has passed upon the vaildity of the rates and classifications involved. Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 27 S.Ct. 350, 51 L.Ed. 553, 9 Ann.Cas. 1075; Robinson v. Baltimore & Ohio R. R. Co., 222 U.S. 506, 32 S.Ct. 114, 56 L.Ed. 288; Northern Pacfic Ry. Co. v. Solum, 247 U.S. 477, 38 S.Ct. 550, 62 L.Ed. 1221; Director General of Railroads v. Viscose Company, 254 U.S. 498, 41 S.Ct. 151, 65 L.Ed. 372; Midland Valley R. Co. v. Barkley, 276 U.S. 482, 48 S.Ct. 342, 72 L.Ed. 664. Until the Commission acts, no court can say that the rates are not lawful and reasonable or that they are not within the lowest range of the zone of reasonableness. Nor can either be assumed, the burden being upon Georgia to show that it is injured by the acts of which it complains. And if the present rates are at the lowest point of reasonableness, as they well may be, Georgia is not injured, for in that event no lower rates could be lawfully enforced by the Commission or the courts.

It is not without pertinence to the present application that the State of Georgia and seven other southern States are parties to proceedings now pending before the Interstate Commerce Commission, Docket No. 28300, Class Rate Investigation, and Docket No. 28310, Consolidated Freight Classification, in which the Chairman of the Georgia Public Service Commission has appeared as the principal witness on behalf of the State.[d] In these proceedings the witness urged uniformity of rates in southern and official classification territories, in conformity to the official territory system of rates. The witness relied on § 3(1) of the Act, 49 U.S.C. § 3(1), 49 U.S.C.A. §

[d] See No. 28300, Class Rate Investigation, 1939, and No. 28310, Consolidated Freight Classification, 262 I.C.C. 447 (1945), in which the Interstate Commerce Commission ordered (1) the establishment of a uniform classification of property for transportation by rail, applicable throughout the entire United States; (2) the establishment of a prescribed scale of class rates, to take effect simultaneously with the uniform classification; (3) pending the establishment of the classification unification and rate revisions as aforesaid, an interim adjustment of rates, of which the principal features were an increase of 10% in class rates on traffic within Official Classification Territory, and a reduction of 10% in class rates on traffic within Southern, Southwestern and Western Trunk-Line Territories, and also among those territories, and between any of such territories and Official Classification Territory.

Suits were filed by a number of northern states and certain western railroads to set aside that part of the Interstate Commerce Commission's order which prescribed the interim rate revision. The complaints were dismissed, in State of New York v. United States, 65 F.Supp. 856 (N.D.N.Y.1946).

3(1), making it unlawful for any rail carrier to make or give undue or unreasonable preferences or advantage to any particular person, locality or particular description of traffic; on § 1(4) (5) (6), 49 U.S.C. § 1(4) (5) (6), 49 U.S.C.A. § 1 (4–6), requiring common carriers by rail to establish just and reasonable rates, fares, charges and classifications; and on § 5(b) of the Transportation Act of 1940, 49 U.S.C.A. § 3 note, which requires the Commission to investigate the lawfulness of rates between points in different classification territories and to enter such orders as may be appropriate for the removal "of any unlawfulness which may be found to exist."

It is plain that the Commission has jurisdiction in these proceedings to set aside such unlawful rates as may have resulted from the conspiracies alleged in the State's amended complaint. If the Commission orders them set aside, nothing further remains for any court to do, for reasons which will presently more fully appear, save only as it may be asked to review or enforce the Commission's order. Without prior resort to the Commission, Georgia does not and cannot establish in a court proceeding, that it is threatened with injury by the conspiracy or that it is necessary for it to resort to the courts to secure the relief which it seeks in the present suit.[e]

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, ETC. v. INTERNATIONAL UNION OF UNITED BREWERY, ETC. WORKERS OF AMERICA

Circuit Court of Appeals of the United States, Ninth Circuit.
106 F.2d 871 (1939)

DENMAN, Circuit Judge. This is an appeal from a decree of the District Court declaratively adjudging that a union, hereafter called Brewery Workers Union, is the sole bargaining agent for certain employees of certain breweries in California, Oregon and Washington and that the employing breweries shall deal solely with that union as the collective bargaining agent of their employees, and enjoining another union, hereafter called the Teamsters Union, claiming to have been designated and selected as the employees' bargaining agent, from interfering by force and violence or otherwise with the employer-employee relationship of the breweries and brewery workers, or the breweries' business. The parties, pertinent portions of the pleadings, relief sought and facts found, so far as this opinion requires, are:

The individual plaintiffs, Henry Jennichen, Fred Heusseler and Theodore Day, sue on their own behalf as employees of the defendant Breweries in California, Oregon and Washington and on behalf of

[e] Footnotes of the court have been omitted.

some two thousand seven hundred employees similarly situated, and are hereafter called Employees.

The plaintiff International Union of United Brewery, Flour, Cereal and Soft Drink Workers of America sues in a claimed capacity as the designated and selected representative of the employees of the defendant Breweries employed in the Brewing, Bottling and Delivery departments and each and all of them of the defendant Breweries and in no other capacity and is hereafter called Brewery Workers Union.

The defendants, International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers and its local unions and subordinate bodies, are sued herein as unincorporated associations of individuals and they together with the individual defendants are hereafter called Teamsters' Union.

The defendant California State Brewers Institute is sued herein as the representative of the defendant Breweries and is hereafter called Institute.

The defendant Brewing Companies and each of them is sued as a corporation engaged in the manufacture of products of the brewing industry, to-wit, malt beverages, and the employers of the plaintiff employeees and are hereafter called Breweries. The Breweries' beer in substantial quantities was sold and transported out of one state and into another and sometimes into a third state.

The American Federation of Labor, hereafter called the Federation, is not a party to this action.

The Brewery Workers Union is a so-called vertical or industrial union including three crafts, the brewers, bottlers and shipping and delivery men. The Teamsters' Union is a union of employees engaged in the craft of shipping and delivery of all kinds.

For more than twenty-five years last past all of the Employees in the brewing, bottling and shipping departments of the Breweries have been represented in collective bargaining with their employers, the Breweries, by the Brewery Workers Union.

After the passage of the National Labor Relations Act, Act of July 5, 1935, 49 Stats. 449, 29 U.S.C.A. §§ 151–166, all of the Employees employed in the brewing, bottling and delivery departments of the Breweries designated and selected in writing the Brewery Workers Union as their sole and exclusive representative for collective bargaining with respect to wages, rates of pay, hours of labor and other conditions of employment with their employers, the Breweries. These writings were delivered to the Breweries and the Institute in 1936 and again in 1937.

Prior to the passage of the National Labor Relations Act, supra, the Breweries and Institute signed a document which purported to bind the Breweries to employ only members of the Teamsters' Union in their delivery department and which by its terms ended not later

than May 6, 1937. The purpose of this arrangement was and the result would be to force all of the Employees in the delivery department either to surrender their jobs or to join the Teamsters' Union. At no time had any of the Employees in the delivery department of the Breweries belonged to the Teamsters' Union.

Having signed these documents the Breweries, after the effective date of the National Labor Relations Act, supra, were pressed by the Teamsters' Union to employ only members of the Teamsters' Union, which would have necessitated the discharge of their present Employees. Upon the refusal of the Breweries to discharge their employees, the Teamsters' Union, whose trucks carried interstate and otherwise the Breweries' beer, declined to carry it. The Teamsters' Union also instituted and carried on, and was carrying on at the date of the trial, a boycott in the states of Washington and Oregon on California beer manufactured by the Breweries and since the commencement of the boycott in June of 1937, the products of the Breweries have not been handled in the states of Oregon and Washington except in a limited degree. The Teamsters' Union also set in motion a reign of violence and intimidation directed at the Breweries and Employees.

The result of that boycott and these acts instituted and maintained by the Teamsters' Union in the states of Oregon and Washington was and has been to reduce substantially the work of the Employees in the Breweries and the amount of interstate commerce in the malt beverages.

The Employees' and Brewery Workers Union's complaint stated the above facts and sought the declaratory relief and injunction granted by the trial court. The Teamsters answered and filed a cross-complaint alleging that the Brewery Workers Union and the Teamsters are affiliated members of the Federation; that by contractual relations between the two unions and their employee members and the Federation, the Employees had given the Federation the power to declare the Brewery Workers Union not the bargaining agent of the Employees engaged in transportation and delivering the Breweries' malt beverages, and to designate and select for the Empolyees their exclusive bargaining agent, and that the Federation has exercised the power and designated and selected the Teamsters' Union as such an exclusive bargaining agent. The Teamsters' Union has offered evidence of the charters of the two unions, the constitution of the Federation in which they are affiliated and the action of the Federation, tending to establish such a designation and selection of that union as the Employees' bargaining agent.

The complaint also joined the Breweries and the Institute as defendants and, in cross-complaints, the two latter sought a declaration of the rights of the parties with reference to the Breweries' and Institute's obligation to the Brewery Workers Union and the Teamsters' Union, particularly with reference to which union was the

bargaining agent of the Employees. They also sought an injunction against the Teamsters' Union.

(A) Jurisdiction for declaratory relief.

The National Labor Relations Act in Section 9(c), 49 Stats. 453, 29 U.S.C.A. § 159(c), provides: "(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 [160 of this title] or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain [sic] such representatives."

Regulations promulgated by the Board since the decision below established the method by which both the employers and the employees are to petition the Board to have it determine which of the two unions is entitled to act as the bargaining agent.[1]

[1]"Article III

"Procedure under Section 9(c) of the Act for the Investigation and Certification of Representatives.

"Section 1. A petition requesting the Board to investigate and certify under Section 9(c) of the Act the name or names of the representatives designated or selected for the purpose of collective bargaining may be filed by an employee or any person or labor organization acting on behalf of employees, or by an employer. Except as provided in Section 10 of this Article, such petition shall be filed with the Regional Director for the Region wherein the contemplated bargaining unit exists, or, if the contemplated bargaining unit exists in two or more Regions, with the Regional Director for any such Regions. Such petition shall be in writing, the original being signed and sworn to before any notary public or other person duly authorized by law to administer oaths and take acknowledgments or any agent of the Board authorized to administer oaths or acknowledgments. Three additional copies of the petition shall be filed.*

"* Blank forms for filing such petitions will be supplied by the Regional Director upon request.

"Sec. 2. (a) Such petition, when filed by an employee or any person or labor organization acting on behalf of employees, shall contain the following:

"(1) The name and address of the petitioner.

"(2) The name and address of the employer or employers involved, the general nature of their businesses, and the approximate number of their employees.

"(3) A description of the bargaining unit which petitioner claims is appropriate and the approximate number of employees in such unit.

"(4) The number or percentage of employees in such unit who have designated or selected petitioner to be their representative for collective bargaining.

"(5) The names of any other known individuals or labor organizations which claim to represent any of the employees in the alleged bargaining unit.

"(6) A brief statement setting forth the nature of the question that has arisen concerning representation.

"(7) Any other relevant facts.

"(b) Such petition, when filed by an employer, shall contain the following:

"(1) The name and address of the petitioner.

"(2) The general nature of the business and the approximate number of employees.

"(3) A description of the bargaining unit or units claimed by competing la-

There is no merit in the contention made that because both unions are members of the American Federation of Labor, the Board has no power to determine which union is the bargaining agent. If the word "may" as used in Section 9(c) of the Act means "must", the Board cannot refuse to decide the question concerning the employers' duty to bargain with one or the other of the contending unions. If "may" is construed to confer a discretionary power on the Board, it is a legal discretion which in the instant case the Board should exercise to effectuate the declared purposes of the Act.

The exercise of the Board's power cannot be avoided by a finding by the Board that the unions and Federation have contractual relations which, in the absence of the National Labor Relations Act, would require the dispute to be settled by the Federation. Congress makes no such reservation from the jurisdiction of the Board. On the contrary, one of the purposes of the Act was to afford both employer and employee a public tribunal in which a prompt decision would be given to determine with whom the employer should bargain. This purpose appears in that portion of the declaration of policy of the Act stating * * * "It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection." National Labor Relations Act, § 1, 49 Stats. 449, 450, 29 U.S.C.A. § 151.

As this court has held in refusing an intervention of a union for the purpose of showing that the right to strike was a matter of the Federation's concern and not that of the Board, "The proposed interveners urge that the dispute, as to which union has jurisdiction, by virtue of the charter provisions should be determined by the Federation, and rely on cases where the courts have declined to enter into a dispute which could be settled by the union. The charter provisions cannot be permitted to control an exercise by Congress of the

bor organizations to be appropriate, and the approximate number of employees in such unit or units.

"(4) The names of all known individuals or labor organizations which claim to represent any of the employees in the claimed bargaining unit or units.

"(5) A brief statement setting forth that a question or controversy affecting commerce has arisen concerning the representation of employees in that two or more such labor organizations have presented to the employer conflicting claims that each represents a majority of the employees in the unit or units set forth above in paragraph 2 (b) (3).

"(6) Any other relevant facts.

* * * * *"

(Emphasis supplied)

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power to regulate commerce, and the contractual relationships arising under the charter provisions are subject to the exercise of that power." National Labor Relations Board v. Star Pub. Co., 9 Cir., 97 F.2d 465, 470.

Nor is there merit in the contention that because the only unfair labor practices subject to Board prevention are those of the employer, the latter, in procuring from the Board the determination of which of two unions is the legally designated and selected agent, is doing nothing for the employees whose protection is the primary aim of the legislation. We do not believe Congress contemplated a necessary hostility between the employees and their employer and that the traditional amity of a group of human beings in an enterprise creating beer or bedsteads or beneficent surgical instruments hopelessly has disappeared in an eternal class war.

It so happens that here all of the employees are members of one union. However, in the greater number of cases some of the employees belong to one union and some to another. While some of the employees of both groups are undoubtedly vitally and primarily concerned with the success of the particular union to which they belong in the controversy between the two unions, there is still a great body of employees who are anxious to serve their employers in a happy relationship and to have certainty in their incomes for the support and nurture of their families and the education of their children and, often, the payment of installments on their homes.

These deprecate internecine union battles where both unions decline a governmental decision on their differences and have a policy of fighting it out by strike, boycotts and other methods, legal and illegal. They welcome the insistence of the employer in procuring peace and stability in the institution which at once yields wages to the laborer and payments of the other corporate indebtedness and may yield dividends to the stockholder. In such a situation it may well be that the employer owes a moral obligation to the employees to initiate the proceedings which will bring peace to all who are ground between the upper and nether stones of factional disputes. To construe the Act differently is to ignore the fact that laws are passed by human beings for human beings living in a world as it is and not in one of economic or logical abstractions.

Nor is there merit in the contention that because it is clear what the decision of the Board will be on the issue raised by the Teamsters, a court has original jurisdiction merely because it may be certain what the Board will hold. Here is a violent "controversy" in all the producing units of a wide flung industry of the exact kind the National Labor Relations Act is purposed to settle. There is not excluded from the jurisdiction of the Board controversies which may be decided by holding that the pleadings of one or another of the contestants fails to state facts sufficient to maintain its contention. It has

such jurisdiction just as a law court has jurisdiction to decide a controversy over the claimed nonpayment of a promissory note, even though the complaint alleges payment.

Since both the Employees and the Brewery Workers Union and also the Breweries have an administrative tribunal established by Congress for the specific purpose of determining the controversy concerning the bargaining agent, the decision of that tribunal, and not the federal court, first should have been sought. Myers v. Bethlehem Shipbuilding Corporation, 303 U.S. 41, 50, 58 S.Ct. 459, 82 L.Ed. 638. Cf. Fur Workers Union, Local No. 72 v. Fur Workers Union, No. 21238, 70 App.D.C. 122, 105 F.2d 1, 12.

It is argued that certification by the Board would not be a final order, would not be subject to review nor enforceable by the Board nor any one 'aggrieved,' and, hence, would not be a remedy. Therefore, it is urged, there is no administrative remedy which the employee or union claiming representation rights first should seek.

Whether or not certification by the Board be denominated a remedy, it is a determination which we must assume will be observed. However, if the relationship, the existence of which is certified by the Board, be unlawfully interfered with, and if the Board's powers afford inadequate protection to the employees and their union agent, it may well be that under the principles of equity the aid of the courts may be invoked.

The decree declaring the Brewery Workers Union to be the bargaining agent of the brewery deliverymen and ordering the Brewers to deal with that union is reversed and the complaint and cross-complaint, other than the Teamsters', ordered dismissed as to their claims for declaratory relief. The dismissal of the cross-complaint of the Teamsters' is affirmed.

* * *

MOORE v. ILLINOIS CENTRAL RAILROAD CO.

Supreme Court of the United States.
312 U.S. 630, 61 S.Ct. 754, 85 L.Ed. 1089 (1941).

Mr. Justice BLACK delivered the opinion of the Court.

* * *

Petitioner Moore, a member of the Brotherhood of Railroad Trainmen, brought suit for damages against respondent railroad company in a Mississippi state court, claiming that he had been wrongfully discharged contrary to the terms of a contract between the Trainmen and the railroad, a copy of the contract being attached to the complaint as an exhibit. Petitioner alleged that as a member of the Trainmen he was entitled to all the benefits of the contract. Judgment on the pleadings was rendered against Moore by the trial court. Upon

appeal the Mississippi Supreme Court reversed and remanded. One of the railroad's pleas was that the contract of employment between Moore and the railroad was verbal, rather than written, and that any action thereon was therefore barred by the three-year statute of limitations provided by Section 2299 of the Mississippi Code of 1930. With reference to this plea the Mississippi Supreme Court said: "The appellant's suit is not on a verbal contract between him and the appellee, but on a written contract made with the appellee, for appellant's benefit, by the Brotherhood of Railroad Trainmen; consequently, section 2299, Code of 1930, has no application, and the time within which the appellant could sue is six years under section 2292, Code of 1930." Moore v. Illinois Central Railroad Co., supra, 180 Miss. 291, 176 So. 596.

After the remand by the Mississippi Supreme Court, Moore amended his bill to ask damages in excess of $3,000, and the railroad removed the case to the federal courts. The District Court, considering itself bound by state law, held that the Mississippi three-year statute of limitations did not apply, but on this point the Circuit Court of Appeals reversed, declining to follow the Mississippi Supreme Court's ruling. Calling attention to the fact that the Mississippi Supreme Court does not regard itself as bound by a decision upon a second appeal, the Circuit Court of Appeals (one judge dissenting) said: "Since the removal of the case to the federal court this court stands in the place of the Supreme Court of Mississippi and with the same power of reconsideration." But the Circuit Courts of Appeals do not have the same power to reconsider interpretations of state law by state courts as do the highest courts of the state in which a decision has been rendered. The Mississippi Supreme Court had the power to reconsider and overrule its former interpretation, but the court below did not. * * *

But respondent says that there is another reason why the judgment in its favor should be sustained. This reason, according to respondent, is that both the District Court and the Circuit Court of Appeals erred in failing to hold that Moore's suit was prematurely brought because of his failure to exhaust the administrative remedies granted him by the Railway Labor Act, 44 Stat. 577, as amended, 48 Stat. 1185, 45 U.S.C. § 151 et seq., 45 U.S.C.A. § 151 et seq. But we find nothing in that Act which purports to take away from the courts the jurisdiction to determine a controversy over a wrongful discharge or to make an administrative finding a prerequisite to filing a suit in court. In support of its contention, the railroad points especially to section 153(i), which, as amended in 1934, provides that disputes growing out of grievances or out of the interpretation or application of agreements "shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party

to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes." And in connection with this statutory language the railroad also directs our attention to a provision in the agreement between the Trainmen and the railroad—a provision authorizing Moore to submit his complaint to officials of the railroad, offer witnesses before them, appeal to higher officers of the company in case the decision should be unsatisfactory, and obtain reinstatement and pay for time lost if officials of the railroad should find that his suspension or dismissal was unjust. It is to be noted that the section pointed out, § 153(i), as amended in 1934, provides no more than that disputes "may be referred * * * to the * * * Adjustment Board * * *." It is significant that the comparable section of the 1926 Railway Labor Act (44 Stat. 577, 578), had, before the 1934 amendment, provided that upon failure of the parties to reach an adjustment a "dispute shall be referred to the designated adjustment board by the parties, or by either party * * *." Section 3(c). This difference in language, substituting "may" for "shall", was not, we think, an indication of a change in policy, but was instead a clarification of the law's original purpose. For neither the original 1926 Act, nor the Act as amended in 1934, indicates that the machinery provided for settling disputes was based on a philosophy of legal compulsion. On the contrary, the legislative history of the Railway Labor Act shows a consistent purpose on the part of Congress to establish and maintain a system for peaceful adjustment and mediation voluntary in its nature. The District Court and the Circuit Court of Appeals properly decided that petitioner was not required by the Railway Labor Act to seek adjustment of his controversy with the railroad as a prerequisite to suit for wrongful discharge. But for failure to follow state law on the state statute of limitations, the judgment of the Circuit Court of Appeals is reversed; the judgment of the District Court is affirmed. It is so ordered.

Judgment of the Circuit Court of Appeals reversed, and judgment of the District Court affirmed.

Mr. Justice FRANKFURTER concurs in the result.[f]

[f] Footnotes of the court have been omitted.

SECTION 2. APPLICATION FOR JUDICIAL INTERVENTION PRIOR TO FINAL ADMINISTRATIVE ACTION

PRENTISS v. ATLANTIC COAST LINE CO.

Supreme Court of the United States.
211 U.S. 210, 29 S.Ct. 67, 53 L.Ed. 150 (1908).

Mr. Justice HOLMES delivered the opinion of the court:

These are bills in equity brought in the circuit court to enjoin the members and clerk of the Virginia State Corporation Commission from publishing or taking any other steps to enforce a certain order fixing passenger rates. The bills allege, with some elaboration of the facts, that the rates in question are confiscatory, and other matters not necessary to mention, and set up the 14th Amendment, etc. The defendants appeared specially, and by demurrer and plea respectively put forward that the proceedings before the commission are proceedings in a court of the state, which the courts of the United States are forbidden to enjoin (Rev.Stat. § 720, U.S.Comp.Stat.1901, p. 581), and that the decision of the commission makes the legality of the rates *res judicata*. On these pleadings final decrees were entered for the plaintiffs, and the defendants appealed to this court. Therefore, as the case is presented, it is to be assumed that the order confiscates the plaintiffs' property and infringes the 14th Amendment if the matter is open to inquiry. The question principally argued, and the main question to be discussed, is whether the order is one which, in spite of its constitutional invalidity, the courts of the United States are not at liberty to impugn.

The State Corporation Commission is established and its powers are defined at length by the Constitution of the state. There is no need to rehearse the provisions that give it dignity and importance or that add judicial to its other functions, because we shall assume that, for some purposes, it is a court within the meaning of Rev.Stat. § 720, and in the commonly accepted sense of that word. Among its duties it exercises the authority of the state to supervise, regulate, and control public service corporations, and to that end, as is said by the supreme court of Virginia and repeated by counsel at the bar, it has been clothed with legislative, judicial, and executive powers. Norfolk & P. Belt Line R. Co. v. Com., 103 Va. 289, 294, 49 S.E. 39.

The state Constitution provides that the commission, in the performance of the duty just mentioned, shall, from time to time, prescribe and enforce such rates, charges, classification of traffic, and rules and regulations for transportation and transmission companies doing business in the state, and shall require them to establish and maintain all such public service facilities and conveniences as may

be reasonable and just. Before prescribing or fixing any rate or charge, etc., it is to give notice (in case of a general order not directed against any specific company by name, by four weeks' publication in a newspaper) of the substance of the contemplated action and of a time and place when the commission will hear objections and evidence against it. If an order is passed, the order again is to be published as above before it shall go into effect. An appeal to the supreme court of appeals is given of right to any party aggrieved, upon conditions not necessary to be stated, and that court, if it reverses what has been done, is to substitute such order as, in its opinion, the commission should have made. The commission is to certify the facts upon which its action was based and such evidence as may be required, but no new evidence is to be received, and how far the findings of the commission can be revised perhaps is not quite plain. No other court of the state can review, reverse, correct, or annul the action of the commission, and, in collateral proceedings, the validity of the rates established by it cannot be called in doubt.

When a rate has been fixed, the commission has power to enforce compliance with its order by adjudging and enforcing, by its own appropriate process, against the offending company, the fines and penalties established by law. But a hearing is required and the validity and reasonableness of the order may be attacked again in this proceeding, and all defenses seem to be open to the party charged with a breach.

On July 31, 1906, under the provisions outlined, the commission published in a newspaper notice to the several steam railroad companies doing business in Virginia, and all persons interested, that, at a certain time and place, it would hear objections to an order prescribing a maximum rate of 2 cents a mile for the transportation of passengers, with details not needing to be stated. A hearing was had, and the complainants (appellees) severally appeared and urged objections similar to those set up in the bills. On April 27, 1907, the commission passed an order prescribing the rates, but in more specific form. For certain railroads named, including all of the complainants except as we shall state, the rate was to be 2 cents; for certain excepted branches of the Southern Railway Company, 2½; for others, including the Chesapeake Western Railway, 3; and for others 3½ cents a mile, with a minimum charge of 10 cents. Publication of the order was directed, and at that stage these bills were brought.

In order to decide the cases it is not necessary to discuss all the questions that were raised or touched upon in argument, and some we shall lay on one side. We shall assume that when, as here, a state Constitution sees fit to unite legislative and judicial powers in a single hand, there is nothing to hinder, so far as the Constitution of the United States is concerned. Dreyer v. Illinois, 187 U.S. 71, 83, 84, 47 L.Ed. 79, 85, 23 Sup.Ct.Rep. 28; Winchester & S. R. Co. v. Com., 106 Va. 264, 268, 55 S.E. 692. We shall assume, as we have

said, that some of the powers of the commission are judicial, and we shall assume, without deciding, that, if was proceeding against the appellees to enforce this order and to punish them for a breach, it then would be sitting as a court and would be protected from interference on the part of courts of the United States.

But we think it is equally plain that the proceedings drawn in question here are legislative in their nature, and none the less so that they have taken place with a body which, at another moment, or in its principal or dominant aspect, is a court such as is meant by § 720. A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative, not judicial, in kind, as seems to be fully recognized by the supreme court of appeals (Com. v. Atlantic Coast Line R. Co., 106 Va. 61, 64, 7 L.R.A.[N.S.] 1086, 117 Am.St.Rep. 983, 55 S.E. 572), and especially by its learned president in his pointed remarks in Winchester & S. R. Co. v. Com., 106 Va. 264, 281, 55 S.E. 692. See, further, Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co., 167 U.S. 479, 499, 500, 505, 42 L.Ed. 243, 253, 255, 17 Sup.Ct.Rep. 896; San Diego Land & Town Co. v. Jasper, 189 U.S. 439, 440, 47 L.Ed. 892, 893, 23 Sup.Ct.Rep. 571.

Proceedings legislative in nature are not proceedings in a court, within the meaning of Rev.Stat. § 720, no matter what may be the general or dominant character of the body in which they may take place. Southern R. Co. v. Greensboro Ice & Coal Co., 134 Fed. 82, 94, affirmed in 202 U.S. 543, 50 L.Ed. 1142, 26 Sup.Ct.Rep. 722. That question depends not upon the character of the body, but upon the character of the proceedings. Ex parte Virginia, 100 U.S. 339, 348, 25 L.Ed. 676, 680. * * *

It appears to us that the most plausible objection to these bills is not the one most dwelt upon in argument, but that they were brought too soon. Our doubt is a narrow one and its limits should be understood. It seems to us clear that the appellees were not bound to wait for proceedings brought to enforce the rate and to punish them for departing from it. Those, we have assumed in favor of the appellants would be proceedings in court, and could not be enjoined; while to confine the railroads to them for the assertion of their rights would be to deprive them of a part of those rights. If the railroads were required to take no active steps until they could bring a writ of error from this court to the supreme court of appeals after a final judgment, they would come here with the facts already found against them. But the determination as to their rights turns almost wholly upon the facts to be found. Whether their property was taken unconstitutionally depends upon the valuation of the property, the income to be derived

from the proposed rate, and the proportion between the two,—pure matters of fact. When those are settled the law is tolerably plain. All their constitutional rights, we repeat, depend upon what the facts are found to be. They are not to be forbidden to try those facts before a court of their own choosing, if otherwise competent. "A state cannot tie up a citizen of another state, having property within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts." Reagan v. Farmers' Loan & T. Co., 154 U.S. 362, 391, 38 L.Ed. 1014, 1021, 4 Inters.Com.Rep. 560, 14 Sup.Ct.Rep. 1047; Smyth v. Ames, 169 U.S. 466, 517, 42 L.Ed. 819, 838, 18 Sup.Ct Rep. 418. See McNeill v. Southern R. Co., 202 U S. 543, 50 L.Ed. 1142, 26 Sup. Ct.Rep. 722; Ex parte Young, 209 U.S. 123, 165, 52 L.Ed. 714, 731, 13 L.R.A.(N.S.) 932, 28 Sup.Ct.Rep. 441. Other cases further illustrating this point are Chicago & N. W. R. Co. v. Dey, 1 L.R.A. 744, 2 Inters.Com.Rep. 325, 35 Fed. 866; Northern P. R. Co. v. Keyes, 91 Fed. 47; Western U. Teleg. Co. v. Myatt, 98 Fed. 335.

Our hesitation has been on the narrower question whether the railroads, before they resorted to the circuit court, should not have taken the appeal allowed to them by the Virginia Constitution at the legislative stage, so as to make it absolutely certain that the officials of the state would try to establish and enforce an unconstitutional rule. Considerations of comity and convenience have led this court ordinarily to decline to interfere by habeas corpus where the petitioner had open to him a writ of error to a higher court of a state, in cases where there was no merely logical reason for refusing the writ. The question is whether somewhat similar considerations ought not to have some weight here.

We admit at once that they have not the same weight in this case. The question to be decided, we repeat, is legislative, whether a certain rule shall be made. Although the appeal is given as a right, it is not a remedy, properly so called. At that time no case exists. We should hesitate to say, as a general rule, that a right to resort to the courts could be made always to depend upon keeping a previous watch upon the bodies that make laws, and using every effort and all the machinery available to prevent unconstitutional laws from being passed. It might be said that a citizen has a right to assume that the Constitution will be respected, and that the very meaning of our system in giving the last word upon constitutional questions to the courts is that he may rest upon that assumption, and is not bound to be continually on the alert against covert or open attacks upon his rights in bodies that cannot finally take them away. It is a novel ground for denying a man a resort to the courts that he has not used due diligence to prevent a law from being passed.

But this case hardly can be disposed of on purely general principles. The question that we are considering may be termed a question of equitable fitness or propriety, and must be answered on the particular facts. The establishment of railroad rates is not like a law that affects

private persons, who may never have heard of it till it was passed. It is a matter of great interest, both to the railroads and to the public, and is watched by both with scrutinizing care. The railroads went into evidence before the commission. They very well might have taken the matter before the supreme court of appeals. No new evidence and no great additional expense would have been involved.

The state of Virginia has endeavored to impose the highest safeguards upon the exercise of the great power given to the State Corporation Commission, not only by the character of the members of that commission, but by making its decisions dependent upon the assent of the same historic body that is intrusted with the preservation of the most valued constitutional rights, if the railroads see fit to appeal. It seems to us only a just recognition of the solicitude with which their rights have been guarded, that they should make sure that the state, in its final legislative action, would not respect what they think their rights to be, before resorting to the courts of the United States.

If the rate should be affirmed by the supreme court of appeals and the railroads still should regard it as confiscatory, it will be understood from what we have said that they will be at liberty then to renew their application to the circuit court, without fear of being met by a plea of *res judicata*. It will not be necessary to wait for a prosecution by the commission. We may add that, when the rate is fixed, a bill against the commission to restrain the members from enforcing it will not be bad as an attempt to enjoin legislation or as a suit against a state, and will be the proper form of remedy. * * * As our decision does not go upon a denial of power to entertain the bills at the present stage, but upon our views as to what is the most proper and orderly course in cases of this sort when practicable, it seems to us that the bills should be retained for the present to await the result of the appeals if the companies see fit to take them. If the appeals are dismissed, as brought too late, the companies will be entitled to decrees. If they are entertained and the orders of the commission affirmed, the bills may be dismissed without prejudice and filed again.

Decrees reversed.[a]

UNITED STATES AND INTERSTATE COMMERCE COMMISSION v. ABILENE & SOUTHERN RAILWAY CO.

Supreme Court of the United States.
265 U.S. 274, 44 S.Ct. 565, 68 L.Ed. 1016 (1924).

See at p. 508, *supra*.

[a] The dissenting opinions of Chief Justice Fuller and Mr. Justice Harlan are omitted.

UNITED STATES v. LOS ANGELES & SALT LAKE RAILROAD CO.

Supreme Court of the United States.
273 U.S. 299, 47 S.Ct. 413, 71 L.Ed. 651 (1927).

Mr. Justice BRANDEIS delivered the opinion of the Court.

This suit was brought in the federal court for southern California by the Los Angeles & Salt Lake Railroad Company to enjoin and annul an order of the Interstate Commerce Commission, purporting to determine the "final value" of its property, under what is now section 19a of the Act to Regulate Commerce of February 4, 1887, c. 104, 24 Stat. 379, as amended by Valuation Act March 1, 1913, c. 92, 37 Stat. 701, by Act Feb. 28, 1920, c. 91, § 433, 41 Stat. 456, 474, 493, and by Act June 7, 1922, c. 210, 42 Stat. 624 (Comp.St. § 8591). San Pedro, Los Angeles & Salt Lake Railroad Co., 75 Interst.Com.Com'n R. 463; Id., 97 Interst.Com.Com'n R. 737; Id., 103 Interst.Com.Com'n R. 398. The bill asserts that the order fixing the final value is invalid, because it is in excess of the powers conferred upon the Commission, is contrary to the provisions of the Valuation Act, and violates the Fifth Amendment. It asserts also that irreparable injury is threatened.

Reasons why the final valuation is invalid are set forth specifically in 31 paragraphs and 35 subparagraphs of the bill. It charges that the Commission adopted rules for the valuation which are unsound and unwarranted in law; that in the determination of values it ignored facts and factors of major importance; that it refused to report an analysis of the methods employed by it, although required so to do by the Valuation Act; and that it refused to comply with the requirement that all values and elements of value be separately reported. It charges that the valuation was made as of June 30, 1914, whereas it should have been made as of June 7, 1923; that the value found is that for rate-making purposes, whereas the finding should have been a general one of value for all purposes; that properties enumerated were erroneously excluded from the valuation; that in making the finding of value the Commission erroneously failed to consider 9 specified elements of value; that in making the finding of investment in road and equipment it ignored 6 items; that in making the finding of cost of reproduction new it ignored 11 items; that in making the finding of cost of reproduction new less depreciation it made 13 errors; that in valuing the lands 11 errors were made; and that in making the finding as to working capital a large sum was arbitrarily deducted. It alleges that for these and other reasons the findings made are incomplete, erroneous in law, and misleading in point of fact.

The jurisdiction of the District Court was invoked under the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219, and also under its general equity powers. The United States was named

as defendant, and the Commission became such by intervention. Both defendants answered; but by appropriate pleadings the United States objected that the adoption by the Commission of the final valuation does not constitute an order within the meaning of the Urgent Deficiencies Act, challenged also the jurisdiction of the court to enjoin or annul the order under its general equity powers, and moved that the bill be dismissed. The motion was overruled, the case was heard on the pleadings and evidence, and, after proceedings which it is not necessary to detail, a decree was entered which annulled the final valuation and enjoined its use for any purpose. Los Angeles & Salt Lake Railroad v. United States (D.C.) 4 F.2d 736; Id. (D.C.) 8 F.2d 747. Whether all or any of the claims and charges made in the bill are well founded, we have no occasion to consider; for we are of opinion that the District Court should have sustained the motion to dismiss the bill.

The final report on value, like the tentative report, is called an order. But there are many orders of the Commission which are not judicially reviewable under the provision now incorporated in the Urgent Deficiencies Act. See Proctor & Gamble Co. v. United States, 225 U.S. 282, 32 S.Ct. 761, 56 L.Ed. 1091; Hooker v. Knapp, 225 U.S. 302, 32 S.Ct. 769, 56 L.Ed. 1099; Lehigh Valley R. Co. v. United States, 243 U.S. 412, 37 S.Ct. 397, 61 L.Ed. 819; United States v. Illinois Central R. R. Co., 244 U.S. 82, 89, 37 S.Ct. 584, 61 L.Ed. 1007; Delaware & Hudson Co. v. United States, 266 U.S. 438, 45 S.Ct. 153, 69 L.Ed. 369. For the first 19 years of the Commission's existence no order was so reviewable. The statutory jurisdiction to enjoin and set aside an order was granted in 1906, because then, for the first time, the rate-making power was conferred upon the Commission, and then disobedience of its orders was first made punishable. Hepburn Act June 29, 1906, c. 3591, §§ 2–7, 34 Stat. 584, 586–595. The first suit to set aside an order was brought soon after. Stickney v Interstate Commerce Commission (C.C.) 164 F. 638; Id., 215 U.S. 98, 30 S.Ct. 66, 54 L.Ed. 112. The jurisdiction conferred by the Hepburn Act was transferred, substantially unchanged, to the Commerce Court, by the Act of June 18, 1910, c. 309, § 1, 36 Stat. 539, and, when that court was abolished, to the District Courts, by the Urgent Deficiencies Act. The so-called order here assailed differs essentially from all those held by this court to be subject to judicial review under any of those acts. Each of the orders so reviewed was an exercise either of the quasi judicial function of determining controversies or of the delegated legislative function of rate making and rule making

The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, anything, which does not grant or withhold any authority, privilege, or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which

does not determine any right or obligation. This so-called order is merely the formal record of conclusions reached after a study of data collected in the course of extensive research conducted by the Commission, through its employees. It is the exercise solely of the function of investigation. Compare Smith v. Interstate Commerce Commission, 245 U.S. 33, 38 S.Ct. 30, 62 L.Ed. 135. Moreover, the investigation made was not a step in a pending proceeding, in which an order of the character of those held to be judicially reviewable could be entered later. It was merely preparation for possible action in some proceeding which may be instituted in the future—preparation deemed by Congress necessary to enable the Commission to perform adequately its duties, if and when occasion for action shall arise. The final report may, of course, become a basis for action by the Commission, as it may become a basis for action by Congress or by the Legislature or an administrative board of a state. But so may any report of an investigation, whether made by a committee of Congress or by the Commission pursuant to a resolution of Congress or of either branch thereof.

The Valuation Act requires that the investigation and study be made of the properties of each of the rail carriers. There are about 1,800. 40 Annual Report Interstate Commerce Commission, 13. In directing the Commission to investigate the value of the property of the several carriers, Congress prescribed in detail the subjects on which findings should be made, and constituted the "final valuations" and "the classification thereof" prima facie evidence, in controversies under the Act to Regulate Commerce. Every party in interest is, therefore, entitled to have and to use this evidence; and the carrier, being a party in interest, has the remedy by mandamus to compel the Commission to make a finding on each of the subjects specifically prescribed. Kansas City Southern Ry. Co. v. Interstate Commerce Commission, 252 U.S. 178, 40 S.Ct. 187, 64 L.Ed. 517. But Congress did not confer upon the courts power, either to direct what this "tribunal appointed by law and informed by experience" (Illinois Central Ry. Co. v. Interstate Commerce Commission, 206 U.S. 441, 454, 27 S.Ct. 700, 704, 51 L.Ed. 1128), shall find, or to annul the report, because of errors committed in making it. Moreover, errors may be made in the final valuation of the property of each of the nearly 1,800 carriers. And it is at least possible that no proceeding will ever be instituted, either before the Commission or a court, in which the matters now complained of will be involved, or in which the errors alleged will be legal significance.

The mere fact that Congress has, in terms, made "all final valuations * * * and the classification thereof * * * prima facie evidence of the value of the property in all proceedings under the Act to Regulate Commerce * * * in all judicial proceedings for the enforcement of the act * * * and in all judicial proceedings brought to enjoin, set aside, annul, or suspend, in whole or in part,

any order of the Interstate Commerce Commission," is, obviously, not a violation of the due process clause, justifying proceedings to annul the order. That to make the Commission's conclusions prima facie evidence in judicial proceedings is not a denial of due process was settled by Meeker v. Lehigh Valley R. Co., 236 U.S. 412, 430, 431, 35 S.Ct. 328, 335 (59 L.Ed. 644, Ann.Cas.1916B, 691). It was there said of a like provision relating to reparation orders:

"This provision only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury. At most therefore it is merely a rule of evidence."

See, also, Mills v. Lehigh Valley R. R. Co., 238 U.S. 473, 481, 482, 35 S.Ct. 888, 59 L.Ed. 1414; St. Louis Southwestern R. Co. v. United States, 264 U.S. 64, 77, 44 S.Ct. 294, 68 L.Ed. 565.

Nor does the fact that "all final valuations * * * and the classifications thereof" are made prima facie evidence prevent the report from being solely an exercise of the function of investigation. Data collected by the Commission as a part of its function of investigation constitute ordinarily evidence sufficient to support an order, if the data are duly made part of the record in the case in which the order is entered. See Interstate Commerce Commission v. Louisville & Nashville R. Co., 227 U.S. 88, 93, 33 S.Ct. 185, 57 L.Ed. 431; Chicago Junction Case, 264 U.S. 258, 262, 44 S.Ct. 317, 68 L.Ed. 667; United States v. Abilene & S. R. Co., 265 U.S. 274, 286, 290, 44 S.Ct. 565, 68 L.Ed. 1016; Act of June 18, 1910, c. 309, § 13, 36 Stat. 539, 555 (Comp.St. § 8584). Inquests and inquisitions, if they were expressly authorized, are, at common law, admissible in evidence in judicial proceedings, thus constituting an exception to both the hearsay rule and the rule against opinion evidence. 3 Wigmore on Evidence (2d Ed.) §§ 1671–1674. Some inquests are at common law also prima facie evidence of the facts found. Hughes v. Jones, 116 N.Y. 67, 22 N.E. 446, 5 L.R.A. 632, 15 Am.St.Rep. 386.

Congress has provided adequate remedies for the correction of errors in the final valuation and the classification thereof. The conclusions reached by the Commission must be submitted first in the form of a tentative report. Section 19a, pars. (f) and (h). When so submitted, the carrier is authorized to file a protest and to be heard thereon. Paragraph (i). If such protest is filed, the Commission is directed to make in the report such changes, if any, as it may deem proper. Even if no protest is filed, the Commission may of its own motion upon due notice to parties in interest correct the tentative report. Compare New York, Ontario & Western Ry. Co. v. United States, 273 U.S. 652, 47 S.Ct. 334, 71 L.Ed. 823, decided January 10, 1927. When the final report is introduced in evidence the opportunity to contest the correctness of the findings therein made is fully preserved to the carrier, and any error therein may be corrected at the trial. Specific findings may be excluded because of errors commit-

ted in making them. It is conceivable that errors of law may have been committed which are so fundamental and far-reaching, as to deprive the "final valuations * * * and the classification thereof" of all probative force. Moreover, additional evidence may be introduced. Paragraph (j) provides that, "if upon the trial of any action involving a final value fixed by the Commission, evidence shall be introduced regarding such value which is found by the court to be different from that offered upon the hearing before the Commission, or additional thereto and substantially affecting said value," the proceedings shall be stayed so as to permit the Commission to consider the same and fix a final value different from that fixed in the first instance, and to "alter, modify, amend or rescind any order which it has made involving such final value."

The District Court rested jurisdiction to entertain a suit to set aside the valuation order largely upon the provisions of paragraph (j), believing that such a suit was within the scope of the words "upon the trial of any action involving a final value." That paragraph was intended to apply to actions brought to set aside rate-fixing orders in which the question of the value of the carrier's property would be material. In our opinion it is not applicable to so-called orders fixing only valuations. The objection to entertaining this suit to annul the final valuation is not merely that the question presented is moot, as in United States v. Alaska Steamship Co., 253 U.S. 113, 116, 40 S.Ct. 448, 64 L.Ed. 808, or that the plaintiff's interest is remote and speculative as in Hines Yellow Pine Trustees v. United States, 263 U.S. 143, 148, 43 S.Ct. 72, 68 L.Ed. 216. There is the fundamental infirmity that the mere existence of error in the final valuation is not a wrong for which Congress provides a remedy under the Urgent Deficiencies Act.

Little need be added concerning the further contention that the suit should be entertained under the general equity power of the court. Two arguments are urged in support of the proposition. One is that, since the Commission has by reason or errors of law and of judgment grossly undervalued the property, its report will, unless suppressed, injure the credit of the carrier with the public. The other is that the Commission may itself be misled into illegal action by the erroneous conclusions, and may apply them to the carriers' injury, since use of the final valuation is required in making rates pursuant to section 15a of the Act to Regulate Commerce, as amended by Transportation Act, c. 91, § 422, 41 Stat. 456 (Comp.St. § 8583a); in prescribing divisions of joint rates under section 15 (Comp.St. § 8583); in determining the limit upon the amount of capitalization, in the event of a consolidation under section 5 (Comp.St. § 8567); in determining the propriety of an issue of securities, under section 20a (Comp.St. § 8592a); or as the basis of computation of the amount of excess earnings to be recaptured under section 15a. Neither argument is persuasive. The first reminds of the effort made in Pennsylvania R. Co. v. United

States Railroad Labor Board, 261 U.S. 72, 43 S.Ct. 278, 67 L.Ed. 536, to suppress the report of that board. The second reminds of the attempt to secure a declaratory judgment in Liberty Warehouse Co. v. Grannis, 273 U.S. 70, 47 S.Ct. 282, 71 L.Ed. 541, decided January 3, 1927, and also of cases in which it was sought to enjoin a municipality from passing an illegal ordinance. Compare New Orleans Waterworks Co. v. New Orleans, 164 U.S. 471, 481, 17 S.Ct. 161, 41 L.Ed. 518; McChord v. Louisville & N. Ry. Co., 183 U.S. 483, 22 S.Ct. 165, 46 L.Ed. 289.

No basis is laid for relief under the general equity powers. The investigation was undertaken in aid of the legislative purpose of regulation. In conducting the investigation, and in making the report, the Commission performed a service specifically delegated and prescribed by Congress. Its conclusions, if erroneous in law, may be disregarded. By neither its utterances, nor its processes of reasoning, as distinguished from its acts, are a subject for injunction. Whether the remedy conferred by the Urgent Deficiencies Act is in all cases the exclusive equitable remedy, we need not determine.

Reversed.[b]

FEDERAL TRADE COMMISSION v. CLAIRE FURNACE COMPANY

Supreme Court of the United States.
274 U.S. 160, 47 S.Ct. 553, 71 L.Ed. 978 (1927).

See at p. 423, *supra*.[c]

MYERS v. BETHLEHEM SHIPBUILDING CORPORATION

Supreme Court of the United States.
303 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638 (1938).

Mr. Justice BRANDEIS delivered the opinion of the Court.

The question for decision is whether a federal District Court has equity jurisdiction to enjoin the National Labor Relations Board from holding a hearing upon a complaint filed by it against an employer alleged to be engaged in unfair labor practices prohibited by National Labor Relations Act, July 5, 1935, c. 372, 49 Stat. 449, 29 U.S.C.A. § 151 et seq. The Circuit Court of Appeals for the First Circuit held in these cases that the District Court possesses such jurisdiction; and granted preliminary injunctions. Every other Circuit Court of Appeals in which the question has arisen has held the con-

[b] *Cf.* Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, 618 19, 64 S.Ct. 281, 295-6, 88 L.Ed. 333 (1944).

[c] Cf. Chamber of Commerce of Minneapolis v. Federal Trade Commission, 280 F. 45 (C C A 8th, 1922).

trary. Because of the importance of the questions presented, the conflict in the lower courts and alleged conflict with our own decisions, we granted these writs of certiorari. 302 U.S. 667, 58 S.Ct. 26, 27, 82 L.Ed. 515.

The declared purpose of the National Labor Relations Act is to diminish the causes of labor disputes burdening and obstructing interstate and foreign commerce; and its provisions are applicable only to such commerce. In order to protect it, the act seeks to promote collective bargaining; confers upon employees engaged in such commerce the right to form, and join in, labor organizations; defines acts of an employer which shall be deemed unfair labor practice; and confers upon the Board certain limited powers with a view to preventing such practices. If a charge is made to the Board that a person "has engaged in or is engaging in any * * * unfair labor practice," and it appears that a proceeding in respect thereto should be instituted, a complaint stating the charge is to be filed, and a hearing is to be held thereon upon notice to the person complained of.

The Industrial Union of Marine and Shipbuilding Workers of America, Local No. 5, made to the Board a charge that the Bethlehem Shipbuilding Corporation, Limited, was engaging in unfair labor practices at its plant in Quincy, Mass., for the production, sale, and distribution of boats, ships, and marine equipment. Upon that charge the Board filed, on April 13, 1936, a complaint which alleged, among other things, that the company dominates and interferes in the manner described "with a labor organization known as Plan of Representation of Employees in Plants of the Bethlehem Shipbuilding Corporation, Ltd."; that such action leads to strikes interfering with interstate commerce; and that "the aforesaid acts of respondent constitute unfair labor practices affecting commerce, within the meaning of Section 8, subdivisions (1) and (2) and Section 2, subdivisions (6) and (7) of said [National Labor Relations] Act [29 U.S.C.A. §§ 158 (1, 2), 152 (6, 7)]."

The complaint alleged, specifically:

"The respondent in the course and conduct of its business causes and has continuously caused large quantities of the raw materials used in the production of its boats, ships and marine equipment to be purchased and transported in interstate commerce from and through states of the United States other than the State of Massachusetts to the Fore River Plant in the State of Massachusetts, and causes and has continuously caused the boats, ships and marine equipment produced by it to be sold and transported in interstate commerce from the Fore River Plant in the State of Massachusetts to, into and through states of the United States other than the State of Massachusetts, all of the aforesaid constituting a continuous flow of trade, traffic and commerce among the several states."

The Board duly notified the corporation that a hearing on the complaint would be held on April 27, 1936, at Boston, Mass., in accordance

with rules and regulations of the Board, a copy of which was annexed to the notice; and that the corporation "will have the right to appear, in person or otherwise, and give testimony."

On that day the corporation filed, in the federal court for Massachusetts, the bill in equity, herein numbered 181, against A. Howard Myers, acting regional director for the First Region, National Labor Relations Board, Edmund J. Blake, its regional attorney for the First Region, and Daniel M. Lyons, trial examiner, to enjoin them from holding "a hearing for the purpose of determining whether or not the plaintiff has engaged at its Fore River Plant in any so-called unfair labor practices under the National Labor Relations Act, and from having any proceedings or taking any action whatsoever, at any time or times, with respect thereto." There were prayers for a restraining order, an interlocutory injunction, and a permanent injunction; and also a prayer that the court declare that the National Labor Relations Act and "defendants' actions and proposed actions thereunder" violate the Federal Constitution.

On May 4, 1936, another bill in equity, herein numbered 182, against the same defendants, seeking on largely the same allegations of fact, substantially the same relief, was brought in the same court by Charles MacKenzie, James E. Mannin, and Thomas E. Barker, employees of the Bethlehem Corporation and officers of the so-called Plan of Representation at the Fore River Plant.

Upon the filing of each bill, the District Court issued a restraining order and an order of notice to show cause why a preliminary injunction should not issue. In each case the defendants filed a motion to dismiss the bill of complaint and also a return to the order to show cause. The cases were heard together. In each, the District Court issued the preliminary injunction; and the decrees therefor are still in effect. They were affirmed by the Circuit Court of Appeals for the First Circuit on February 12, 1937. 88 F.2d 154. Petitions for a rehearing, based upon the conflict with the decisions of other circuit courts of appeals, were denied. And the court denied also motions for leave to file a second petition for rehearing, based upon the decisions of this Court in National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893, 108 A.L.R. 1352, and other cases rendered April 12, 1937. 1 Cir., 89 F.2d 1000. The District Court denied the motions to dismiss the bills. Bethlehem Shipbuilding Corp. v. Meyers, 15 F.Supp. 915. But the review by the Circuit Court of Appeals dealt only with the decrees for a preliminary injunction.

The two cases present, in the main, the same questions. In discussing them reference will be made, in the first instance, only to the suit brought by the corporation.

We are of opinion that the District Court was without power to enjoin the Board from holding the hearings.

First. There is no claim by the corporation that the statutory provisions and the rules of procedure prescribed for such hearings are illegal; or that the corporation was not accorded ample opportunity to answer the complaint of the Board; or that opportunity to introduce evidence on the allegations made will be denied. The claim is that the provisions of the act are not applicable to the corporation's business at the Fore River Plant, because the operations conducted there are not carried on, and the products manufactured are not sold, in interstate or foreign commerce; that, therefore, the corporation's relations with its employees at the plant cannot burden or interfere with such commerce; that hearings would, at best, be futile; and that the holding of them would result in irreparable damage to the corporation, not only by reason of their direct cost and the loss of time of its officials and employees, but also because the hearings would cause serious impairment of the good will and harmonious relations existing between the corporation and its employees, and thus seriously impair the efficiency of its operations.

Second. The District Court is without jurisdiction to enjoin hearings because the power "to prevent any person from engaging in any unfair practice affecting commerce" has been vested by Congress in the Board and the Circuit Court of Appeals, and Congress has declared: "This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise." The grant of that exclusive power is constitutional, because the act provided for appropriate procedure before the Board and in the review by the Circuit Court of Appeals an adequate opportunity to secure judicial protection against possible illegal action on the part of the Board. No power to enforce an order is conferred upon the Board. To secure enforcement, the Board must apply to a Circuit Court of Appeals for its affirmance. And, until the Board's order has been affirmed by the appropriate Circuit Court of Appeals, no penalty accrues for disobeying it. The independent right to apply to a Circuit Court of Appeals to have an order set aside is conferred upon any party aggrieved by the proceeding before the Board. The Board is even without power to enforce obedience to its subpoena to testify or to produce written evidence. To enforce obedience it must apply to a District Court; and to such an application appropriate defense may be made.

As was said in National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 46, 47, 57 S.Ct. 615, 628, 81 L.Ed. 893, 108 A.L.R. 1352, the procedural provisions "do not offend against the constitutional requirements governing the creation and action of administrative bodies. See Interstate Commerce Commission v. Louisville & Nashville R. Co., 227 U.S. 88, 91, 33 S.Ct. 185, 57 L.Ed. 431. The act establishes standards to which the Board must conform. There must be complaint, notice and hearing. The Board must receive

evidence and make findings. The findings as to the facts are to be conclusive, but only if supported by evidence. The order of the Board is subject to review by the designated court, and only when sustained by the court may the order be enforced. Upon that review all questions of the jurisdiction of the Board and the regularity of its proceedings, all questions of constitutional right or statutory authority are open to examination by the court. We construe the procedural provisions as affording adequate opportunity to secure judicial protection against arbitrary action in accordance with the well-settled rules applicable to administrative agencies set up by Congress to aid in the enforcement of valid legislation."

It is true that the Board has jurisdiction only if the complaint concerns interstate or foreign commerce. Unless the Board finds that it does, the complaint must be dismissed. And, if it finds that interstate or foreign commerce is involved, but the Circuit Court of Appeals concludes that such finding was without adequate evidence to support it, or otherwise contrary to law, the Board's petition to enforce it will be dismissed, or the employer's petition to have it set aside will be granted. Since the procedure before the Board is appropriate and the judicial review so provided is adequate, Congress had power to vest exclusive jurisdiction in the Board and the Circuit Court of Appeals. Anniston Manufacturing Co. v. Davis, 301 U.S. 337, 343–346, 57 S.Ct. 816, 819, 820, 81 L.Ed. 1143.

Third. The corporation contends that, since it denies that interstate or foreign commerce is involved and claims that a hearing would subject it to irreparable damage, rights guaranteed by the Federal Constitution will be denied unless it be held that the District Court has jurisdiction to enjoin the holding of a hearing by the Board. So to hold would, as the government insists, in effect substitute the District Court for the Board as the tribunal to hear and determine what Congress declared the Board exclusively should hear and determine in the first instance. The contention is at war with 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. That rule has been repeatedly acted on in cases where, as here, the contention is made that the administrative body lacked power over the subject matter.

Obviously, the rule requiring exhaustion of the administrative remedy cannot be circumvented by asserting that the charge on which the complaint rests is groundless and that the mere holding of the prescribed administrative hearing would result in irreparable damage. Lawsuits also often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact.

Fourth. The Circuit Court of Appeals should have reversed the decrees for a preliminary injunction. It is true that ordinarily the

decree of a District Court granting or denying a preliminary injunction will not be disturbed on appeal. But that rule of practice has no application where, as here, there was an insuperable objection to the maintenance of the suit in point of jurisdiction and where it clearly appears that the decree was the result of an improvident exercise of judicial discretion. Since the constitutionality of the act has been determined by our decision in National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893, 108 A.L.R. 1352, and the defect in the bill is incapable of remedy by amendment, its dismissal should be directed.

Fifth. In No. 182, also, the Circuit Court of Appeals should have reversed the decree for a preliminary injunction and directed dismissal of the bill. The plaintiffs, officers of the so-called Plan of Representation of Employees, alleged, in addition to the facts already stated, that the employees are satisfied with their existing contracts of employment and desire to retain the existing plan without change; that the holding of the proposed hearing will discredit the plan and destroy its usefulness to the employees; that they will be deprived of their right to negotiate by the method of their choice, the value of which has been proved by years of operation; that alteration of the plan will cause dissatisfaction among the employees; that operation of plant will be disrupted by labor disturbances; that employment will be interrupted; and that the damage to the employees will be irreparable. These additional allegations furnish no reason why the Board should be prevented from exercising the exclusive initial jurisdiction conferred upon it by Congress.

Decrees for preliminary injunction reversed, with direction to dismiss the bills.[d]

FEDERAL POWER COMMISSION v. METROPOLITAN EDISON COMPANY

Supreme Court of the United States.
304 U.S. 375, 58 S.Ct. 963, 82 L.Ed. 1408 (1938).

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

On January 6, 1936, the Federal Power Commission instituted an investigation to determine the "conditions, practices, and matters regarding the ownership, operation, management, and control" of the respondent corporations. The order directed respondents to file with the Commission copies of contracts and statements of working arrangements between respondents and persons controlling them, and statements of charges on respondents' books for 1934 and 1935 representing payments made and obligations incurred to such persons.

[d] Footnotes of the court have been omitted.

To similar effect: Macauley v. Waterman S. S. Corporation, 327 U.S. 540, 66 S.Ct. 712, 90 L.Ed. —— (1946).

Respondents were also directed to make their books, records, etc., available for examination by the Commission's representatives. The investigation was instituted on representations of the Governor and Public Service Commission of Pennsylvania.

Respondents challenged the jurisdiction of the Commission to make the order, and, reserving their right to question its legality, they furnished various data and information. Following an examination of the books and records of respondents, the Commission's examiners submitted a report on December 10, 1936.

Thereupon the Commission on January 26, 1937, made an order providing that a hearing should be held on March 3, 1937. The order recited that the respondents had reported charges appearing upon their books which represented payments made and obligations incurred to named persons as (a) "conceded affiliates" and (b) "not conceded affiliates," respectively; that the examination of the books and records of respondents and of admitted affiliates disclosed transactions between respondents and additional named persons, and that the accounting representatives of the Commission had submitted a report indicating that certain named persons "control respondents, or are controlled by the same persons which control respondents." The order then directed respondents to appear at the hearing, as stated, and to present information bearing upon the question of control and specifically showing: (1) their form of organization, respectively, (2) their articles of incorporation, partnership agreements or other documents of organization, (3) the names and addresses of partners, directors, officers, trustees and agents, (4) the ownership held by such persons "in or over any other person named above," as well as the manner by which such ownership was maintained, and (5) such other data as might from time to time be required by the Commission. The order further directed that a copy of the report prepared by the accounting representatives of the Commission should be served on each person named, and the Commission gave notice that the hearing would be had by the Commission sitting jointly with the Public Service Commission of Pennsylvania. See Federal Power Act, § 209(b), as amended by Act Aug. 26, 1935, § 213, 49 Stat. 853, 16 U.S.C.A. § 824h (b).

Respondents then filed with the Commission a petition for rehearing as to the order of January 26, 1937, asking for the vacating of that order and the termination of the proceeding initiated by the order of January 6, 1936. Respondents contended that the Commission lacked jurisdiction to conduct an investigation concerning the propriety of contracts and working arrangements between respondents and third persons, and, in particular, (1) that the Commission was without power to investigate for the purpose of supplying information to a state commission for use in local proceedings for violations of local law, and, (2) that as to three of the respondents the

Commission was without jurisdiction of their persons because they were not "public utilities" as defined in the Federal Power Act.

The Commission thereupon adjourned without day the hearing directed by the order of January 26, 1937. Later, the Commission granted the petition for rehearing and assigned "the matters involved" for hearing on April 14, 1937. Respondents then appeared and introduced evidence tending to support their objections to the Commission's jurisdiction. The Commission's counsel then introduced evidence on its behalf. Respondents objected to its admissibility upon the ground that it was immaterial to the issues presented by the petition for rehearing. Their objection was overruled and respondents then asked the examiner to certify to the Commission the request to define the issues to be determined on the petition for rehearing and to instruct its representatives that no evidence in furtherance of the orders of January 6, 1936, and January 26, 1937, be introduced. The examiner refused and respondents then presented a like request to the Commission, which was denied on April 20, 1937, for the reason that its rules of practice did not provide for that method "or interim review of the examiner's rulings." Upon remand to the examiner, he again ruled against respondents, stating that their rights could "be amply protected by the usual method of exceptions" and argument thereon.

Respondents then presented, on April 21, 1937, to the Circuit Court of Appeals a petition asking for a rule to show cause why the Commission should not be restrained from taking any steps in furtherance of the inquiry under the orders of January 6, 1936, or of January 26, 1937, until the petition for rehearing had been disposed of, and from introducing any evidence except that which was relevant to the questions raised by the petition for rehearing. The Circuit Court of Appeals, on July 6, 1937, issued the rule to show cause, as prayed, returnable on October 4, 1937, and on September 7, 1937, granted a temporary stay. The Commission made its return to the rule and asked for a dismissal of the petition. The Circuit Court of Appeals rendered its decision on January 27, 1938. Its decree remanded the case to the Commission "for determination in accordance with the opinion" of the court and restrained the Commission "from proceeding with its proposed inquiry and investigation in accordance with its two orders of January 6, 1936, and January 26, 1937, until the questions raised in the petition for rehearing are determined by it."

In its opinion the court stated that the only issues of fact raised by the petition for rehearing and the evidence of the respondents were that three of the respondents were not "public utilities" as defined by the Federal Power Act and that the purpose of the investigation was to supply information to the Pennsylvania Commission for use in local proceedings designed to impose penalties under the state law. 3 Cir., 94 F.2d 943, 945. The court said (page 946):

"Coming to the merits of the case, when the petition was filed and granted it was the plain duty of the Federal Commission to determine the issues raised in the petition. We are going to remand the case for such determination. In doing so the evidence admitted should be strictly confined to the two issues raised in the petition and not extended to the scope of the investigation proposed in the orders of January 6, 1936, and January 26, 1937. The relation of the evidence to the two questions involved should be apparent and logical and not far-fetched and remotely inferential. Some of the evidence admitted when the case was before the Federal Commission on rehearing was not relevant and material. If both sides will seek to produce only such evidence as is clearly admissible, we venture to hope that the determination of the issues will be speedy, final and satisfactory.

"In remanding the case, we express no opinion on the merits of the questions to be decided. The determination of them is for the Federal Commission under relevant and competent evidence. The act has provided a review by this court of the orders of the Federal Commission, and no order on the merits is now before us. These proceedings were taken so that the questions would not be moot if and when they come here."

This Court granted certiorari, 304 U.S. 553, 58 S.Ct. 947, 82 L.Ed. 1523, and the cause has been argued. We are of the opinion that the Circuit Court of Appeals had no jurisdiction to enter the decree.

First.—There was no order of the Commission before the Circuit Court of Appeals for review. Apart from the question whether the order of January 6, 1936, or that of January 26, 1937, can be regarded as reviewable, no application for such a review had been made.

The provision conferring appellate jurisdiction on the Circuit Court of Appeals in relation to orders of the Federal Power Commission is found in section 313 of the Federal Power Act, as amended by the Act of August 26, 1935, c. 687, § 213, 49 Stat. 860, 861, 16 U.S.C.A. § 825*l*.[1]

1 Sec. 313. "(a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this Act [chapter] to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

"(b) 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 Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility 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, by filing in such court, within sixty days after the order

Section 313(a) provides that any person aggrieved by an order of the Commission may apply for a rehearing within thirty days after its issuance and that no proceeding to review any order of the Commission shall be brought unless there has been an application for a rehearing thereon.

Respondents say that under this provision they could not ask review of the order of January 26, 1937, until they had sought a rehearing. They did seek a rehearing and it was granted. No appeal from the order granting it would lie and none was attempted. Respondents do not contend that there was any appeal from an order, or any application for a review of an order, pending before the Circuit Court of Appeals. On the contrary, respondents say that the Commission "has never passed upon the objections raised in respondents' petition for rehearing with respect to the order of January 26, 1937"; that "concededly, the minute of the Commission granting a rehearing did not purport to decide the objections raised in the petition for rehearing"; and that "until the Commission has made an order determining those objections, respondents will not be in a position to perfect an appeal to the Circuit Court of Appeals should the Commission's determination make that necessary."

Second.—Respondents seek to sustain the action of the Circuit Court of Appeals by virtue of the authority conferred by section 262 of the Judicial Code, 28 U.S.C.A. § 377, which provides that the federal courts shall have power "to issue all writs not specifically pro-

of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended [U.S.C., Title 28, Secs. 346 and 347]."

vided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." The argument is that the Circuit Court of Appeals could intervene to protect its prospective appellate jurisdiction. We are of the opinion that this contention is unsound and that the Circuit Court of Appeals in the circumstances disclosed had no appellate jurisdiction to protect.

The argument proceeds on the view that the order of January 26, 1937, despite its preliminary character, was a reviewable order subject only to the requirement that an application for rehearing should first be made. Reliance is placed on section 313(b) of the Federal Power Act that "Any party to a proceeding under this Act [chapter] aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals." But neither this language, nor that of section 313(a), should be construed as authorizing a review of every order that the Commission may make, albeit of a merely procedural character. Such a construction, affording opportunity for constant delays in the course of the administrative proceeding for the purpose of reviewing mere procedural requirements or interlocutory directions, would do violence to the manifest purpose of the provision.

The context in section 313(b) indicates the nature of the orders which are subject to review. Upon service of the petition for review, the Commission is to certify and file with the appellate court "a transcript of the record upon which the order complained of was entered." The statute contemplates a case in which the Commission has taken evidence and made findings. Its findings, if supported by evidence, are to be conclusive. The appellate court may order additional evidence to be taken by the Commission and the Commission may thereupon make modified or new findings. The provision for review thus relates to orders of a definitive character dealing with the merits of a proceeding before the Commission and resulting from a hearing upon evidence and supported by findings appropriate to the case.

There are persuasive analogies in the construction of provisions for the review of the orders of other administrative bodies. The Urgent Deficiencies Act of October 22, 1913,[2] provides for cases brought to enjoin, set aside, or suspend *"any order"* of the Interstate Commerce Commission. But this Court has held that "there are many orders of the Commission which are not judicially reviewable under [this] provision." See United States v. Los Angeles & Salt Lake R. Co., 273 U.S. 299, 309, 47 S.Ct. 413, 414, 71 L.Ed. 651, and cases cited. In United States v. Illinois Central R. Co., 244 U.S. 82, 37 S.Ct. 584, 61 L.Ed. 1007, the Interstate Commerce Commission had made an order for a hearing upon an issue of reparation. The Railroad Company contended that the Commission had no jurisdiction to award damages

[2] 28 U.S.C. § 47, 28 U.S.C.A § 47.

in the case presented. A decree of the District Court, enjoining the Commission from proceeding with the hearing, was reversed by this Court with directions to dismiss the petition. The "order" was not of the sort which brought it within the purview of the statute. It was a mere step in procedure. See, also, New York, Ontario & Western Ry. Co. v. United States, D. C., 14 F.2d 850, affirmed 273 U.S. 652, 47 S.Ct. 334, 71 L.Ed. 823. Negative orders of the Commission are not reviewable. Procter & Gamble Co. v. United States, 225 U.S. 282, 32 S.Ct. 761, 56 L.Ed. 1091; Lehigh Valley R. Co. v. United States, 243 U.S. 412, 414, 37 S.Ct. 397, 61 L.Ed. 819. A final report by the Commission on value under section 19a of the Interstate Commerce Act, though called an order, is not reviewable. United States v. Los Angeles & Salt Lake R. Co., supra. Compare United States v. Atlanta, Birmingham & Coast R. Co., 282 U.S. 522, 527, 51 S.Ct. 237, 238, 239, 75 L.Ed. 513; Great Northern Railway Co. v. United States, 277 U.S. 172, 181, 182, 48 S.Ct. 466, 467, 468, 72 L.Ed. 838; United States v. Griffin, 303 U.S. 226, 58 S.Ct. 601, 82 L.Ed. 764, decided February 28, 1938; Shannahan v. United States, 303 U.S. 596, 58 S.Ct. 732, 82 L.Ed. 1039, decided April 4, 1938. With respect to other regulatory bodies, it has been held that mere preliminary or procedural orders are not within the statutes providing for review by the Circuit Court of Appeals. Chamber of Commerce v. Federal Trade Commission, 8 Cir., 280 F. 45, 48; Ames Baldwin Wyoming Co. v. National Labor Relations Board, 4 Cir., 73 F.2d 489, 490; Jones v. Securities and Exchange Commission, 2 Cir., 79 F.2d 617, 619; Id., 298 U.S. 1, 14, 56 S.Ct. 654, 657, 80 L.Ed. 1015. So, attempts to enjoin administrative hearings because of a supposed or threatened injury, and thus obtain judicial relief before the prescribed administrative remedy has been exhausted, have been held to be at war with the long-settled rule of judicial administration. Myers v. Bethlehem Shipbuilding Corporation, 303 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638, decided January 31, 1938. See, also, Securities and Exchange Commission v. Andrews, 2 Cir., 88 F.2d 441.

The Commission's order of January 26, 1937, (a) fixed a date for hearing, (b) required respondents to appear, and (c) required them to produce the information and documents described. In fixing a date for hearing, the order was nothing more than a notice. United States v. Illinois Central R. Co., supra, page 89, 37 S.Ct. 584. The statute confers no authority upon the Commission to enforce its directions to appear, testify or produce books and papers save by application to a federal court under section 307(c).[3] Upon such an application, the

[3] Subdivision (c) of section 307 of the Federal Power Act, as amended by Act Aug. 26, 1935, § 213, 16 U.S.C.A. § 825f (c), is as follows:

"(c) In case of contumacy by, or refusal to obey a subpena issued to, any person, the Commission may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence,

court may require attendance, testimony and the production of books and papers touching the matter under investigation and failure to obey such an order of the court may be punished by it as a contempt. We think that this provision embraces all cases of alleged "contumacy" on the part of any person who is required to attend, give testimony or produce documents. Upon such an application by the Commission for the enforcement of its order, respondents would have full opportunity to contest its validity. See Jones v. Securities and Exchange Commission, supra. In the instant case no such application by the Commission has been made. Section 307(c) also provides that any person who willfully fails or refuses to attend and testify, or produce books and papers, in obedience to the subpœna of the Commission, shall be guilty of a misdemeanor and be subject to fine and imprisonment. The qualification that the refusal must be "willful" fully protects one whose refusal is made in good faith and upon grounds which entitle him to the judgment of the court before obedience is compelled.

The Commission's order of January 26, 1937, lay outside any appellate jurisdiction conferred by the statute upon the Circuit Court of Appeals. In that view, section 262 of the Judicial Code, 28 U.S.C.A. § 377, gives no support to the decree under review and its injunction and instructions to the Commission must be regarded as unauthorized.

The decree of the Circuit Court of Appeals is reversed and the cause is remanded with directions to dismiss the respondents' petition. It is so ordered.

Reversed and remanded. •

memoranda, contracts, agreements, and other records. Such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found or may be doing business. Any person who willfully shall fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, contracts, agreements, or other records, if in his or its power so to do, in obedience to the subpena of the Commission, shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine of not more than $1,000 or to imprisonment for a term of not more than one year, or both."

• See, to similar effect, United States v. Illinois Central Railway Company, 244 U.S. 82, 37 S.Ct. 584, 61 L.Ed. 1007 (1917).

Suppose that the Metropolitan Edison Company, instead of applying to the Circuit Court of Appeals for a decree restraining the Commission from continuing the inquiry, had merely declined to produce the information and documents in question. In a proceeding by the Commission under § 307(c) of the Federal Power Act to compel the production of the documents, could the Company have defended on the ground that the Commission lacked jurisdiction to make the inquiry, thus raising the very issues which it sought unsuccessfully to raise in the principal case? In this connection, the implications of Meyers v. Bethlehem Shipbuilding Corporation, 303 U.S. 41, 58 S.Ct. 459, 82

NATIONAL LABOR RELATIONS BOARD v. FALK CORPORATION

Supreme Court of the United States.
308 U.S. 453, 60 S.Ct. 307, 84 L.Ed. 396 (1940).

Mr. Justice BLACK delivered the opinion of the Court.

Upon charges filed by the Amalgamated Association of Iron, Steel, and Tin Workers of North America, Lodge No. 1528, the Labor Board found that respondent, an employer conceded to be engaged in interstate commerce, had, in violation of the National Labor Relations Act, interfered with its employees' free right to self organization and had fostered and dominated a company union called the Independent Union. Respondent was ordered to cease and desist from such interference and domination; to disestablish the company union completely, and to post notices in its plant of compliance with the Board's order. At the same time and in a proceeding consolidated with the determination of the alleged unfair labor practices, the Board, also upon petition of Amalgamated, directed an election of a representative for collective bargaining on a ballot to contain the Amalgamated and the Operating Engineers—a participant in the consolidated hearing—but not the Independent.

On petition by the Board for enforcement of its order, the Court of Appeals concluded that "the order of the Board is valid and * * * its petition for enforcement * * * is * * * granted." But, of its own volition, the court provided in its final order "that the * * * employees shall remain free to choose at the coming election, or any future election held or conducted pursuant to the provisions of the * * * Act, the Independent Union to represent them in labor relation dealings with respondent;" and that respondent be permitted to add to the notices in its plant the qualification that the Independent would be disestablished and unrecognized only "until and unless * * * [the] employees freely and of their own choice select the Independent Union as their representative * * *."

In its petition for certiorari, the Board contended that the court was without jurisdiction to review a direction of election and that, apart from the question of jurisdiction, the court had improperly interfered with the discretion given the Board by the Act. We granted certiorari to review these important questions.

The first of the two consolidated proceedings before the Board was based upon the charge of the Amalgamated, a labor organization, that respondent had engaged in unfair labor practices contrary to Section

L.Ed. 638 (1939), *supra* at p. 654, should be borne in mind. See, also, Jones v. Securities and Exchange Commission, 298 U.S. 1, 56 S.Ct. 654, 80 L.Ed. 1015 (1936), on the scope of the issues which may be raised by a defendant in a proceeding by an administrative agency to obtain a court order enforcing a subpoena of the agency.

8(1), (2), (3) and (5) of the Act. As already noted, the Board found respondent had interfered with its employees' free choice of a bargaining agent in violation of section 8(1), (2) and (3). Because there was no clear showing that the Amalgamated then represented a majority of the employees, the Board did not sustain the charge that respondent's refusal to bargain collectively with Amalgamated amounted to an unfair labor practice under 8(5).

The second phase of the Labor Board's action was taken pursuant to Section 9(c)[6] of the Act, authorizing the Board to investigate and ascertain representatives of employees for collective bargaining. As expressly permitted by subsection (c), the Board conducted this investigation, itself a distinct proceeding, "in conjunction with a proceeding under section 10 [160 of this title]" and rendered its "Direction of Election" at the same time the order relative to the unfair labor practices was entered "under section 10 [160 of this title]." It was this "Direction of Election" that provided for inclusion on the ballot of Amalgamated (C. I. O.) and the Operating Engineers (A. F. of L.), but omitted the Independent. The election was not actually to be held until after the Board was "satisfied that the effects of the company's unfair labor practices * * * [had] been dissipated by" compliance with the order to cease and desist and to disestablish the Independent.

When the Board petitioned the Court of Appeals for enforcement of its order against respondent, it filed a transcript of the entire consolidated proceedings held under 9(c) and 10(c).

Affirming the finding of unfair labor practices and order made by the Board under 10(c), 29 U.S.C.A. § 160(c), the court considered its power to act at an end if nothing had been before it "but the terms of an election by the employees about to take place." But the court held, one judge dissenting, that it did have jurisdiction to attach a condition to the Board's order whereby Independent might become a candidate in the proposed election because it was "disposing of a labor dispute case wherein the proceedings [had] gone beyond mere plans by the Board for the calling of an election" and therefore had before it "for final disposition, the matter of the selection of the bargaining agent." Having thus found jurisdiction in itself to make "final disposition * * * of the selection of the bargaining agent", the court thought it necessary so to condition the Board's order as to prevent the elimination "for all time [of] one of the candidates—the Independent Union."

Respondent and the intervening Independent (company) union here contend that the court below did not actually modify the Board's "Di-

[6] Sec. 9(c), 49 Stat. 453: "Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 [160 of this title] or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives."

rection of Election", but if deemed to have done so, the modification was authorized under either Section 9(d) or Section 10(e).[7] They also support the result below on the ground that, as the court below believed, the Board was without power to keep the company union—if purged from company influence—from the ballot in a future election to select a bargaining agent, because such proscription would impair the guarantee in Section 7 of agent. Here, the Board's order that the employer cease its unfair practices, disestablish the company union and post notices was not "based in whole or in part upon facts certified" as the result of an election or investigation made by the Board pursuant to Section 9(c). The proposed election here has not even been held and consequently no certification of a proper bargaining agent has been made by the Board. Until that election is held, there can be no certification of a bargaining representative and no Board order—based on a certification, has been or can be made, so as to invoke the court's powers under 9(d).

The fundamental error of the court below lay in its assumption that there was before it "for final disposition, the matter of the selection of the bargaining agent." The court has no right to review a proposed election and in effect to supervise the manner in which it shall thereafter be conducted. There can be no court review under 9(d) until the Board issues an order and requires the employer to do something predicated upon the result of an election.

Since this employer has not been ordered by the Board to do anything predicated upon the results of an election the court had no authority to act under 9(d). * * *

The court below committed error in modifying the Board's order. Accordingly, the cause is remanded to the Court of Appeals with instructions to enforce the Board's order without any modification.

It is so ordered.

Remanded with instructions.[f]

[7] "Sec. 9. * * *

"(d) Whenever an order of the Board made pursuant to section 10(c) [160(c) of this title] is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10(e) [160(e)] or 10(f) [160(f) of this title], and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

"Sec. 10. * * *

"(e) [For text of § 10(e), see p. 534, *supra*.—Ed.]

[f] *Cf.* Southern Steamship Co. v. National Labor Relations Board, 316 U.S. 31, 37, 62 S.Ct. 886, 890, 86 L.Ed. 1246 (1942).

The footnotes of the court, except footnotes 6 and 7, have been omitted.

NATIONAL LABOR RELATIONS BOARD v. CHENEY CALIFORNIA LUMBER COMPANY

Supreme Court of the United States.
327 U.S. 385, 66 S.Ct. 553, 90 L.Ed. —— (1946).

Mr. Justice FRANKFURTER delivered the opinion of the Court.

Cheney California Lumber Company, the respondent, operated a sawmill at Greenville, California. Some employees of the Company were members of Lumber and Saw Mill Workers, Local 4726, affiliated with the American Federation of Labor. The union complained to the National Labor Relations Board that the Company had engaged in unfair labor practices, in violation of § 8 of the Wagner Act, 49 Stat. 449, 452, 29 U.S.C. § 158, 29 U.S.C.A. § 158. Following the usual procedure, there was a hearing before a trial examiner who made an intermediate report, including specific recommendations for a cease-and-desist order. The Company filed no exceptions to this report, nor did it request an oral argument before the Board. Upon due consideration, the Board adopted the findings, conclusions, and recommendations of the trial examiner. 54 N.L.R.B. 205. Thereupon the Board asked the Circuit Court of Appeals for the Ninth Circuit to enter a decree upon its order. The Company then proposed modifications of the Board's order, which were granted by the court below. 149 F.2d 333. The Government petitioned for certiorari urging that one of the changes made by the Circuit Court of Appeals was based on a misconception of National Labor Relations Board v. Express Pub. Co., 312 U.S. 426, 61 S.Ct. 693, 85 L.Ed. 930, as to the allowable scope of the Board's power to "effectuate the policies" of the Act. § 10(c), 49 Stat. 454, 29 U.S.C. § 160(c), 29 U.S.C.A. § 160(c). So we brought the case here. 326 U.S. 706, 66 S.Ct. 97, 90 L.Ed. ——. Upon the argument, this was the only modification to which the Government objected. We shall not consider the others. The court below struck out from the Board's order paragraph 1(b) whereby the Company was ordered, after appropriate treatment of the unfair labor practice arising from prohibited discharge of employees, to cease and desist from

"(b) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act."

The court found warrant for its excision of this provision in Labor Relations Board v. Express Pub. Co., supra. That case, however, recognized that it was within the power of the Board to make an order precisely like 1(b). It merely held that whether such an inclusive provision as 1(b) is justified in a particular case depends upon the circumstances of the particular case before the Board. See 312 U.S. at pages 433, 437, 438, 61 S.Ct. at pages 698, 700, 701, 85 L.Ed. 930.

Here the trial examiner recommended the inclusion of 1(b) on the basis of his review of past hostilities by the company against efforts at unionization; no exception was made either to the findings or to this recommendation; upon full consideration of the record the Board adopted the trial examiner's recommendation; no objection was raised by the Company until after the Board sought judicial enforcement of its order. The objection came too late.

When judicial review is available and under what circumstances, are questions (apart from whatever requirements the Constitution may make in certain situations) that depend on the particular Congressional enactment under which judicial review is authorized. Orders of the National Labor Relations Board are enforceable by decrees of circuit courts of appeals. In such an enforcement proceeding, a court of appeals may enforce or modify or set aside the Board's order. § 10(e), 49 Stat. 454, 29 U.S.C. § 160(e), 29 U.S.C.A. § 160(e). Since the court is ordering entry of a decree, it need not render such a decree if the Board has patently traveled outside the orbit of its authority so that there is legally speaking no order to enforce. But the proper scope of a Board order upon finding unfair labor practices calls for ample discretion in adapting remedy to violation. We have said that "in the nature of things Congress could not catalogue all the devices and strategems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration. The exercise of the process was committed to the Board subject to limited judicial review." Phelps Dodge Corp. v. National Labor Relations Board, 313 U.S. 177, 194, 61 S.Ct. 845, 852, 85 L.Ed. 1271, 133 A.L.R. 1217.

A limitation which Congress has placed upon the power of courts to review orders of the Labor Board is decisive of this case. Section 10(e) of the Act commands that "No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." We have heretofore had occasion to respect this explicit direction of Congress. Marshall Field & Co. v. National Labor Relations Board, 318 U.S. 253, 63 S.Ct. 585, 87 L.Ed. 744; and see May Department Stores Co. v. National Labor Relations Board, 326 U.S. 376, 66 S.Ct. 203, 209, note 5, 90 L.Ed. ——. By this provision, Congress has said in effect that in a proceeding for enforcement of the Board's order the court is to render judgment on consent as to all issues that were contestable before the Board but were in fact not contested. Cf. Pope v. United States, 323 U.S. 1, 65 S.Ct. 16, 89 L.Ed. 3. We can say of this case, as was said of the Marshall Field case, supra, that it "gives emphasis to the salutary policy adopted by Section 10(e) of affording the Board opportunity to consider on the merits questions to be urged upon review of its

order." Marshall Field & Co. v. National Labor Relations Board, supra, 318 U.S. at page 256, 63 S.Ct. at page 586, 87 L.Ed. 744. The appropriateness of such a prohibition as the Board's order contains depends as the Express Publishing Company case, supra, abundantly shows, upon evidence found by the Board disclosing a course of conduct against which such an order may be the only proper remedy. The Board here so found. Justification of such an order, which necessarily involves consideration of the facts which are the foundation of the order, is not open for review by a court if no prior objection has been urged before the case gets into court and there is a total want of extraordinary circumstances to excuse "the failure or neglect to urge such objection." Congress desired that all controversies of fact, and the allowable inferences from the facts, be threshed out, certainly in the first instance, before the Board. That is what the Board is for. It was therefore not within the power of the court below to make the deletion it made.

Judgment reversed.[g]

Mr. Justice JACKSON took no part in the consideration or decision of this case.

Mr. Chief Justice STONE concurring.

I concur on a ground which the Court's opinion points out and which is alone sufficient to sustain its decision, namely, that the court below erroneously applied National Labor Relations Board v. Express Pub. Co., 312 U.S. 426, 61 S.Ct. 693, 85 L.Ed. 930. But I cannot say that when the court below was appealed to as a court of equity to enforce by its injunction the Board's order, § 10(e) of the National Labor Relations Act rendered the court powerless to frame its own injunction consistently with the record, on which that section requires it to act, and in conformity to accepted principles governing the scope of the injunction; or that if the tables were turned the section would require the reviewing court to repeat, by the excessive scope of its injunction, the very abuse of power condemned by the Express Publishing Company case.

The prohibition by § 10(e) of the court's consideration of objections which the parties did not urge before the Board is a limitation upon the court's review of the grounds for granting or denying relief. This Court has treated it as such. See Marshall Field & Co. v. National Labor Relations Board, 318 U.S. 253, 63 S.Ct. 585, 87 L.Ed. 744. But we have not held that § 10(e) could, and I think it cannot rightly, be construed to be also a limitation on the court's power to conform its own process to accepted legal standards applied to the "entire record" which § 10(e) requires to be filed with it. Nor is that prohibition a command to the court to act as a mere ministerial agency to execute

[g] *To same effect:* Marshall Field & Co. v. National Labor Relations Board, 318 U.S. 253, 63 S.Ct. 585, 87 L.Ed. 744 (1943).

the order of the Board, without regard to those standards which control the court's use of its own process, even though the Board and the parties have ignored them.

Only recently we have held that the imposition of a mandatory duty on a federal court of equity to restrain violations of a statute is not to be taken as depriving the court of its traditional power to administer its remedies according to its own governing principles and in conformity to the standards of public interest. See Hecht Co. v. Bowles, 321 U.S. 321, 331, 64 S.Ct. 587, 592, 88 L.Ed. 754. In that case we held that a command explicitly addressed to a court of equity, by § 205(a) of the Emergency Price Control Act of 1942, 50 U.S.C.A.Appendix, § 925(a), to grant an injunction enforcing the act when violation of it is shown, did not deprive the court of its equitable discretion to grant or withhold an injunction. It has been well said that § 205(a), which directs that the court upon showing of violation "shall" grant the injunction, "does not change the historic conditions for the exercise by courts of equity of their power to issue injunctions." 321 U.S. 331, 64 S.Ct. 592, 88 L.Ed. 754.

It should likewise be held that the present statute does not alter the power of a court of equity to frame its injunction according to equitable principles applied in the light of the record on which it must act. Here the statute is not mandatory. It does not purport to curtail the court's power to define the scope of its process. The section only confers on the court the power to make "a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board." This emphasizes what was implicit in the statute involved in the Hecht case, and made explicit by the opinion, that when a statute authorizes an appeal to equity to enforce a liability created by statute, the exercise is invoked of those powers which pertain to it as a court of equity. This at least includes the power to fix, on its own motion, the scope of the decree which it may be required to enforce by contempt proceedings, in conformity to recognized equitable standards applied to the record before it.

COLUMBIA BROADCASTING SYSTEM, INC. v. UNITED STATES

Supreme Court of the United States.
316 U.S. 407, 62 S.Ct. 1194, 86 L.Ed. 1563 (1942).

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

The Federal Communications Commission, by its order of May 2, 1941, as amended by its order of October 11, 1941, promulgated regulations which purport to require the Commission to refuse to grant a license to any broadcasting station which enters into certain defined types of contract with any broadcasting network organization. These regulations, it is alleged, affect adversely appellant's contractual rela-

tions with broadcasting stations and impair its ability to carry on its business in maintaining and operating its nationwide broadcasting network. The regulations as amended on October 11, 1941, together with a supplemental "minute" promulgated by the Commission on October 31, 1941, are set forth at the end of this opinion. The question for our decision is whether appellant is entitled to secure a judicial review of the order by a suit brought under § 402(a) of the Communications Act of 1934, 48 Stat. 1093, 47 U.S.C. § 402(a), 47 U.S.C.A. § 402(a), and the Urgent Deficiencies Act, 38 Stat. 219, 220, 28 U.S.C. § 47, 28 U.S.C.A. § 47.

Pursuant to § 402(a) appellant brought the present suit against the United States in the Southern District of New York, to enjoin enforcement of the Commission's order as contrary to the public interest and beyond the Commission's statutory authority, and on the further ground, if the order be deemed within that authority, that the statute is an unconstitutional delegation of legislative power by Congress in violation of Article I, § 1 of the Constitution, and operates to deprive appellant of property without due process of law in violation of the Fifth Amendment. The case was heard by a court of three judges, which permitted the Commission and the Mutual Broadcasting Company to intervene as defendants. It granted appellees' motion to dismiss the complaint for want of jurisdiction, D.C., 44 F.Supp. 688, and stayed the operation of the Commission's order pending direct appeal to this Court.

In 1938 the Communications Commission authorized an investigation "to determine what special regulations applicable to radio stations engaged in chain or other broadcasting are required in the public interest, convenience, or necessity". Extensive hearings were held by a committee consisting of three members of the Commission, at whose request the national networks, including appellant, intervened. In June, 1940, the committee made a report, on the basis of which briefs were filed and oral argument was presented before the full Commission by the three national networks and other interested parties. In May, 1941, the Commission issued its "Report on Chain Broadcasting" and ordered the adoption of the regulations which, in their amended form, are the subject of the present controversy.

The relevant facts stated in the bill of complaint are as follows: Appellant or its predecessor has been engaged in the business of nationwide network or chain broadcasting since 1927. It has a large amount of physical property used in the business and has built up a valuable goodwill. For its broadcasts it maintains a staff of employees and expends large amounts for musicians and broadcasting performers. It has commitments by long-term contracts aggregating more than $4,000,000 for broadcasting expenditures, including those for the use of land and buildings and for the furnishing of news and broadcasting programs in the next few years. Appellant's total property devoted to

its broadcasting business exceeds $18,000,000 in value; earnings from the network exceeded $3,000,000 in both 1939 and 1940.

Chain broadcasting is the means by which radio programs are made available to all or a large part of the nationwide radio audience. It is defined by the Communications Act, 47 U.S.C. § 153(p), 47 U.S.C.A. § 153(p), as the "simultaneous broadcasting of an identical program by two or more connected stations". The chain broadcaster prepares radio programs, for which it engages performers in advance, and simultaneously broadcasts them over a large number of radio stations to which the programs are transmitted from some central point of origination by wire telephone lines leased by the broadcaster, here the appellant. The programs, which are prepared well in advance of the broadcast and given by persons employed for the purpose by appellant, are of two classes—commercial programs sponsored and paid for by advertisers, and sustaining programs furnished by appellant and not paid for by any advertiser.

Appellant's network comprises 123 stations in 122 cities in the United States. It is so operated as to enable ninety per cent of the radio audience of the United States to listen simultaneously to programs provided by appellant and broadcasted over these stations. Appellant owns and operates seven of the stations and leases an eighth, all licensed by the Commission. With the remaining 115 stations it enters into individual contracts usually for periods of five years, terminable in some instances by appellant on twelve months' notice. By these contracts appellant undertakes to furnish each station with an average of at least sixty hours per week of network sustaining and sponsored programs. The sustaining programs are furnished without charge, the station being free to use them or not as it chooses. Appellant undertakes to furnish the station with all commercial programs which the sponsor requests the station to broadcast and to pay the station a specified hourly rate for the use of its facilities in broadcasting such programs. Appellant agrees not to furnish its programs to other stations in the same city; the affiliated station, with exceptions not now material, agrees not to broadcast the program of any other network. Of critical importance in the present litigation is the stipulation of the affiliated station that it will, upon not less than twenty-eight days' notice from appellant, broadcast the sponsored or commercial program furnished to it by appellant for at least fifty "converted" hours (averaging seventy-nine regular clock hours) per week.

These provisions of appellant's contracts are alleged to be indispensable to the maintenance and efficient operation of its network and to the existence of a strong and efficient network broadcasting system, and necessary to enable appellant to compete with other advertising media. On May 2, 1941 the Commission issued its order which, as amended by its order of October 11, 1941, promulgated the "Chain Broadcasting Regulations" of which appellant complains, and which the Commission characterized in its Report as "the expression of the

general policy we will follow in exercising our licensing power".[1] The regulations provide that no license shall be granted to a broadcast station having contracts with a network organization, containing any of several provisions which are characteristic of appellant's contracts with its affiliates. These include provisions by which the station is prevented from broadcasting the programs of any other network organization (3.101); or which prevent another station serving substantially the same area from broadcasting the network programs not taken by the station applying for license, or prevent another station serving a substantially different area from broadcasting any program of the network organization (3.102); or by which the station contracts for affiliation with the network for a period longer than two years (3.103); or by which the station "options for network programs any time subject to call on less than 56 days' notice or more time than a total of three hours" within each of four specified segments of the broadcast day, the regulation declaring "such options may not be exclusive as against other network organizations and may not prevent or hinder the station from optioning or selling any or all of the time covered by the option, or other time, to other network organizations" (3.104); or which prevent the station (a) from rejecting network programs which the station reasonably believes to be unsatisfactory or unsuitable or (b) from substituting for the network program a program of outstanding local or national importance (3.105).

After making its order of May 2, 1941, the Commission deferred its effective date until further order. By its order of October 11, 1941, the Commission fixed the effective date as November 15, 1941, and directed "that the effective date of Regulation 3.106 with respect to any station may be extended from time to time in order to permit the orderly disposition of properties", and "that the effective date of Regulation 3.107 shall be suspended indefinitely and any further order of the Commission placing said Regulation 3.107 in effect shall provide for not less than six months' notice and for further extension of the effective date from time to time in order to permit the orderly disposition of properties."

[1] The Commission in its Report says, p. 85:

"We believe that the announcement of the principles we intend to apply in exercising our licensing power will expedite business and further the ends of justice.

"Announcements of policy may take the form of regulations or of general public statements. In either case, the applicant's right to a hearing on the question whether he does in fact propose to operate in the public interest is fully preserved. The regulations we are adopting are nothing more than the expression of the general policy we will follow in exercising our licensing power. The formulation of a regulation in general terms is an important aid to consistency and predictability and does not prejudice any rights of the applicant. Good administrative practice would seem to demand that such a statement of policy or rules and regulations be promulgated wherever sufficient information is available upon which they may be based."

The bill of complaint also alleges that the purpose and effect of the regulations are to prohibit station licensees from having agreements of the kind which appellant has with its affiliates; that prior to the order of May 2, 1941, it was the practice of the Commission to renew the licenses of stations annually and that the licensed stations have had a reasonable expectancy of the annual renewal of their licenses; that 115 licensed stations have such contracts with appellant expiring at various times between the original effective date of the regulations and December 31, 1947. It is alleged that when their current licenses expire, at the latest, and perhaps earlier through the revocation of existing licenses, such stations face the loss of their licenses if they perform or continue in force or renew any existing contracts containing the described provisions.

The bill alleges that since the stations fear the loss of their licenses, as a result of the regulations, they will not negotiate for or renew affiliation contracts containing such provisions. And because they fear the loss of their licenses the stations have threatened to cancel and repudiate their affiliation contracts, and many have notified appellant that they will not be bound by their contracts after the regulations become effective. As a consequence appellant's ability to conduct its business and maintain its public broadcasting service is seriously impaired and the regulations will make the operation of appellant's business more costly, reduce its earnings and render its property and business less valuable.

The bill of complaint was filed October 30, 1941. The following day the Commission promulgated a supplemental "minute" setting up a procedure by which the validity of the regulations might be tested upon application for a license by an individual licensee. The minute declared that if a station wished to challenge the regulations the Commission would grant a temporary extension of its license until there had been a final court determination of the issues. In the event of such litigation, and if the validity of the regulations were sustained, "the Commission will nevertheless grant a regular license to the licensee, otherwise entitled thereto, who has unsuccessfully litigated that issue, if the licensee thereupon conforms to the decision".

An affidavit subsequently submitted by appellant in support of its motion for a temporary injunction states that since the Commission's minute of October 31st, appellant has continued to receive indications that its affiliates will cancel and repudiate their contracts and refuse to renew them, and has received no indication that the minute has or will have the effect of inducing stations to assume the burden of testing the validity of the regulations. Attached to the affidavit are letters from five affiliates, written after October 31st, indicating their intention not to be bound by the contracts. The affidavit also states appellant's belief that it would have received more such letters had it not been for its circulation of information concerning the pendency of this suit.

Accepting the allegations of the complaint as true, as for present purposes we must, it is evident that application by the Commission of its regulations in accordance with their terms would disrupt appellant's broadcasting system and seriously disorganize its business. As the bill alleges, station licenses have been renewable by the Commission annually,[2] whereas appellant's contracts are for five year periods and many of them will survive the expiration of the existing licenses to the affiliated stations. Under Regulations 3.101, 3.102, 3.103 and 3.104, each affiliate must repudiate his contract or be denied the renewal of his license. In either case this would deprive appellant of the station's participation in its network, for which its contracts call.

Regulation 3.104 not only requires all options by appellant to be exercised on 56 days' rather than 28 days' notice as at present, but provides that no option time is exclusive of other networks, and thus allows to appellant no option time within which it can command the use of affiliated stations for any program for broadcasting on a national scale. These sections together thus operate to break down the network enterprise in which appellant and its affiliates are by their contracts cooperating, and to substitute a system in which every station is available to every network on a "first come first served basis".

The Commission concedes by its brief that as provided by § 312(a) "Any station license may be revoked * * * because of conditions revealed by such statements of fact as may be required [of a licensee] from time to time which would warrant the Commission in refusing to grant a license on an original application". Consequently the regulations by their terms, read in conjunction with § 312(a), expose licensees, who renew their affiliation contracts, to revocation proceedings by the Commission whenever upon a statement which the Commission may require it appears that the licensee has entered into an affiliation contract which the regulations proscribe.

A proceeding to set aside an order of the Commission under § 402 (a) and the Urgent Deficiencies Act is a plenary suit in equity. Hence the questions raised by the motion to dismiss are whether the Commission's order is an "order", review of which is authorized by § 402 (a) of the Act, and if so whether the bill states a cause of action in equity. The suit cannot be maintained unless both questions are answered in the affirmative.

Section 402(a) makes applicable the provisions of the Urgent Deficiencies Act to "suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission" except orders "granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or

[2] On October 11, 1941, the Commission amended Regulation 3.34 to make the normal license period two years.

for modification of an existing radio station license, or suspending a radio operator's license". Review of the orders excepted from § 402 (a) is by appeal to the Court of Appeals of the District of Columbia under the provisions of § 402(b). See Scripps-Howard Radio, Inc., v. Federal Communications Comm., 316 U.S. 4, 62 S.Ct. 875, 86 L.Ed. 1229. Since the Commission's order neither grants, denies nor modifies any license, any review in advance or independently of an application for a station license must be under § 402(a), and then only if the Commission's order promulgating the regulations is an "order" within the meaning of this section. The particular label placed upon it by the Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive. Powell v. United States, 300 U.S. 276, 284, 285, 57 S.Ct. 470, 474, 475, 81 L.Ed. 643; A. F. of L. v. Labor Board, 308 U.S. 401, 408, 60 S.Ct. 300, 303, 84 L.Ed. 347.

The Commission's investigation of the contractual relations between the networks and the stations, which resulted in the order now under attack, was for the stated purpose of prescribing regulations of such relationships. The order authorizing the investigation recited that the proceeding was taken under § 303(i) of the Act, which gives the Commission "authority to make special regulations applicable to radio stations engaged in chain broadcasting". Since the Commission is not in terms given authority to regulate contractual relations between the stations and the networks, regulation of them could be accomplished only by regulating licensed radio stations which participate in chain broadcasting. It was by regulations in terms applicable to such stations that the Commission sought to control their contractual relationships with the networks.

The order is thus in its genesis and on its face, and in its practical operation, an order promulgating regulations which operate to control such contractual relationships, and it was adopted by the Commission in the avowed exercise of its rule-making power. Such regulations which affect or determine rights generally even though not directed to any particular person or corporation, when lawfully promulgated by the Interstate Commerce Commission, have the force of law and are orders reviewable under the Urgent Deficiencies Act. Assigned Car Cases, 274 U.S. 564, 47 S.Ct. 727, 71 L.Ed. 1204; United States v. Baltimore & O. R. Co., 293 U.S. 454, 55 S.Ct. 268, 79 L.Ed. 587. And regulations of like character, by which the Communications Commission has prescribed generally the records and accounts to be kept by telephone companies subject to its jurisdiction, are similarly reviewable under § 402(a). American T. & T. Co. v. United States, 299 U.S. 232, 57 S.Ct. 170, 81 L.Ed. 142.

The regulations here prescribe rules which govern the contractual relationships between the stations and the networks. If the applicant for a license has entered into an affiliation contract, the regulations require the Commission to reject his application. If a licensee

renews his contract, the regulations, with the sanction of § 312(a), authorize the Commission to cancel his license. In a proceeding for revocation or cancellation of a license, the decisive question is whether the station, by entering into a contract, has forfeited its right to a license as the regulations prescribe. It is the signing of the contract which, by virtue of the regulations alone, has legal consequences to the stations and to appellant. The regulations are not any the less reviewable because their promulgation did not operate of their own force to deny or cancel a license. It is enough that failure to comply with them penalizes licensees, and appellant, with whom they contract. If an administrative order has that effect it is reviewable and it does not cease to be so merely because it is not certain whether the Commission will institute proceedings to enforce the penalty incurred under its regulations for non-compliance. Assigned Car Cases, supra; American T. & T. Co. v. United States supra.

The regulations are rules which in proceedings before the Commission require it to reject and authorize it to cancel licenses on the grounds specified in the regulations without more. If the regulations are valid they alter the status of appellant's contracts and thus determine their validity in advance of such proceedings. By striking them down by a determination proclaimed in advance that licenses shall be cancelled or refused because of a previous failure to comply with the regulations, they impose a penalty and sanction for noncompliance far more drastic than the fines customarily inflicted for breach of reviewable administrative orders.

Most rules of conduct having the force of law are not self-executing but require judicial or administrative action to impose their sanctions with respect to particular individuals. Unlike an administrative order or a court judgment adjudicating the rights of individuals, which is binding only on the parties to the particular proceeding, a valid exercise of the rule-making power is addressed to and sets a standard of conduct for all to whom its terms apply. It operates as such in advance of the imposition of sanctions upon any particular individual. It is common experience that men conform their conduct to regulations by governmental authority so as to avoid the unpleasant legal consequences which failure to conform entails. And in this case it is alleged without contradiction that numerous affiliated stations have conformed to the regulations to avoid loss of their licenses with consequent injury to appellant.

Such regulations have the force of law before their sanctions are invoked as well as after. When as here they are promulgated by order of the Commission and the expected conformity to them causes injury cognizable by a court of equity, they are appropriately the subject of attack under the provisions of § 402(a) and the Urgent Deficiencies Act. American T. & T. Co. v. United States, supra; Rochester Tel. Corp. v. United States, 307 U.S. 125, 59 S.Ct. 754, 83 L.Ed. 1147; Interstate Commerce Commission v. Goodrich Transit Co.,

224 U.S. 194, 32 S.Ct. 436, 56 L.Ed. 729; Kansas City So. Ry. v. United States, 231 U.S. 423, 34 S.Ct. 125, 58 L.Ed. 296, 52 L.R.A.,N.S., 1; Assigned Car Cases, supra; Chicago, R. I. & P. Ry. Co. v. United States, 284 U.S. 80, 52 S.Ct. 87, 76 L.Ed. 177; United States v. Baltimore & O. R. Co., supra.

It is no answer to say that the regulations are addressed only to the Commission and merely prohibit it from granting—and authorize it to cancel—licenses in the case of all stations entering into such contracts, and that accordingly all stations are left free to enter into contracts or not as they choose. They are free only in the sense that all those who do not choose to conform to regulations which may be determined to be lawful are free by their choice to accept the legal consequences of their acts. Failure to comply with the regulations entails such consequences to the station owner and to appellant. These are the loss of the affiliated stations' licenses if they adhere to their contracts, and disruption of appellant's network through the declared unlawfulness of the contracts, if the regulations are valid.

The purposes sought to be accomplished by § 402(a) and the Urgent Deficiencies Act would be defeated if a suitor were unable to resort to them to avoid reasonably anticipated irreparable injury resulting from such legal consequences of the Commission's order, merely because the Commission as yet has neither refused to renew a license, as the regulations require, nor cancelled a license, as the regulations permit. Such an argument addressed to the form rather than the substance of the order was rejected in Powell v. United States, supra; cf. A. F. of L. v. Labor Board, supra, 308 U.S. 408, 60 S.Ct. 303, 84 L.Ed. 347. The Powell case likewise repudiates the suggestion that merely because the order is not in terms addressed to those whose rights are affected, they cannot seek its review. See also Western Pacific C. R. Co. v. Southern Pac. Co., 284 U.S. 47, 52 S.Ct. 56, 76 L.Ed. 160; Claiborne-Annapolis Ferry Co. v. United States, 285 U.S. 382, 52 S.Ct. 440, 76 L.Ed. 808.

The order here is not one, as the Government argues and as the court below seemed to think, where the complainant's rights are affected only on the contingency of future administrative action as in United States v. Los Angeles & S. L. R. R., 273 U.S. 299, 47 S.Ct. 413, 71 L.Ed. 651; cf. Rochester Telephone Corp. v. United States, supra, 307 U.S. 130, 59 S.Ct. 757, 83 L.Ed. 1147. As the Court declared in the Los Angeles case, 273 U.S. 309, 310, 47 S.Ct. 414, 71 L.Ed. 651, reviewable orders are "an exercise either of the quasi judicial function of determining controversies or of the delegated legislative function of rate making and rule making". And the Court pointed out that the "so-called order" in that case did not "determine any right or obligation" or change the plaintiff's "existing or future status or condition", and that it was "merely the formal record of conclusions reached after a study of data collected in the course of extensive research con-

ducted by the Commission" and "is the exercise solely of the function of investigation."

Here the Commission exercised its rule-making power by adopting regulations whose operation is not made subject to future administrative determinations, save only as the Commission may be called on to decide in any given case whether a station's contract with a network is within the regulations. The regulations' applicability to all who are within their terms does not depend upon future administrative action. Instead they operate to control such action and to determine in advance the rights of others affected by it. The Commission gave its own recognition that such is their operation by its successive postponements of the effective date of the order for a period now expired, and by its suspension of Regulations 3.106 and 3.107, in order to enable the networks to dispose of their properties.

Of course the Commission was at liberty to follow a wholly different procedure. Instead of proclaiming general regulations applicable to all licenses, in advance of any specific contest over a license, it might have awaited such a contest to declare that the policy which these regulations embody represents its concept of the public interest. As a matter of sound administrative practice, both the rule-making proceeding and the specific license proceeding undoubtedly have much to commend them. But they are by no means the same, nor do they necessarily give rise to the same kind of judicial review. Having adopted this order under its rule-making power, the Commission cannot insist that the appellant be relegated to that judicial review which would be exclusive if the rule-making power had never been exercised and consequently had never subjected appellant to the threatened irreparable injury.

The court below assumed that if appellant had any equitable cause of action, it must be prosecuted in an ordinary suit and not under the provisions of the Urgent Deficiencies Act. But we think this mistakes both the nature of the regulations and the purpose of suits under that Act, as incorporated in § 402(a). Such a cause of action obviously can arise only because of the operation of the regulations. The regulations are the effective implement by which the injury complained of is wrought, and hence must be the object of the attack. It is because they are an exercise of the rule-making power, and because they presently determine rights on the basis of which the Commission is required to withhold licenses and authorized to cancel them, that there is an order within the meaning of § 402(a) and the Urgent Deficiencies Act.

The Commission argues that since its Report characterized the regulations as announcements of policy, the order promulgating them is no more subject to review than a press release similarly announcing its policy. Undoubtedly regulations adopted in the exercise of the administrative rule-making power, like laws enacted by legislatures, embody announcements of policy. But they may be something more.

When, as here, the regulations are avowedly adopted in the exercise of that power, couched in terms of command and accompanied by an announcement of the Commission that the policy is one "which we will follow in exercising our licensing power", they must be taken by those entitled to rely upon them as what they purport to be—an exercise of the delegated legislative power—which, until amended, are controlling alike upon the Commission and all others whose rights may be affected by the Commission's execution of them. The Commission's contention that the regulations are no more reviewable than a press release is hardly reconcilable with its own recognition that the regulations afford legal basis for cancellation of the license of a station if it renews its contract with appellant.

Appellant's standing to maintain the present suit in equity is unaffected by the fact that the regulations are not directed to appellant and do not in terms compel action by it or impose penalties upon it because of its action or failure to act. It is enough that, by setting the controlling standards for the Commission's action, the regulations purport to operate to alter and affect adversely appellant's contractual rights and business relations with station owners whose applications for licenses the regulations will cause to be rejected and whose licenses the regulations may cause to be revoked. Chicago Junction Case, 264 U.S. 258, 266–268, 44 S.Ct. 317, 320, 68 L.Ed. 667; Western Pacific C. R. Co. v. Southern Pac. Co. supra; Claiborne-Annapolis Ferry Co. v. United States, supra; compare, in the case of an attack upon the validity of a statute, Truax v. Raich, 239 U.S. 33, 38, 39, 36 S. Ct. 7, 9, 60 L.Ed. 131, L.R.A.1916D, 545, Ann.Cas.1917B, 283; Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070, 39 A.L.R. 468.

What we have said of the allegations of the complaint, and of the effect of the Commission's order if those allegations are sustained upon the trial, is enough to establish the threat of irreparable injury to appellant's business and to show also that the injury can not be avoided, as the Commission suggests, by appellant's intervention in proceedings upon applications for renewal of licenses by its affiliates or in proceedings to cancel their licenses, if and when such proceedings are instituted. Appellant has sufficiently alleged that the affiliates are cancelling or threatening to cancel their contracts in order to conform to the regulations. It is to avoid the irreparable injury which would result from such wholesale cancellations of its contracts, induced by the force of the regulations, that appellant makes its attack on them now rather than in later proceedings on the individual applications for licenses in those cases, if any, in which the stations are willing to seek licenses without complying with the prerequisites laid down by the regulations.

The issues in such a proceeding are not necessarily the same as the issues here. Intervention in it would afford appellant no assurance either of an adjudication of appellant's contentions or that the ac-

tion of other stations would be governed by it. Moreover, if the Commission's order is as we hold a reviewable order, appellant is free to seek review under § 402(a). It is not thereby, as the court below seemed to think, improperly substituting a different procedure and court for that which Congress has prescribed for the trial of like issues so far as they may be raised on review of an order denying a license. Such issues may likewise be involved in a proceeding, upon the Commission's own motion, for modification or cancellation of a license, which concededly is reviewable under § 402(a). See Scripps-Howard Radio, Inc., v. Federal Communications Commission, supra. But review of the order by a licensee in such a proceeding affords no adequate remedy. If ever instituted, which is uncertain, it would come too late to save appellant from the injury wrought by the outlawry of its contracts.

Nor does the Commission's minute, filed after the present suit was brought, afford an adequate basis for requiring appellant to seek relief by intervention in a proceeding on application for a license reviewable under § 402(b). In that event the minute would not operate to broaden the issues involved in the renewal application. Nor would it afford a basis for restraining enforcement of the regulations as to other affiliated stations, pending adjudication of the validity of the regulations. Without full exploration of the subject, such as can be had only at the trial, we cannot say that the minute will afford a sufficient inducement to persuade the affiliated stations to cease cancellations and assume the initiative in litigating the validity of the regulations and of the contracts which they undertake to condemn. The affidavit filed in the court below on the application for a stay is to the contrary. And in any case we are of the opinion that there are no equitable principles by which the right of appellant, upon the showing made by its complaint and affidavit, to test the order under § 402(a) can justly be suspended to await action which the station owners may or may not take in assuming the burden of challenging the regulations.

We need not stop to discuss here the great variety of administrative rulings which unlike this one, are not reviewable—either because they do not adjudicate rights or declare them legislatively, or because there are adequate administrative remedies which must be pursued before resorting to judicial remedies, or because there is no occasion to resort to equitable remedies. But we should not for that reason fail to discriminate between them and this case in which, because of its peculiar circumstances, all the elements prerequisite to judicial review are present. The ultimate test of reviewability is not to be found in an overrefined technique, but in the need of the review to protect from the irreparable injury threatened in the exceptional case by administrative rulings which attach legal consequences to action taken in advance of other hearings and adjudications that may follow, the results of which the regulations purport to control.

We conclude that the Commission's promulgation of the regulations is an order reviewable under § 402(a) of the Act, and that the bill of complaint states a cause of action in equity. The stay now in effect will be continued, on terms to be settled by the court below.

Reversed.

Mr. Justice FRANKFURTER, dissenting.

The criteria governing judicial review of "orders" under the Urgent Deficiencies Act were defined by a unanimous Court in United States v. Los Angeles & S. L. R. R., 273 U.S. 299, 309, 310, 47 S.Ct. 413, 414, 71 L.Ed. 651: "The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, any thing; which does not grant or withhold any authority, privilege, or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation." If "broadcasting company" were substituted for "carrier", this analysis of the legal consequences of the action of the Interstate Commerce Commission in the Los Angeles case would fit perfectly the legal consequences of the action of the Federal Communications Commission in making public the challenged regulations.

The fact that an action of an administrative agency occasions even irreparable loss does not in itself afford sufficient grounds for judicial review. Even if the Commission committed a wrong, the question of judicial reviewability still remains that put in the Los Angeles case, 273 U.S. at page 313, 47 S.Ct. page 416, 71 L.Ed. 651, to wit, is it "a wrong for which Congress provides a remedy under the Urgent Deficiencies Act" of October 22, 1913, 38 Stat. 208, 219, 28 U.S.C.A. § 47, as incorporated in § 402(a) of the Communications Act of 1934, 47 U.S.C.A. § 402(a)?

For Congress has not authorized resort to the federal courts merely because someone feels aggrieved, however deeply, by an action of the Federal Communications Commission. A District Court of the United States can take a case only when Congress has authorized that type of case to be taken. Congress did not leave opportunity for reviewing damaging action by the Federal Communications Commission to the general equity powers of the district courts. It circumscribed the power of the courts in relation to the Commission in the most detailed way. Its incorporation by reference, in the Communications Act of 1934, 47 U.S.C.A. § 151 et seq., of the scope of review allowed in reviewing an "order" of the Interstate Commerce Commission gave all the precise, definite, and technical boundaries which the concept of a reviewable "order" had acquired through the decisions of this Court prior to the enactment of the Communications Act. The precise requirements of an "order" of the Commission for purposes

of judicial review are therefore as inflexible as though they were written into the Act itself.

Our problem, then, is this: Does the issuance of the chain broadcasting regulations constitute an "order" reviewable in a proceeding brought under § 402(a) of the Communications Act, in the light of the settled rules for determining what such an "order" is when a determination of the Interstate Commerce Commission is made the basis of judicial review. It is therefore necessary to put out of mind what this case is not. It is not the invocation of equity jurisdiction in order to avoid threatened irreparable harm resulting from the criminal enforcement of an unconstitutional statute, as in Pierce v. Society of Sisters, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070, 39 A.L.R. 468. Nor do we have here a resort to equity because it is essential for the protection of asserted rights that criminal prosecutions unauthorized by law be restrained, as in Shields v. Utah Idaho Cent. R. Co., 305 U.S. 177, 183, 59 S.Ct. 160, 163, 83 L.Ed. 111.

In promulgating these regulations the Communications Commission merely announced its conception of one aspect of the public interest, namely, the relationship of certain provisions in network-affiliation contracts to the obligation of a station licensee to render the most effective service to the listening public. The regulations themselves determine no rights. They alter the status of neither the networks nor licenses. As such they require nobody—neither the networks, the licensees, nor the Commission—to do any thing. They are merely an announcement to the public of what the Commission intends to do in passing upon future applications for station licenses. No action of the stations or the networks can violate the regulations, for there is nothing the regulations require them to do or refrain from doing.

Announcements of general policies intended to be followed by administrative agencies customarily take any one of various forms. Sometimes they are noted in the agency's annual report to Congress, sometimes in a public announcement or press release, and sometimes, as was the case here, they are published as "rules" or "regulations". See Final Report of the Attorney General's Committee on Administrative Procedure (1941), pp. 26, 27. But whatever form such announcements may take, their nature and effect is the same. The reason why the Commission formulated its chain broadcasting policy in the form of a "regulation" is given in its report: "We believe that the announcement of the principles we intend to apply in exercising our licensing power will expedite business and further the ends of justice. * * * Good administrative practice would seem to demand that such a statement of policy or rules and regulations be promulgated wherever sufficient information is available upon which they may be based." Report on Chain Broadcasting, Federal Communications Commission, Order No. 37, Docket No. 5060, p. 85.

With respect to its jurisdiction over matters relating to radio broadcasting, the Communications Commission is essentially a licensing agency. Its regulatory power over the industry is derived, for the most part, from its authority to grant and withhold station licenses. Under § 309 of the Communications Act of 1934 the Commission is required to examine each application for a station license and to determine in each case whether a grant would serve public interest, convenience, or necessity. As was noted in Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134, 138, 60 S.Ct. 437, 439, 84 L.Ed. 656, the Act "expresses a desire on the part of Congress to maintain, though appropriate administrative control, a grip on the dynamic aspects of radio transmission." To that end Congress established an administrative procedure under which the Commission must make a specific determination in each case whether the public interest would be served by granting the particular application before it. No announcement of general licensing policy can relieve the Commission of its statutory obligation to examine each application for a license and determine whether a grant or denial is required by the public interest.

The Commission recognized this fact in issuing these regulations. It explicitly stated that a determination of the requirements of the public interest will, in spite of the regulations, still have to be made in passing upon particular applications: "Announcements of policy may take the form of regulations or of general public statements. In either case, the applicant's right to a hearing on the question whether he does in fact propose to operate in the public interest is fully preserved. The regulations we are adopting are nothing more than the expression of the general policy we will follow in exercising our licensing power. The formulation of a regulation in general terms is an important aid to consistency and predictability and does not prejudice any rights of the applicant." Report on Chain Broadcasting, supra, p. 85.

Subsequent to the promulgation of the regulations, the Commission found that substantial modifications were necessary. In its supplemental report on these amendments the Commission gave further evidence of the flexible nature of the regulations: "The Commission stands ready at all times to amend and modify its regulations upon the petition of any network, national or regional, or any station or group of stations if it can be shown that those regulations prevent profitable network operations, or unduly disturb any aspect of broadcasting, or that because of special or changed circumstances the chain broadcasting regulations should not be applicable to any particular situation." Moreover, in its Minute of October 31, 1941, designed primarily to protect the interests of station licensees who contest the validity of the regulations, the Commission again made it abundantly clear that the regulations were not final: "If a station wishes to contest the validity of the Chain Broadcasting Regulations * * *, or the

reasonableness of their application to the particular station, its license will be set for hearing."

The regulations do not, therefore, commit the Commission to any definitive course of action in passing upon applications for licenses. Consistently with the regulations (and, parenthetically, consistently with the authority of the Commission to depart from general regulations where such departure is in the public interest, see Federal Radio Commission v. Nelson Bros. B. & M. Co., 289 U.S. 266, 285, 53 S.Ct. 627, 636, 77 L.Ed. 1166, 89 A.L.R. 406), the Commission is free to dilute them with amendments and exceptions. The construction of the regulations and their application to particular situations is still in the hands of the Commission. Administrative adjudication is still open. Before its completion it is not ripe for judicial review.

The characteristics of the administrative determinations in all the cases on which the Court's opinion relies were wholly different. In each one the force of the law either through criminal prosecution or injunction or fine or some other judicial remedy could immediately be brought to bear to enforce the command of the administrative agency. In none of the cases was an administrative action held reviewable which in itself entailed no immediate legal consequences.

Thus, in the Assigned Car Cases, 274 U.S. 564, 47 S.Ct. 727, 71 L.Ed. 1204, suit was brought under the Urgent Deficiencies Act to annul an order of the Interstate Commerce Commission prescribing for all railroads within its jurisdiction a rule governing distribution of cars for the transportation of bituminous coal. Under § 402 of the Transportation Act of 1920, 41 Stat. 456, 476, 49 U.S.C. § 1(12) (14), 49 U.S.C.A. § 1(12, 14), the carriers were required "to make just and reasonable distribution of cars", and the Commission was authorized to "establish reasonable rules, regulations, and practices with respect to car service by carriers by railroad". Failure of a carrier to comply with such regulations issued by the Commission was declared unlawful, subjecting the carrier to a fine of $100 for each offense. Since the order of the Commission commanded carriers to take specified actions, and since the failure to comply with the order would bring immediate legal sanctions, the order was held reviewable.

Similarly, in United States v. Baltimore & O. R. Co., 293 U.S. 454, 55 S.Ct. 268, 79 L.Ed. 587, the Interstate Commerce Commission required railroads subject to its jurisdiction to equip locomotives with a suitable type of power-operated reverse gear. The Boiler Inspection Act, 36 Stat. 913, 916, 45 U.S.C.A. § 22 et seq., expressly provided that violation by a carrier of any rule or regulation issued by the Commission under the Act was punishable by a fine recoverable in a civil action. A suit under the Urgent Deficiencies Act to set aside the Commission's order was therefore entertained.

American T. & T. Co. v. United States, 299 U.S. 232, 57 S.Ct. 170, 81 L.Ed. 142, was a suit under § 402(a) of the Communications Act of 1934, the same provision upon which jurisdiction of the present litigation is based, to set aside an order of the Federal Communications Commission prescribing a uniform system of accounts for telephone companies within the Act. Section 220(a) authorized the Commission to prescribe such forms of accounts, and § 220(d) made the failure or refusal of a company to keep accounts in the manner prescribed by the Commission unlawful, punishable by a $500 forfeiture for each day of the continuance of the offense. Because of the legal sanctions immediately attaching upon its violation, the order was held reviewable. * * *

It is said that the regulations derive legal effect through § 312(a) giving the Commission authority to revoke licenses, and that "by virtue of the regulations alone", the networks and their affiliates are now subjected to legal detriment. But this is merely another way of phrasing the main contention that the regulations at once and without further action by the Commission release legal sanctions. But the regulations have no such effect. To be sure, the Commission can revoke a station license "because of conditions revealed by such statements of fact as may be required from time to time which would warrant the Commission in refusing to grant a license on an original application". But the Commission may never require a licensee to file a statement of fact under § 312(a); its provisions may therefore never come into operation. In any event, the regulations as such do not subject licensees to any sanctions. A license can be revoked under § 312(a) because of the licensee's failure to operate its station in the public interest, as required by the statute. The regulations adopted by the Commission cannot operate to revoke any licenses. It is only after a proceeding has been started (in which the licensee is entitled to a hearing during which the revocation order is suspended) and adversely concluded against a party that legal sanctions come into play—the Commission can bring proceedings to enforce its order of revocation and, correspondingly, the licensee can bring suit under § 402(a) challenging the validity of the Commission's termination of the license.

Section 502 of the Communications Act provides that the violation of "any rule, regulation, restriction, or condition made or imposed by the Commission under authority of this Act [chapter]" shall be a criminal offense. Would the renewal by a licensee of its network-affiliation contract subject it to the criminal penalties imposed by § 502? Obviously not, for the regulations do not forbid a licensee from taking that or any other action. And, for the same reason, a license could not be revoked under the provision of § 312(a) which authorizes revocation "for violation of or failure to observe * * * any regulation of the Commission authorized by this Act [chapter] * * *." If the Commission had issued regulations which ordered licensees to

do or refrain from doing something, the problem would be entirely different. Violation by a licensee of such a regulation would be grounds for revocation of its license, under § 312(a), and for the imposition of criminal penalties, under § 502. And, the other requisites being present, such a regulation could be reviewed as a final administrative determination.

This leaves only the suggestion that since the action taken by the Commission, although not the completion of its adjudicatory process, nevertheless drastically affects substantial business interests, it is proper for the courts to intercede at this stage. Even if this argument were to be considered as if it had never before been made to and rejected by this Court, its infirmities are obvious. As a practical matter, the impact upon the business operations of the networks and their affiliated stations would probably be as disturbing as if the policies formulated in the regulations had been expressed through a press release, or if only the report, which is not only the foundation of the regulations but also embodies them, had been published without the regulations which are only the summary of the report, or if Congress itself had incorporated these regulations into the text of the Communications Act. It will hardly be argued that any of these steps could be the subject of judicial review before the Commission acted upon particular applications. But assume that the greater formality given to the announcement of the Commission's statement of policy through the regulations intensified the practical business consequences. Congress has not conferred upon the district courts jurisdiction over "practical business consequences". They can review action of administrative agencies only when there is an "order", and when Congress in § 402(a) made only an "order" of the Communications Commission reviewable, it incorporated the settled doctrine established by an unbroken series of decisions in this Court that the courts could review only a final determination by an agency whereby its administrative process has been concluded. * * *

This case illustrates anew the influence of a particular instance of felt hardship in derailing legal principles from customary tracks. But this is not an isolated case. If threatened damage through general pronouncement of policy for future administrative action, even if cast in the formal language of a regulation, is to give rise to equitable review apart from the rule that judicial review is premature because of want of administrative finality, the same basis of irreparable harm which is here equated to jurisdiction will bear rich litigious fruit in the case of "regulations" issued by the Securities and Exchange Commission which are damaging in their immediate repercussions to stock exchange and holding companies, or regulations announced by the Treasury for the guidance of taxpayers but which adversely affect business interests, or regulations by the Federal Power Commission, etc. Suppose, for example, that the Commissioner of Internal Revenue issues a ruling that profits derived by radio stations

from their network operations are subject to a tax deemed by them onerous and illegal. Could a network successfully bring a suit in equity prior to the imposition of such taxes to invalidate the ruling on the ground that its practical consequence was the cancellation of or refusal to renew network affiliations? One had supposed that the answer was clearly no. But surely in principle the problem is essentially that of the cases before us.

A final consideration remains. We are not dealing with the reviewability of administrative orders *in vacuo*. The reviewability of an order of the Federal Communications Commission depends upon the statutory scheme of judicial review embodied in § 402 of the Communications Act of 1934. Therefore, even if the regulations could be deemed to possess the essential attributes of a reviewable order, it would not inevitably follow that the order is reviewable in the manner provided for by § 402(a) of the Act. The scope and historical background of the provisions for judicial review contained in the Communications Act of 1934 have too recently been canvassed, see Scripps-Howard Radio, Inc. v. Federal Communications Commission, 316 U.S. 4, 62 S.Ct. 875, 86 L.Ed. 1229; Federal Communications Commission v. Columbia Broadcasting System, 311 U.S. 132, 61 S.Ct. 152, 85 L.Ed. 87; Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134, 60 S.Ct. 437, 84 L.Ed. 656, to require detailed consideration here. Briefly, the Act created two avenues by which orders of the Federal Communications Commission were open to review by the federal courts. Under § 402(a), incorporating the provisions of the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 208, 219, relating to judicial review of orders of the Interstate Commerce Commission, a suit to enforce, set aside, annul, or suspend an order of the Federal Communications Commission may be brought in a specially constituted district court, with a right of direct appeal to this Court, only if the order does not fall within the exceptions enumerated by § 402(b), namely, orders granting or denying applications for station licenses or construction permits and for renewal or modification of licenses. Review of the orders comprehended within § 402(b) is available only through an appeal to the Court of Appeals for the District of Columbia, with no right of direct appeal to this Court.

If the regulations do constitute an order, what kind of an order can it be? It must be in the nature of a blanket denial, operating *in futuro*, to be sure, of applications for renewal of station licenses. But the Act expressly precludes judicial review of orders denying renewal applications of licensees in any manner other than that prescribed by § 402(b), to wit, by an appeal to the Court of Appeals for the District of Columbia. As the court below held, the effect of taking jurisdiction in these cases is to substitute a different court and a different procedure for those specified by Congress. This Court has not in the past displayed such an indifference to the particularities of legislation defining the jurisdiction of the lower federal courts. On the

contrary, only last Term did the Court insist upon strict compliance, with the statutory scheme for judicial review established by the Communications Act of 1934. See Federal Communications Commission v. Columbia Broadcasting System, 311 U.S. 132, 61 S.Ct. 152, 85 L.Ed. 87.

Even if we were free to disregard the scheme for judicial review which Congress has established, I could not agree that an appeal under § 402(b) would not be an adequate means for testing the claims made in the present litigation. There is essentially only one issue on the merits in this proceeding, namely, whether the adoption by the Commission of the policies expressed in the regulations transgresses its statutory and constitutional authority. But this issue could be raised and fully determined in an appeal under § 402(b) from an order denying a renewal application. Indeed, in its Minute of October 31, 1941, the Commission explicitly stated that the validity of the regulations could be put in issue in a renewal proceeding. If anything, therefore, the issues in an appeal under § 402(b) would be broader and not narrower than the issues here. Moreover, since the reasonableness of the application of the regulations to the particular situation would also be in issue in the renewal proceeding, the reviewing court would have before it a record containing elements of concreteness and particularity not present in the record now before us.

The Commission's Minute enables a licensee to contest the validity of the regulations, or the reasonableness of applying them to the particular case, without fear of losing its license. "In order to insure that the station may remain on the air and be in no way injured by any such Commission proceeding [contesting the validity of the regulations] and appeal to court from a decision in such proceeding, the Commission will grant such licensee a temporary extension of its license, with renewals from time to time until there has been a final determination of the issues raised at such hearing. In the event of such litigation, and if the validity of the application of the Chain Broadcasting Regulations to such licensee is sustained by the courts, the Commission will nevertheless grant a regular license to the licensee, otherwise entitled thereto, who has unsuccessfully litigated that issue, if the licensee thereupon conforms to the decision."

Plainly, therefore, a licensee is under no compulsion to cancel or modify its affiliation contract. Licensees who regard the regulations as invalid are free to continue their existing contracts and at the same time challenge the regulations in the orderly manner provided by the Act—and without any danger of losing their right to continue broadcasting. Similarly, the interests of the networks may be protected through intervention in renewal proceedings. Under the Commission's procedure, Rule 1.102 of the Rules of Practice and Procedure, where a renewal application is designated for hearing because of the licensee's contractual arrangements with others, the latter are customarily permitted to intervene. See, for example, Application of E.

J. Regan and F. Arthur Bostwick, Docket No. 5788; Application of John H. Stenger, Jr., Docket No. 5430.

We need go no farther than this litigation to perceive the unfortunate effects of premature judicial review. The chain broadcasting regulations were issued on May 2, 1941, more than a year ago. They were adopted by the Commission as a consequence of its finding, after an investigation lasting more than three years, that certain features of network-affiliation contracts prevented licensees from effectively discharging their obligation to render the fullest service to the listening public. The policy formulated by the Commission may or may not be wise—that is not our concern. But we cannot blink the fact that this litigation has for more than a year prevented the Commission from testing by experience the practical wisdom of a policy found by it to be required by the public interest. The commencement of a proceeding under § 402(b) would not have presented the jurisdictional problems present in this proceeding. Surely those desirous of a speedy adjudication of the issue of the validity of the regulations were aware that the commencement of a proceeding under § 402(a) would not produce a prompt adjudication on the merits, but that it would instead result in postponing for a considerable period the effective date of the regulations, with all the contingent advantages afforded by such postponement.

Hardship there may well come through action of an administrative agency. But to slide from recognition of a hardship to assertion of jurisdiction is once more to assume that only the courts are the guardians of the rights and liberties of the people. In denying that it had power to review the action of the Federal Communications Commission because that body had not yet determined a legal right, the court below, as Judge Learned Hand's opinion abundantly proves, was not respecting a rule of etiquette. On the contrary, it merely recognized that the federal courts are entrusted with the correction of administrative errors or wrongdoing only to the extent of Congressional authorization. To say that the courts should reject the doctrine of administrative finality and take jurisdiction whenever action of an administrative agency may seriously affect substantial business interests, regardless of how intermediate or incomplete the action may be, is, in effect, to imply that the protection of legal interests is entrusted solely to the courts. The unbroken current of this Court's decisions in construing the scope of judicial review under the Urgent Deficiencies Act, and which is the only warrant for jurisdiction in this case, repels such a contention. The decision should therefore be affirmed.

Mr. Justice REED and Mr. Justice DOUGLAS join in this dissent.[h]

[h] To same effect: National Broadcasting Co., Inc. v. United States, 316 U.S. 447, 62 S.Ct. 1214, 86 L.Ed. 1586 (1942). For a subsequent phase of this litigation, involving a determination of the merits, see National Broadcasting Co., Inc. v. United States, 319 U.S. 190, 63 S.Ct. 997, 87 L.Ed. 1344 (1943), *infra* at p. 873.

SECTION 3. "NON-REVIEWABLE" ORDERS

A. "Negative" Orders

PROCTER & GAMBLE CO. v. UNITED STATES

Supreme Court of the United States.
225 U.S. 282, 32 S.Ct. 761, 56 L.Ed. 1091 (1912).

See p. 301, *supra*.

LEHIGH VALLEY RAILROAD CO. v. UNITED STATES

Supreme Court of the United States.
243 U.S. 412, 37 S.Ct. 397, 61 L.Ed. 819 (1917).

Mr. Justice HOLMES delivered the opinion of the court.

This is a bill to prevent the enforcement of an order of the Interstate Commerce Commission. On December 2, 1913, the Commission issued a circular calling attention to the fact that the Act of August 24, 1912 (chap. 390, § 11, 37 Stat. at L. 560, 566, Comp.Stat. 1913, §§ 10,037, 8,567), known as the Panama Canal Act, prohibited, after July 1, 1914, any ownership by a railroad in any common carrier by water when the railroad might compete for traffic with the water carrier; and that the Commission was authorized to determine questions of fact as to such competition, and to extend the time beyond July 1, 1914, if the extension would not exclude or reduce competition on the water route. Notice was given that applications for extension of time should be filed by March 1, 1914. Thereupon, in January, 1914, the appellant filed a petition praying for a hearing as to whether the services of a steamboat line owned by it would be in violation of the above section and for an extension of time. It is the order issued upon this petition against which relief is sought.

The facts other than the question whether they warrant the conclusion that the railroad and the steamboat line do or may compete are not disputed. The railroad extends from Jersey City to Buffalo, and there connects with the line of the Lehigh Valley Transportation Company, which runs vessels between Buffalo and Chicago and Milwaukee. The railroad company owns all the stock of the Transportation Company, but, with the exception of the interchange port of Buffalo, serves no point in common with the boats of the latter. It is, however, a party to certain fast-freight-line arrangements and all-rail routes and joint rates to the ports served by its vessels. The effect of these connections and of the railroad's membership of the Lake Lines Association was held by the Commission to put the railroad in a position inimical to the best interests of the boat line, to deprive

the latter of its initial rate-making power, and to determine by outside authority whether freight shall move by all rail or by lake and rail routes, and if by the latter, by which lake line. It was held that, by virtue of these arrangements, the railroad did or might compete with its boat line, and upon that decision the petition of the appellant was dismissed. 33 Inters.Com.Rep. 699, 706, 716; 37 Inters.Com. Rep. 77.

Three judges sitting in the district court denied the injunction asked and dismissed the bill. 234 Fed. 682. Although they proceeded to discuss the merits of the case, they intimated at the outset a strong doubt whether, in any event, an injunction could be granted. If this doubt was well founded, there is nothing more to be said, since the ground of jurisdiction is gone. We assume that the question whether the facts found by the Commission present a case of real or possible competition within the meaning of the statute is a question of law that could not be conclusively answered by the Commission; but still there is nothing for a court of equity to enjoin if all that the Commission has done is to decline to extend the time during which the railroad can keep its boat line without risk.

The order of the Commission was negative in substance as well as in form. Procter & G. Co. v. United States, 225 U.S. 282, 292, 293, 56 L.Ed. 1091, 1095, 32 Sup.Ct.Rep. 761. The risk to which the railroad was left subject did not come from the order, but from the abovementioned section of the Panama Canal Act (amending § 5 of the Act to Regulate Commerce [24 Stat. at L. 380, chap. 104, Comp.Stat.1913, § 8567]), making each day of violation a separate offense, and the provision of the latter act, § 10, which imposes a possibly large fine. This risk is the same that it was before the order, or that it would have been if appellant had not applied to the Commission, except so far as the findings establish facts that we believe there is no desire to dispute. Without going further it appears to us plain that the decree of the District Court, dismissing the bill, was right.[a]

Decree affirmed.

[a] But see Section 5 (14) (15) (16) of the Interstate Commerce Act, as amended, 49 U.S.C.Supp. § 5 (14) (15) (16), in which are incorporated the relevant provisions of the Panama Canal Act. See also 49 U.S.C. § 5 (10) (11) (12), being the same matter prior to the amendments of 1933, 1934, 1935 and 1940. Note, especially, the requirement in section 5(15) of the Interstate Commerce Act that the Commission make its determination "after full hearing"; and the last sentence of the same section: "In all such cases, the order of said Commission shall be final."

THE CHICAGO JUNCTION CASE

Supreme Court of the United States.
264 U.S. 258, 44 S.Ct. 317, 68 L.Ed. 667 (1924).

Mr. Justice BRANDEIS delivered the opinion of the Court.

The Chicago Junction Railway and the Chicago River & Indiana Railroad are terminal railroads located within the Chicago switching district. Prior to May 16, 1922, they were operated as independent belt lines, uncontrolled by any trunk line carrier, and they were used by the 23 railroads entering Chicago, impartially and without discrimination. Among these were the New York Central Lines and their chief competitors, the 6 carriers who are plaintiffs in this suit. The New York Central sought to obtain control of these terminal railroads. To this end, it made an application to the Interstate Commerce Commission, on December 28, 1920, under paragraph 18 of section 1 and paragraph 2 of section 5 of the Act to Regulate Commerce, as amended by Transportation Act 1920, c. 91, 41 Stat. 456, 477, 481. The authorization requested was to make an agreement with stockholders then owning these properties by which, among other things, the New York Central would purchase all the capital stock of the Chicago River & Indiana Railroad for $750,000, and the latter company would lease for 99 years (and thereafter) the Chicago Junction Railway at an annual rental of $2,000,000. Upon this application hearings were had. The Baltimore & Ohio Railroad, and its co-plaintiffs herein, intervened, and opposed granting the application. On May 16, 1922, an order was entered which authorized the New York Central to acquire the Chicago River & Indiana Railroad stock, and authorized the latter company to lease the Chicago Junction Railway. Chicago Junction Case, 71 Interst.Com.Comn.R. 631. The order did not fix the date when it should become effective. Immediately after its entry, the purchase of the stock was completed and the lease was executed.

On April 10, 1923, this suit was brought in the federal court for the Eastern district of Illinois against the United States, the Commission, the New York Central, the terminal railroads, and the stockholders thereof. The relief sought is to have the order declared void, to have set aside the sale of the stock and the lease, to restore the status quo ante the order, and for an injunction. The case was heard before three judges on plaintiffs' motion for an interlocutory injunction and on defendants' motions to dismiss the bill. The District Court, without opinion, denied the injunction and dismissed the bill. The case is here on direct appeal under the Act of October 22, 1913, c. 32, 38 Stat. 208, 220 (Comp.St. § 998).

The order did not provide for the issue of a certificate of public convenience and necessity. It did not disclose whether it was issued under paragraph 18 of section 1 or under paragraph 2 of section 5. An application, by the carriers who are plaintiffs herein, that this be

specified was denied by the Commission without opinion. In this court counsel for all the defendants stated that the order was entered solely under paragraph 2 of section 5. We have, therefore, no occasion to consider the incidents of applications under paragraph 18 of section 1, or rights thereunder. Several reasons are urged why the order should be held void. The defendants, besides asserting its validity, insist that the plaintiffs have no interest which entitles them to assail the order, and that there are, also, other obstacles to the maintenance of this suit.

First. Plaintiffs contend that the order is void because there was no evidence to support the finding that the acquisition of control of the terminal railroads by the New York Central "will be in the public interest." The bill charges, in clear and definite terms, that this finding was wholly unsupported by evidence. We must take that fact as admitted for the purposes of this appeal. The allegation is made as one of fact. There is no suggestion in the motions to dismiss (which are both general and special) that this fact is not well pleaded, or that a copy of the evidence introduced at the hearing should have been annexed to the bill. Compare Louisiana & Pine Bluff Ry. Co. v. United States, 257 U.S. 114, 42 S.Ct. 25, 66 L.Ed. 156. Facts conceivably known to the Commission, but not put in evidence, will not support an order. Interstate Commerce Commission v. Louisville & Nashville R. R. Co., 227 U.S. 88, 93, 33 S.Ct. 185, 57 L.Ed. 431. The defendants concede that the New York Central could not legally acquire control of these terminal railroads unless authorized so to do by the Commission, pursuant to paragraph 2 of section 5, and that the Commission cannot legally grant such authority unless it finds, after hearing, that the acquisition "will be in the public interest." They contend that this order is not one of those subject to judicial review, and that, if subject to review, it cannot be held void merely because unsupported by evidence. These objections are based on the nature of the order, not on the class of persons by whom the judicial review is invoked.

Whether this order can be described properly as legislative may be doubted. It is clear that legislative character alone would not preclude judicial review. Rate orders are clearly legislative. Prentis v. Atlantic Coast Line, 211 U.S. 210, 226, 29 S.Ct. 67, 53 L.Ed. 150. Nor would the further fact that the order is permissive preclude review, if by that term is meant an order which, in contradistinction to one compelling performance, authorizes a carrier to do some act otherwise prohibited. Orders entered under the Act of June 18, 1910, c. 309, § 8, 36 Stat. 539, 547 (Comp.St. § 8566), amending section 4 of the Interstate Commerce Act, are of this character. That section prohibits carriers from charging more "for a shorter than for a longer distance over the same line or route in the same direction" without obtaining authority from the Commission. A suit will lie to set aside an order granting such authority, and to enjoin action by the

carrier thereunder. Skinner & Eddy Corporation v. United States, 249 U.S. 557, 562, 39 S.Ct. 375, 63 L.Ed. 772. Compare United States v. Merchants' & Manufacturers' Traffic Association, 242 U.S. 178, 37 S.Ct. 24, 61 L.Ed. 233. The order here challenged is wholly unlike those which have been held not subject to judicial review. In United States v. Illinois Central R. R. Co., 244 U.S. 82, 89, 37 S.Ct. 584, 61 L.Ed. 1007, the action of the Commission, with which the court refused to interfere, was the assignment of a complaint for hearing. As this court said: "The notice * * * had no characteristic of an order, affirmative or negative." In Procter & Gamble v. United States, 225 U.S. 282, 32 S.Ct. 761, 56 L.Ed. 1091, Hooker v. Knapp, 225 U.S. 302, 32 S.Ct. 769, 56 L.Ed. 1099, and Lehigh Valley R. R. Co. v. United States, 243 U.S. 412, 37 S.Ct. 397, 61 L.Ed. 819, judicial review was refused, not because the order was permissive, or because it was negative in character, but because it was a denial of the affirmative relief sought. This court declined to interfere, because to do so would have involved exercise by it of the administrative function of granting the relief which the Commission, in the exercise of its jurisdiction, had denied. Here the order complained of is an affirmative one; that is, it grants the relief sought. Compare Manufacturers' Ry. Co. v. United States, 246 U.S. 457, 483, 38 S.Ct. 383, 62 L.Ed. 831.

It is further contended that paragraph 2 of section 5 confers a power purely discretionary, and that, for this reason, the order entered cannot be set aside by a court merely on the ground that the action taken was based on facts erroneously assumed, or of which there was no evidence. The power here challenged is not of that character. Congress by using the phrase "whenever the Commission is of opinion, after hearing," prescribed quasi judicial action. Upon application of a carrier, the Commission must form a judgment whether the acquisition proposed will be in the public interest. It may form this judgment only after hearing. The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it. To refuse to consider evidence introduced or to make an essential finding without supporting evidence is arbitrary action. As it was admitted by the motion that the order was unsupported by evidence, and since such an order is void, there is no occasion to consider the other grounds of invalidity asserted by plaintiffs.

Second. The defendants contend that the plaintiffs have not the legal interest necessary to entitle them to challenge the order. That they have in fact a vital interest is admitted. They are the competitors of the New York Central. Practically all the tonnage originated at or destined to points on these terminal railroads is competitive, in that the same can be hauled either over the lines of the New York Central or over those of the plaintiffs. Prior to the date of the order, and while the terminal railroads were uncontrolled by any trunk line carrier, they were all served impartially and without discrimina-

tion, and they competed for the traffic on equal terms. The order substitutes for neutral control of the terminal railroads, monopoly of control in the New York Central, and, in so doing, necessarily gives to it substantial advantage over all its competitors and subjects the latter to serious disadvantage and prejudice. The main purpose of the acquisition by the New York Central was to secure a larger share of the Chicago business. By means of the preferential position incident to the control of these terminal railroads, it planned to obtain traffic theretofore enjoyed by its competitors. Because such was the purpose of the New York Central control, and would necessarily be its effect, these plaintiffs intervened before the Commission. That their apprehensions were well founded is shown by the results. The plaintiffs are no longer permitted to compete with the New York Central on equal terms. A large volume of traffic has been diverted from their lines to those of the New York Central. The diversion of traffic has already subjected the plaintiffs to irreparable injury. The loss sustained exceeds $10,000,000. Continued control by the New York Central will subject them to an annual loss in net earnings of approximately that amount. If, as suggested in Interstate Commerce Commission v. Chicago, Rock Island & Pacific Ry. Co., 218 U.S. 88, 109, 30 S.Ct. 651, 54 L.Ed. 946, a legal interest exists where carriers' revenues may be affected, there is clearly such an interest here.

This loss is not the incident of more effective competition. Compare Edward Hines Trustees v. United States, 263 U.S. 143, 148, 44 S.Ct. 72, 68 L.Ed. 216. It is injury inflicted by denying to the plaintiffs equality of treatment. To such treatment carriers are, under the Interstate Commerce Act, as fully entitled as any shipper. Pennsylvania Co. v. United States, 236 U.S. 351, 35 S.Ct. 370, 59 L.Ed. 616. It is true that, before Transportation Act 1920, the Interstate Commerce Act would not have prohibited the owners of the terminal railroads from selling them to the New York Central. Nor would it have prohibited the latter company from making the purchase. And by reason of a provision then contained in section 3 of the Interstate Commerce Act the purchase might have enabled the New York Central to exclude all other carriers from use of the terminals. Compare Louisville & Nashville R. R. Co. v. United States, 242 U.S. 60, 37 S.Ct. 61, 61 L.Ed. 152; Manufacturers' Ry. Co. v. United States, 246 U.S. 457, 482, 38 S.Ct. 383, 62 L.Ed. 831. But Transportation Act 1920 repealed that provision in section 3, it made provision for securing joint use of terminals, and it prohibited any acquisition of a railroad by a carrier, unless authorized by the Commission. By reason of this legislation, the plaintiffs, being competitors of the New York Central and users of the terminal railroads theretofore neutral, have a special interest in the proposal to transfer the control to that company.

The plaintiffs may challenge the order because they are parties to it. Judicial Code, § 212 (originally Commerce Court Act June 18, 1910, c. 309, 36 Stat. 543 [Comp.St. § 1005]), declares that any party

to a proceeding before the Commission may, as of right, become a party to "any suit wherein is involved the validity of such order." The section does not in terms provide that such party may institute a suit to challenge the order. But this is implied. For, otherwise, there would in some cases be no redress for the injury inflicted by an illegal order. Moreover, the fact of intervention, allowed as it was, implies a finding by the Commission that the plaintiffs have an interest. In the proceeding before the Commission, they opposed by evidence and argument the granting of the application. This they did as of right. For under the rules of practice, adopted by the Commission pursuant to paragraph 1 of section 17 of the Interstate Commerce Act, the intervener becomes a party to the proceeding, entitled, like any other party, to appear at the taking of testimony, to produce and cross-examine witnesses, and to be heard in person or by counsel. The intervention must be preceded by an order of the Commission granting leave, and leave can be granted only to one showing interest. No case has been found in which either this court, or any lower court, has denied to one who was a party to the proceedings before the Commission the right to challenge the order entered therein. On the other hand, persons who were entitled to become parties before the Commission, but did not do so, have been allowed to maintain such suits where the requisite interest was shown. Interstate Commerce Commission v. Diffenbaugh, 222 U.S. 42, 49, 32 S.Ct. 22, 56 L.Ed. 83; Skinner & Eddy Corporation v. United States, 249 U.S. 557, 562, 39 S. Ct. 375, 63 L.Ed. 772.[b] * * *

PIEDMONT & NORTHERN RY. v. UNITED STATES

Supreme Court of the United States.
280 U.S. 469, 50 S.Ct. 192, 74 L.Ed. 551 (1930).

Mr. Justice BRANDEIS delivered the opinion of the Court.

Paragraph 18 of section 1 of the Interstate Commerce Act, as amended by Transportation Act 1920, February 28, c. 91, § 402, 41 Stat. 456, 477, 478 (49 U.S.C.A. § 1(18), prohibits any carrier by railroad subject to that act from undertaking any extension of its lines or construction of new lines, without first obtaining from the Interstate Commerce Commission a certificate of public necessity and convenience. Paragraphs 19 and 20 provide for applications for certificates and prescribe the procedure and mode of disposal. Paragraph 22 exempts from the scope of those provisions the construction of industrial and certain other tracks "located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

[b] Footnotes of the court have been omitted.

The Piedmont & Northern Railway, a carrier by railroad subject to the Interstate Commerce Act, operates in interstate commerce about 128 miles of line in North and South Carolina, using exclusively electric locomotives. It determined to extend its lines 53 miles on one route and 75 miles on another, in order to connect with several steam railroads; and, believing that the above provisions of the act were inapplicable, it intended to make the proposed extensions without securing from the Commission a certificate of public necessity and convenience. The Commission, learning informally of the project, advised the railway by letter that before it "constructs any extensions to its line or issues any securities it will be expected to file appropriate applications for authority therefor under sections 1 and 20a [49 U.S.C.A. §§ 1, 20a]. The filing of such applications will, of course, be without prejudice to your right to assert that the Commission has no jurisdiction over your property in those respects and to adduce whatever evidence you may desire to support such contention." The letter called attention to the following passage in Texas & Pacific Ry. Co. v. Gulf, Colorado & Santa Fé Ry. Co., 270 U.S. 266, 272, 46 S.Ct. 263, 264, 70 L.Ed. 578:

"Whenever such an application is made, the Commission may pass incidentally upon the question whether what is called an extension is in fact such; for if it proves to be only an industrial track, the Commission must decline, on that ground, to issue a certificate. A carrier desiring to construct new tracks does not, by making application to the Commission, necessarily admit that they constitute an extension. It may secure a determination of the question, without waiving any right by asserting in the application that in its opinion a certificate is not required, because the construction involves only an industrial track."

Upon receipt of this letter, the railway filed an application for a certificate of public necessity and convenience; and it asserted therein that the proposed extensions were parts of a single project undertaken prior to the effective date of paragraph 18 [1] and that it was an interurban electric railway within the exemption of paragraph 22. It accordingly moved that its application be dismissed for want of jurisdiction. The Commission overruled the motion; took jurisdiction; and entered an order denying the application on its merits. Proposed Construction of Lines by Piedmont & Northern Ry. Co., 138 I.C.C. 363. This suit was then brought by the railway against the United States in the federal court for Western South Carolina, under the Urgent Deficiencies Act, October 22, 1913, c. 32, 38 Stat. 208, 219, 220, U.S.C. tit. 28, § 47 (28 U.S.C.A. § 47), and, as the bill states, also under "the general equity jurisdiction" of the court. The bill charges that, if the order is not set aside, the railway "will be prevented from constructing the new mileage"; and prays for "a permanent injunction decreeing that the Commission was without ju-

[1] [Footnote omitted.—Ed.]

risdiction of the application," that the order "taking jurisdiction of said application and denying the same, be set aside and annulled, and that the Commission be forever enjoined from taking any action or proceeding against your petitioner under said order." The National Association of Railroad and Utility Commissioners intervened as plaintiff. The Interstate Commerce Commission, the Southern Railway, and other steam railroads intervened as defendants. The Commission moved to dismiss the bill for want of jurisdiction. The court, three judges sitting, denied the motion; and, the case being submitted on final hearing upon the pleadings and the record before the Commission, entered a decree dismissing the bill on the merits. (D.C.) 30 F.(2d) 421. A direct appeal to this Court was taken by both plaintiffs under section 238(4) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, § 1, 43 Stat. 936, 938, U.S.C. tit. 28, § 345 (28 U.S.C.A. § 345(d).

Plaintiffs do not complain of the order's denial of a certificate of public necessity and convenience. They concede that no court has the power to compel the Commission to issue such a certificate, since no railroad subject to the provisions of the act has a right to extend its lines. Therefore, the order denying a certificate, being negative in substance as well as in form, infringed no right of the railway. Compare Procter & Gamble Co. v. United States, 225 U.S. 282, 32 S.Ct. 761, 56 L.Ed. 1091; Lehigh Valley R. R. Co. v. United States, 243 U.S. 412, 37 S.Ct. 397, 61 L.Ed. 819; United States v. New River Co., 265 U.S. 533, 540, 44 S.Ct. 610, 68 L.Ed. 1165. The plaintiffs have also abandoned, in this Court, their contention that the proposed extensions are part of a project undertaken prior to the effective date of paragraph 18. Their sole contention is that the court below and the Commission erred in not holding that the railway is an interurban electric railway within the exemption of paragraph 22. The defendants renew their objections to the jurisdiction of the court.

We think that the defendants' objection is well taken. There is no allegation of fact in the bill, and no provision in the statute, which supports the charge that the order will prevent the railway from proceeding with the construction of the new mileage. The order is wholly unlike a decree which dismisses a bill in equity on the merits when it should have been dismissed for want of jurisdiction. Such a decree must be set aside because, otherwise, it might be held to operate as res judicata. Compare Swift & Co. v. United States, 276 U.S. 311, 325, 326, 48 S.Ct. 311, 72 L.Ed. 587; New Orleans v. Fisher, 180 U.S. 185, 196, 21 S.Ct. 347, 45 L.Ed. 485; Dowell v. Applegate, 152 U.S. 327, 337–341, 14 S.Ct. 611, 38 L.Ed. 463. But neither the assumption of jurisdiction by the Commission nor its denial of the application can operate as res judicata of the railway's claim of immunity. If, as is contended, the Commission was without jurisdiction, the railway is as free to proceed with the construction as if the application had not been made and the Commission had not acted.

Nothing done by the Commission can prejudice the railway's claim to immunity in any other proceeding.

It is true that, if the railway builds without having secured a certificate, it may suffer serious loss. For a court may hold, in an appropriate proceeding, that the railway is within the purview of paragraph 18. And the railway may be thus subjected to the penalties prescribed by paragraph 20. These risks arise, however, not from the order, but from the statute. Compare Lehigh Valley R. R. Co. v. United States, 243 U.S. 412, 414, 37 S.Ct. 397, 61 L.Ed. 819. The order is entirely negative. It is not susceptible of violation and cannot call for enforcement. It does not finally adjudicate the railway's standing; nor does it enjoin it to do or refrain from doing anything. The penalties provided in paragraph 20 are prescribed not for violation of an order of the Commission, but for violation of the provisions of the statute. And the apprehended loss will be no greater by virtue of the Commission's order than if the railway had commenced building without trying to secure a certificate, as was done in Texas & Pacific Ry. Co. v. Gulf, Colorado & Santa Fé Ry. Co., 270 U.S. 266, 46 S.Ct. 263, 70 L.Ed. 578. There is no suggestion in the bill how the Commission or the government could conceivably take any action under the order.

The action taken by the Commission may lend greater justification to the railway's fear of the uncertainty instinct in the prophecy as to whether it will be held to be an interurban electric within the meaning of paragraph 22. But it does not alter the substance of the remedy sought. That is the same as if the suit had been brought by the railway prior to any action by the Commission, except that the railway may be bound by the record made before the Commission. The relief which plaintiffs seek is not from the order but from the uncertainty as to the applicability of the statute. If the statute gives the Commission jurisdiction over the railway's application, then concededly the order is not subject to attack. If, on the other hand, the statute does not confer the jurisdiction, then obviously the order is no obstacle to the railway's plans. What plaintiffs are seeking is, therefore, in substance, a declaratory judgment that the railway is within the exemption contained in paragraph 22 of the act. Such a remedy is not within either the statutory or the equity jurisdiction of federal courts. Compare Willing v. Chicago Auditorium Association, 277 U.S. 274, 48 S.Ct. 507, 72 L.Ed. 880; Great Northern Ry. Co. v. United States, 277 U.S. 172, 48 S.Ct. 466, 72 L.Ed. 838; Liberty Warehouse Co. v. Grannis, 273 U.S. 70, 74, 47 S.Ct. 282, 71 L.Ed. 541; United States v. Los Angeles & Salt Lake R. R. Co., 273 U.S. 299, 47 S.Ct. 413, 71 L.Ed. 651.

There is nothing in the passage from Texas & Pacific Ry. Co. v. Gulf, C. & S. F. R. Co., 270 U.S. 266, 272, 46 S.Ct. 263, 70 L.Ed. 578, quoted by the Commission, which is inconsistent with the conclusion stated above. The case is entirely different from those cases

where an application for a certificate is alleged to have been erroneously granted, as in The Chicago Junction Case, 264 U.S. 258, 44 S.Ct. 317, 68 L.Ed. 667, and Colorado v. United States, 271 U.S. 153, 46 S.Ct. 452, 70 L.Ed. 878. There, a judicial review is provided in order to protect a legal right of the plaintiff alleged to have been infringed by an order which authorizes affirmative action.

Since plaintiff's bill was dismissed on the merits when it should have been dismissed for want of jurisdiction, the decree must be reversed with directions to dismiss the bill for want of jurisdiction. Smallwood v. Gallardo, 275 U.S. 56, 62, 48 S.Ct. 23, 72 L.Ed. 152; Shawnee Sewerage & Drainage Co. v. Stearns, 220 U.S. 462, 471, 31 S.Ct. 452, 55 L.Ed. 544; Blacklock v. Small, 127 U.S. 96, 105, 8 S.Ct. 1096, 32 L.Ed. 70. Compare United States v. Anchor Coal Co., 279 U.S. 812, 49 S.Ct. 262, 73 L.Ed. 971; Gnerich v. Rutter, 265 U.S. 388, 393, 44 S.Ct. 532, 68 L.Ed. 1068; Brownlow v. Schwartz, 261 U.S. 216, 218, 43 S.Ct. 263, 67 L.Ed. 620.

Reversed, with direction to dismiss the bill for want of jurisdiction.

ROCHESTER TELEPHONE CORPORATION v. UNITED STATES

Supreme Court of the United States.
307 U.S. 125, 59 S.Ct. 754, 83 L.Ed. 1147 (1939).

Mr. Justice FRANKFURTER delivered the opinion of the Court.

This is an appeal, under Sec. 238 of the Judicial Code as amended, 28 U.S.C. § 345, 28 U.S.C.A. § 345, from a final decree by a district court of three judges, under the Urgent Deficiencies Act of October 22, 1913, 28 U.S.C. §§ 45, 47a, 28 U.S.C.A. §§ 45, 47a, as extended by Sec. 402(a) of the Federal Communications Act, 47 U.S.C. § 402(a), 47 U.S.C.A. § 402(a), dismissing on the merits a bill to review an order of the Federal Communications Commission.

At the outset a challenge to the jurisdiction of the District Court confronts us. It involves those problems of administrative law which are implied by the doctrine of "negative orders." Inasmuch as this phrase is shorthand for a variety of situations, sharp heed must be given to the precise circumstances—inter alia, the statutory provisions for review, the terms of the contested order, the grounds of objection to it—which in this and other cases have invoked the doctrine.

Section 2(b) of the Communications Act of 1934, 47 U.S.C.A. § 152 (b), provides that, with certain exceptions not here material, the Communications Commission shall not have jurisdiction over any carrier "engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier." The appellant, Rochester Telephone Corporation (hereafter called the Rochester), is a New York

corporation maintaining a system of telephone communications in and around the City of Rochester. For present purposes the Rochester is to be deemed as engaged in interstate communications solely because of physical connections with the facilities of the New York Telephone Company (hereafter called the New York).

The present controversy grew out of a ruling by the Federal Communications Commission that the Rochester owed obedience to a series of orders issued by the Commission. These orders required all telephone carriers subject to the Act to file schedules of their charges, copies of contracts with other telephone carriers, information concerning their corporate and service history, their relations with affiliates, their use of franks and passes. Copies of these orders were duly served on the Rochester. No response being had, the Telephone Division of the Communications Commission, on October 9, 1935, ordered the Rochester to show cause why it should not be required to file responses to the general orders theretofore served upon it.[1] The Rochester answered, claiming to be outside the requirements of the Act except as to matters not here questioned.

To ascertain the facts in the contested issue, the Commission appointed a trial examiner. At hearings held by him the Rochester entered a special appearance, denying the Commission's jurisdiction and contending that the burden of proof was on the Commission to show that Rochester did not come within the exclusionary provisions of Section 2(b) (2). After a thorough hearing[2] and the submission of briefs, the examiner filed his report, to which the Rochester duly excepted. Upon the basis of these proceedings and of argument before it, the Commission, through its Telephone Division, sustained the findings of its chief examiner, determined that the Rochester was under the "control" of the New York and therefore not entitled to the classification of a mere connecting carrier under Section 2(b) (2). Accordingly, the Commission ordered the Rochester classified "as subject to all common carrier provisions of the Communications Act of 1934, and, therefore, subject to all orders of the Telephone Division." A petition for rehearing before the full Commission was denied.

The Rochester thereupon filed the present bill, alleging that the order entered by the Commission on November 18, 1936, pursuant to its Report, was contrary to undisputed facts and erroneous as a matter of law, and that the Commission's threat to enforce it put the Rochester to the hazard of irreparable injury, and praying that the District Court "make and enter its order and decree setting aside and annulling said orders of the Federal Communications Commission hereinbefore mentioned, and each and all of them, and enjoining the enforcement of said orders, except in so far as the provisions of said orders * * * have already been complied with."

[1] On November 13, 1935, the order was amended in matters not here relevant.

[2] The hearing before the examiner lasted two days; 221 pages of testimony were taken and 34 exhibits were introduced.

The case was disposed of in the District Court on the pleadings and the record before the Commission.

Below, the Government made no objection to the District Court's jurisdiction, nor did that Court raise the question sua sponte.[3] It sustained the Commission's action on the merits and dismissed the bill. Here, the Government urges that under the doctrine of "negative orders" the Commission's order was not reviewable, but, in the alternative, supports the decree on the merits.

The relation of action by the Federal Communications Commission to the reviewing power of the courts is here for the first time. The jurisdictional objection raised by the Government in this case implicates other federal regulatory bodies as well, because the various statutory schemes for judicial review have either been carried over from the Urgent Deficiencies Act, pertaining to orders under the Acts to Regulate Commerce, or because different statutory provisions have by analogy been assimilated to the "negative order" doctrine. That doctrine has not had wholly plain sailing in the many cases, both here and in the lower federal courts, since it first got under way in 1912, in Procter & Gamble Co. v. United States, 225 U.S. 282, 32 S.Ct. 761, 56 L.Ed. 1091.

The important procedural problems with which this case is entangled therefore call for clarification.

The prior decisions involving the "negative order" doctrine fall into three categories: [4]

(1) Where the action sought to be reviewed may have the effect of forbidding or compelling conduct on the part of the person seeking to review it, but only if some further action is taken by the Commission. Such a situation is presented by an attempt to review a valuation made by the Interstate Commerce Commission which has no immediate legal effect although it may be the basis of a subsequent rate order.

(2) Where the action sought to be reviewed declines to relieve the complainant from a statutory command forbidding or compelling conduct on his part. The most obvious case is a denial of permission by the Interstate Commerce Commission for a departure from the long-short haul clause.

(3) Where the action sought to be reviewed does not forbid or compel conduct on the part of the person seeking review but is at-

[3] Under United States v. Corrick, 298 U.S. 435, 440, 56 S.Ct. 829, 831, 80 L.Ed. 1263, and United States v. Griffin, 303 U.S. 226, 229, 58 S.Ct. 601, 602, 82 L.Ed. 764, the doctrine of "negative orders" implies a jurisdictional defect which courts must consider sua sponte.

[4] All except one of the prior decisions of this Court on the "negative order" doctrine involved review of action by the Interstate Commerce Commission. United States v. Corrick, supra, note 3, involved review of action by the Secretary of Agriculture under the Packers and Stockyards Act, 7 U.S.C.A. § 181 et seq.

tacked because it does not forbid or compel conduct by a third person. A familiar example is that of a shipper requesting the Interstate Commerce Commission for an order compelling the carrier to adopt certain rates or practices which the Commission, on the merits, declines. Another instance is where the Commission authorizes the carrier to depart from the long-short haul clause and a shipper adversely affected seeks to have the authorization set aside.

In group (1) the order sought to be reviewed does not of itself adversely affect complainant but only affects his rights adversely on the contingency of future administrative action. In view of traditional conceptions of federal judicial power, resort to the courts in these situations is either premature or wholly beyond their province. Thus, orders of the Interstate Commerce Commission setting a case for hearing despite a challenge to its jurisdiction,[5] or rendering a tentative [6] or final valuation [7] under the Valuation Act, 49 U.S.C.A. § 19a, although claimed to be inaccurate, or holding that a carrier is within the Railway Labor Act, 45 U.S.C.A. § 151 et seq., and therefore amenable to the National Mediation Board, are not reviewable.[8]

The governing considerations which keep such orders without the area of judicial review were thus summarized for the Court by Mr. Justice Brandeis in denying reviewability of a "final valuation" under the Valuations Act: "The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, anything; which does not grant or withhold any authority, privilege, or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation." United States v. Los Angeles R. R., 273 U.S. 299, 309, 310, 47 S.Ct. 413, 414, 71 L.Ed. 651.

Plainly the denial of judicial review in these cases does not derive from a regard for the special functions of administrative agencies. Judicial abstention here is merely an application of the traditional criteria for bringing judicial action into play. Partly these have been written into Article 3 of the Constitution, U.S.C.A., by what is implied from the grant of "judicial power" to determine "Cases" and "Controversies," Art. 3, Sec. 2, U.S.Constitution.[9] Partly they are

[5] United States v. Illinois Central R. R., 244 U.S. 82, 37 S.Ct. 584, 61 L.Ed. 1007. Compare Federal Power Commission v. Metropolitan Edison Co., 304 U. S. 375, 58 S.Ct. 963, 82 L.Ed. 1408.

[6] Delaware & Hudson Co v. United States, 266 U.S. 438, 45 S.Ct. 153, 69 L.Ed. 369.

[7] United States v. Los Angeles R. R., 273 U.S. 299, 47 S.Ct. 413, 71 L.Ed. 651.

[8] Shannahan v. United States, 303 U. S. 596, 58 S.Ct. 732, 82 L.Ed. 1039; compare Shields v. Utah Idaho Central R. R., 305 U S. 177, 182–184, 59 S.Ct. 160, 163, 164, 83 L.Ed. 111.

[9] Hayburn's Case, 2 Dall. 409, 1 L.Ed. 436, is the symbol for considerations which limit the constitutional power of the federal courts, though that case itself never reached adjudication. See, also, United States v. Ferreira, 13 How. 40, 14 L Ed. 42; Muskrat v. United States, 219 U.S. 346, 31 S.Ct. 250, 55 L. Ed 246.

an aspect of the procedural philosophy pertaining to the federal courts whereby, ever since the first Judiciary Act, Congress has been loathe to authorize review of interim steps in a proceeding.[10]

Group (2) is composed of instances of statutory regulations which place restrictions upon the free conduct of the complainant. To rid himself of these restrictions the complainant either asks the Interstate Commerce Commission to place him outside the statute, or, being concededly within it, he invokes the Commission's dispensing power. In this type of situation a complainant seeking judicial review under the Urgent Deficiencies Act of adverse action by the Commission must clear three hurdles: (a) "case" or "controversy" under Article 3; (b) the conventional requisites of equity judisdiction; (c) the specific terms of the statute granting to the district courts jurisdiction in suits challenging "any order" of the Commission.

Where a complainant seeks the Commission's authority under the terms of a statute and the Commission's action is followed by legal consequences, as was the case in Lehigh Valley R. R. v. United States, 243 U.S. 412, 37 S.Ct. 397, 61 L.Ed. 819, or where the Commission's order denies an exemption from the terms of the statute, as in the Inter-Mountain Rate Case, 234 U.S. 476, 34 S.Ct. 986, 58 L.Ed. 1408, the road to the courts' jurisdiction seems to be clear. There is a constitutional "case" or "controversy," Interstate Commerce Commission v. Brimson, 154 U.S. 447, 14 S.Ct. 1125, 38 L.Ed. 1047; the requirements of equity are satisfied if disregard of the Commission's adverse action entails threat of oppressive penalties; and the suit is within the express language of the Urgent Deficiencies Act in that it is one "to enjoin, set aside, annul" an "order of said commission." 28 U.S.C. Sec. 46, 47, 28 U.S.C.A. §§ 46, 47.[11] While the penalties may be

[10] Prior to Section 7 of the Act of March 3, 1891, 26 Stat. 828, authorizing an appeal to the Circuit Court of Appeals from a decree granting a preliminary injunction, review in a case not involving a final judgment was unknown in the federal judicial system, except insofar as it was present in the practice of certification introduced by Section 6 of the Act of April 29, 1802, 2 Stat. 159. See United States v. Bailey, 9 Pet. 267, 9 L.Ed. 124. For state court decisions the requirements for finality of the original Judiciary Act have been adhered to. Section 237, Judicial Code as amended, 28 U.S.C. Sec. 344, 28 U.S.C.A. § 344. Review of action of the federal district courts not involving final judgments can be had only in a limited class of cases dealing with interlocutory injunctions, receiverships, and criminal appeals. Section 129 and 238 of the Judicial Code as amended, 28 U.S.C. Sec. 227, 345, 28 U.S.C.A. §§ 227, 345. This Court, however, may take jurisdiction on certiorari before the appellate jurisdiction of the circuit court of appeals is exhausted.

[11] The Lehigh Valley case apparently originated the statement, often made in "negative order" cases, that the risk results from the statute, not from the order. But this formula hardly squares with the actualities of the situation in that case. The Panama Canal Act, paragraphs (19–21) of Section 5 of the Act to Regulate Commerce, as amended, 49 U.S.C.A. § 5 (19–21), forbade community of interest between any common carrier subject to the Act and a competing water carrier. Under paragraph (20), jurisdiction was conferred on the Commission to determine questions of fact as to the existence of actual or poten-

imposed by the statute for its violation and not for disobedience of the Commission's order, a favorable order would render the prohibitions of the statute inoperative. The complainant can come into court, of course, not to review action within the discretionary authority of the Commission to render an adverse rather than a favorable decision but because he urges errors of law outside the Commission's final say-so. Such an analysis emerges from a long sequence of cases under the Urgent Deficiencies Act viewed in the setting of general

tial competitive conditions, either on the application of the carrier or on the Commission's motion, its determination to be final. Under paragraph (21), the Commission was given jurisdiction to extend the time within which operations otherwise prohibited by the statute might be carried on after July 1, 1914, if such extension did not reduce competition and benefited the public. After receipt of notice of the Act from the Commission, the Lehigh applied to the Commission for a ruling that it was not subject to the Act, or, in the alternative, for an extension. The Commission issued an order subjecting the Lehigh to the Act and denying an extension. Thereupon the Lehigh brought a suit to set aside this order and to enjoin the Commission from enforcing it.

As a practical matter the risk of prosecution to which the Lehigh was subjected if it wished to continue to operate its boats was the result of the order. Since the Panama Canal Act provided that the Commission should find the facts under it, there could have been no prosecution without a previous finding by the Commission that the Lehigh was within the Act; once such a finding was made it was subject to the rule of administrative finality. Compare Keogh v. Chicago & N. W. Ry., 260 U.S. 156, 43 S.Ct. 47, 67 L.Ed. 183. Therefore the Commission's order that the Lehigh was subject to the Panama Canal Act was responsible for the risk, as much so as if it had expressly commanded the Lehigh to stop running its boat lines And assuming the Lehigh was within the prohibition of the statute, the Commission's order denying an exception had the same practical effect as a direct command. Inter-Mountain Rate Case, 234 U.S. 476, 34 S.Ct. 986, 58 L.Ed. 1408.

Piedmont & Northern Ry. v. United States, 280 U.S. 469, 50 S.Ct. 192, 74 L. Ed. 551, presents a more complicated situation. Section 1(18–22) of the Act to Regulate Commerce, as amended, 49 U. S.C.A. § 1 (18–22), prohibits any common carrier by rail subject to the Act from extending its lines or constructing new lines without a certificate of convenience and necessity. This requirement did not apply to "interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation." Upon an application for a certificate by the Piedmont & Northern, coupled with a motion to dismiss on the ground that it was an "interurban electric" railway, for which no certificate was required, the Commission denied the motion to dismiss and denied the certificate on the merits. The bill to enjoin the Commission from taking any proceedings against the Piedmont & Northern under this order attacked the action of the Commission solely on its assumption of jurisdiction. The Court held the order was not reviewable, on the ground that the order did not adjudicate the railroad's status, did not command it to do anything, but only had the effect of increasing the Piedmont's doubts as to the correctness of its construction of the statute. To be sure, statutory construction is a judicial function. But this is to view the matter too abstractly. For the Commission itself had instituted the system whereby it requested preliminary submission to it of the status of interurban roads. Such a decision was at least the equivalent of a threat of prosecution under the statute, and, in fact, considerable weight is given to administrative practice in ascertaining the meaning of such legislation. Compare United States v. Village of Hubbard, 260 U.S. 474, 45 S.Ct. 160, 69 L.Ed. 389.

doctrines of federal jurisdiction. On the other hand, the result in the Lehigh Valley case was reached in the earlier phases of modern administrative law and did not deal with its specific jurisdictional problems in the perspective of underlying principles governing federal equitable jurisdiction. In consequence, the phrase "negative orders" gained currency as though it were descriptive of some technical doctrine of jurisdiction having peculiar relevance to judicial review of orders of the Interstate Commerce Commission and comparable regulatory bodies.[12]

This brings us to the cases in group (3). Here review is sought of action by the Commission which affects the complainant because it does not forbid or compel conduct with reference to him by a third person. This type of situation is illustrated by Procter & Gamble Co. v. United States, 225 U.S. 282, 32 S.Ct. 761, 56 L.Ed. 1091. Since this case gave rise to the notion that there is a specialized jurisdictional doctrine pertaining to "negative orders," it calls for re-examination. Procter & Gamble Co. filed a complaint with the Interstate Commerce Commission to set aside demurrage rules that imposed charges on private cars left unloaded for over forty-eight hours on private tracks. The Commission dismissed the complaint on the ground that the rules were within the carriers' authority to make conditions for the acceptance of private cars. Procter & Gamble then petitioned the Commerce Court to annul the Commission's action and to enjoin the carriers from enforcing the rules. The Commerce Court took jurisdiction but found the Commission's action to be within its authority. On appeal this Court held that the Commerce Court erred in taking jurisdiction and remanded the cause for dismissal.

Clearly Procter & Gamble was authorized under Section 13 of the Act to Regulate Commerce, 49 U.S.C.A. § 13, to institute the proceed-

[12] The initial decision in this group of cases, the Inter-Mountain Rate Case, 234 U.S. 476, 34 S.Ct. 986, 58 L.Ed. 1408, held reviewable the action of the Commission in refusing to grant requested consent to depart from the long-short haul clause. Section 4 of the Act to Regulate Commerce, as amended, 49 U.S. C.A. § 4. While this case would seem to control the Lehigh Valley case and at least to be persuasive in the Piedmont & Northern case, it was not mentioned in them. After these two cases, subsequent decisions in this group indicated that the "negative order" doctrine might prevent review of the refusal by the Secretary of Agriculture to accept rates for filing, the Packers and Stockyards Act, 7 U.S.C.A. § 181 et seq., prohibiting the charging of rates except those on file with the Secretary, United States v. Corrick, 298 U.S. 435, 56 S.Ct. 829, 80 L.Ed. 1263, and of the refusal to grant an increase in rates of compensation for carrying of mail, the Railway Mail Pay Act of 1916, 39 U.S.C.A. § 523 et seq., requiring the carrier to carry the mail at the rate set, United States v. Griffin, 303 U.S. 226, 58 S.Ct. 601, 82 L.Ed. 764. But in both these decisions the result reached was supported by factors irrelevant to the present discussion. On the other hand, in Powell v. United States, 300 U.S. 276, 57 S.Ct. 470, 81 L.Ed. 643, action of the Commission, striking from its files a tariff on the ground that a point was not served by the carrier, was held subject to review as a command to the railway which had filed the tariff not to give the service covered by the tariff.

ings before the Commission. Since it asserted a legal right under that Act to have the Commission apply different principles of law from those which led the Commission to dismiss the complaint, the ingredients for an adjudication—constituting a case or controversy—were present. Compare Interstate Commerce Commission v. Brimson, supra; Interstate Commerce Commission v. Baird, 194 U.S. 25, 38, 24 S.Ct. 563, 566, 48 L.Ed. 860. Judicial relief would be precisely the same as in the recognized instances of review by courts of Commission action: if the legal principles on which the Commission acted were not erroneous, the bill would be ordered dismissed; if the Commission was found to have proceeded on erroneous legal principles, the Commission would be ordered to proceed within the framework of its own discretionary authority on the indicated correct principles. The requisites of equity have of course to be satisfied, but by the conventional criteria. They were satisfied in the Procter & Gamble case, since the bill sought to avoid a multiplicity of suits. Finally, the shipper was within the express language of Congress authorizing suits "to enjoin, set aside, annul, * * * any order of the Interstate Commerce Commission." To be sure the opinion in the Procter & Gamble case partly yielded to the Government's main contention in that case that the jurisdictional statute only applied where the order complained of was one which was to be enforced by the Commission. More recent decisions of this Court, however, have dispensed with this requisite for review.[13]

The impelling consideration underlying the decision in the Procter & Gamble case did not concern technical procedure. It was part of the process of adjusting relations between the Interstate Commerce Commission and the courts to effectuate the purposes of the Commission. This is made abundantly clear by the general atmosphere of the opinion as well as by its language,[14] particularly when regard is had

[13] The Chicago Junction Case, 264 U. S. 258, 44 S.Ct. 317, 68 L.Ed. 667; Venner v. Michigan Central R. R., 271 U.S. 127, 46 S.Ct. 444, 70 L.Ed. 868; Colorado v. United States, 271 U.S. 153, 46 S.Ct. 452, 70 L.Ed. 878; Claiborne-Annapolis Ferry Co. v. United States, 285 U.S. 382, 52 S.Ct. 440, 76 L.Ed. 808; United States v. Idaho, 298 U.S. 105, 56 S.Ct. 690, 80 L.Ed. 1070.

[14] "* * * we have learned of no instance where it was held or even seriously asserted, that as to subjects which in their nature were administrative and within the competency of the Commission to decide, there was power in a court, by an exercise of original action, to enforce its conceptions as to the meaning of the act to regulate commerce by dealing directly with the subject, irrespective of any prior affirmative command or action by the Interstate Commerce Commission. On the contrary, by a long line of decisions, whereby applications to enforce orders of the Commission were considered and disposed of, or where requests to restrain the enforcement of such orders were passed upon, it appears by the reasoning indulged in that it was never considered that there was power in the courts as an original question, without previous affirmative action by the Commission, to deal with what might be termed in a broad sense the administrative features of the act to regulate commerce by determining as an original question that there had been a compliance or noncompliance with the provisions of the act." 225 U.S at pages 296, 297, 32 S.

to the fact that the Court's spokesman was Chief Justice White, who had such a large share in developing modern administrative law.[15] While the Interstate Commerce Commission had been in existence since 1887, the enlargement of its powers through the Hepburn Act, in 1906,[16] and the Mann-Elkins Act, in 1910,[17] the establishment of similar agencies in many states following the lead of New York [18] and Wisconsin,[19] the widespread recognition that these specific instances marked a general movement,[20] made increasingly manifest the place of administrative agencies in enforcing legislative policies and called for accommodation of the duties entrusted to them to our traditional judicial system. The Court "ascribed" to the findings of the Commission "the strength due to the judgments of a tribunal appointed by law and informed by experience." Illinois Central R. R. v. Interstate Commerce Commission, 206 U.S. 441, 454, 27 S.Ct. 700, 704, 51 L.Ed. 1128. Recognition of the Commission's expertise also led this Court not to bind the Commission to common law evidentiary and procedural fetters in enforcing basic procedural safeguards.[21]

Ct. at page 766, 56 L.Ed. 1091. "* * * the recognition of a right in a court to assert the power now claimed would, of necessity, amount to a substitution of the court for the Commission, or, at all events, would be to create a divided authority on a matter where, from the beginning, primary singleness of action and unity was deemed to be imperative." 225 U.S. at pages 298, 299, 32 S.Ct. at page 767, 56 L.Ed. 1091.

15 See Chief Justice Taft's estimate of the services of Chief Justice White in "a new field of administrative law": "The capital importance which our railroad system has come to have in the welfare of this country made the judicial construction of the interstate commerce act of critical moment. It is not too much to say that Chief Justice White, in construing the measure and its great amendments has had more to do with placing this vital part of our practical government on a useful basis than any other judge. His opinions in the case of the Texas & Pacific Railway Co. v. Abilene Cotton Oil Co. [204 U.S. 426, 27 S.Ct. 350, 51 L.Ed. 553, 9 Ann. Cas. 1075], and the cases which followed it, are models of clear and satisfactory reasoning which gave to the people, to state legislatures, to Congress, and the courts a much-needed knowledge of the practical functions the Commerce Commission was to discharge, and of how they were to be reconciled to existing governmental machinery, for the vindication of the rights of the public in respect of national transportation. They are a conspicuous instance of his unusual and remarkable power and facility in statesmanlike interpretation of statute law." Proceedings on the Death of Chief Justice White, 257 U.S. v, xxv.

16 34 Stat. 584.

17 36 Stat. 539.

18 Laws of New York, One Hundred and Thirtieth Session, c. 429 (1907).

19 Wisconsin Laws of 1907, c. 499, St. 1911, § 1797m—1 et seq.

20 See, e. g., Hughes, Some Aspects of the Development of American Law, 1916, 39 N.Y.B.A. Rep. 266, 269-270; Root, Public Service by the Bar, 1916, 41 A. B.A. Rep. 355, 368-369; Sutherland, Private Rights and Government Control, 1917, 42 A.B.A. 197.

21 Interstate Commerce Commission v. Baird, 194 U.S. 25, 44, 24 S.Ct. 563, 568, 48 L.Ed. 860; Interstate Commerce Commission v. Louisville & Nashville R. R., 227 U.S. 88, 93, 33 S.Ct. 185, 187, 57 L.Ed. 431; United States v. Abilene & So. Ry., 265 U.S. 274, 288, 44 S.Ct. 565, 569, 68 L.Ed. 1016; compare Douglas v. Noble, 261 U.S. 165, 169, 43 S.Ct. 303, 305, 67 L.Ed. 590. "It is, perhaps, not too much to say that not a single case arising before the Commission could be properly decided if the complainant, the railroad, or the Commission were bound by the rules of evi-

From these general considerations the Court evolved two specific doctrines limiting judicial review of orders of the Interstate Commerce Commission. One is the primary jurisdiction doctrine, firmly established in Texas & Pacific Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 27 S.Ct. 350, 51 L.Ed. 553, 9 Ann.Cas. 1075. Thereby matters which call for technical knowledge pertaining to transportation must first be passed upon by the Interstate Commerce Commission before a court can be invoked.[22] The other is the doctrine of administrative finality. Even when resort to courts can be had to review a Commission's order, the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority and the basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable. Interstate Commerce Commission v. Illinois Central R. R., 215 U.S. 452, 470, 30 S.Ct. 155, 160, 54 L.Ed. 280; Interstate Commerce Commission v. Union Pacific R. R., 222 U.S. 541, 32 S.Ct. 108, 56 L.Ed. 308.

In translating these important objectives for effectuating the Congressional scheme to enlarge the independent powers of the Interstate Commerce Commission into a seemingly technical distinction between "negative" and "affirmative" orders, the opinion in Procter & Gamble v. United States gave authority to a doctrine which harmonizes neither with the considerations which induced it nor with the course of decisions which have purported to follow it.[23] Subsequent

dence applying to the introduction of testimony in courts." Twenty-second Annual Report of the Interstate Commerce Commission, 10.

[22] See, also, e. g., Baltimore & Ohio R. R. v. United States, ex rel. Pitcairn Coal Co., 215 U.S. 481, 30 S.Ct. 164, 54 L.Ed. 292; Robinson v. Baltimore & Ohio R. R., 222 U.S. 506, 32 S.Ct. 114, 56 L.Ed. 288; United States v. Pacific & Arctic Co., 228 U.S. 87, 33 S.Ct. 443, 57 L.Ed. 742; Texas & Pacific Ry. v. American Tie Co., 234 U.S. 138, 34 S.Ct. 885, 58 L.Ed. 1255; Northern Pacific Ry. v. Solum, 247 U.S. 477, 38 S.Ct. 550, 62 L.Ed. 1221; Director General v. Viscose Co., 254 U.S. 498, 41 S.Ct. 151, 65 L.Ed. 372; Dayton-Goose Creek Ry. v. United States, 263 U.S. 456, 44 S.Ct. 169, 68 L.Ed. 388, 33 A.L.R. 472; Western & Atlantic R. R. v. Georgia Public Service Comm., 267 U.S. 493, 45 S.Ct. 409, 69 L.Ed. 753; Midland Valley R. R. v. Barkley, 276 U.S. 482, 48 S.Ct. 342, 72 L.Ed. 664; Board of Railroad Commissioners v. Great Northern Ry., 281 U.S. 412, 50 S.Ct. 391, 74 L.Ed. 936. The doctrine has been given general application, e. g., United States Navigation Co. v. Cunard Steamship Co., 284 U.S. 474, 52 S.Ct. 247, 76 L.Ed. 408 (Shipping Board); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638 (National Labor Relations Board). Compare, also, Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 29 S.Ct. 67, 53 L.Ed. 150; Anniston Mfg. Co. v. Davis, 301 U.S. 337, 57 S.Ct. 816, 81 L.Ed 1143.

[23] In Manufacturers' Railway Co. v. United States, 246 U.S. 457, 38 S.Ct. 383, 62 L.Ed. 831, the Court treated as reviewable the action of the Commission in failing to require an absorption of switching charges or a requested joint rate but held not reviewable refusal to fix divisions. In part this may have been on the theory that the issue of the divisions was not properly before the Commission. See 246 U.S. at pages 482, 483, 38 S.Ct. at page 390, 62 L.Ed. 831. In United States v. New River Co., 265 U. S. 533, 44 S.Ct. 610, 68 L.Ed. 1165, the Court held reviewable the action of the full Commission dismissing a complaint by a shipper against certain car prac-

cases have made it abundantly clear that "negative order" and "affirmative order" are not appropriate terms of art.[24] Thus, the Court has had occasion to find that while an order was "negative in form" it was "affirmative in substance." [25] "Negative" has really been an obfuscating adjective in that it implied a search for a distinction—non-action as against action—which does not involve the real considerations on which rest, as we have seen, the reviewability of Commission orders within the framework of its discretionary authority and within the general criteria of justiciability.[26] "Negative" and "affirmative," in the context of these problems, is as unilluminating and mischief-making a distinction as the outmoded line between "nonfeasance" and "misfeasance".[27]

tices held invalid by one division of the Commission. Standard Oil Co. v. United States, 283 U.S. 235, 51 S.Ct. 429, 75 L.Ed. 999, held not reviewable the action of the Commission refusing to grant reparations, but the main basis of the decision was not the "negative order" doctrine but the statutory scheme dealing with reparations. In Alton R. R. v. United States, 287 U.S. 229, 53 S.Ct. 124, 77 L.Ed. 275, the Court held reviewable the action of the Commission refusing to interfere with divisions set by a railroad in violation of a previous agreement, the Court stating that the action of the Commission, validated divisions which were previously invalid. See 287 U.S. at pages 236, 237, 53 S.Ct. at page 127, 77 L.Ed. 275.

[24] The only test which can be derived from the cases in notes 11-13, 23, supra, is that an order is "affirmative" if it has the legal effect of changing the status quo, permitting what was previously not allowed or compelling what was previously not required. But on this test the order in the Lehigh Valley case was "affirmative". The decision in the New River Co. case could hardly be hung on such a gossamer thread as this test, since there the only change in the status quo resulting from an order considered "affirmative" was that the order of the full Commission held unobjectionable a car practice which was the subject of complaint. A division of the Commission in the same proceeding had stated that the practice was invalid and should be abandoned and it was abandoned. After the full Commission found the practice not invalid and dismissed the complaint, the practice was adopted again.

[25] See Alton R. R. v. United States, 287 U.S. 229, 235, 53 S.Ct. 124, 126, 77 L.Ed. 275.

[26] This becomes clear on analysis of the precise problem presented in the Procter & Gamble case. It was a dispute between shippers who owned private cars and those who did not as to the distribution of the cars owned by the carriers. The Commission was called upon to resolve that economic conflict by virtue of its authority to prevent practices which unfairly discriminated against one group at the expense of the other. Its final decision was based on a comprehensive policy concerning the place of private cars in our transportation system. Had the prior practice of the carriers been inconsistent with this policy, and the order of the Commission compelled a change, the private car shippers would admittedly have been entitled to test the validty of the Commission ruling in the courts, subject, of course, to the canons of administrative finality. It seems capricious that the fact that the Commission's order authorized the preservation of the status quo should block any review at all. The force of this reasoning is emphasized when it is realized what small factors may determine whether the status quo has been changed, e. g., a difference of views within the Commission, as in the New River Co. case, supra, note 24. See the opinion of the Commerce Court sustaining reviewability in Procter & Gamble Co. v. United States, 188 F. 221.

[27] The Restatement of Torts does not employ this nomenclature. See, also, 7 Labatt, Master and Servant, § 2586.

The considerations of policy for which the notions of "negative" and "affirmative" orders were introduced, are completely satisfied by proper application of the combined doctrines of primary jurisdiction and administrative finality. The concept of "negative orders" has not served to clarify the relations between administrative bodies and the courts but has rather tended to obscure them. An action before the Interstate Commerce Commission is akin to an inclusive equity suit in which all relevant claims are adjusted.[28] An order of the Commission dismissing a complaint on the merits and maintaining the status quo is an exercise of administrative function, no more and no less, than an order directing some change in status. The nature of the issues foreclosed by the Commission's action and the nature of the issues left open, so far as the reviewing power of courts is concerned, are the same. Refusal to change an existing situation may, of course, itself be a factor in the Commission's allowable exercise of discretion. In the application of relevant canons of judicial review an order of the Commission directing the adoption of a practice might raise considerations absent from a situation where the Commission merely allowed such a practice to continue. But this bears on the disposition of a case and should not control jurisdiction. The nature of judicial relief, that is the form of directions available, in situations like those presented by the Procter & Gamble and the Lehigh Valley cases, were the Commission's orders reviewed, would be no different than was that used in the Inter-Mountain Rate and the New River Co. cases.[29] In both types of situations "a judgment rendered will be a final and indisputable basis of action as between the Commission and the defendant," Interstate Commerce Commission v. Baird, 194 U.S. 25, 38, 24 S.Ct. 563, 566, 48 L.Ed. 860. We conclude, therefore, that any distinction, as such, between "negative" and "affirmative" orders, as a touchstone of jurisdiction to review the Commission's orders, serves no useful purpose, and insofar as earlier decisions have been controlled by this distinction, they can no longer be guiding.

[28] Compare Inland Steel Co. v. United States, 306 U.S. 153, 59 S.Ct. 415, 418, 83 L.Ed. 557. "* * * the Commission was acting in the interest of shippers generally and in behalf of the public and the national railroad system."

[29] In the Procter & Gamble case the judicial relief asked was that the order of the Commission dismissing the complaint against the demurrage rules be annulled and that the carriers be enjoined from applying those rules. In the New River Co. case the judicial relief asked was that the car rule under attack be adjudged invalid, that the order of the Commission dismissing the complaint against it be adjudged invalid that the carriers be enjoined from complying with the rule and that the Commission be enjoined from restricting the commerce of the complainants by its order and by the rule.

In the Lehigh Valley case the judicial relief asked was that the enforcement of the order of the Commission and the institution of any proceedings thereunder against the complainant be enjoined. In the Inter-Mountain Rate case the judicial relief asked was that the order of the Commission be set aside, that Section 4 of the Act to Regulate Commerce, 49 U.S.C.A. § 4, be declared invalid, and that the Commission and the Attorney General be enjoined from taking any proceedings to prosecute the carriers for violation of Section 4.

The order of the Communications Commission in this case was therefore reviewable. It was not a mere abstract declaration regarding the status of the Rochester under the Communications Act,[30] nor was it a stage in an incomplete process of administrative adjudication. The contested order determining the status of the Rochester necessarily and immediately carried direction of obedience to previously formulated mandatory orders addressed generally to all carriers amenable to the Commission's authority. Into this class of carriers the order under dispute covered the Rochester, and by that fact, in conjunction with the other orders, made determination of the status of the Rochester a reviewable order of the Commission.

But while the Rochester had a right to challenge the order, it cannot prevail on the merits.

The ultimate legal issue is the validity of the Commission's finding that the Rochester "is under the control of the New York Telephone Company". The justification for this finding clearly emerges from a rapid summary of the governing facts adduced before the Commission concerning the relationship between the New York and the Rochester.

Prior to 1920 an independent telephone company and the New York (which was part of the Bell system) were competitors in Rochester. As part of an endeavor to meet an arrangement which the Bell system had, in 1913, made with the Department of Justice, the details of which need not here be recited, the Rochester was formed to consolidate the two previously competing enterprises. The property of the independent was paid for by bonds of the Rochester, and the property of the New York by preferred stock, later designated as second preferred, of which the New York had the entire issue, 48,140 shares at $100 par. The Rochester issued 1000 shares of common stock, at $100 par, of which the New York purchased 335 shares. The New York also paid the officers of the independent company $70,000 for their services in consummating the consolidation, but $66,500 of this amount was to be used in purchasing the remaining 665 shares of common stock for deposit in a voting trust. Other outstanding securities of the Rochester, first preferred stock and bonds, neither of which had any voting rights, were held by the public. There were complicated limitations upon the voting rights of the second preferred stockholders, but the dominating circumstances touching voting rights were that in major matters no vote of stockholders could be effective unless concurred in by eighty per cent of the common stock and that the Executive Committee and the Board of Directors were elected by cumulative voting of the common stock, thereby assuring New York five out of fifteen members of the Board of Directors and two members in an Executive Committee of five.

[30] Compare United States v. Atlanta, B. & C. R. R., 282 U.S. 522, 51 S.Ct. 237, 75 L.Ed. 513.

Putting all these factors in the context of the circumstances under which the Rochester came into being, the manner in which it was financed, the operation of the voting trust, and the stake of the New York in the Rochester, the Commission, after full hearing and due consideration, concluded that "the New York Company, through stock ownership, is the dominant financial factor in the respondent company and also, that this, taken together with their contractual arrangements and other pertinent facts and circumstances appearing in the record, unquestionably gives the New York Company power to control the functions of the Rochester Telephone Corporation."

The record amply justified the Communications Commission in making such findings. Investing the Commission with the duty of ascertaining "control" of one company by another, Congress did not imply artificial tests of control.[31] This is an issue of fact to be determined by the special circumstances of each case. So long as there is warrant in the record for the judgment of the expert body it must stand. The suggestion that the refusal to regard the New York ownership of only one third of the common stock of the Rochester as conclusive of the former's lack of control of the latter should invalidate the Commission's finding, disregards actualities in such intercorporate relations. Having found that the record permitted the Commission to draw the conclusion that it did, a court travels beyond its province to express concurrence therewith as an original question. "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." Mississippi Valley Barge Line Co. v. United States, 292 U.S. 282, 286, 287, 54 S.Ct. 692, 693, 694, 78 L.Ed. 1260; Swayne & Hoyt, Ltd. v. United States, 300 U.S 297, 303, et seq., 57 S.Ct. 478, 480, 81 L.Ed. 659.

Decree affirmed.[c]

FEDERAL POWER COMMISSION v. PACIFIC POWER & LIGHT COMPANY

Supreme Court of the United States.
307 U.S. 156, 59 S.Ct. 766, 83 L.Ed. 1180 (1939).

Mr. Justice FRANKFURTER delivered the opinion of the Court.

The case is here on certiorari to the Circuit Court of Appeals for the Ninth Circuit, granted, 305 U.S. 593, 59 S.Ct. 361, 83 L.Ed. 375, because of the intrinsic importance of the issue raised and of a conflict between the decision below, 9 Cir., 98 F.2d 835, and that of the Circuit Court of Appeals for the Second Circuit. Newport Electric Corp. v. Federal Power Commission, 2 Cir., 97 F.2d 580.

[31] See House Report 1850, 73d Cong., 2d Sess., 4, 5; compare 78 Cong.Rec. 8146.

[c] The concurring opinion of Mr. Justice Butler, in which Mr Justice McReynolds joined, is omitted.

The sole issue before us is whether an order of the Federal Power Commission, denying an application under Section 203(a) [1] of the Federal Power Act, as amended, 16 U.S.C.A. § 824b (a), is reviewable under Section 313(b) of that Act, 16 U.S.C.A. § 825l(b).

The Inland Power & Light Company, an Oregon corporation, owns three hydro-electric projects in Oregon and Washington, two of which are operated under license of the Federal Power Commission, and the third, under a permit issued by the Secretary of the Interior. The Pacific Power & Light Company, a Maine corporation, is engaged in generating and distributing electric energy in Washington and Oregon, and owns and operates facilities for interstate transmission of electricity. The Inland and Pacific Companies filed a joint application with the Power Commission for approval, under Sections 8 and 203 of the Act, 16 U.S.C.A. §§ 801, 842b, of a proposed transfer of all the assets, including licenses, of Inland to Pacific, and of the termination of Inland's existence. Having found after due hearing and consideration that "applicants have failed to establish that said transfer will be consistent with the public interest within the contemplation of Section 203(a) of the Federal Power Act", the Commission ordered that "the application be and the same hereby is denied."

Invoking Section 313(b) of the Federal Power Act, the applicants initiated the present proceedings in the Circuit Court of Appeals for the Ninth Circuit to review the order of the Commission as unwarranted in law and unsupported in its findings. The exact scope of the prayer is postponed for later consideration. The Power Commission challenged the jurisdiction of the Circuit Court of Appeals by a motion to dismiss the petition on the ground that the court was without jurisdiction under Section 313(b), since the order sought to be set aside was negative in character. The denial of that motion brought the case here.

If the Federal Power Act had formally taken over the statutory provisions of the Urgent Deficiencies Act pertaining to review of orders of the Interstate Commerce Commission, the decision in Rochester Telephone Corp. v. United States, 307 U.S. 125, 59 S.Ct. 754, 83 L.Ed. 1147, would dispose of this case and sustain the assumption of jurisdiction below. But the Power Act contains a distinctive formulation of the conditions under which resort to the courts may be made and Congress determines the scope of jurisdiction of the lower federal

[1] No public utility shall sell, lease, or otherwise dispose of the whole of its facilities subject to the jurisdiction of the Commission, or any part thereof of a value in excess of $50,000, or by any means whatsoever, directly or indirectly, merge or consolidate such facilities or any part thereof with those of any other person, or purchase, acquire, or take any security of any other public utility, without first having secured an order of the Commission authorizing it to do so. * * * After notice and opportunity for hearing, if the Commission finds that the proposed disposition, consolidation, acquisition, or control will be consistent with the public interest, it shall approve the same.

courts. Section 313(b) provides that "Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States". The denial by the Commission of approval of the application by petitioners of the transfer of Inland to Pacific as not "consistent with the public interest" was an "order," and the petitioners were "aggrieved" by it since without such approval the transfer was forbidden. Section 203(a). Thus the statutory scheme of the Power Act only reinforces the analysis made in the Rochester case.

But it is urged that review of the Power Commission's order does not present a "Case" or "Controversy", because the court itself cannot lift the prohibition of the statute by granting permission for the transfer, nor order the Commission to grant such permission. And so it is claimed that any action of a court in setting aside the order of the Commission would be an empty gesture, since without permission a transfer would be unlawful. But this proves too much. In none of the situations in which an action of the Interstate Commerce Commission or of a similar federal regulatory body comes for scrutiny before a federal court can judicial action supplant the discretionary authority of a commission. A federal court cannot fix rates nor make divisions of joint rates nor relieve from the long-short haul clause nor formulate car practices. So here it is immaterial that the court itself cannot approve or disapprove the transfer. The court has power to pass judgment upon challenged principles of law insofar as they are relevant to the disposition made by the Commission. "* * * a judgment rendered will be a final and indisputable basis of action as between the Commission and the defendant." Interstate Commerce Commission v. Baird, 194 U.S. 25, 38, 24 S.Ct. 563, 566, 48 L.Ed. 860. In making such a judgment the court does not intrude upon the province of the Commission, while the constitutional requirements of "Case" or "Controversy" are satisfied. For purposes of judicial finality there is no more reason for assuming that a Commission will disregard the direction of a reviewing court than that a lower court will do so.

Affirmed.

B. Certification of Employee Representatives for Collective Bargaining

AMERICAN FEDERATION OF LABOR v. NATIONAL LABOR RELATIONS BOARD

Supreme Court of the United States.
308 U.S. 401, 60 S.Ct. 300, 84 L.Ed. 347 (1940)

Mr. Justice STONE delivered the opinion of the Court.

The question decisive of this case is whether a certification by the National Labor Relations Board under § 9(c) of the Wagner Act, 49 Stat. 449, 453, 29 U.S.C., Supp. IV, §§ 151–166, 29 U.S.C.A. §§ 151–166, that a particular labor organization of longshore workers is the collective bargaining representative of the employees in a designated unit, composed of numerous employers of longshore workers at Pacific Coast ports, is reviewable by the Court of Appeals for the District of Columbia by the procedure set up in § 10(f) of the Act.

Petitioners, International Longshoremen's Association, and its affiliate, Pacific Coast District International Longshoremen's Association No. 38, are labor organizations, both affiliated with the petitioner, American Federation of Labor (A. F. of L.). In January, 1938, the International Longshoremen's & Warehousemen's Union, District No. 1, a labor organization affiliated with the Congress of Industrial Organization (C.I.O.) petitioned the Board for an investigation concerning the representation of longshoremen on the Pacific Coast, and that the Board certify the name of the appropriate representative for collective bargaining as provided in § 9(c) of the Wagner Act.

The Board directed an investigation with appropriate hearings, and a consolidation of the proceeding for purposes of hearing with two other proceedings already initiated by locals of the Longshoremen's Union. Petitioners were made parties to the consolidated proceedings and participated in the hearings, at the conclusion of which the Board made its findings of fact and of law and certified that the workers who do longshore work in the Pacific Coast ports for the employers which are members of five designated employer associations of Pacific Coast shipowners or of waterfront employers, constitute a unit appropriate for the purposes of collective bargaining within the meaning of § 9(b) of the Act. It also certified that the C. I. O. affiliate, Longshoremen's Union, District No. 1, is the exclusive bargaining representative of all the workers in such unit within the meaning of the Act. In the Matter of Shipowners' Association of the Pacific Coast et al., 7 N.L.R.B. 1002.

The effect of the certification, as petitioner alleges, is the inclusion in a single unit, for bargaining purposes, of all of the longshore employees of the members of the employer associations doing business at the west coast ports of the United States, and to designate the C.I.O.

affiliate as their bargaining representative so that in the case of some particular employers, their workers who are not organized or represented by the C.I.O. affiliate have been deprived of opportunity to secure bargaining representatives of their own choice. Although the petitioners who are affiliated with the A. F. of L. assert that they have in fact been selected as bargaining representatives by a majority of the employees of their respective employers, petitioners allege that they have nevertheless been prevented from acting in that capacity by the Board's designation of the C. I. O. affiliate as the exclusive representative of such employees.

The present suit was begun by petition to the Court of Appeals of the District of Columbia in which the petitioners set forth, in addition to the facts already detailed, that they were aggrieved by the "decision and order of certification of the Board" in that the certificate is contrary to fact and to law; that the Wagner Act does not contemplate or authorize "the designation by the Board of an employee unit constituting all the employees of different employers in different and distant geographical districts of the United States." The petition prayed that the "order of certification" be set aside, in so far as it attempts to designate a single exclusive bargaining representative for longshore employees of many employers on the Pacific Coast and denies to a majority of the longshore employees of a single employer the right to select one of the petitioners as their exclusive bargaining representative.

The Court of Appeals dismissed the petition as not within the jurisdiction to review orders of the Board conferred upon it by § 10 of the Wagner Act. 70 App.D.C. 62, 103 F.2d 933. We granted certiorari October 9, 1939, 308 U.S. 531, 60 S.Ct. 76, 84 L.Ed. 448, because of the importance of the question presented and to resolve an alleged conflict of the decision below with that of the Court of Appeals for the Sixth Circuit, in International Brotherhood of Electrical Workers v. National Labor Relations Board, 105 F.2d 598.

The Court of Appeals for the District of Columbia, like the several circuit courts of appeals, is without the jurisdiction over original suits conferred on district courts by § 24 of the Judicial Code, as amended. 28 U.S.C. § 41, 28 U.S.C.A. § 41. Such jurisdiction as it has, to review directly the action of administrative agencies, is specially conferred by legislation relating specifically to the determinations of such agencies made subject to review, and prescribing the manner and extent of the review. Here, the provisions of the Wagner Act, § 10(f), which gives a right of review to "any person aggrieved by a final order of the Board", determines the nature and scope of the review by the court of appeals.

The single issue which we are now called on to decide is whether the certification by the Board is an "order" which, by related provisions of the statute, is made reviewable upon petition to the Court of Appeals of the District or in an appropriate case to a circuit court of

appeals. The question is distinct from another much argued at the Bar, whether petitioners are precluded by the provisions of the Wagner Act from maintaining an independent suit in a district court to set aside the Board's action because contrary to the statute, and because it inflicts on petitioners an actionable injury otherwise irreparable.

By the provisions of the Wagner Act the Board is given two principal functions to perform. One, defined by § 9, which as enacted is headed "Representatives And Elections", is the certification, after appropriate investigation and hearing, of the name or names of representatives, for collective bargaining, of an appropriate unit of employees. The other, defined by § 10, which as enacted is headed "Prevention of Unfair Labor Practices", is the prevention by the Board's order after hearing and by a further appropriate proceeding in court, of the unfair labor practices enumerated in § 8, 29 U.S.C.A. § 158, One of the outlawed practices is the refusal of an employer to bargain with the representative of his employees. § 8(5).

Certification involves, under § 9(b), decision by the Board whether "the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof", and the ascertainment by the Board under § 9(c) of the bargaining representative who, under § 9(a) must be "designated or selected * * * by the majority of the employees in a unit appropriate for such [bargaining] purposes". The Board is authorized by § 9(c) "whenever a question affecting commerce arises concerning the representation of employees" to investigate "such controversy" and to certify the names of the appropriate bargaining representatives. In conducting the investigation it is required to provide for appropriate hearing upon due notice "and may take a secret ballot of employees, or utilize any other suitable method" of ascertaining such representatives. By § 9(d) whenever an order of the Board is made pursuant to § 10(c) directing any person to cease an unfair labor practice and there is a petition for enforcement or review of the order by a court, the Board's "certification and the record of such investigation" is to be included in the transcript of the entire record required to be filed under § 10(e) or (f), and the decree of the court enforcing, modifying or setting aside the order of the Board is to be made and entered upon the pleadings, testimony and proceedings set forth in the transcript.

It is to be noted that § 9, which is complete in itself, makes no provision, in terms, for review of a certification by the Board and authorizes no use of the certification or of the record in a certification proceeding, except in the single case where there is a petition for enforcement or review of an order restraining an unfair labor practice as authorized by § 10(c). In that event the record in the certification proceeding is included in the record brought up on review of the Board's order restraining an unfair labor practice. It then

becomes a part of the record upon which the decree of the reviewing court is to be based.

All other provisions for review of any action of the Board are found in § 10 which as its heading indicates relates to the prevention of unfair labor practices. Nowhere in this section is there mention of investigations or certifications authorized and defined by § 9. Section 10(a) authorizes the Board "to prevent any person from engaging in any unfair labor practice (listed in section 8 [158]) affecting commerce". Section 10(b) prescribes the procedure of the Board when any person is charged with engaging in any unfair labor practice, and requires that the person so charged shall be served with a complaint and notice of hearing by the Board with opportunity to file an answer and be heard. Section 10(c) directs the Board, if it is of opinion, as the result of the proceedings before it, that any person named in the complaint has engaged in an unfair labor practice "to issue" "an order" directing that person to cease the practice and commanding appropriate affirmative action. If the Board is of opinion that there has been no unfair labor practice it is directed "to issue" "an order" dismissing the complaint. Section 10(e) authorizes a petition to the appropriate federal court of appeals by the Board for the enforcement of its order prohibiting an unfair labor practice.

This brings us to the provisions for review of action taken by the Board in § 10(f) which is controlling in the present proceeding. That subdivision[1] appears as an integral part of § 10. All the other subdivisions relate exclusively to proceedings for the prevention of unfair labor practices. Both they and subdivision (f) are silent as to the proceedings or certifications authorized by § 9. Section 10(f), providing for review, speaks only of a "final order of the Board". It gives a right to review to persons aggrieved by a final order upon petition to a court of appeals in the circuit "wherein the unfair labor practice in question was alleged to have been engaged in or wherein

[1] "(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall, in like manner be conclusive."

such person resides or transacts business, or in the Court of Appeals of the District of Columbia". It directs that the order shall be reviewed on the entire record before the Board "including the pleading and testimony" upon which the order complained of was entered, although no complaint or other pleading is mentioned by § 9 relating to representation proceedings and certificates. Subdivision (f) provides that upon petition for review by an aggrieved person "the court shall proceed in the same manner as in the case of an application by the Board under subdivision [subsection] (e)", and it is given the same judisdiction "to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board." See, Ford Motor Co. v. National Labor Relations Board, 305 U.S. 364, 369, 59 S.Ct. 301, 305, 83 L.Ed. 221.

In analyzing the provisions of the statute in order to ascertain its true meaning, we attribute little importance to the fact that the certification does not itself command action. Administrative determinations which are not commands may for all practical purposes determine rights as effectively as the judgment of a court, and may be reexamined by courts under particular statutes providing for the review of "orders". See Rochester Telephone Corporation v. United States, 307 U.S. 125, 130, 135 et seq., 59 S.Ct. 754, 757, 759, 83 L.Ed. 1147; Federal Power Commission v. Pacific Power & Light Co., 307 U.S. 156, 59 S.Ct. 766, 83 L.Ed. 1180. We must look rather to the language of the statute, read in the light of its purpose and its legislative history, to ascertain whether the "order" for which the review in court is provided, is contrasted with forms of administrative action differently described as a purposeful means of excluding them from the review provisions.

Here it is evident that the entire structure of the Act emphasizes, for purposes of review, the distinction between an "order" of the Board restraining an unfair labor practice and a certification in representation proceedings. The one authorized by § 10 may be reviewed by the court on petition of the Board for enforcement of the order, or of a person aggrieved, in conformity to the procedure laid down in § 10, which says nothing of certifications. The other, authorized by § 9, is nowhere spoken of as an order, and no procedure is prescribed for its review apart from an order prohibiting an unfair labor practice. The exclusion of representation proceedings from the review secured by the provisions of § 10(f) is emphasized by the clauses of § 9(d), which provide for certification by the Board of a record of a representation proceeding only in the case when there is a petition for review of an order of the Board restraining an unfair labor practice. The statute on its face thus indicates a purpose to limit the review afforded by § 10 to orders of the Board prohibiting

unfair labor practices, a purpose and a construction which its legislative history confirms.

Upon the introduction of the bill which was enacted as the Wagner Act, Congress had pointedly brought to its attention the experience under Public Resolution 44 of June 19, 1934, 48 Stat. 1183. That resolution authorized the National Labor Relations Board, predecessor of respondent, "to order and conduct an election" by employees of any employer to determine who were their representatives for bargaining purposes. Section 2 provided that any order of the Board should be reviewed in the same manner as orders of the Federal Trade Commission under the Federal Trade Commission Act. The reports of the Congressional committees upon the bill which became the Wagner Act refer to the long delays in the procedure prescribed by Resolution 44, resulting from applications to the federal appellate courts for review of orders for elections. And in considering the provisions of § 9(d) the committee reports were emphatic in their declaration that the provisions of the bill for court review did not extend to proceedings under § 9 except as incidental to review of an order restraining an unfair labor practice under § 10. The bill was similarly explained on the Senate floor by the committee chairman who declared: "It provides for review in the courts only after the election has been held and the Board has ordered the employer to do something predicated upon the results of an election." 79 Cong.Rec. 7658. The conclusion is unavoidable that Congress, as the result of a deliberate choice of conflicting policies, has excluded representation certifications of the Board from the review by federal appellate courts authorized by the Wagner Act except in the circumstances specified in § 9(d).

An argument, much pressed upon us, is, in effect, that Congress was mistaken in its judgment that the hearing before the Board in proceedings under § 9(c), with review only when an order is made under § 10(c) directing the employer to do something "provides an appropriate safeguard and opportunity to be heard", House Rep., p. 23, and that "this provides a complete guarantee against arbitrary action by the Board," Sen.Rep., p. 14. It seems to be thought that this failure to provide for a court review is productive of peculiar hardships, which were perhaps not foreseen in cases where the interests of rival unions are affected. But these are arguments to be addressed to Congress and not the courts. The argument too that Congress has infringed due process by withholding from federal appellate courts a jurisdiction which they never possessed is similarly without force. Shannahan v. United States, 303 U.S. 596, 58 S.Ct. 732, 82 L.Ed. 1039; see In re National Labor Relations Board, 304 U.S. 486, 495, 58 S.Ct. 1001, 1005, 82 L.Ed. 1482.

The Board argues that the provisions of the Wagner Act, particularly § 9(d), have foreclosed review of its challenged action by independent suit in the district court, such as was allowed under other

acts providing for a limited court review in Shields v. Utah Idaho Central Railroad Co., 305 U.S. 177, 59 S.Ct. 160, 83 L.Ed. 111, and in Utah Fuel Co. v. National Bituminous Coal Commission, 306 U.S. 56, 59 S.Ct. 409, 83 L.Ed. 483; cf. Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 58 S.Ct. 459, 82 L.Ed. 638. But that question is not presented for decision by the record before us. Its answer involves a determination whether the Wagner Act, in so far as it has given legally enforceable rights, has deprived the district courts of some portion of their original jurisdiction conferred by § 24 of the Judicial Code, 28 U.S.C.A. § 41. It can be appropriately answered only upon a showing in such a suit that unlawful action of the Board has inflicted an injury on the petitioners for which the law, apart from the review provisions of the Wagner Act, affords a remedy. This question can be properly and adequately considered only when it is brought to us for review upon a suitable record.

Affirmed.[d]

SWITCHMEN'S UNION OF NORTH AMERICA v. NATIONAL MEDIATION BOARD

Supreme Court of the United States.
320 U.S. 297, 64 S.Ct. 95, 88 L.Ed. 61 (1943).

Mr. Justice DOUGLAS delivered the opinion of the Court.

This is an action by the petitioners, the Switchmen's Union of North America and some of its members against the National Mediation Board, its members, the Brotherhood of Railroad Trainmen, and the New York Central Railroad Company and the Michigan Central Railroad Company. The individual plaintiffs are members and officials of the Switchmen's Union and employees of the respondent carriers.

Petitioners were plaintiffs in the District Court. A certification of representatives for collective bargaining under § 2, Ninth of the Railway Labor Act, 44 Stat. 577, 48 Stat. 1185, 45 U.S.C.A. § 152, subd. 9, was made by the Board to the carriers.[1] This certification followed the invocation of the services of the Board to investigate a dispute

[d] Footnotes of the court, except footnote 1, have been omitted.

To same effect: National Labor Relations Board v. International Brotherhood of Electrical Workers, 308 U.S. 413, 60 S.Ct. 306, 84 L.Ed. 354 (1940). But *cf.* National Labor Relations Board v. Falk Corp., 308 U.S. 453, 60 S.Ct. 307, 84 L.Ed. 396 (1940), *supra* at p. 667; and Southern Steamship Co. v. National Labor Relations Board, 316 U.S. 31, 37, 62 S.Ct. 886, 890, 86 L.Ed. 1246 (1942).

[1] Sec. 2, Ninth provides: "If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the

among the yardmen as to their representative. The Brotherhood sought to be the representative for all the yardmen of the rail lines operated by the New York Central system. The Switchmen contended that yardmen of certain designated parts of the system should be permitted to vote for separate representatives instead of being compelled to take part in a system-wide election.

The Board designated all yardmen of the carriers as participants in the election. The election was held and the Brotherhood was chosen as the representative. Upon the certification of the result to the carriers, petitioners sought to have the determination by the Board of the participants and the certification of the representative cancelled. This suit for cancellation was brought in the District Court. That court upheld the decision of the Board to the effect that all yardmen in the service of a carrier should select a single representative for collective bargaining. The United States Court of Appeals for the District of Columbia affirmed by a divided vote. 77 U.S.App.D.C. 264, 135 F.2d 785. The case is here on a petition for a writ of certiorari which we granted because of the importance of the problems which are raised.

We do not reach the merits of the controversy. For we are of the opinion that the District Court did not have the power to review the action of the National Mediation Board in issuing the certificate.

Sec. 24(8) of the Judicial Code, 28 U.S.C. § 41(8), 28 U.S.C.A. § 41(8), gives the federal district courts "original jurisdiction" of all "suits and proceedings arising under any law regulating commerce." We may assume that if any judicial review of the certificate of the Board could be had, the District Court would have jurisdiction by reason of that provision of the Judicial Code. See Louisville & Nashville R. Co. v. Rice, 247 U.S. 201, 38 S.Ct. 429, 62 L.Ed. 1071; Mulford v. Smith, 307 U.S. 38, 59 S.Ct. 648, 83 L.Ed. 1092; Peyton v. Railway Express Agency, 316 U.S. 350, 62 S.Ct. 1171, 86 L.Ed. 1525. But we do not think that the broad grant of general jurisdiction may be invoked in face of the special circumstances which obtain here.

carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph."

If the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control. That was the purport of the decisions of this Court in Texas & N. O. R. Co. v. Brotherhood of Ry. & S. S. Clerks, 281 U.S. 548, 50 S.Ct. 427, 74 L.Ed. 1034, and Virginian Ry. Co. v. System Federation No. 40, 300 U.S. 515, 57 S.Ct. 592, 81 L.Ed. 789. In those cases it was apparent that but for the general jurisdiction of the federal courts there would be no remedy to enforce the statutory commands which Congress had written into the Railway Labor Act. The result would have been that the "right" of collective bargaining was unsupported by any legal sanction. That would have robbed the Act of its vitality and thwarted its purpose. Such considerations are not applicable here. The Act in § 2, Fourth writes into law the "right" of the "majority of any craft or class of employees" to "determine who shall be the representative of the craft or class for the purposes of this Act." That "right" is protected by § 2, Ninth which gives the Mediation Board the power to resolve controversies concerning it and as an incident thereto to determine what is the appropriate craft or class in which the election should be held. See Brotherhood of Railroad Trainmen v. National Mediation Board, 66 App.D.C. 375, 88 F.2d 757; Brotherhood of Railroad Trainmen v. National Mediation Board, 77 U.S.App.D.C. 259, 135 F.2d 780. A review by the federal district courts of the Board's determination is not necessary to preserve or protect that "right". Congress for reasons of its own decided upon the method for the protection of the "right" which it created. It selected the precise machinery and fashioned the tool which it deemed suited to that end. Whether the imposition of judicial review on top of the Mediation Board's administrative determination would strengthen that protection is a considerable question. All constitutional questions aside, it is for Congress to determine how the rights which it creates shall be enforced. Tutun v. United States, 270 U.S. 568, 576, 577, 46 S.Ct. 425, 426, 70 L.Ed. 738. In such a case the specification of one remedy normally excludes another. See Arnson v. Murphy, 109 U.S. 238, 3 S.Ct. 184, 27 L.Ed. 920; Wilder Mfg. Co. v. Corn Products Refining Co., 236 U.S. 165, 174, 175, 35 S.Ct. 398, 401, 59 L.Ed. 520; United States v. Babcock, 250 U.S. 328, 331, 39 S.Ct. 464, 465, 63 L.Ed. 1011; Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 404, 60 S.Ct. 907, 917, 84 L.Ed. 1263.

Generalizations as to when judicial review of administrative action may or may not be obtained are of course hazardous. Where Congress has not expressly authorized judicial review, the type of problem involved and the history of the statute in question become highly relevant in determining whether judicial review may be nonetheless supplied. See United States v. Griffin, 303 U.S. 226, 232–237, 58 S.Ct. 601, 604–606, 82 L.Ed. 764. As is indicated at some length

in General Committee of Adjustment v. Missouri-Kansas-Texas R. Co., 320 U.S. 323, 64 S.Ct. 146, decided this day, the emergence of railway labor problems from the field of conciliation and mediation into that of legally enforcible rights has been quite recent. Until the 1926 Act the legal sanctions of the various acts had been few. The emphasis of the legislation had been on conciliation and mediation; the sanctions were publicity and public opinion. Since 1926 there has been an increasing number of legally enforcible commands incorporated into the Act. And Congress has utilized administrative machinery more freely in the settlement of disputes. But large areas of the field still remain in the realm of conciliation, mediation, and arbitration. On only a few phases of this controversial subject has Congress utilized administrative or judicial machinery and invoked the compulsions of the law. We need not recapitulate that history here. Nor need we reiterate what we have said in the Missouri-Kansas-Texas R. Co. case beyond our conclusion that Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate.

In that connection the history of § 2, Ninth is highly relevant. It was introduced into the Act in 1934 as a device to strengthen and make more effective the processes of collective bargaining. Virginian Ry. Co. v. System Federation No. 40, supra, 300 U.S. pages 543–549, 57 S.Ct. pages 597–600, 81 L.Ed. 789. It was aimed not only at company unions which had long plagued labor relations (Id., pages 545–547 of 300 U.S., pages 598, 599 of 57 S.Ct., 81 L.Ed. 789) but also at numerous jurisdictional disputes between unions. Commissioner Eastman, draftsman of the 1934 amendments, explained the bill at the Congressional hearings. He stated that whether one organization or another was the proper representative of a particular group of employees was "one of the most controversial questions in connection with labor organization matters." Hearings, Committee on Interstate & Foreign Commerce, House of Representatives, on H. R. 7650, 73d Cong., 2d Sess., p. 40. He stated that it was very important "to provide a neutral tribunal which can make the decision and get the matter settled." Id., p. 41. But the problem was deemed to be so "highly controversial" that it was thought that the prestige of the Mediation Board might be adversely affected by the rulings which it would have to make in these jurisdictional disputes. Id., p. 40. And see Hearings, Committee on Interstate Commerce, U. S. Senate, on S. 3266, 73d Cong., 2d Sess., pp. 134–135. Accordingly § 2, Ninth was drafted so as to give to the Mediation Board the power to "appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election." That was added so that the Board's "own usefulness of settling disputes that might arise thereafter might not be impaired." S.Rep. No. 1065, 73d Cong., 2d Sess., p. 3. Where Congress took such great pains to protect the Mediation Board in its handling of an explosive problem, we cannot help but be-

lieve that if Congress had desired to implicate the federal judiciary and to place on the federal courts the burden of having the final say on any aspect of the problem, it would have made its desire plain.

The fact that the certificate of the Mediation Board is conclusive is of course no ground for judicial review. Great Northern Ry. Co. v. United States, 277 U.S. 172, 182, 48 S.Ct. 466, 467, 72 L.Ed. 838. Congress has long delegated to executive officers or executive agencies the determination of complicated questions of fact and of law. And where no judicial review was provided by Congress this Court has often refused to furnish one even where questions of law might be involved. See State of Louisiana v. McAdoo, 234 U.S. 627, 633, 34 S.Ct. 938, 940, 58 L.Ed. 1506; United States v. George S. Bush & Co., 310 U.S. 371, 60 S.Ct. 944, 84 L.Ed. 1259; Work v. U. S. ex rel. Rives, 267 U.S. 175, 45 S.Ct. 252, 69 L.Ed. 561; United States v. Babcock, supra. We need not determine the full reach of that rule. See Bates & Guild Co. v. Payne, 194 U.S. 106, 24 S.Ct. 595, 48 L.Ed. 894; Houston v. St. Louis Independent Packing Co., 249 U.S. 479, 39 S.Ct. 332, 63 L.Ed. 717. But its application here is most appropriate by reason of the pattern of this Act.

While the Mediation Board is given specified powers in the conduct of elections, there is no requirement as to hearings. And there is no express grant of subpoena power. The Mediation Board makes no "order". And its only ultimate finding of fact is the certificate. Virginian Ry. Co. v. System Federation No. 40, supra, 300 U.S. page 562, 57 S.Ct. page 606, 81 L.Ed. 789. The function of the Board under § 2, Ninth is more the function of a referee. To this decision of the referee Congress has added a command enforcible by judicial decree. But the "command" is that "of the statute, not of the Board." Id., page 562 of 300 U. S., page 606 of 57 S.Ct., 81 L.Ed. 789.

The statutory mandate is that "the carrier shall treat with the representative so certified." § 2, Ninth. But the scheme of § 2, Ninth is analogous to that which existed in Butte, A. & P. Ry. Co. v. United States, 290 U.S. 127, 54 S.Ct. 108, 78 L.Ed. 222. In that case Congress provided compensation to the owners of short line railroads for losses attributable to federal control of the main systems during the first World War. The Interstate Commerce Commission was directed by § 204 of the Transportation Act of 1920, 49 U.S.C.A. § 73, to ascertain the amount of deficits or losses and to "certify to the Secretary of the Treasury the several amounts payable" to the carriers. And the Secretary of the Treasury was "authorized and directed thereupon to draw warrants in favor of each such carrier upon the Treasury of the United States for the amount shown in such certificate as payable thereto." Payments were made to the Butte company on such a certificate and the United States instituted suit to recover on the theory that the money had been disbursed on an erroneous interpretation of the statute. This Court, speaking through Mr. Justice Brandeis, held that since authority to interpret the statute was "essential to the per-

formance of the duty imposed upon the Commission" and since "Congress did not provide a method of review", the Government, as well as the carrier, was "remediless whether the error be one of fact or of law." Id., pages 142, 143 of 290 U.S., page 112 of 54 S.Ct., 78 L.Ed. 222. Cf. United States v. Great Northern Ry. Co., 287 U.S. 144, 53 S.Ct. 28, 77 L.Ed. 223.

In the present case the authority of the Mediation Board in election disputes to interpret the meaning of "craft" as used in the statute is no less clear and no less essential to the performance of its duty. The statutory command that the decision of the Board shall be obeyed is no less explicit. Under this Act Congress did not give the Board discretion to take or withhold action, to grant or deny relief. It gave it no enforcement functions. It was to find the fact and then cease. Congress prescribed the command. Like the command in the Butte Ry. case it contained no exception. Here as in that case the intent seems plain—the dispute was to reach its last terminal point when the administrative finding was made. There was to be no dragging out of the controversy into other tribunals of law.

That conclusion is reinforced by the highly selective manner in which Congress has provided for judicial review of administrative orders or determinations under the Act. There is no general provision for such review. But Congress has expressly provided for it in two instances. Thus Congress gave the National Railroad Adjustment Board jurisdiction over disputes growing out of "grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions." § 3, First (i), 45 U.S.C.A. § 153, subd. 1(i). The various divisions of the Adjustment Board have authority to make awards. § 3, First (k)–(*o*). And suits based on those awards may be brought in the federal district courts. § 3, First (p). In such suits "the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated." The other instance in the Act where Congress provided for judicial review is under § 9, 45 U.S.C.A. § 159. The Act prescribes machinery for the voluntary arbitration of labor controversies. § 5, Third; § 7; § 8, 45 U.S.C.A. §§ 155, subd. 3, 157, 158. It is provided in § 9 that an award of a board of arbitration may be impeached by an action instituted in a federal district court on the grounds specified in § 9, one of which is that "the award plainly does not conform to the substantive requirements laid down by this Act for such awards, or that the proceedings were not substantially in conformity with this Act." § 9, Third (a). When Congress in § 3 and in § 9 provided for judicial review of two types of orders or awards and in § 2 of the same Act omitted any such provision as respects a third type, it drew a plain line of distinction. And the inference is strong from the history of the Act that that distinction was not inadvertent. The language of the Act read in light of that history supports the view that Congress gave administrative ac-

tion under § 2, Ninth a finality which it denied administrative action under the other sections of the Act.

Shields v. Utah Idaho Cent. R. Co., 305 U.S. 177, 59 S.Ct. 160, 83 L.Ed. 111, is not opposed to that view. That case involved a determination by the Interstate Commerce Commission under § 1, First of the Act that the lines of the carrier in question did not constitute an interurban electric railway. The result was that the railroad company was a "carrier" within the meaning of the Act and subject to its criminal penalties. The carrier brought a suit in equity against a United States Attorney to restrain criminal prosecutions under the Act. This Court allowed the action to be maintained even though the Railway Labor Act, 45 U.S.C.A. § 151 et seq. contained no provision for judicial review of such rulings. But the decision was placed on the traditional use of equity proceedings to enjoin criminal proceedings. 305 U.S. page 183, 59 S.Ct. page 163, 83 L.Ed. 111. Moreover, it was the action of the Interstate Commerce Commission which this Court held to be reviewable. Although the authority of the Commission derived from the Railway Labor Act, this Court quite properly related the issue not to railway labor disputes but to those transportation problems with which the Commission had long been engaged. And see Shannahan v. United States, 303 U.S. 596, 58 S.Ct. 732, 82 L.Ed. 1039. The latter have quite a different tradition in federal law than those pertaining to carrier-employee relationships.

What is open when a court of equity is asked for its affirmative help by granting a decree for the enforcement of a certificate of the Mediation Board under § 2, Ninth raises questions not now before us. See Virginian Ry. Co. v. System Federation No. 40, supra, 300 U.S. pages 559–562, 57 S.Ct. pages 605, 606, 81 L.Ed. 789.[a]

Reversed.

Mr. Justice BLACK and Mr. Justice RUTLEDGE took no part in the consideration or decision of this case.

Mr. Justice REED, dissenting. * * *

The members of the Switchmen's Union and the Union itself, in view of the fact that it was the bargaining representative of its members prior to this controversy (R. 79), have an interest recognized by law in the selection of representatives. Texas & N. O. R. Co. v. Ry. Clerks, 281 U.S. 548, 571, 50 S.Ct. 427, 434, 74 L.Ed. 1034. This right adheres to his condition as an employee as a right of privacy does to a person. This right is created for these employees by the Railway Labor Act and, in appropriate proceedings, a remedy provided by the general jurisdiction of district courts, to test the extent of this right to select representatives follows from the creation of the right unless negatived by statute, withdrawal

[a] Note that the Court, in Virginian Railway Co. v. System Federation No. 40, 300 U.S. 515, 57 S.Ct. 592, 81 L.Ed. 789 (1937), *supra* at p. 504, did review the validity of the certificate of the National Mediation Board.

of jurisdiction or the like, when the right is claimed to be infringed. Idem, pages 569, 570 of 281 U.S., page 433 of 50 S.Ct., 74 L.Ed. 1034; Virginian Ry. v. System Federation No. 40, 300 U.S. 515, 543, 57 S.Ct. 592, 597, 81 L.Ed. 789. The remedy may not be available to parties with a standing to enforce it because, for example, the infringement may be by governmental action without consent of the Government to be sued for a wrong committed by it. The fact that the remedy may come from the general jurisdiction of the courts rather than from the review provisions of the Act is not significant. We cannot conclude that because no statutory review exists no remedy for misinterpretation of statutory powers is left. No such presumption of obliteration of rights may be entertained. A. F. of L. v. Labor Board, 308 U.S., 401, 412, 60 S.Ct. 300, 305, 84 L.Ed. 347; United States v. Griffin, 303 U.S. 226, 238, 58 S.Ct. 601, 607, 82 L.Ed. 764; Shannahan v. United States, 303 U.S. 596, 603, 58 S.Ct. 732, 735, 82 L.Ed. 1039.

The Court in this case and in General Committee of Adjustment of the Brotherhood of Locomotive Engineers for the Missouri-Kansas-Texas Railroad v. Missouri-Kansas-Texas Railroad Company, et al., 320 U.S. 323, 64 S.Ct. 146, decided today, gives as reasons for denying power to the courts to determine the meaning of the statute the history of federal railway labor legislation and the omission of any provision in this act for review of the determination of voting participants under Section 2, Ninth.

The history of this legislation is adequately stated in the opinions to which reference is made in the preceding paragraph. From their review of the successive enactments in this field, it is plain that until the 1926 act, the scheme for adjustment of railway labor disputes was without legal sanctions. In that act, Section 2, Third, Section 9, Second, providing for the enforcement of arbitration awards, and Section 10, authorizing emergency boards and forbidding changes in the conditions out of which the controversy arose for thirty days after the creation of an emergency board, established rights which were legally enforceable. The statute made the awards of Section 9 subject to judicial control but only a dictum of this Court as to Section 10 and judicial interpretation of Section 2, Third, provided judicial sanction to compel compliance with their provisions. Texas & N. O. R. Co. v. Clerks, 281 U.S. 548, 564, 566–570, 50 S.Ct. 427, 431, 432, 433, 74 L.Ed. 1034.

The 1934 Act was directed particularly at control over the initial step in collective bargaining—the determination of the employees' representatives. Section 2, Ninth, here under examination, was an entirely new provision. By the Clerks case, just cited, decided in 1929 and well known as a landmark of labor law, this Court had upheld judicial compulsion on the carrier to prohibit its interference in the selection of employee representatives even though there was no statutory authority for such judicial action. Section 2, Ninth of the 1934 Act created by its terms a right in employees to participate in an elec-

tion under the designation of the Board in accordance with the authorization of the statute. It was only natural therefore that Congress should assume that where its own creature, the Mediation Board, was charged with interference with the right of employees by a misconstruction of the statute under which it existed, that error of law would be subject to judicial examination to determine the correct meaning.

Nothing to which our attention has been called appears in the legislative history indicating a determination of Congress to exclude the courts from their customary power to interpret the laws of the nation in cases or controversies arising from administrative violations of statutory standards. No intention to refuse judicial aid in administration of the act is apparent. Attention was called just above to the criminal sanctions written into Section 2, Tenth. In addition provision is made in the act for judicial review of the orders of the National Railroad Adjustment Board, Section 3, First (p), and board of arbitration awards, Section 9, Third. Furthermore, the National Mediation Board has appeared in many court cases, as here, involving its certifications and so far as appears neither the parties nor the courts have questioned judicial power. The Board feels that such review has been profitable. Against these later facts, the earlier reliance, prior to 1926, on voluntary action to enforce the railway labor statutes has little significance.

Nor in view of the statements and the decision in the Clerks case, do we think that the omission of statutory review from the provisions of Section 2, Ninth, is important. The requirement of that very subsection that "the carrier shall treat with the representatives so certified" was construed as an affirmative command open to judicial enforcement without specific statutory authority. Virginian Ry. v. System Federation, No. 40, 300 U.S. 515, 544, 57 S.Ct. 592, 597, 81 L.Ed. 789.

Butte, A. & P. Ry. Co. v. United States, 290 U.S. 127, 54 S.Ct. 108, 78 L.Ed. 222, is cited as authority for a conclusion that delegation of an administrative duty carries to the appointee the authority to finally construe the statute since such authority was " 'essential to the performance of the duty imposed upon the Commission' and since 'Congress did not provide a method of review', the Government, as well as the carrier, was 'remediless whether the error be one of fact or of law.' " This was a case in which the Government ordered payments to carriers as compensation for deficits incurred during federal operation of the railways. It was determined that Congress intended to leave finally the determination of the beneficiaries to its agent, the Interstate Commerce Commission. This intention is far easier to deduce when the Congress is dealing with its own money than where it creates rights of suffrage for citizens to exercise for the improvement of their economic condition.

The Virginian Railway case presents a much closer analogy to the present controversy. As pointed out above, it dealt with the carrier's duty to "treat with" employees declared by Section 2, Ninth. Employees sought and obtained a judicial order directing the railroad to negotiate on the ground that new duties, requirements and rights were created "mandatory in form and capable of enforcement by judicial process." [300 U.S. 515, 57 S.Ct. 598, 81 L.Ed. 789.] Despite the absence of statutory authority for court action it was held Congress intended legal sanction. A prohibition of negotiation, such as petitioners seek here, is, a fortiori, within judicial competence.

One factor to test the intention of Congress, it is suggested in the Missouri-Kansas-Texas opinion of today, is whether Congress was willing to crystallize the problem into "statutory commands." The statutory command for which determination is sought here is that the Board exercise its discretion. In the same opinion, it is said, "the command of the Act should be explicit and the purpose to afford a judicial remedy plain before an obligation enforcible in the courts should be implied." Here, Congress has unequivocally provided that "employees shall have the right to organize and bargain collectively through representatives" chosen by the majority of each "craft or class." 45 U.S.C.A. § 152 subd. 4. The special competence of the National Mediation Board lies in the field of labor relations rather than in that of statutory construction. Of course the judiciary does not make the administrative determination. "The functions of the courts cease when it is ascertained that the findings of the Commission meet the statutory test." Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 400, 60 S.Ct. 907, 916, 84 L.Ed. 1263. Likewise, the National Mediation Board may be conceded discretion to make any reasonable determination of the meaning of the words, "craft or class." Cf. Gray v. Powell, 314 U.S. 402, 62 S.Ct. 326, 86 L.Ed. 301. By requiring a plain sanction for a judicial remedy, the court authorizes the Mediation Board to determine not only questions judicially found to be committed to its discretion, as in Gray v. Powell, supra, but the statutory limits of its own powers as well. It seems more consonant with the genius of our institutions to assume, not that the purpose to apply a legal sanction must be plain, but that in the absence of any express provision to the contrary, Congress intended the general judicial authority conferred by the Judicial Code to be available to a union and its members aggrieved by an administrative order presumably irreconcilable with a statutory right so explicitly framed as the right to bargain through representatives of the employees' own choosing.

The petitioners assert their rights as rights arising under the Railway Labor Act, which is stated to be a law of the United States relating to interstate commerce. If this allegation is correct, and we think it is, there is jurisdiction of the subject matter of the suit under Judicial Code, section 24(8), 28 U.S.C.A. § 41(8): "The district courts shall have original jurisdiction as follows: * * * Eighth. Of all suits

and proceedings arising under any law regulating commerce." The general purpose of the act is to avoid interruption to commerce by prohibition of interference with the employees' freedom of association and by provision for collective bargaining to settle labor disputes. This regulates commerce.

The right to select representatives with whom carriers must bargain was created by the Act and the remedy sought here arises under that law. Since the cause of action "[had] its origin in and is controlled by" the Railway Labor Act, it arises under it. Peyton v. Ry. Express Agency, 316 U.S. 350, 62 S.Ct. 1171, 1172, 86 L.Ed. 1525; Mulford v. Smith, 307 U.S. 38, 46, 59 S.Ct. 648, 651, 83 L.Ed. 1092; Turner, Dennis & Lowry Lumber Co. v. C., M. & St. Paul Ry., 271 U.S. 259, 261, 46 S.Ct. 530, 531, 70 L.Ed. 934; Louisville & Nash. R. R. Co. v. Rice, 247 U.S. 201, 38 S.Ct. 429, 62 L.Ed. 1071.

Since the Court declines federal jurisdiction, it is useless to discuss either the merits or the other procedural questions such as jurisdiction in equity to grant the injunction requested, the power to vacate the order of the Mediation Board or the effect of the Norris-LaGuardia Act, 29 U.S.C.A. § 101 et seq.

Mr. Justice ROBERTS and Mr. Justice JACKSON join in this dissent.[f]

GENERAL COMMITTEE, ETC., OF BROTHERHOOD OF LOCOMOTIVE ENGINEERS v. MISSOURI-KANSAS-TEXAS RAILROAD

Supreme Court of the United States.
320 U.S. 323, 64 S.Ct. 146, 88 L.Ed. 76 (1943).

Mr. Justice DOUGLAS delivered the opinion of the Court.

This case involves a dispute under the Railway Labor Act, 45 U.S.C.A. § 151 et seq., concerning the authority of two railroad Brotherhoods to represent certain employees in collective bargaining with the defendant-carriers. The petitioner (hereinafter called the Engineers) is a committee of the Brotherhood of Locomotive Engineers which has been and is the duly designated bargaining representative for the craft of engineers employed by the carriers. The third-party defendant (hereinafter called the Firemen) is a committee of the Brotherhood of Locomotive Firemen and Enginemen which has been and is the duly designated bargaining representative for the craft of firemen on the same lines. Each craft has long had an agreement with the carriers concerning rules, rates of pay, and working conditions. The agreement with the Engineers states that the right to make and interpret contracts, rules, rates and working agreements for locomotive engineers is vested in that committee. The agreement with the Firemen con-

[f] Footnotes of the court, except footnote No. 1 of the majority opinion, have been omitted.

tains a similar provision concerning members of that craft. Both agreements also contain rules governing the demotion of engineers to be firemen, the promotion of firemen to be engineers, and return of demoted engineers to their former work.[1] For many years the two Brotherhoods had an agreement which established rules and regulations on these subjects and which provided machinery for resolving disputes which might arise between them. This agreement was cancelled in 1927. The present dispute arose since that time and relates to the calling of engineers for emergency service. In general the Engineers and the carriers had a working arrangement providing (1) that, excepting Smithville, Texas, the senior available demoted engineer whose home terminal was at the place where the service was required or the man assigned to the particular run as fireman, if he had greater seniority as engineer, would be chosen when it was necessary to call an engineer for emergency service; (2) that the regulation of the engineers' working lists was to be handled by the Engineers' local chairman, not by the management; and (3) that at Smithville, emergency work would be performed by advancing the assignment of engineers in the so-called "pool",[2] instead of calling in emergency engineers. These arrangements were not satisfactory to the Firemen. After protest to the carriers and after a failure of the Brotherhoods to resolve their dispute the matter was submitted to the National Mediation Board for mediation. The Engineers did not participate. The Firemen and the carriers entered into the Mediation Agreement of December 12, 1940, the validity of which is here challenged. The effect of that agreement was in general to eliminate the preference previously given to engineers of the home terminal and the special arrangement at Smithville in favor of the pool engineers. It also changed the practice respecting the handling of the engineers' working lists—thereafter the assignments would be handled by the management assisted by the local chairmen of the two groups. After making the agreement the carriers gave notice to the Engineers that they were cancelling previous arrangements with that Brotherhood.

[1] Generally speaking employees hired under collective bargaining agreements as firemen immediately begin to acquire seniority as such. After a certain period firemen are required to take an engineer's examination. Vacant positions as engineers are filled from the list of those who have passed the qualifying tests. When it is necessary to reduce the force of working engineers those with the lowest seniority are dropped and they resume their positions as firemen in accordance with their seniority in that craft. As a result, firemen with a lower seniority are moved down the ladder of jobs. Thus the most junior firemen are deprived of work and furloughed until their services are needed. When a vacancy occurs in the engineers' ranks or when the work of engineers increases, all move up the ladder of jobs again.

[2] Engineers are generally assigned in order of seniority to regular runs (both passenger and freight), then to pool freight service (which rotates irregular runs among the pool members on a first in first out basis), and then to extra boards of engineers from which assignments are made as positions are available. If no engineer in those categories is available, the senior available qualified engineer working as a fireman is called as an "emergency" engineer.

The Engineers then brought this action for a declaratory judgment, 48 Stat. 955, 28 U.S.C. § 400, 28 U.S.C.A. § 400, that the agreement of December 12, 1940, was in violation of the Railway Labor Act, 44 Stat. 577, 48 Stat. 1185, 45 U.S.C. § 151 et seq., 45 U.S.C.A. § 151 et seq., and that the Engineers should be declared to be the sole representative of the locomotive engineers with the exclusive right to bargain for them. The carriers in their answer prayed that the court declare the respective rights of the parties. And the Firemen, though challenging the jurisdiction of the court, in the alternative asked that the agreement of December 12, 1940, be declared valid. The District Court dismissed the petition, holding that the carriers had a right to contract with either of the crafts with reference to the problems in question. The Circuit Court of Appeals held that both crafts were interested in the subject matter of the dispute, that neither craft had an exclusive right to bargain concerning the matters in issue, that the representatives of both crafts should confer and if possible agree, and that the agreement of December 12, 1940, might be terminated by the carriers if not acquiesced in by the Engineers, 5 Cir., 132 F.2d 91.

The case is here on a petition for certiorari which we granted because of the importance of the problems raised by the assumption of jurisdiction over such controversies by the federal courts.

The bulk of the argument here relates to the merits of the dispute. But we do not intimate an opinion concerning them. For we are of the view that the District Court was without power to resolve the controversy.

It is our view that the issues tendered by the present litigation are not justiciable—that is to say that Congress by this Act has foreclosed resort to the courts for enforcement of the claims asserted by the parties.

The history of this legislation has been traced in earlier cases coming before this Court. See Pennsylvania R. Co. v. United States Railroad Labor Board, 261 U.S. 72, 43 S.Ct. 278, 67 L.Ed. 536; Pennsylvania Railroad System & Allied Lines Federation No. 90 v. Pennsylvania R. Co., 267 U.S. 203, 45 S.Ct. 307, 69 L.Ed. 574; Texas & N. O. R. Co. v. Brotherhood of Ry. & Steamship Clerks, 281 U.S. 548, 50 S.Ct. 427, 74 L.Ed. 1034; Virginian Ry. Co. v. System Federation No. 40, 300 U.S. 515, 57 S.Ct. 592, 81 L.Ed. 789. The present Act is the product of some fifty years of evolution. For many years the only sanctions under the various Congressional enactments in this field were publicity and public opinion. A conspicuous example concerns the Railroad Labor Board, constituted under the Transportation Act of 1920, 41 Stat. 356. It had important functions to perform. But this Court held in the Federation No. 90 case, 267 U.S. 203, 45 S.Ct. 307, 69 L.Ed. 574, that the Board's decisions were not supported by any legal sanctions. The parties to the labor controversies covered by the Act were not "in any way to be forced into compliance with the statute or with the judgments pronounced by the Labor Board, except through the

effect of adverse public opinion." Id., 267 U.S. at page 216, 45 S.Ct. at page 311, 69 L.Ed. 574. The 1926 Act, 44 Stat. 577, made a basic change in the pattern of the railway labor legislation which had preceded. Conciliatory means were adhered to; provisions for mediation and arbitration were adopted; and the use of that machinery on a voluntary basis was encouraged. But Congress also supported its policy with the imposition of some rules of conduct for breach of which the courts afford a sanction. Thus Congress stated in § 2, Fourth, of the 1926 Act that the choice by employees of their collective bargaining representatives should be free from the carriers' coercion and influence. That "definite statutory prohibition of conduct which would thwart the declared purpose" of the Act was held by this Court in the Clerks case to be enforcible in an appropriate suit. 281 U.S. 548, 568, 50 S.Ct. 427, 433, 74 L.Ed. 1034. As stated by Chief Justice Hughes in that case:

"Freedom of choice in the selection of representatives on each side of the dispute is the essential foundation of the statutory scheme. All the proceedings looking to amicable adjustments and to agreements for arbitration of disputes, the entire policy of the act, must depend for success on the uncoerced action of each party through its own representatives to the end that agreements satisfactory to both may be reached and the peace essential to the uninterrupted service of the instrumentalities of interstate commerce may be maintained. There is no impairment of the voluntary character of arrangements for the adjustment of disputes in the imposition of a legal obligation not to interfere with the free choice of those who are to make such adjustments. On the contrary, it is of the essence of a voluntary scheme, if it is to accomplish its purpose, that this liberty should be safeguarded. The definite prohibition which Congress inserted in the act can not therefore be overridden in the view that Congress intended it to be ignored. As the prohibition was appropriate to the aim of Congress, and is capable of enforcement, the conclusion must be that enforcement was contemplated." 281 U.S. at page 569, 50 S.Ct. at page 433, 74 L.Ed. 1034.

Thus what had long been a "right" of employees enforcible only by strikes and other methods of industrial warfare emerged as a "right" enforcible by judicial decree. The right of collective bargaining was no longer dependent on economic power alone.

Further protection was accorded that right by the amendments which were added in 1934. Thus § 2, Ninth, provided machinery strengthening the representation provisions of the Act. H. Rep. No. 1944, 73d Cong., 2d Sess., p. 2. That new provision gave the National Mediation Board an adjudicatory function in the settlement of representation disputes. It provided for a reference to that Board of representation disputes arising among a carrier's employees. It charged the Board with the "duty" upon the request of either party to the dispute to investigate the controversy and to certify the name

or names of the designated and authorized representatives of the employees. And Congress added the command that "Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act." It was that specific command for disobedience of which this court held in the Virginian R. Co. case, 300 U.S. 515, 57 S.Ct. 592, 81 L.Ed. 789, that courts would provide a remedy. That result was reached over the objection that § 2, Ninth, stated a policy but created no rights or duties enforcible by judicial decree. This Court reviewed the history of § 2, Ninth—its purpose and meaning. It concluded that the provision in question was "mandatory in form and capable of enforcement by judicial process." Id., 300 U.S. at page 545, 57 S.Ct. at page 598, 81 L.Ed. 789. It observed that if the provision were construed as being precatory only, its addition to the Act was "purposeless"; that only a requirement of "some affirmative act on the part of the employer" would add to the 1926 Act. Id., 300 U.S. at page 547, 57 S.Ct. at page 599, 81 L.Ed. 789. The Court accordingly concluded that the command of § 2, Ninth could not have been intended to be without legal sanction.

Other similar statutory commands or prohibitions were provided by Congress. The right of the majority of a craft or class to determine who shall be the craft or class representative, § 2, Fourth; the right of the employees to designate as their representative one who is not an employee of the carrier, § 2, Third; the prohibition against "yellow dog" contracts, § 2, Fifth, are illustrative. Moreover, administrative machinery was provided for the adjudication of certain controversies. Congress established the National Railroad Adjustment Board for the settlement of specific types of disputes or grievances between employees and the carrier. § 3. And Congress gave the courts jurisdiction to entertain suits based on the awards of the Adjustment Board. § 3, First (p). That feature of the Act, as well as § 2, Ninth, which placed on the Mediation Board definite adjudicatory functions, transferred certain segments of railway labor problems from the realm of conciliation and mediation to tribunals of the law. The new administrative machinery plus the statutory commands and prohibitions marked a great advance in supplementing negotiation and self-help with specific legal sanctions in enforcement of the Congressional policy.

But it is apparent on the face of the Act that while Congress dealt with this subject comprehensively, it left the solution of only some of those problems to the courts or to administrative agencies. It entrusted large segments of this field to the voluntary processes of conciliation, mediation, and arbitration. Thus by § 5, First, Congress provided that either party to a dispute might invoke the services of the Mediation Board in a "dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference" and any other "dispute not referable" to the Adjustment Board and

"not adjusted in conference between the parties or where conferences are refused." [7] Beyond the mediation machinery furnished by the Board lies arbitration. § 5, First and Third, § 7. In case both fail there is the Emergency Board which may be established by the President under § 10. In short, Congress by this legislation has freely employed the traditional instruments of mediation, conciliation and arbitration. Those instruments, in addition to the available economic weapons, remain unchanged in large areas of this railway labor field. On only certain phases of this controversial subject has Congress utilized administrative or judicial machinery and invoked the compulsions of the law. Congress was dealing with a subject highly charged with emotion. Its approach has not only been slow; it has been piecemeal. Congress has been highly selective in its use of legal machinery. The delicacy of these problems has made it hesitant to go too fast or too far. The inference is strong that Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate.

That history has a special claim here. It must be kept in mind in analyzing a bill of complaint which, like the present one, seeks to state a cause of action under the Railway Labor Act and asks that judicial power be exerted in enforcement of an obligation which it is claimed Congress has created.

The Engineers assert that the carriers had no right under the Act to negotiate with the Firemen on the subject of emergency engineers and that the Mediation Agreement of December 12, 1940, is therefore void. They rely on § 2, Fourth, of the Act and on § 2, First and Ninth. Sec. 2, Fourth states that "Employees shall have the right to organize and bargain collectively through representatives of their own choosing." But that great right, which Congress in 1926 at last supported with legal sanctions, is not challenged here. The Engineers and the Firemen are the collective bargaining agents for their respective crafts and are acknowledged as such. Their authority so to act is not challenged. Nor is it apparent how the majority rule provision of § 2, Fourth, is involved here. It states that "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act." But concededly the Engineers represent a majority of the craft of engineers and the Firemen a majority of the firemen's craft. The principle of majority representation is not challenged. Nor does § 2, Second, make justiciable what otherwise is not. It provides that "All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer,

[7] The Mediation Board also has power of interpretation of mediation agreements. § 5, Second. It likewise has duties with respect to the arbitration of disputes. See § 5, Third. Mediation is the Board's "most important task". Eighth Annual Report, National Mediation Board (1942) p. 4.

respectively, by the carrier or carriers and by the employees thereof interested in the dispute." As we have already pointed out, § 2, Ninth, after providing for a certification by the Mediation Board of the particular craft or class representative, states that "the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act." That command of § 2, Ninth, was enforced in the Virginian R. Co. case. But § 2, Second, like § 2, First, merely states the policy which those other provisions buttress with more particularized commands.

It is true that the present controversy grows out of an application of the principles of collective bargaining and majority rule. It involves a jurisdictional dispute—an asserted overlapping of the interests of two crafts. It necessitates a determination of the point where the authority of one craft ends and the other begins or of the zones where they have joint authority. In the Clerks case and in the Virginian R. Co. case the Court was asked to enforce statutory commands which were explicit and unequivocal. But the situation here is different. Congress did not attempt to make any codification of rules governing these jurisdictional controversies. It did not undertake a statement of the various principles of agency which were to govern the solution of disputes arising from an overlapping of the interests of two or more crafts. It established the general principles of collective bargaining and applied a command or prohibition enforcible by judicial decree to only some of its phases. The contention, however, is that the rule which Congress intended to govern can be found from the implications of the Act. Thus it is argued that the reasons which support the holding in the Virginian R. Co. case that the right of majority craft representation is exclusive also suggest that Congress intended to write into the Railway Labor Act a restriction on the rules and working conditions concerning which the craft has the right to contract. It is pointed out that if the jurisdiction of a craft within which the exclusive right may be exercised is not limited, then disputes between unions may defeat the express purposes of the Act. In that connection reference is made to the statement of this Court in the Virginian R. Co. case, 300 U.S. at page 548, 57 S.Ct. at page 600, 81 L.Ed. 789, that the Act imposes upon the carrier "the affirmative duty to treat only with the true representative, and hence the negative duty to treat with no other." That expresses the basic philosophy of § 2, Ninth. But that decision does not imply, as is argued here, that every representation problem arising under the Act presents a justiciable controversy. It does not suggest that the respective domains for two or more overlapping crafts should be litigated in the federal district courts.

It seems to us plain that when Congress came to the question of these jurisdictional disputes, it chose not to leave their solution to the courts. As we have already pointed out, Congress left the present problems far back in the penumbra of those few principles which it

codified. Moreover, it selected different machinery for their solution. Congress did not leave the problem of inter-union disputes untouched. It is clear from the legislative history of § 2, Ninth, that it was designed not only to help free the unions from the influence, coercion and control of the carriers but also to resolve a wide range of jurisdictional disputes between unions or between groups of employees. H. Rep. No. 1944, supra, p. 2; S. Rep. No. 1065, 73d Cong., 2d Sess., p. 3. However wide may be the range of jurisdictional disputes embraced within § 2, Ninth,[11] Congress did not select the courts to resolve them. To the contrary, it fashioned an administrative remedy and left that group of disputes to the National Mediation Board. If the present dispute falls within § 2, Ninth, the administrative remedy is exclusive. If a narrower view of § 2, Ninth, is taken, it is difficult to believe that Congress saved some jurisdictional disputes for the Mediation Board and sent the parties into the federal courts to resolve the others. Rather the conclusion is irresistible that Congress carved out of the field of conciliation, mediation and arbitration only the select list of problems which it was ready to place in the adjudicatory channel. All else it left to those voluntary processes whose use Congress had long encouraged to protect these arteries of interstate commerce from industrial strife. The concept of mediation is the antithesis of justiciability.

In view of the pattern of this legislation and its history the command of the Act should be explicit and the purpose to afford a judicial remedy plain before an obligation enforcible in the courts should be implied. Unless that test is met the assumption must be that Congress fashioned a remedy available only in other tribunals. There may be as a result many areas in this field where neither the administrative nor the judicial function can be utilized. But that is only to be expected where Congress still places such great reliance on the voluntary process of conciliation, mediation and arbitration. See H. Rep. No. 1944, 73d Cong., 2d Sess., p. 2. Courts should not rush in where Congress has not chosen to tread.

We are here concerned solely with legal rights under this federal Act which are enforcible by courts. For unless such a right is found it is apparent that this is not a suit or proceeding "arising under any law regulating commerce" over which the District Court had original jurisdiction by reason of § 24(8) of the Judicial Code, 28 U.S.C. § 41(8), 28 U.S.C.A. § 41(8). Cf. People of Puerto Rico v. Russell

11 It is apparently the view of the National Mediation Board that § 2, Ninth, was designed to cover only those disputes entailing an election by employees of their representatives. See Brotherhood of Railroad Trainmen v. National Mediation Board, 77 U.S.App.D.C. 259, 135 F.2d 780, 782. In an election case the Board may have to make a preliminary determination as to the eligibility of voters involving the type of problem presented here. See Brotherhood of Railroad Trainmen v. National Mediation Board, 66 App.D.C. 375, 88 F.2d 757, dealing with the question whether brakemen having seniority as conductors could vote in the conductors' election.

& Co., 288 U.S. 476, 483, 53 S.Ct. 447, 449, 77 L.Ed. 903; Gully v. First Nat. Bank, 299 U.S. 109, 57 S.Ct. 96, 81 L.Ed. 70; Peyton v. Railway Express Agency, 316 U.S. 350, 352, 62 S.Ct. 1171, 1172, 86 L.Ed. 1525. When a court has jursdiction it has of course "authority to decide the case either way." The Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25, 33 S.Ct. 410, 411, 57 L.Ed. 716. But in this case no declaratory decree should have been entered for the benefit of any of the parties. Any decision on the merits would involve the granting of judicial remedies which Congress chose not to confer.

Reversed.

Mr. Justice JACKSON concurs in the result.

Mr. Justice ROBERTS and Mr. Justice REED are of the view that the Court should entertain jurisdiction of the present controversy for the reasons set out in the dissent in Switchmen's Union of North America, etc., v. National Mediation Board, 320 U.S. 297, 64 S.Ct. 95, decided today.[g]

INLAND EMPIRE DISTRICT COUNCIL, LUMBER AND SAWMILL WORKERS UNION, ETC. v. MILLIS

Supreme Court of the United States.
325 U.S. 697, 65 S.Ct. 1316, 89 L.Ed. 1877 (1945).

Mr. Justice RUTLEDGE delivered the opinion of the Court.

This controversy grows out of a contest between rival labor unions over the right to act as collective bargaining representative of employees of Potlatch Forest, Inc., a company conducting logging, lumbering and milling operations in northern Idaho. Petitioners seek relief from a certification order of the National Labor Relations Board issued pursuant to § 9(c) of the National Labor Relations Act, 49 Stat. 453, 29 U.S.C. § 159(c), 29 U.S.C.A. § 159(c). They are affiliated with the American Federation of Labor, the certified union with the Congress of Industrial Organizations.

In American Federation of Labor v. National Labor Relations Board, 308 U.S. 401, 60 S.Ct. 300, 84 L.Ed. 347, this Court held that a certification under § 9(c) is not reviewable by the special statutory procedure except incidentally to review of orders restraining unfair labor practices under § 10, 29 U.S.C.A. § 160. Decision was expressly reserved whether, apart from such proceedings, review of certification may be had by an independent suit brought pursuant to § 24 of the Judicial Code, 28 U.S.C.A. § 41. 308 U.S. 412, 60 S.Ct. 305, 84 L.Ed. 347.

Petitioners now assert the right to such review. Prior to the certification, they had represented the company's employees in collective

[g] Footnotes of the court except Nos. 1, 2, 7 and 11, have been omitted.

bargaining. They do not seek review upon the merits of the certification. Their claim is that they were denied the "appropriate hearing" which § 9(c) requires and that the effect was not only to deprive them of the statutory right to hearing but also to deny them due process of law contrary to the Fifth Amendment's guaranty. Accordingly, they seek, in substance, injunctive relief requiring respondents, members of the Board, to vacate the order of certification or, in the alternative, a declaratory judgment that the order is invalid.

The District Court declined to dismiss the suit, upon respondents' motion alleging, among other grounds, that the court was without jurisdiction of the subject matter. The Court of Appeals reversed the judgment, one judge dissenting. AppD.C., 144 F.2d 539. That court held that the statutory review is exclusive, with the consequence that this suit cannot be maintained. The obvious importance of the decision caused us to grant the petition for certiorari. 323 U.S. 703, 65 S.Ct. 269, 89 L.Ed. 567.

In American Federation of Labor v. National Labor Relations Board, 312 U.S. at page 412, 60 S.Ct. at page 306, 84 L.Ed. 347, the Court said, with reference to the question whether the Wagner Act has excluded judicial review of certification under § 9(c) by an independent suit brought under § 24 of the Judicial Code, 28 U.S.C.A. § 41:

"It can be appropriately answered only upon a showing in such a suit that unlawful action of the Board has inflicted an injury on the petitioners for which the law, apart from the review provisions of the Wagner Act, affords a remedy."

Petitioners earnestly urge that this case presents the required showing of unlawful action by the Board and resulting injury. Unless they are right in this view, it would be inappropriate, as was said in the American Federation of Labor case, to determine the question of reviewability. That question should not be decided in the absence of some showing that the Board has acted unlawfully. Upon the facts presented, we think no such showing has been made, whether by way of departure from statutory requirements or from those of due process of law.

On March 9, 1943, local unions affiliated with the C. I. O. filed petitions with the Board for certification as bargaining representatives in three of the company's five logging and milling plants or units. The plants were geographically separate. Some were located as far from others as one hundred miles. But there was common ownership, management and control, with occasional shifting of crews or men from one plant to another. Although the petitions sought separate local units rather than a single company-wide unit, the Board consolidated them for hearing before a trial examiner.

The hearing was held in May, 1943. The company, the C. I. O., and the petitioners, who may be referred to collectively as the A. F. of L.,

appeared and participated. No complaint is made concerning this hearing. It was apparently a typical representation proceeding. The principal issue was the character of the appropriate unit. The A. F. of L. urged that the unit should be company-wide. The C. I. O. advocated separate plant units.

The Board's decision was rendered July 13, 1943. 51 N.L.R.B. 288. It found that the A. F. of L. had organized the employees on a company-wide basis and on this basis had made a "master contract" with the company which however was supplemented by local contracts relating to local matters in each of the five operations. The Board concluded that the history of the bargaining relations had demonstrated the appropriateness of a unit consisting of all the logging and mill employees of the company. It therefore dismissed the petitions of the C. I. O. on the ground that the three separate plant units sought were inappropriate.

Three days later, on July 16, the C. I. O. filed a further petition, this time asking to be certified as bargaining representative on a company-wide basis, excluding clerical, supervisory, confidential, and temporary employees, as well as employees of Potlatch Townsite and Potlatch Mercantile Company. The unit thus suggested conformed generally to the one covered by the outstanding A. F. of L. contract.

On September 14, pursuant to C. I. O.'s motion, the Board served notice upon the A. F. of L. to show cause why the decision of July 13 should not be vacated; the petitions in the earlier cases reinstated and treated as amended by the new petition; and why the Board should not reconsider and proceed to decision without further hearing. The order also proposed to make part of the record the statement of the Board's field examiner concerning the C.I.O. claims of authorization to represent employees.

The A. F. of L. responded by filing a "Protest and Objection." This alleged that the proposed order contemplated a decision without the taking of evidence, to be based in part on an ex parte survey of C. I. O. claims of authorization by employees; that employees of the two units not involved in the first proceeding would have no opportunity to present evidence in their own behalf; and that the Board had no authority to set aside the A. F. of L.'s existing contract by such proceedings.

The Board considered the objections, but found them insufficient, rejected the protest and, without further hearing for the taking of evidence, considered the case upon the full record, including that made in the original hearings. It again approved a company-wide unit, following the historical lines of organization, but excluded certain "fringe" classifications in conformity with generally established policy. It further found that a question concerning representation had arisen and directed that an election be held among the employees in the appropriate unit as it had been determined. The Board's decision was rendered October 14, 1943. 52 N.L.R.B. 1377.

The election was held during the following November and resulted in a majority for the C. I. O. The A. F. of L. filed "Objections and Exceptions to Election," see 55 N.L.R.B. 255, 256, which renewed the claim of impropriety in failing to hold another hearing and also challenged some exclusions of employees from eligibility to take part in the election. Accordingly the A. F. of L. moved to vacate the decision and direction of election, to vacate the election itself, to stay certification and to grant an appropriate hearing.

In January, 1944, the Board granted the A. F. of L.'s motion for further hearing, but deferred ruling upon the request to vacate the previous decision and the election. The hearing was held before a trial examiner in February, 1944. Petitioners appeared and participated fully, as did the company and the C. I. O. No complaint is made concerning the scope of this hearing or the manner in which it was conducted, except as to its timing in relation to the election. Full opportunity was afforded petitioners to present objections, and evidence in support of them. From the absence of contrary allegation, as well as the official report of the Board's decision, it must be taken that all available objections to the Board's procedure and action were made, considered, and determined adversely to petitioners.

The Board rendered its supplemental decision on March 4, 1944. 55 N.L.R.B. 255. This made supplemental findings of fact based upon the entire record, including the record in the original proceedings, the election report, petitioners' objections and exceptions, the motion for reconsideration, and the evidence and objections taken at the February hearing. After reviewing the entire proceedings, the Board found that an "appropriate hearing" had been given, within the requirement of § 9(c); ruled upon each of petitioners' objections, whether new or renewed; and concluded that none of them furnished adequate reason for disturbing its previous decision and direction for election. Accordingly it denied the motion to vacate that decision and the election, and certified the C. I. O. as exclusive bargaining representative of the employees in the unit found appropriate. A. F. of L.'s further motion for reconsideration was denied and thereafter the present suit was instituted.

Upon this history petitioners say they have been denied the "appropriate hearing" § 9(c) requires. They insist that the hearing, to be "appropriate," must precede the election. Accordingly the February, 1944, hearing is said to be inadequate to satisfy the statutory requirement, as well as due process, although no complaint is made concerning its adequacy in any respect other than that it followed, rather than preceded, the election.

Petitioners urge also that the procedure was unwarranted for the Board to vacate the decision of July, 1943, reopen or "reinstate" the original proceedings, treat the C. I. O.'s petition for company-wide certification as an amendment to its original petitions, and thereafter to regard the record in the earlier proceedings as part of the record.

in the later ones, together with the field examiner's report concerning C. I. O. employee representation.

Petitioners' exact contention concerning the reopening of the original proceedings is not altogether clear. But, in any event, it clearly maintains that the Board's action, in effect treating the later proceedings as a continuance of the earlier ones, injected new issues upon which petitioners were entitled to present additional evidence. Accordingly it is claimed that the original record, together with the additional matter presented by the new petition, the motions which followed and the proceeding to show cause, was not adequate to sustain the Board's action in vacating its first decision and entering the direction for election. Although petitioners urge that the preelection proceedings were defective, they emphasize most strongly that the February hearing could not cure the failure to grant the further hearing they demanded prior to the election.

The Board's position is, in effect, twofold, that there was no departure from the statute's requirements or those of due process in the proceedings prior to the election; and, if they were defective in any respect, the departure was cured by the full hearing granted at petitioners' insistence after the election.

We think petitioners have misconceived the effects of § 9(c). It is as follows:

"Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. *In any such investigation,* the Board shall provide for an *appropriate hearing upon due notice,* either in conjunction with a proceeding under section 10 or otherwise, and *may* take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives." (Emphasis added.)

The section is short. Its terms are broad and general. Its only requirements concerning the hearing are three. It must be "upon due notice," it must be "appropriate," and it is mandatory "in any such investigation," but may be held in conjunction with a § 10 (unfair practice) proceeding or otherwise.

Obviously great latitude concerning procedural details is contemplated. Requirements of formality and rigidity are altogether lacking. The notice must be "due," the hearing "appropriate." These requirements are related to the character of the proceeding of which the hearing is only a part. That proceeding is not technical. It is an "investigation," essentially informal, not adversary. The investigation is not required to take any particular form or confined to the hearing. The hearing is mandatory—"the Board *shall* provide for" it. But the requirement is only that it shall be provided "in any such investigation." The statute does not purport to specify when or

at what stage of the investigation the hearing shall be had. It may be conducted "in conjunction with a proceeding under section 10 or otherwise."

Moreover, nothing in the section purports to require a hearing before an election. Nothing in fact requires an election. The hearing "in any such investigation" is mandatory. But the election is discretionary. The Board "*may* take a secret ballot * * * or utilize any other suitable method to ascertain such representatives."

An election, when held, is only a preliminary determination of fact. Sen.Rep.No.573, 74th Cong., 1st Sess., 5–6; H.R.Rep.No.1147, 74th Cong., 1st Sess., 6–7. A direction of election is but an intermediate step in the investigation, with certification as the final and effective action National Labor Relations Board v. International Brotherhood of Electrical Workers, 308 U.S. 413, 414, 415, 60 S.Ct. 306, 307, 84 L.Ed. 354. Nothing in § 9(c) requires the Board to utilize the results of an election or forbids it to disregard them and utilize other suitable methods.

It hardly can be taken, in view of all these considerations, that Congress intended a hearing which it made mandatory "in any such investigation" always to precede an election which it made discretionary for all and which, in the committee reports, it specifically denominated as only a method for making a preliminary determination of fact. That characterization was not beyond congressional authority to make and is wholly consistent with the discretionary status the section gives that mode of determination.

In view of the preliminary and factual function of an election, we cannot agree with petitioners' view that only a hearing prior to an election can be "appropriate" within the section's meaning. The conclusive act of decision, in the investigation, is the certification. Until it is taken, what precedes is preliminary and tentative. The Board is free to hold an election or utilize other suitable methods. Such other methods are often employed and frequently are of an informal character. Petitioners' view logically would require the hearing to be held in advance of the use of any such other method as much as when the method of election is used.

Congress was fully informed concerning the effects of mandatory hearings preceding elections upon the process of certification. For under Public Resolution 44, which preceded § 9(c), the right of judicial hearing was provided. The legislative reports cited above show that this resulted in preventing a single certification after nearly a year of the resolution's operation and that one purpose of adopting the different provisions of the Wagner Act was to avoid these consequences. In doing so Congress accomplished its purpose not only by denying the right of judicial review at that stage but also by conferring broad discretion upon the Board as to the hearing which § 9(c) required before certification.

Petitioners' argument does not in terms undertake to rewrite the statute. But the effect would be to make it read as if the words "appropriate * * * in any such investigation" were replaced with the words "hearing prior to any election." Neither the language of the section nor the legislative history discloses an intent to give the word "appropriate" such an effect. We think the statutory purpose rather is to provide for a hearing in which interested parties shall have full and adequate opportunity to present their objections before the Board concludes its investigation and makes its effective determination by the order of certification.

In this case that opportunity was afforded to petitioners. We need not decide whether the hearing would have been adequate or "appropriate," if the February, 1944, hearing had not been granted and held. In the Board's view, petitioners, when afforded the opportunity in the proceedings to show cause held prior to the election, brought forward nothing which required it to hold a further hearing for the taking of evidence. With this petitioners disagree. We need not examine whether one or the other was correct in its view. For when the objections were renewed after the election, and others also were advanced, the Board gave full and adequate opportunity for hearing, including the presentation of evidence, concerning them. Petitioners do not contend that the hearing was a sham or that the Board did not consider their objections. They do not ask for review upon the merits. Their only objection is that the hearing came too late. That objection is not tenable in view of the statute's terms and intent.

It may be, as petitioners insist, that their interests were harmfully affected by the outcome of the election, through loss of prestige and in other ways. It does not follow that the injury is attributable to any failure of the Board to afford a hearing which was "appropriate" within the section's meaning. This being true, and since petitioners do not now question the Board's rulings upon the merits of the issues apart from those relating to the character of the hearing, the injury must be regarded, for presently material purposes, as an inevitable result of losing an election which was properly conducted.

Petitioners also assert that the Board departed from its own rules in failing to accord them the hearing demanded prior to the election. The regulations provide for direction of election to follow the hearing before the trial examiner and, in the Board's discretion, oral argument or further hearing as it may determine. Rules and Regulations, Art. III, §§ 3, 8, 9. But the regulations also contemplate further hearings for reconsideration before the final act of certification, a procedure of which petitioners had full advantage in this case. Whether or not the hearings provided before the election were adequate to comply with the regulations, the procedure upon rehearing afterward was adequate to perform its intended function of affording full opportunity for correcting any defect which may have existed in the previous stages of hearing.

We think no substantial question of due process is presented. The requirements imposed by that guaranty are not technical, nor is any particular form of procedure necessary. Morgan v. United States, 298 U.S. 468, 481, 56 S.Ct. 906, 912, 80 L.Ed. 1288. "The demands of due process do not require a hearing, at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective." Opp. Cotton Mills v. Administrator, 312 U.S. 126, 152, 153, 657, 61 S.Ct. 524, 536, 85 L.Ed. 624; cf. Bowles v. Willingham, 321 U.S. 503, 519, 521, 64 S.Ct. 641, 649, 650, 88 L.Ed. 892. That requirement was fully met in this case.

The judgment is affirmed.

Affirmed.

Mr. Justice ROBERTS dissents.[h]

SECTION 4. EFFECT OF ADMINISTRATIVE PROCEDURE ACT

ADMINISTRATIVE PROCEDURE ACT § 10(c)

5 U.S.C.Supp. § 1009(c).

Sec. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

* * *

(c) REVIEWABLE ACTS.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

[h] Footnotes of the court have been omitted.

PART II. SCOPE OF JUDICIAL REVIEW

INTRODUCTORY

EXCERPT FROM UNITED STATES v. MORGAN

Supreme Court of the United States.
307 U.S. 183, 190-1, 59 S.Ct. 795, 799-800, 83 L.Ed. 1211 (1939).

[Mr. Justice STONE delivered the opinion of the Court.]

* * * In answering these questions there are two cardinal principles which must guide us to our conclusion. The one is that in construing a statute setting up an administrative agency and providing for judicial review of its action, court and agency are not to be regarded as wholly independent and unrelated instrumentalities of justice, each acting in the performance of its prescribed statutory duty without regard to the appropriate function of the other in securing the plainly indicated objects of the statute. Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through co-ordinated action. Neither body should repeat in this day the mistake made by the courts of law when equity was struggling for recognition as an ameliorating system of justice,[2] neither can rightly be regarded by the other as an alien intruder, to be tolerated if must be, but never to be encouraged or aided by the other in the attainment of the common aim. The other guiding principle is that in reviewing the action of the Secretary and in similarly reviewing the action of the Interstate Commerce Commission in conformity with the provisions of the Urgent Deficiencies Act, the district court sits as a court of equity, see Ford Motor Co. v. National Labor Relations Board, 305 U.S. 364, 373, 59 S.Ct. 301, 83 L.Ed. 221; Inland Steel Co. v. United States, 306 U.S. 153, 59 S.Ct. 415, 83 L.Ed. 557; and in exerting its extraordinary powers to stay execution of a rate order, and in directing payment into court of so much of the rate as has been found administratively to be excessive, it assumes the duty of making disposition of the fund in conformity to equitable principles.

[2] [Footnote omitted.—Ed.]

SECTION 1. ADMINISTRATIVE FINALITY—FINDINGS OF FACT

A. In General

(1) In Judicial Review of Administrative Orders

EXCERPT FROM INTERSTATE COMMERCE COMMISSION v. ILLINOIS CENTRAL RAILROAD

Supreme Court of the United States.
215 U.S. 452, 470, 30 S.Ct. 155, 160, 54 L.Ed. 280 (1910).

[Mr. Justice WHITE delivered the opinion of the Court.]

Beyond controversy, in determining whether an order of the Commission shall be suspended or set aside, we must consider (a) all relevant questions of constitutional power or right; (b) all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made; and (c) a proposition which we state independently, although in its essence it may be contained in the previous one, *viz.*, whether, even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. Postal Teleg. Cable Co. v. Adams, 155 U.S. 688, 698, 39 L.Ed. 311, 316, 5 Inters. Com. Rep. 1, 15 Sup.Ct.Rep. 268, 360. Plain as it is that the powers just stated are of the essence of judicial authority, and which, therefore, may not be curtailed, and whose discharge may not be by us in a proper case avoided, it is equally plain that such perennial powers lend no support whatever to the proposition that we may, under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful administrative order upon our conception as to whether the administrative power has been wisely exercised.

Power to make the order, and not the mere expediency or wisdom of having made it, is the question.

INTERSTATE COMMERCE COMMISSION v. UNION PACIFIC RAILROAD CO.

Supreme Court of the United States.
222 U.S. 541, 32 S.Ct. 108, 56 L.Ed. 308 (1912).

Mr. Justice LAMAR, after making the foregoing statement, delivered the opinion of the court.

These appeals raise the single question as to whether, in making the 45-cent rate, the Commission acted within or beyond its power. As the statute makes its finding prima facie correct (Cincinnati, H. & D. R. Co. v. Interstate Commerce Commission, 206 U.S. 154, 51 L.Ed. 1000, 27 Sup.Ct.Rep. 648), it will be more convenient to consider the case from the standpoint of the carriers, who first insist that the order was void because made without evidence or finding that the 50-cent rate was unreasonable.

There has been no attempt to make an exhaustive statement of the principle involved, but in cases thus far decided, it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance and not the shadow, determines the validity of the exercise of the power. Interstate Commerce Commission v. Illinois C. R. Co. 215 U.S. 470, 54 L.Ed. 287, 30 Sup.Ct.Rep. 155; Southern P. Co. v. Interstate Commerce Commission, 219 U.S. 433, 55 L.Ed. 283, 31 Sup.Ct.Rep. 288; Interstate Commerce Commission v. Northern P. R. Co. 216 U.S. 544, 54 L.Ed. 609, 30 Sup.Ct.Rep. 417; Interstate Commerce Commission v. Alabama Midland R. Co. 168 U.S. 146, 174, 42 L.Ed. 414, 425, 18 Sup.Ct.Rep. 45.

In determining these mixed questions of law and fact, the court confines itself to the ultimate question as to whether the Commission acted within its power. It will not consider the expediency or wisdom of the order, or whether, on like testimony, it would have made a similar ruling. "The findings of the Commission are made by law prima facie true, and this court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience." Illinois C. R. Co. v. Interstate Commerce Commission, 206 U.S. 441, 51 L.Ed. 1128, 27 Sup.Ct.Rep. 700. Its conclusion, of course, is subject to review, but, when supported by evidence, is accepted as

final; not that its decision, involving, as it does, so many and such vast public interests, can be supported by a mere scintilla of proof, but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order. * * *

Considering the case as a whole, we cannot say that the order was made because of the effect of the advance on the lumber industry; nor because of a mistake of law as to presumption arising from the long continuance of the low rate, when the carrier was earning dividends; nor that there was no evidence to support the finding. If so, the Commission acted within its power, and, in view of the statute, its lawful orders cannot be enjoined. The decree, therefore, must be reversed.

INTERSTATE COMMERCE COMMISSION v. LOUISVILLE & NASHVILLE R. R. CO.

Supreme Court of the United States.
227 U.S. 88, 33 S.Ct. 185, 57 L.Ed. 431 (1913).

Mr. Justice LAMAR delivered the opinion of the court.

The New Orleans Board of Trade, in October and November, 1907, brought three separate proceedings against the Louisville & Nashville Railroad, asking the Commerce Commission to set aside as unfair, unreasonable, and discriminatory certain class and commodity rates (local) from New Orleans to (1) Mobile, to (2) Pensacola, and (3) through rates, *via* those cities, to Montgomery, Selma, and Prattville. The railroad answered. A hearing was had, the issue as to commodity rates was adjusted by agreement, and on December 31, 1909, the Commission made a single order in which it found the class rates complained of to be unreasonable, directed the old locals to be restored, and a corresponding reduction made in the through rates. The railroad thereupon, on January 26, 1910, filed a bill in the United States circuit court for the western district of Kentucky, praying that the Commission be enjoined from enforcing this order, which it alleged was arbitrary, oppressive, and confiscatory, and deprived the company of its property and right to make rates, without due process of law.

After a hearing before three circuit court judges, the carrier's application for a temporary injunction was denied. 184 F. 118. Testimony was then taken before an examiner. Later the suit was transferred to the newly organized commerce court,—the United States being made a party. There, in addition to the evidence in the circuit court, the railroad exhibited all that had been introduced before the Commission, as a basis for the contention that this evidence utterly failed to show that the rates attacked were unreasonable. This view was sustained by the commerce court, which in a lengthy opinion held (one judge dissenting) that the order was void because there was no material evidence to support it.

On the appeal here, the government insisted that while the act of 1887 to regulate commerce (24 Stat. at L. 379, §§ 14–16, chap. 104, U.S.Comp.Stat.Supp.1911, p. 1284) made the orders of the Commission only prima facie correct, a different result followed from the provision in the Hepburn Act of 1906 (34 Stat. at L. 584, § 4, chap. 3591, U.S. Comp.Stat.Supp.1911, p. 1297), that rates should be set aside if after a hearing the "Commission shall be of the opinion that the charge was unreasonable." In such case it insisted that the order based on such opinion is conclusive, and (though Interstate Commerce Commission v. Union P. R. Co. 222 U.S. 547, 56 L.Ed. 311, 32 Sup.Ct. Rep. 108, was to the contrary) could not be set aside, even if the finding was wholly without substantial evidence to support it.

1. But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless. And if the government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean that, where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power.

In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the "indisputable character of the evidence" (Tang Tun v. Edsell, 223 U.S. 681, 56 L.Ed. 610, 32 Sup.Ct.Rep. 359; Chin Yow v. United States, 208 U.S. 13, 52 L.Ed. 370, 28 Sup.Ct.Rep. 201; Low Wah Suey v. Backus, 225 U.S. 468, 56 L.Ed. 1167, 32 Sup.Ct.Rep. 734; Zakonaite v. Wolf, 226 U.S. 272, 57 L.Ed. 218, 33 Sup.Ct.Rep. 31), or if the facts found do not, as a matter of law, support the order made (United States v. Baltimore & Ohio S. W. R. Co., 226 U.S. 14, 57 L.Ed. 104, 33 Sup.Ct.Rep. 5, Cf. Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U.S. 20, 51 L.Ed. 942, 27 Sup.Ct.Rep. 585; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U.S. 301, 45 L.Ed. 201, 21 Sup.Ct.Rep. 115; Washington ex rel. Oregon R. & Nav. Co. v. Fairchild, 224 U.S. 510, 56 L.Ed. 863, 32 Sup.Ct.Rep. 535; Interstate Commerce Commission v. Illinois C. R. Co. 215 U.S. 470, 54 L.Ed. 287, 30 Sup.Ct.Rep. 155; Southern P. Co. v. Interstate Commerce Commission, 219 U.S. 433, 55 L.Ed. 283, 31 Sup.Ct.Rep. 288; Muser v. Magone, 155 U.S. 247, 39 L.Ed. 137, 15 Sup.Ct.Rep. 77).

2. The government's claim is not only opposed to the ruling in Interstate Commerce Commission v. Union P. R. Co. 222 U.S. 547,

56 L.Ed. 311, 32 Sup.Ct.Rep. 108, and the cases there cited, but is contrary to the terms of the act to regulate commerce, which in its present form provides (25 Stat. at L. 861, § 6, chap. 382, U.S.Comp. Stat.1901, p. 3168), for methods of procedure before the Commission that "conduce to justice." The statute, instead of making its orders conclusive against a direct attack, expressly declares that they may "be suspended or set aside by a court of competent jurisdiction." 36 Stat. at L. 551, § 12, chap. 309. Of course, that can only be done in cases presenting a justiciable question. But whether the order deprives the carrier of a constitutional or statutory right, whether the hearing was adequate and fair, or whether for any reason the order is contrary to law,—are all matters within the scope of judicial power.

3. Under the statute the carrier retains the primary right to make rates, but if, after hearing, they are shown to be unreasonable, the Commission may set them aside and require the substitution of just for unjust charges. The Commission's right to act depends upon the existence of this fact, and if there was no evidence to show that the rates were unreasonable there was no jurisdiction to make the order. Interstate Commerce Commission v. Northern P. R. Co. 216 U.S. 544, 54 L.Ed. 609, 30 Sup.Ct.Rep. 417. In a case like the present the courts will not review the Commission's conclusions of fact (Interstate Commerce Commission v. Delaware, L. & W. R. Co. 220 U.S. 251, 55 L.Ed. 456, 31 Sup.Ct.Rep. 392) by passing upon the credibility of witnesses or conflicts in the testimony. But the legal effect of evidence is a question of law. A finding without evidence is beyond the power of the Commission. An order based thereon is contrary to law, and must, in the language of the statute, be "set aside by a court of competent jurisdiction." 36 Stat. at L. 551, chap. 309.

4. The government further insists that the commerce act (26 Stat. at L. 743, chap. 128, U.S.Comp.Stat.1901, p. 3163) requires the Commission to obtain information necessary to enable it to perform the duties and carry out the objects for which it was created; and having been given legislative power to make rates it can act, as could Congress, on such information, and therefore its findings must be presumed to have been supported by such information, even though not formally proved at the hearing. But such a construction would nullify the right to a hearing,—for manifestly there is no hearing when the party does not know what evidence is offered or considered, and is not given an opportunity to test, explain, or refute. The information gathered under the provisions of § 12 may be used as basis for instituting prosecutions for violations of the law, and for many other purposes, but is not available, as such, in cases where the party is entitled to a hearing. The Commission is an administrative body and, even where it acts in a quasi judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties. Interstate Commerce Commission v. Baird,

194 U.S. 25, 48 L.Ed. 860, 24 Sup.Ct.Rep. 563. But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the Commissioners cannot act upon their own information, as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents, and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the Commission had before it extraneous, unknown, but presumptively sufficient information to support the finding. United States v. Baltimore, &c. R. R. 226 U.S. 14, 57 L.Ed. 104, 33 Sup.Ct. Rep. 5.

As these contentions of the government must be overruled, it is necessary to examine the record with a view of determining whether there was substantial evidence to support the order. * * *

The order of the Commission restoring a local rate that had been in force for many years, and making a corresponding reduction in the through rate, was not arbitrary, but sustained by substantial, though conflicting, evidence. The courts cannot settle the conflict, nor put their judgments against that of the rate-making body, and the decree is reversed.

FEDERAL TRADE COMMISSION v. ALGOMA LUMBER COMPANY

Supreme Court of the United States.
291 U.S. 67, 54 S.Ct. 315, 78 L.Ed. 655 (1934).

Mr. Justice CARDOZO delivered the opinion of the Court.

In May, 1929, the Federal Trade Commission filed and served complaints against a group of fifty manufacturers on the Pacific Coast charging "unfair competition in interstate commerce" in violation of section 5 of the Federal Trade Commission Act. 38 Stat. 717, 719, c. 311, § 5, 15 U.S.C. § 45 (15 U.S.C.A. § 45).

After the service of answers the proceedings were consolidated and many witnesses examined. The outcome was a series of reports sustaining the complaints as to thirty-nine manufacturers, with orders to "cease and desist" from the practice challenged as unfair. Twelve companies thus enjoined petitioned the Circuit Court of Appeals for the Ninth Circuit to review the orders of the Commission. Such review being had, the orders were annulled. 64 F.2d 618. A writ of certiorari brings the case here.

The practice complained of as unfair and enjoined by the Commission is the use by the respondents of the words "California white pine" to describe lumber, logs, or other forest products made from the pine species known as "pinus ponderosa." The findings as to this use and its effect upon the public are full and circumstantial. They are too long to be paraphrased conveniently within the limits of an opinion. We must be content with an imperfect summary.

The respondents are engaged in the manufacture and sale of lumber and timber products which they ship from California and Oregon to customers in other states and foreign lands. Much of what they sell comes from the species of tree that is known among botanists as "pinus ponderosa." The respondents sell it under the name of "California white pine," and under that name, or at times "white pine" simply, it goes to the consumer. In truth it is not a white pine, whether the tests to be applied are those of botanical science or of commercial practice and understanding.

Pine trees, the genus "pinus," have for a long time been divided by botanists, foresters, and the public generally into two groups, the white pine and the yellow. The white pine group includes, by common consent, the northern white pine (pinus strobus), the sugar pine, and the Idaho white pine. It is much sought after by reason of its durability under exposure to weather and moisture, the proportion of its heartwood as contrasted with its sapwood content as well as other qualities. For these reasons it commands a high price as compared with pines of other species. The yellow pine group is less durable, harder, heavier, more subject to shrinkage and warping, darker in color, more resinous, and more difficult to work. It includes the long leaf yellow pine (pinus palustris), grown in the southern states, and the pinus ponderosa, a far softer wood, which is grown in the Pacific Coast states, and in Arizona and New Mexico as well as in the "inland empire" (Eastern Washington, Oregon, Idaho, and Western Montana).

Of the varieties of white pine, the northern or pinus strobus has been known better and longer than the others. It is described sometimes as northern white pine, sometimes as white pine simply, sometimes with the addition of its local origin, as Maine white pine, Michigan, Wisconsin, Minnesota, Canadian, New Brunswick. It is native to the northeastern states and to the Great Lakes region, as far west as Minnesota. It is found also in Canada and along the Appalachian highlands. It was almost the only building material for the settlers of New England, and so great is its durability that many ancient buildings made from it in the seventeenth and eighteenth centuries survive in good condition. The sugar pine is native to the upland regions of California, Southern Oregon and parts of Nevada. The Idaho white pine grows in the mountainous sections of Idaho, Washington, and Oregon and in parts of British Columbia. The white pine species "still holds an exalted reputation among the consuming public"

and "in general esteem is the highest type of lumber as respects the excellences desired in soft wood material." "It is coming more and more to be a specialty wood, largely devoted to special purposes, as it becomes scarcer and higher in price. It is in great demand."

About 1880 the pinus ponderosa, though botanically a yellow pine, began to be described as a white pine when sold in the local markets of California, New Mexico, and Arizona, the description being generally accompanied by a reference to the state of origin, as "California white pine," etc. By 1886, sales under this description had spread to Nevada and Utah with occasional shipments farther east. About 1900, they entered the middle western states, and about 1915 had made their way into New England, though only to a small extent. The pines from the inland empire traveled east more slowly, and when they did were described as western white pine, a term now generally abandoned. The progress of the newcomers both from the coast and from the inland empire was not wholly a march of triumph. In their movement to the central and eastern markets they came into competition more and more with the genuine white pine with which those markets had been long familiar. Mutterings of discontent were heard. In 1924, partly as a result of complaints and official investigations, many of the producers, notably those of the "inland empire," as well as some producers in California and Arizona, voluntarily gave up the use of the adjective "white" in connection with their product, and adopted the description "pondosa pines," pondosa being a corruption or abbreviation of the ponderosa of the bontanists. "Pondosa pine is the term employed for ponderosa by the representatives of producers of slightly more than half of the ponderosa marketed." The respondents and others, however, declined to make a change. During the next five years California white pine and its equivalents became an even more important factor in the lumber markets of the country. Accumulating complaints led to an inquiry by the Commission, which had its fruit in this proceeding.

The confusion and abuses growing out of these interlocking names have been developed in the findings. Many retail dealers receiving orders for white pine deliver California white pine, not knowing that it differs from the lumber ordered. Many knowing the difference deliver the inferior product because they can buy it cheaper. Still others, well informed and honest, deliver the genuine article, thus placing themselves at a disadvantage in the race of competition with the unscrupulous and the ignorant. Trade has thus been diverted from dealers in white pine to dealers in pinus ponderosa masquerading as white pine. Trade has also been diverted from dealers in pinus ponderosa under the name pinus pondosa to dealers in pinus ponderosa under the more attractive label. The diversion of trade from dealers of one class to dealers of another is not the only mischief. Consumers, architects, and retailers have also been misled. They have given orders for the respondents' product, supposing it to be white pine and

to have the qualities associated with lumber of that species. They have accepted deliveries under the empire of that belief. True indeed it is that the woods sold by the respondents, though not a genuine white pine, are nearer to that species in mechanical properties than they are to the kinds of yellow pine indigenous in the south. The fact that for many purposes they are halfway between the white species and the yellow makes the practice of substitution easier than it would be if the difference were plain. Misrepresentation and confusion flourish in such a soil. From these findings and others the Commission was brought to the conclusion that the respondents compete unfairly in transacting business as they do, and that in the interest of the public their methods should be changed.

"The findings of the Commission as to facts, if supported by testimony, shall be conclusive." 15 U.S.C. § 45 (15 U.S.C.A. § 45.)[a] The Court of Appeals, though professing adherence to this mandate, honored it, we think, with lip service only. In form the court determined that the finding of unfair competition had no support whatever. In fact what the court did was to make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences. Statute and decision (Federal Trade Commission v. Pacific States Paper Trade Association, 273 U.S. 52, 61, 63, 47 S.Ct. 255, 71 L.Ed. 534) forbid that exercise of power.

First. The argument is made that unfair competition is disproved by the "simplified practice recommendations" of the Bureau of Standards when read in conjunction with the testimony as to the comparative utility of the genuine white pine and pinus ponderosa.

The Court of Appeals concedes that the recommendations of the Bureau will not avail without more to control the action of the Commission. Cf. Brougham v. Blanton Mfg. Co., 249 U.S. 495, 499, 39 S.Ct. 363, 63 L.Ed. 725; Piedmont & Northern Ry. Co. v. Interstate Commerce Commission, 286 U.S. 299, 312, 52 S.Ct. 541, 76 L.Ed. 1115. The view was expressed, however, that alone they are in a high degree persuasive, and that in conjunction with other evidence they are even controlling. In particular that result was thought to follow in this case because the substituted wood, in the judgment of the court, is so nearly equal in utility that buyers are not injured, even though misled.

Such a holding misconceives the significance of the Government's endeavor to simplify commercial practice. It misconceives even more essentially the significance of the substitution of one article for another without notice to the buyer.

(a) The Bureau of Standards is a branch of the Department of Commerce. At its instance representatives of manufacturers, sellers,

[a] This sentence has since been amended to read: "The findings of the Commission as to the facts, if supported by evidence, shall be conclusive". Federal Trade Commission Act, as amended, § 5 (c), 15 U.S.C. § 45(c).

and users of lumber, as well as architects, engineers, and others, met in conference at various times between 1922 and 1928 in an endeavor to simplify methods of business in the lumber industry. Following these conferences the Bureau in 1929 issued a report entitled "Lumber, Simplified Practice Recommendations." Many subjects that were considered are without relation to this case. The report dealt with standards of size, of inspection, of structural material, and other cognate themes. One of its subdivisions, however, enumerates the standard commercial names for lumber of many types. Sixteen names of pines are stated in the list, and among them is the name "California white pine" with its botanical equivalent, pinus ponderosa.

The recommendations of the Bureau of Standards for the simplification of commercial practice are wholly advisory. Dealers may conform or diverge as they prefer. The Bureau has defined its own function in one of its reports. The Purpose and Application of Simplified Practice, National Bureau of Standards, Department of Commerce, July 1, 1931, pp. 2, 7, 10, 17. "Simplified practice is a method of eliminating superfluous variety through the voluntary action of industrial groups." "The Department of Commerce has no regulatory powers" with reference to the subject, and hence "it is highly desirable that this recommendation be kept distinct from any plan or method of governmental regulation or control." There is nothing to show that in making up the list of names the Bureau made any investigation of the relation between pinus ponderosa and the white pines of the east. Certainly it had no such wealth of information on the subject as was gathered by the Commission in the course of this elaborate inquiry. There is nothing to show to what extent its advice has been accepted by the industry. The record does show that the recommendation does not accord with the practice of other governmental agencies. For example, the United States Forest Service in its publications and forest signs describes the ponderosa species as western yellow pine. In such circumstances the action of the Bureau was at most a bit of evidence to be weighed by the Commission along with much besides. It had no such significance as to discredit in any appreciable degree a conclusion founded upon evidence otherwise sufficient. The powers and function of the two agencies of government are essentially diverse. The aim of the one is to simplify business by substituting uniformity of methods for wasteful diversity, and in the achievement of these ends to rely upon cooperative action. The aim of the other is to make the process of competition fair. There are times when a description is deceptive from the very fact of its simplicity.

(b) The wood dealt in by the respondents is not substantially as good as the genuine white pine, nor would sales under the wrong name be fitting if it were.

The ruling of the court below as to this is infected by a twofold error. The first is one of fact. The supposed equivalence is unreal. The sec-

ond is one of law. If the equivalence existed, the practice would still be wrong.

The Commission found as a fact that the genuine white pine is superior for many reasons to pinus ponderosa, and notably because of its greater durability. The court held the view that the difference in durability had not been proved so clearly as to lay a basis for the orders, and this, it seems, upon the ground that though the superiority exists, the evidence fails to disclose its precise degree. "What the testimony appears to establish is that Northern white pine has relatively a greater durability for exterior use without establishing any comparative degree of such durability." 64 F.2d 618 at page 622.

Court and counsel for the respondents lean heavily at this point upon the testimony of the Director of the United States Forest Products Laboratory at Madison, Wis., and his assistant Mr. Hunt. The Director testified that he did not know the comparative durability of the pines, and would refer any inquirer to specialists, of whom Mr. Hunt was one. The testimony of Mr. Hunt is that there have been no tests in a strict sense, but that the comparison between the white pines and pinus ponderosa has been based upon observation and opinion. He continues: "The general experience with the use of the white pines, during the two hundred years since they began to be used, indicated that those pines had moderately high durability. The general experience with pinus ponderosa indicated that that wood had low durability in contact with the ground or any place favoring the growth of decay. That is a matter of common knowledge." Inquirers at the Laboratory were accordingly advised that "the heartwood of the white pine has more decay resistance, will give longer service under conditions favoring decay than the heartwood of pinus ponderosa," and "the mill run of the white pine probably would average higher in durability under decay producing conditions."

This testimony, even if it stood alone, would tend to sustain rather than to discredit the findings by the Commission that the genuine white pines are materially superior to the woods that the respondents are selling as a substitute. It is fortified, however, by evidence from many other sources. To be sure there is contradiction which we have no thought to disparage. For present purposes we assume the credibility of those who spoke for the complainants. Wholesalers, retailers, manufacturers, lumber graders, laboratory experts and others bore witness to the comparative merits of the woods, stating their own experience as well as common opinion among their fellows in the industry. If all this may be ignored in the face of the findings of the Commission, it can only be by turning the court into an administrative body which is to try the case anew.

What has been written has been aimed at the position that pinus ponderosa is as good or almost as good as the white pines of the east. We have yet to make it plain that the substitution would be unfair though equivalence were shown. This can best be done in consider-

ing another argument which challenges the finding of the Commission that there has been misunderstanding on the part of buyers. To this we now turn.

Second. The argument is made that retailers and consumers are not shown to have been confused as to the character of the lumber supplied by the respondents, and that even if there was confusion there is no evidence of prejudice.

Both as to the fact of confusion and its consequences the evidence is ample. Retailers order "white pine" from manufacturers and take what is sent to them, passing it on to their customers. At times they do this knowing or suspecting that they are supplying California white pine instead of the genuine article, and supplying a wood that is inferior, at least for the outer parts of buildings. Its comparative cheapness creates the motive for the preference. At times they act in good faith without knowledge of the difference between the California pines and others. Architects are thus misled, and so are builders and consumers. There is a suggestion by the court that for all that appears the retailers, buying the wood cheaper, may have lowered their own price, and thus passed on to the consumer the benefit of the saving. The inference is a fair one that this is not always done, and perhaps not even generally. If they lower the price at all, there is no reason to believe that they do so to an amount equivalent to the saving to themselves.

But saving to the consumer, though it be made out, does not obliterate the prejudice. Fair competition is not attained by balancing a gain in money against a misrepresentation of the thing supplied. The courts must set their faces against a conception of business standards so corrupting in its tendency. The consumer is prejudiced if upon giving an order for one thing, he is supplied with something else. Federal Trade Commission v. Royal Milling Co., 288 U.S. 212, 216, 53 S.Ct. 335, 77 L.Ed. 706; City of Carlsbad v. W. T. Thackeray & Co. (C. C.) 57 F. 18. In such matters, the public is entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by ignorance. Nor is the prejudice only to the consumer. Dealers and manufacturers are prejudiced when orders that would have come to them if the lumber had been rightly named, are diverted to others whose methods are less scrupulous. "A method inherently unfair does not cease to be so because those competed against have become aware of the wrongful practice." Federal Trade Commission v. Winsted Hosiery Co., 258 U.S. 483, 494, 42 S.Ct. 384, 385, 66 L.Ed. 729. The careless and the unscrupulous must rise to the standards of the scrupulous and diligent. The Commission was not organized to drag the standards down.

Third. The argument is made that the name for the respondents' lumber was adopted more than thirty years ago without fraudulent design, and that a continuation of the use is not unfair competition,

though confusion may have developed when the business, spreading eastward, attained national dimensions.

The Commission made no finding as to the motives animating the respondents in the choice of the contested name. The respondents say it was chosen to distinguish their variety of yellow pine from the harder yellow pines native to the southern states. We may assume that this is so. The fact remains, however, that the pines were not white either botanically or commercially, though the opportunity for confusion may have been comparatively slight when the sales were restricted to customers in local markets, buying for home consumption. Complaints, if there were any, must have been few and inarticulate at a time when there was no supervisory body to hold business to its duty. According to the law as then adjudged, many competitive practices that today may be suppressed (Federal Trade Commission v. Winsted Hosiery Co., supra), were not actionable wrongs, the damage to the complainants being classified often as collateral and remote. American Washboard Co. v. Saginaw Mfg. Co. (C.C.A.) 103 F. 281, 286, 50 L.R.A. 609. The Federal Trade Commission was not organized till 1914, its jurisdiction then as now confined to interstate and foreign commerce. Silence up to that time is not even a faint token that the misapplied name had the approval of the industry. It may well have meant no more than this, that the evil was not great, or that there was no champion at hand to put an end to the abuse. Even silence thereafter will not operate as an estoppel against the community at large, whatever its effect upon individuals asserting the infringement of proprietary interests. French Republic v. Saratoga Vichy Spring Co., 191 U.S. 427, 24 S.Ct. 145, 48 L.Ed. 247. There is no bar through lapse of time to a proceeding in the public interest to set an industry in order by removing the occasion for deception or mistake, unless submission has gone so far that the occasion for misunderstanding, or for any so widespread as to be worthy of correction, is already at an end. Competition may then be fair irrespective of its origin. This will happen, for illustration, when by common acceptation the description, once misused, has acquired a secondary meaning as firmly anchored as the first one. Till then, with every new transaction, there is a repetition of the wrong.

The evidence here falls short of establishing two meanings with equal titles to legitimacy by force of common acceptation. On the contrary, revolt against the pretender, far from diminishing, has become increasingly acute. With the spread of business eastward, the lumber dealers who sold pines from the states of the Pacific Coast were involved in keen competition with dealers in lumber from the pines of the east and middle west. In the wake of competition came confusion and deception, the volume mounting to its peak in the four or five years before the Commission resolved to act. Then, if not before, misbranding of the pines was something more than a venial wrong. The respondents, though at fault from the beginning, had

been allowed to go their way without obstruction while the mischief was not a crying one. They were not at liberty to enlarge the area of their business without adjusting their methods to the needs of new conditions. An analogy may be found in the decisions on the law of trade marks where the principle is applied that a name legitimate in one territory may generate confusion when carried into another, and must then be given up. Hanover Milling Co. v. Metcalf, 240 U.S. 403, 416, 36 S.Ct. 357, 60 L.Ed. 713; United Drug Co. v. Rectanus Co., 248 U.S. 90, 100, 39 S.Ct. 48, 63 L.Ed. 141. More than half the members of the industry have disowned the misleading name by voluntary action and are trading under a new one. The respondents who hold out are not relieved by innocence of motive from a duty to conform. Competition may be unfair within the meaning of this statute and within the scope of the discretionary powers conferred on the Commission, though the practice condemned does not amount to fraud as understood in courts of law. Indeed there is a kind of fraud, as courts of equity have long perceived, in clinging to a benefit which is the product of misrepresentation, however innocently made. Redgrave v. Hurd, L. R. 20 Ch.D. 1, 12, 13; Rawlins v. Wickham, 3 De G. & I. 304, 317; Hammond v. Pennock, 61 N.Y. 145, 152. That is the respondents' plight today, no matter what their motives may have been when they began. They must extricate themselves from it by purging their business methods of a capacity to deceive.

Fourth. Finally, the argument is made that the restraining orders are not necessary to protect the public interest (see Federal Trade Commission v. Royal Milling Co., supra), but to the contrary that the public interest will be promoted by increasing the demand for pinus ponderosa, though it be sold with a misleading label, and thus abating the destruction of the pine forests of the east.

The conservation of our forests is a good of large importance, but the end will have to be attained by methods other than a license to do business unfairly.

The finding of unfair competition being supported by the testimony, the Commission did not abuse its discretion in reaching the conclusion that no change of the name short of the excision of the word "white" would give adequate protection.

The judgment is reversed.[b]

In FEDERAL TRADE COMMISSION v. STANDARD EDUCATION SOCIETY, 302 U.S. 112, 58 S.Ct. 113, 82 L.Ed. 141 (1937), the court, at p. 117 of 302 U.S. (p. 116 of 58 S.Ct.), said:

The courts do not have a right to ignore the plain mandate of the statute which makes the findings of the Commission conclusive as to

[b] Footnotes of the court have been omitted.

the facts if supported by testimony.[1] The courts cannot pick and choose bits of evidence to make findings of fact contrary to the findings of the Commission. The record in this case is filled with evidence of witnesses under oath which support the Commission's findings. Clauses 1 and 3 of the Commission's order should be sustained and enforced.

NATIONAL LABOR RELATIONS BOARD v. COLUMBIAN ENAMELING & STAMPING CO.

Supreme Court of the United States.
306 U.S. 292, 59 S.Ct. 501, 83 L.Ed. 660 (1939).

Mr. Justice STONE delivered the opinion of the Court.

This petition tests the validity of an order of the National Labor Relations Board of February 14, 1936, directing respondent to discharge from its service employees who were not employed by it on July 22, 1935; to reinstate, to the vacancies so created, those who were employed on that date and have not since received substantially equivalent employment elsewhere; and to desist from refusing to bargain collectively with Enameling and Stamping Mill Employees Union No. 19694 as the exclusive representative of respondent's production employees with respect to rates to pay, wages, hours, and other conditions of employment. Unless the finding of the Board that respondent had refused to bargain collectively with the Union on July 23, 1935, is sustained by the evidence, the order is invalid.

Pursuant to a charge lodged with it by the Union, the Board issued its complaint charging respondent with unfair labor practices affecting interstate commerce within the meaning of § 8(1) and (5) of the National Labor Relations Act, 49 Stat. 449, 452, 29 U.S.C.A. § 158 (1, 5). After hearing, the Board made findings which, so far as now relevant, may be summarized as follows: * * *

* * * On March 17th the Union passed resolutions reciting grievances and demanding a closed shop, and on March 23d ordered a strike, when four hundred and fifty of respondent's five hundred employees left work. On March 30th respondent announced that its factory was closed indefinitely.

The strike was in effect July 5, 1935, when the National Labor Relations Act was approved, and continued until about July 23d, when respondent resumed operations at its plant. By August 19th it had received three thousand applications for employment and had reemployed one hundred and ninety of its production employees. By the end of the second week in September respondent had employed a full force. On July 23d two labor conciliators from the Depart-

[1] Federal Trade Commission Act, Sept. 26, 1914, 38 Stat. 717, U.S.C. title 15, § 45 (15 U.S.C.A. § 45).

ment of Labor appeared in Terre Haute and were requested by the Union "to try and open up negotiations with the respondent". On that day the conciliators met and conferred with respondent's president, who agreed to meet them with the Scale Committee. Several days later he informed them that he would not meet with them or with the Scale Committee. Later respondent received, but did not answer, letters of the Union of September 20th and October 11th, asking for a meeting to settle the controversy between them.

The Board concluded that on July 23d the "union represented a majority of the respondent's employees, that it sought to bargain with the respondent, that the respondent refused to so bargain, and that this constituted an unfair labor practice" within the meaning of § 8, subdivision (5) of the Act. It ordered respondent to discharge all of its production employees who were not employed by it on July 22, 1935, to reinstate its employees as of that date, and thereupon to desist from refusing to bargain with the Union as the exclusive representative of respondent's production employees.

Application by the Board for a decree enforcing its order was denied by the Circuit Court of Appeals for the Seventh Circuit, 96 F.2d 948, * * * We granted certiorari October 10, 1938, 305 U.S. 583, 59 S.Ct. 86, 83 L.Ed. 368, the questions presented with respect to the administration of the National Labor Relations Act being of public importance.

The Board's order is without support unless the date of the refusal to bargain collectively be fixed as on July 23, 1935. The evidence and findings leave no doubt that later, in September, respondent ignored the Union's request for collective bargaining, but as at that time respondent's factory had been reopened and was operating with a full complement of production employees, the refusal to bargain could afford no basis for an order by the Board directing, as of that date, the discharge of new employees and their replacement by strikers. Restoration of the strikers to their employment, by order of the Board, under § 10(c) of the Act, 29 U.S.C.A. § 160(c), could as a practical matter be effected only if respondent had failed in its statutory duty to bargain collectively at some time after the approval of the National Labor Relations Act on July 5th, and before respondent had resumed normal operation of its factory. The date fixed by the Board was July 23d, when respondent reopened its factory, and the occasion was the personal interview on that day and a later telephone conversation of respondent's president with the conciliators from the Labor Department, who were not members or official representatives of the Union and who, so far as the testimony discloses, did not then appear to the president to be authorized to speak for the Union. * * *

However desirable may be the exhibition by the employer of a tolerant and conciliatory spirit in the settlement of labor disputes, we think it plain that the statute does not compel him to seek out his em-

ployees or request their participation in negotiations for purposes of collective bargaining, and that he may ignore or reject proposals for such bargaining which come from third persons not purporting to act with authority of his employees, without violation of law and without suffering the drastic consequences which violation may entail. To put the employer in default here the employees must at least have signified to respondent their desire to negotiate. Measured by this test the Board's conclusion that respondent refused to bargain with the Union is without support, for the reason that there is no evidence that the Union gave to the employer, through the conciliators or otherwise, any indication of its willingness to bargain or that respondent knew that they represented the Union. The employer cannot, under the statute, be charged with refusal of that which is not proffered.

During the eight months preceding the strike respondent had, upon request, entered into negotiations with the Union on some eleven different occasions. Such meetings, always with some known representatives of the Union, were customarily with the Union Scale Committee and on its written request. All negotiations were broken off by the Union by the strike which followed almost immediately its resolutions of March 17th. On July 23d the strike had continued for about four months, accompanied by picketing, violence and destruction of property, and had culminated, on July 22d, in a proclamation of martial law. A meeting on June 11th had resulted in no change of attitude on either side. From then until July 23d no attempt appears to have been made on either side to resume negotiations.

While there was before the Board testimony of the secretary of the Union that on July 23d he had asked the conciliators to "try and open up negotiations", there was no testimony that respondent or its officers had ever been informed of that fact or that they were advised in any way of the willingness of the Union to enter into negotiations. This was pointedly brought to the attention of the Board and the trial examiner by a motion to strike the testimony of the secretary and that of respondent's president, giving his account of his interview with the conciliators. But the conciliators were not called as witnesses and no attempt was made to supply the omission.

Respondent's president testified that on July 23d the conciliators asked him if he would meet with them and the Scale Committee; that he replied that he would; that no meeting was arranged and that several days later he called one of the conciliators on the telephone and informed him that he, the witness, "would not have any meeting with him or with the Scale Committee". All else that took place between the conciliators and respondent is left a matter of conjecture.

This testimony, on which the Board relies to support its finding, shows on its face that there was no indication until sometime later than July 23d of any unwillingness on the part of respondent's presi-

dent to meet the Union. Furthermore, it contains no hint that the Union at any time after July 5th and before September communicated to respondent its willingness to bargain, or that the conciliators, in asking a meeting and discussing the matter with respondent's president, purported to speak for the Union. The testimony is consistent throughout with the inference, and indeed supports it, that the conciliator, so far as known to respondent, appeared in their official role as mediators to compose the long-standing dispute between respondent and its employees; that the employer first consented in advance to attend a meeting, and later withdrew its consent when they had failed for some days to arrange a meeting. Whether in the meantime the Scale Committee or any other representative of the Union was in fact willing to attend a meeting does not appear.

Section 10(e) of the Act provides: "* * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive". But as has often been pointed out, this, as in the case of other findings by administrative bodies, means evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred. Washington, Virginia & Maryland Coach Co. v. National Labor Relations Board, 301 U.S. 142, 57 S.Ct. 648, 81 L.Ed. 965; Consolidated Edison Co. of New York v. National Labor Relations Board, 305 U.S. 197, 59 S.Ct. 206, 83 L.Ed. 126; Appalachian Electric Power Co. v. National Labor Relations Board, 4 Cir., 93 F.2d 985, 989; National Labor Relations Board v. Thompson Products Inc., 6 Cir., 97 F.2d 13; Ballston-Stillwater Knitting Co. v. National Labor Relations Board, 2 Cir., 98 F.2d 758, 764. Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the fact to be established. "It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," Consolidated Edison Co. of New York v. National Labor Relations Board, supra, 59 S.Ct. 217, and it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. See Baltimore & O. R. R. Co. v. Groeger, 266 U.S. 521, 524, 45 S.Ct. 169, 170, 69 L.Ed. 419; Gunning v. Cooley, 281 U.S. 90, 94, 50 S.Ct. 231, 233, 74 L.Ed. 720; Appalachian Electric Power Co. v. National Labor Relations Board supra, page 989 of 93 F.2d.

Judged by these tests or any of them we cannot say that there was substantial evidence that respondent at any time between July 5, 1935, and September, 1935, was aware that the Union desired or sought to bargain collectively with respondent, or that there is support in the evidence for the Board's conclusion that on or about July 23, 1935 respondent refused to bargain collectively with the Union.

Affirmed.

Mr. Justice FRANKFURTER took no part in the consideration or decision of this case.

Mr. Justice BLACK, dissenting.

The Labor Board was given jurisdiction by Congress to hear and weigh evidence and to determine the inferences from it; to make findings of fact; and to issue orders necessary to effectuate the purposes of the National Labor Relations Act. In apt language, Congress limited the power of courts to review the Board's findings by providing in the Act that "The findings of the Board as to the facts, of supported by evidence, shall be conclusive."

I believe that "The inferences to be drawn were for the Board and not the courts,"[1] and that the inferences drawn by the Board were supported by the evidence. Courts should not—as here—substitute *their appraisal of the evidence for that of the Board.*

The Labor Board, the Federal Trade Commission, the Interstate Commerce Commission, the Securities and Exchange Commission and many other administrative agencies were all created to deal with problems of regulation of ever increasing complexity in the economic fields of trade, finance and industrial conflicts. Congress thus sought to utilize procedures more expeditious and administered by more specialized and experienced experts than courts had been able to afford. The decision here tends to nullify this Congressional effort.[c]

SECURITIES ACT OF 1933 § 9(a)

15 U.S.C. § 77i(a).

Sec. 9. (a) Any person aggrieved by an order of the Commission may obtain a review of such order in the Circuit Court of Appeals of the United States, within any circuit wherein such person resides or has his principal place of business, or in the Court of Appeals of the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or be set aside in whole or in part. A copy of such petition shall be forthwith served upon the Commission, and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission. *The finding of the Commission as to the facts, if supported by evidence, shall be conclusive.*[d] If either party shall apply to the court for leave to adduce additional evidence, and shall show to

1 [Footnote omitted.—Ed.]

c *Cf.* National Labor Relations Board v. Sands Manufacturing Co., 306 U.S. 332, 59 S Ct. 508, 83 L.Ed 682 (1939).

d *Cf.* Federal Trade Commission Act, as amended, § 5(c), 15 U.S.C. § 45(c); National Labor Relations Act § 10(f), 29 U.S.C. § 160(f). *Cf.*, also, Securities Exchange Act of 1934, § 25(a), 15 U.S.C. § 78y(a) ("if supported by substantial evidence"); Public Utility Holding Company Act of 1935, § 24(a), 15 U.S.C. § 79x(a) ("if supported by substantial evidence").

the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the hearings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendations, if any, for the modification or setting aside of the original order. The jurisdiction of the court shall be exclusive and its judgment and decree, affirming, modifying, or setting aside, in whole or in part, any order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347). [Italics added.]

(2) In Judicial Review of Rules and Regulations

Although statutes which authorize the issuance of rules and regulations do not ordinarily require the rules and regulations to be based upon express findings, such a requirement of findings is not uncommon. The requirement may be explicit, or it may be implicit in a statutory provision for a hearing. In this connection, see Chapter V, Part I, Section 3, B, *supra* pp. 281ff. relating to the requirement of a hearing preliminary to the promulgation of regulations.

THE ASSIGNED CAR CASES

Supreme Court of the United States.
274 U.S. 564, 47 S.Ct. 727, 71 L.Ed. 1204 (1927).

See part "Fourth" of the opinion, *supra* at p. 300.

B. "CONSTITUTIONAL" OR "JURISDICTIONAL" QUESTIONS OF FACT

OHIO VALLEY WATER CO. v. BEN AVON BOROUGH

Supreme Court of the United States.
253 U.S. 287, 40 S.Ct. 527, 64 L.Ed. 908 (1920).

Mr. Justice McREYNOLDS delivered the opinion of the court.

Acting upon a complaint charging plaintiff in error, a water company, with demanding unreasonable rates, the Public Service Commission of Pennsylvania instituted an investigation and took evidence. It found the fair value of the company's property to be $924,744 and ordered establishment of a new and lower schedule which would yield 7 per centum thereon over and above operating expenses and depreciation.

Claiming the commission's valuation was much too low and that the order would deprive it of a reasonable return and thereby confiscate its property, the company appealed to the Superior Court. The latter reviewed the certified record, appraised the property at $1,324,621.80, reversed the order, and remanded the proceeding, with directions to authorize rates sufficient to yield 7 per centum of such sum.

The Supreme Court of the state reversed the decree and reinstated the order, saying:

"The appeal [to the Superior Court] presented for determination the question whether the order appealed from was reasonable and in conformity with law, and in this inquiry was involved the question of the fair value, for rate-making purposes, of the property of appellant, and the amount of revenue which appellant was entitled to collect. In its decision upon the appeal, the Superior Court differed from the commission as to the proper valuation to be placed upon several items going to make up the fair value of the property of the water company for rate-making purposes."

It considered those items and held that as there was competent evidence tending to sustain the commission's conclusion and no abuse of discretion appeared, the Superior Court should not have interfered therewith.

"A careful examination of the voluminous record in this case has led us to the conclusion that in the items wherein the Superior Court differed from the commission upon the question of values there was merely the substitution of its judgment for that of the commission in determining that the order of the latter was unreasonable."

Looking at the entire opinion we are compelled to conclude that the Supreme Court interpreted the statute as withholding from the courts power to determine the question of confiscation according to their own independent judgment when the action of the commission comes to be considered on appeal.

The order here involved prescribed a complete schedule of maximum future rates and was legislative in character. Prentis v. Atlantic Coast Line, 211 U.S. 210, 29 S.Ct. 67, 53 L.Ed. 150; Lake Erie & Western R. R. Co. v. State Public Utility Commission, 249 U.S. 422, 424, 39 S.Ct 345, 63 L.Ed. 684. In all such cases, if the owner claims confiscation of his property will result, the state must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment. Missouri Pac. R. R. v. Tucker, 230 U.S. 340, 347, 33 S.Ct. 961, 57 L.Ed. 1507; Wadley Southern Ry. Co. v. Georgia, 235 U.S. 651, 660, 661, 35 S.Ct. 214, 59 L.Ed. 405; Missouri v. Chicago, Burlington & Quincy R. R., 241 U.S. 533, 538, 36 S.Ct. 715, 60 L.Ed. 1148; Oklahoma Operating Co. v. Love (March 22, 1920), 252 U.S. 331, 40 S.Ct. 338, 64 L.Ed. 596.

Here the insistence is that the Public Service Company Law as construed and applied by the Supreme Court has deprived plaintiff in error of the right to be so heard; and this is true if the appeal therein specifically provided is the only clearly authorized proceeding where the commission's order may be challenged because confiscatory. Thus far plaintiff in error has not succeeded in obtaining the review for which the Fourteenth Amendment requires the state to provide.

Article 6, Public Service Company Law of Pennsylvania (P.L. 1913, p. 1429):

"Sec. 31. No injunction shall issue modifying, suspending, staying, or annulling any order of the commission, or of a commissioner, except upon notice to the commission and after cause shown upon a hearing. The court of common pleas of Dauphin county is hereby clothed with exclusive jurisdiction throughout the commonwealth of all proceedings for such injunctions, subject to an appeal to the Supreme Court as aforesaid. Whenever the commission shall make any rule, regulation, finding, determination, or order under the provisions of this act the same shall be and remain conclusive upon all parties affected thereby, unless set aside, annulled, or modified in an appeal or proceeding taken as provided in this act."

It is argued that this section makes adequate provision for testing judicially any order by the commission when alleged to be confiscatory, and that plaintiff in error has failed to take advantage of the opportunity so provided.

The Supreme Court of Pennsylvania has not ruled upon effect or meaning of section 31, or expressed any view concerning it. So far as counsel have been able to discover, no relief against an order alleged to be confiscatory has been sought under this section, although much litigation has arisen under the act. It is part of the article entitled "Practice and Procedure Before the Commission and upon Appeal." Certain opinions by the Supreme Court seem to indicate that all objections to the commission's orders must be determined upon appeal—St.

Clair Borough v. Tamaqua & Pottsville Electric Ry. Co., 259 Pa. 462, 103 A. 287; Pittsburgh Railways Co. v. Pittsburgh, 260 Pa. 424, 103 A. 959—but they do not definitely decide the point.

Taking into consideration the whole act, statements by the state Supreme Court concerning the general plan of regulation, and admitted local practice, we are unable to say that section 31 offered an opportunity to test the order so clear and definite that plaintiff in error was obliged to proceed thereunder or suffer loss of rights guaranteed by the federal Constitution. On the contrary, after specifying that within 30 days an appeal may be taken to the Superior Court (section 17), the act provides (section 22):

"At the hearing of the appeal the said court shall, upon the record certified to it by the commission, determine whether or not the order appealed from is reasonable and in conformity with law."

But for the opinion of the Supreme Court in the present cause, this would seem to empower the Superior Court judicially to hear and determine all objections to an order on appeal and to make its jurisdiction in respect thereto exclusive. Of this the latter court apparently entertained no doubt; and certainly counsel did not fatally err by adopting that view, whatever meaning finally may be attributed to section 31.

Without doubt the duties of the courts upon appeals under the act are judicial in character—not legislative, as in Prentis v. Atlantic Coast Line, supra. This is not disputed; but their jurisdiction, as ruled by the Supreme Court, stopped short of what must be plainly intrusted to some court in order that there may be due process of law.

Plaintiff in error has not had proper opportunity for an adequate judicial hearing as to confiscation; and unless such an opportunity is now available, and can be definitely indicated by the court below in the exercise of its power finally to construe laws of the state (including of course section 31), the challenged order is invalid.

The judgment of the Supreme Court of Pennsylvania must be reversed, and the cause remanded there, with instructions to take further action not inconsistent with this opinion.

Reversed.

Mr. Justice BRANDEIS, dissenting.

The Public Service Commission of Pennsylvania, acting upon complaint of Ben Avon borough and others, found, after due notice and hearing, that increased rates adopted by the Ohio Valley Water Company were unreasonable, and it prescribed a schedule of lower rates which it estimated would yield 7 per cent. net upon the value of the property used and useful in the service. The company appealed to the Superior Court, contending that the property had been undervalued and that the rates were, therefore, confiscatory in violation of the Fourteenth Amendment. That court, passing upon the weight of the evi-

dence introduced before the commission, found that larger amounts should have been allowed for several items which entered into the valuation, reversed the order on that ground, and directed the commission to reform its valuation accordingly and upon such revised valuation to fix a schedule of rates which would yield the net return which it had found to be fair. From the decision of the Superior Court the commission appealed to the Supreme Court of the state, contending that the Superior Court had in passing upon the weight of the evidence exceeded its jurisdiction. The Supreme Court sustained this contention, and, holding, upon a careful review of the evidence and of the opinions below, that the commission had been justified in its findings by "ample testimony" or "competent evidence," and that they were not unreasonable, reversed the decree of the Superior Court and reinstated the order of the commission. Borough of Ben Avon v. Ohio Valley Water Co., 260 Pa. 289, 103 A. 744. The case comes here on writ of error under section 237 of the Judicial Code, as amended (Comp.St. § 1214), the company claiming that its rights guaranteed by the Fourteenth Amendment have been violated: (1) because the Public Service Company Law, as construed by the Supreme Court of the State, denies the opportunity of a judicial review of the commission's order; and (2) that the order, which was reinstated by the Supreme Court, confiscates its property.

First. The commission's order, although entered in a proceeding commenced upon due notice, conducted according to judicial practice and participated in throughout by the company, was a legislative order; and, being such, the company was entitled to a judicial review. Prentis v. Atlantic Coast Line, 211 U.S. 210, 228, 29 S.Ct. 67, 53 L.Ed. 150. The method of review invoked by the company under specific provisions of the statute was this: A stenographic report is made of all the evidence introduced before the commission. On a record consisting of such evidence, the opinion and the orders, the case is appealed to the Superior Court, which is given power, if it finds that the order appealed from "is unreasonable or based upon incompetent evidence materially affecting the determination of the commission or is otherwise not in conformity with law" either to reverse the order or to remand the record to the commission with direction to reconsider the matter and make such order as shall be reasonable and in conformity with law. No additional evidence may be introduced in the Superior Court; but it may remand the case to the commission with directions to hear newly discovered evidence and upon the record thus supplemented to enter such order as may be reasonable and in conformity with law. From such new order a like appeal lies to that court. Act July 26, 1913, No. 854, §§ 21–25 (P.L.1913, pp. 1427, 1428); Act June 3, 1915, No. 345 (P.L.1915, p. 779). The Supreme Court construed this act as denying to the Superior Court the power to pass upon the weight of evidence; and the company contends that for this reason the

review had does not satisfy the constitutional requirements of a judicial review.[1]

Whether the appeal to the Superior Court fails, for the reason assigned or for some other reason, to satisfy the constitutional requirements of a judicial review, we need not determine, because the statute left open to the company, besides this limited review, the right to resort in the state courts, as well as in the federal court, to another and unrestricted remedy, the one commonly pursued when challenging the validity of a legislative order of this nature, namely, a suit in equity to enjoin its enforcement. See Louisville & Nashville Ry. v. Garrett, 231 U.S. 298, 311, 34 S.Ct. 48, 58 L.Ed. 229; Wadley Southern Ry. v. Georgia, 235 U.S. 651, 661, 35 S.Ct. 214, 59 L.Ed. 405. For section 31 (P.L. 1913, p. 1429) provides:

"No injunction shall issue modifying, suspending, staying, or annulling any order of the commission, or of a commissioner, except upon notice to the commission and after cause shown upon a hearing. The court of common pleas of Dauphin county is hereby clothed with exclusive jurisdiction throughout the commonwealth of all proceedings for such injunctions, subject to an appeal to the Supreme Court as aforesaid. Whenever the commission shall make any rule, regulation, finding, determination, or order under the provisions of this act the same shall be and remain conclusive upon all parties affected thereby, unless set aside, annulled, or modified in an appeal or proceeding taken as provided in this act."

Resort to suit for injunction is made easy in rate controversies like the present by section 41, p. 1432, in which it is provided that the penalties for failure to obey the commission's orders imposed by sections 35, 39, and 59, pp. 1430, 1431, shall not apply to an order declaring a rate unreasonable, if the tariff of rates actually charged is filed with the commission. The appeal provided for in sections 22–25 was under the original act also to the court of common pleas, but was changed to the Superior Court by the act of July 3, 1915.

No decisions of the Supreme Court of Pennsylvania construing section 31 of this act have been brought to our attention. The company contends, however, that the construction here suggested has been inferentially made untenable by dicta in St. Clair Borough v. Tamaqua & Pottsville Elec Ry. Co., 259 Pa. 462, 103 A. 287; Pittsburgh Rys. Co. v. Pittsburgh, 260 Pa. 424, 103 A. 959; Klein-Logan Co. v. Duquesne Light Co., 261 Pa. 526, 104 A. 763. But the language relied upon was in each instance used by the court in making the point, not that the sole method of review was by appeal, as distinguished from a bill in equity, but that the function of the courts was to review only after the commission had in the first instance passed upon the case.

Where a state offers a litigant the choice of two methods of judicial review, of which one is both appropriate and unrestricted, the mere

[1] [Footnote omitted.—Ed.]

fact that the other which the litigant elects is limited, does not amount to a denial of the constitutional right to a judicial review. The alternative or additional remedy in the present case was in effect an appeal on the law applicable to facts found below. It is in substantial accord with the practice pursued in other appellate courts and approved in New York & Queens Gas Co. v. McCall, 245 U.S. 345, 38 S.Ct. 122, 62 L.Ed. 337. It is true, however, that an additional or alternative remedy may deny the constitutional right to due process of law because of its nature or the course of the proceeding. See Iowa Central Railroad Co. v. Iowa, 160 U.S. 389, 16 S.Ct. 344, 40 L.Ed. 467. And it is the contention of the plaintiff that because the Supreme Court did not weigh the evidence, but reinstated the order of the commission on account of there being substantial evidence to support it, the procedure was not a judicial review and denied it due process of law. The defendants, on the other hand, insist that the action of the Supreme Court, in reinstating the order, found not merely that there was substantial evidence, but, upon a full review, that there was ample evidence to support the findings, and that the order was reasonable. They contend that the course pursued by the Supreme Court in making such review was that customarily followed in Pennsylvania, both by appellate courts on appeals from chancellors and by trial courts on exceptions to reports of auditors, masters or referees (Barnes' Estate, 221 Pa. 399, 70 A. 790); and they point out that the same method was pursued on appeal to the Supreme Court prior to the enactment of the Public Service Company Law, at a time when proceedings by consumers to secure reduction of water rates alleged to be unreasonably high were brought in the court of common pleas, subject to appeal to the Supreme Court (Turtle Creek Borough v. Penna. Water Co., 243 Pa. 401, 90 A. 194).

The contention of neither party is in my opinion wholly correct. Both overlook the nature of the question of law which was under review by the Supreme Court. It is true that there was no statutory limitation upon the scope of its review; but it does not follow either that the Supreme Court weighed the evidence and found that the preponderance supported the findings, or that because it failed to weigh the evidence there was either a denial of due process or even a mistake of law. The questions of law before the Supreme Court were, first, whether the Superior Court had jurisdiction to weigh the evidence; second, whether in rendering its decision it weighed the evidence; and, third, whether the valuation of the plaintiff's property was so low that a rate based upon it would operate to deprive the plaintiff of property without due process of law, would confiscate its property. On each of these questions the Supreme Court found against the contentions of the plaintiff. It held that the Superior Court did not have revisory legislative powers, but only the power to review questions of law—in the present case, whether there was evidence on which the valuation adopted could reasonably have been found— and in so hold-

ing it acted upon the established principle applied in reviewing the findings of administrative boards, that "courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order." Interstate Commerce Commission v. Union Pacific R. R. Co., 222 U.S. 541, 547, 548, 32 S.Ct. 108, 111 (56 L.Ed. 308). It, therefore, reinstated the order of the commission. But it did not do so as an appellate court reviewing on the weight of the evidence findings of fact made by the Superior Court. It did so solely because the only question before it was whether there was substantial evidence to support the finding of value; for if the valuation was legally arrived at, the order was confessedly reasonable. Interstate Commerce Commission v. Union Pacific R. R. Co , supra; San Diego Land & Town Co. v. Jasper, 189 U.S. 439, 441, 442, 23 S.Ct. 571, 47 L.Ed. 892. The presumption created by section 23, P.L. p. 1427, by which an order of the commission is made prima facie evidence of its reasonableness is in no sense a limitation upon the scope of the review. It is in effect the presumption which this court has declared to exist in rate cases, independently of statute, in favor of the conclusion of an experienced administrative body reached after a full hearing. Darnell v. Edwards, 244 U.S. 564, 569, 37 S.Ct. 701, 61 L.Ed. 1317.

Second. As the company had the opportunity for a full judicial review through a suit in equity for an injunction, as it was not denied due process by disregard in the proceedings actually taken of the essentials of judicial process, and since it is clear that the findings of the commission were supported by substantial evidence, the judgment of the Supreme Court of Pennsylvania must be affirmed, unless, as contended, the claim of confiscation compels this court to decide, upon the weight of the evidence, whether or not its property has been undervalued, or unless some error in law is shown.

The case is here on writ of error to a state court. It is settled that in such cases we accept the facts as there found, not only in actions at law (Dower v. Richards, 151 U.S. 658, 14 S.Ct. 452, 38 L.Ed. 305), but also where, as in chancery, the record contains all the evidence and it was open for consideration by and actually passed upon by the highest court of the state (Egan v. Hart, 165 U.S. 188, 17 S.Ct. 300, 41 L.Ed. 680; Waters-Pierce Oil Co. v. Texas, 212 U.S. 86, 107, 29 S.Ct. 220, 53 L.Ed. 417). And this is true, although the existence of a federal question depends upon the determination of the issue of fact, and although the finding of fact will determine whether or not there has been a taking of property in violation of the Fourteenth Amendment. Minneapolis & St. Louis Railroad Co. v. Minnesota, 193 U.S. 53, 65, 24 S.Ct. 396, 48 L.Ed. 614. This court may, of course, upon writ of error to a state court "examine the entire record, including the evidence, to determine whether what purports to be a finding" upon questions of fact is "so involved with and dependent upon questions of federal law as to be really a decision" of the latter. Kansas City Southern Co. v. Albers Commission Co., 223 U.S. 573, 591–593, 32 S.Ct. 316,

320 (56 L.Ed. 556); Cedar Rapids Gaslight Co. v. Cedar Rapids, 223 U.S. 655, 658, 32 S.Ct. 389, 56 L.Ed. 594; Graham v. Gill, 223 U.S. 643, 645, 32 S.Ct. 396, 56 L.Ed. 586. But in order that such examination may be required or be permissible, its purpose must not be to pass upon the relative weight of conflicting evidence (Oregon Railroad & Navigation Co. v. Fairchild, 224 U.S. 510, 528, 32 S.Ct. 535, 56 L.Ed. 863) and to substitute the judgment therein of this court for that of the lower court, but to ascertain whether a finding was unsupported by evidence, or whether evidence was properly admitted or excluded, or whether in some other way a ruling was involved which is within the appellate jurisdiction of this court (Northern Pacific Railway v. North Dakota, 236 U.S. 585, 593, 35 S.Ct. 429, 59 L.Ed. 735, L.R.A. 1917F, 1148, Ann.Cas.1916A, 1; Norfolk & Western Railway v. West Virginia, 236 U.S. 605, 35 S.Ct. 437, 59 L.Ed. 745).

Here, it is clear, there was substantial evidence to support the findings of the commission; and no adequate reason is shown for declining to accept as conclusive the facts found by the state tribunals. See Portland Railway Light & Power Co. v. Oregon Railroad Commission, 229 U.S. 397, 33 S.Ct. 820, 57 L.Ed. 1248; Miedreich v. Lauenstein, 232 U.S. 236, 34 S.Ct. 309, 58 L.Ed. 584. The rates are predicated on the company's earning 7 per cent. net on the value of its property used and useful in the service, after deducting from the income all expenses and charges for depreciation. It is conceded that 7 per cent. is a fair return upon the investment, and it is not contended that any erroneous rule has been applied in ascertaining the expenses of operation or the depreciation charges. The claim that the rates are confiscatory rested wholly on the contention that the property was undervalued; and on that question the contention is that the court failed to give due weight to the evidence adduced by the company and that the processes by which the commission arrived at the value it fixed differed from that often pursued by courts and administrative bodies. To this the Supreme Court of Pennsylvania said:

"The ascertainment of the fair value of the property, for rate-making purposes, is not a matter of formulas, but it is a matter which calls for the exercise of a sound and reasonable judgment upon a proper consideration of all relevant facts."

The objections to the valuation made by the company raise no question of law but concern pure matters of fact; and the finding of the commission, affirmed by the highest court of the state, is conclusive upon this court. The case at bar is wholly unlike Great Northern Railway v. Minnesota, 238 U.S. 340, 35 S.Ct. 753, 59 L.Ed. 1337, and Union Pacific Railroad Co. v. Missouri, 248 U.S. 67, 39 S.Ct. 24, 63 L. Ed. 131, where this court reversed the judgments as matter of law upon the facts found by the commission.

In my opinion the judgment of the Supreme Court of Pennsylvania should be affirmed.

Mr. Justice HOLMES and Mr. Justice CLARKE concur in this dissent.

NG FUNG HO v. WHITE

Supreme Court of the United States.
259 U.S. 276, 42 S.Ct. 492, 66 L.Ed. 938 (1922).

Mr. Justice BRANDEIS delivered the opinion of the Court.

On January 27, 1919, five persons of the Chinese race, of whom four are petitioners herein, joined in an application for a writ of habeas corpus to the judge of the federal court for the Southern Division of the Northern District of California. A writ issued, directed to the Commissioner of Immigration for the Port of San Francisco, who held the petitioners in custody under warrants of deportation of the Secretary of Labor pursuant to section 19 of the General Immigration Act of February 5, 1917, c. 29, 39 Stat. 874, 889 (Comp.St. 1918, Comp.St. Ann.Supp. 1919, § 4289¼jj). The case was heard upon the original files of the Bureau of Immigration, containing the record of the deportation proceedings. Each petitioner had entered the United States before May 1, 1917, the effective date of the General Immigration Act of February 5, 1917, and within five years of the commencement of the deportation proceedings. As to each the warrant of deportation recited that the petitioner was a native of China, was found to have secured his admission by fraud, and was found within the United States in violation of section 6 of the Chinese Exclusion Act of May 5, 1892, c. 60, 27 Stat. 25, as amended by Act No. 3, 1893, c. 14, § 1, 28 Stat. 7 (Comp.St. § 4320), being a Chinese laborer not in possession of a certificate of residence. The District Court entered an order quashing the writ and remanding the prisoners to the custody of the immigration authorities. The judgment was affirmed by the Circuit Court of Appeals for the Ninth Circuit, except as to one appellant, who was ordered released. 266 F. 765. The case is here on writ of certiorari. 254 U.S. 628, 41 S.Ct. 148, 65 L.Ed. 446.

There is a faint contention, which we deem unfounded, that the petitioners were not given a fair hearing, and that there is no evidence to sustain the findings of the immigration official. The contention mainly urged is that any violation of the Chinese Exclusion Laws of which petitioners may be guilty occurred prior to the effective date of the General Immigration Act of February 5, 1917; that, consequently, petitioners were not subject to its provision authorizing deportation on executive orders; and that under the provisions of the Chinese Exclusion Acts they could be deported only upon judicial proceedings. In certain respects the situation of two of the petitioners differs from that of the other two, and to that extent their rights require separate consideration.

First. As to Ng Fung Ho and Ng Yuen Shew, his minor son, the question presented is solely one of statutory construction. Deportation under provisions of the Chinese Exclusion Acts can be had only upon judicial proceedings; that is, upon a warrant issued by a justice, judge, or commissioner of a United States court upon a complaint and re-

turnable before such court, or a justice, judge, or commissioner thereof. From an order of deportation entered by a commissioner an appeal is provided to the District Court, and from there to the Circuit Court of Appeals. United States, Petitioner, 194 U.S. 194, 24 S.Ct. 629, 48 L.Ed. 931. We held in United States v. Woo Jan. 245 U.S. 552, 38 S.Ct. 207, 62 L.Ed. 466, that section 21 of the General Immigration Act of February 20, 1907, c. 1134, 34 Stat. 898, which authorized deportation of aliens on executive orders, did not apply to violators of the Chinese Exclusion Acts, and that they continued to enjoy the right to a judicial hearing. The 1907 act remained in force until May 1, 1917, when the General Immigration Act of February 5, 1917, became operative. Section 19 of the latter act also provides for deportation of aliens on executive orders. The question is: Did the act of 1917 also preserve to Chinese the exceptional right to a judicial hearing, as distinguished from an executive hearing?

Petitioners practically concede that Chinese who first entered the United States after April 30, 1917, are subject to deportation under the provisions of section 19; but they insist that the rights and liabilities of those who entered before May 1, 1917, are governed wholly by the Chinese Exclusion Acts, and that these remain entitled to a judicial hearing. The mere fact that at the time petitioners last entered the United States they could not have been deported, except by judicial proceedings, presents no constitutional obstacle to their expulsion by executive order now. Neither Ng Fung Ho nor Ng Yuen Shew claims to be a citizen of the United States. Congress has power to order at any time the deportation of aliens whose presence in the country it deems hurtful, and may do so by appropriate executive proceedings. Bugajewitz v. Adams, 228 U.S. 585, 33 S.Ct. 607, 57 L.Ed. 978; Lapina v. Williams, 232 U.S. 78, 34 S.Ct. 196, 58 L.Ed. 515; Lewis v. Frick, 233 U.S. 291, 34 S.Ct. 488, 58 L.Ed. 967. Our task, therefore, so far as concerns these two petitioners, is merely to ascertain the intention of Congress.

Petitioners argue that to hold section 19 of the 1917 act applicable to them would give it retroactive operation, contrary to the expressed intention of Congress. They rely particularly on the clauses in section 38 (section 4289¼u) which declare that "as to all * * * acts, things, or matters," "done or existing at the time of the taking effect of this [1917] act" the "laws * * * amended * * * are hereby continued in force." The government, on the other hand, insists that section 19 was intended to operate retroactively, and to cover acts done prior to its going into effect, provided deportation proceedings were begun within five years after entry. But its main contention rests upon the fact that here the arrest and deportation are based, not merely upon unlawful entry, but upon the unlawful remaining of the petitioners after May 1, 1917. For the charge as to each is:

"That he has been found within the United States in violation of section 6, Chinese Exclusion Act of May 5, 1892, as amended by the Act of

November 3, 1893, being a Chinese laborer not in possession of a certificate of residence."

Unlawful remaining of an alien in the United States is an offense distinct in its nature from unlawful entry into the United States. One who has entered lawfully may remain unlawfully. This is expressly recognized in section 6 of the Act of May 5, 1892, under which the deportations here in question were sought. See Fong Yue Ting v. United States, 149 U.S. 698, 13 S.Ct. 1016, 37 L.Ed. 905; Li Sing v. United States, 180 U.S. 486, 21 S.Ct. 449, 45 L.Ed. 634; Ah How v. United States, 193 U.S. 65, 24 S.Ct. 357, 48 L.Ed. 619. A different rule might apply if the statute had so connected the two offenses that there could not be an unlawful remaining unless there had been an unlawful entry. Compare section 1 of the Act of May 6, 1882, c. 126, 22 Stat. 58. As we agree with the government that the orders of deportation were valid, because these petitioners were then unlawfully within the United States, we have no occasion to consider its further contention that Congress intended section 19 to be broadly retroactive.

Second. As to Gin Sang Get and Gin Sang Mo a constitutional question also is presented. Each claims to be a foreign-born son of a native-born citizen, and hence, under section 1993 of the Revised Statutes (Comp.St. § 3947), to be himself a citizen of the United States. They insist that, since they claim to be citizens, Congress was without power to authorize their deportation by executive order. If at the time of the arrest they had been in legal contemplation without the borders of the United States, seeking entry, the mere fact that they claimed to be citizens would not have entitled them under the Constitution to a judicial hearing. United States v. Ju Toy, 198 U.S. 253, 25 S.Ct. 644, 49 L.Ed. 1040; Tang Tun v. Edsell, 223 U.S. 673, 32 S.Ct. 359, 56 L.Ed. 606. But they were not in the position of persons stopped at the border when seeking to enter this country. Nor are they in the position of persons who entered surreptitiously. See United States v. Wong You, 223 U.S. 67, 32 S.Ct. 195, 56 L.Ed. 354. They arrived at San Francisco, a regularly designated port of entry, were duly taken to the immigration station, and, after a protracted personal examination, supplemented by the hearing of witnesses and the examination of reports of immigration officials, were ordered admitted as citizens. Then they applied for and received their certificates of identity. Fifteen months after the entry of one and six months after the entry of the other, both were arrested, on the warrant of the Secretary of Labor, in Arizona, where they were then living.

The constitutional question presented as to them is: May a resident of the United States who claims to be a citizen be arrested and deported on executive order? The proceeding is obviously not void ab initio. United States v. Sing Tuck, 194 U.S. 161, 24 S.Ct. 621, 48 L.Ed. 917. But these petitioners did not merely assert a claim of citizenship. They supported the claim by evidence sufficient, if believed, to entitle them to a finding of citizenship. The precise question is: Does the

claim of citizenship by a resident, so supported both before the immigration officer and upon petition for a writ of habeas corpus, entitle him to a judicial trial of this claim?

The question suggests—but is different from—another concerning deportation proceedings on which there is much difference of opinion in the lower courts, namely: whether the provision which puts upon the detained the burden of establishing his right to remain (see section 3 of the Act of May 5, 1892 [Comp.St. § 4317]; Chin Bak Kan v. United States, 186 U.S. 193, 22 Sup.Ct. 891, 46 L.Ed. 1121; Ah How v. United States, 193 U.S. 65, 24 S.Ct. 357, 48 L.Ed. 619) applies where one resident within the country is arrested under the provisions of the Chinese Exclusion Law and claims American citizenship. There the proceeding for deportation is judicial in its nature. It is commenced usually before a commissioner of the court, but on appeal to the District Court additional evidence may be introduced, and the trial is de novo. Liu Hop Fong v. United States, 209 U.S. 453, 28 S.Ct. 576, 52 L.Ed. 888. The constitutional question presented in those cases is merely how far the Legislature may go in prescribing rules of evidence and burden of proof in judicial proceedings. Fong Yue Ting v. United States, 149 U.S. 698, 729, 13 S.Ct. 1016, 37 L.Ed. 905; Bailey v. Alabama, 219 U.S. 219, 238, 31 S.Ct. 145, 55 L.Ed. 191; Luria v. United States, 231 U.S. 9, 26, 34 S.Ct. 10, 58 L.Ed. 101; Hawes v. Georgia, 258 U.S. 1, 42 S.Ct. 204, 66 L.Ed. 431, decided February 27, 1922. Here the proceeding is throughout executive in its nature.

Jurisdiction in the executive to order deportation exists only if the person arrested is an alien. The claim of citizenship is thus a denial of an essential jurisdictional fact. The situation bears some resemblance to that which arises where one against whom proceedings are being taken under the military law denies that he is in the military service. It is well settled that in such a case a writ of habeas corpus will issue to determine the status. Ex parte Reed, 100 U.S. 13, 25 L.Ed. 538; In re Grimley, 137 U.S. 147, 11 S.Ct. 54, 34 L.Ed. 636; In re Morrissey, 137 U.S. 157, 11 S.Ct. 57, 34 L.Ed. 644; Johnson v. Sayre, 158 U.S. 109, 15 S.Ct. 773, 39 L.Ed. 914. Compare Ex parte Crow Dog, 109 U.S. 556, 3 S.Ct. 396, 27 L.Ed. 1030. If the jurisdiction of the Department of Labor may not be tested in the courts by means of the writ of habeas corpus, when the prisoner claims citizenship and makes a showing that his claim is not frivolous, then obviously deportation of a resident may follow upon a purely executive order, whatever his race or place of birth; for, where there is jurisdiction, a finding of fact by the executive department is conclusive (United States v. Ju Toy, 198 U.S. 253, 25 S.Ct. 644, 49 L.Ed. 1040), and courts have no power to interfere, unless there was either denial of a fair hearing (Chin Yow v. United States, 208 U.S. 8, 28 S.Ct. 201, 52 L.Ed. 369), or the finding was not supported by evidence (American School of Magnetic Healing v. McAnnulty, 187 U.S. 94, 23 S.Ct. 33, 47 L.Ed. 90), or there was an

application of an erroneous rule of law (Gegiow v. Uhl, 239 U.S. 3, 36 S.Ct. 2, 60 L.Ed. 114).

To deport one who so claims to be a citizen obviously deprives him of liberty, as was pointed out in Chin Yow v. United States, 208 U.S. 8, 13, 28 S.Ct. 201, 52 L.Ed. 369. It may result also in loss of both property and life, or of all that makes life worth living. Against the danger of such deprivation without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law. The difference in security of judicial over administrative action has been adverted to by this court. Compare United States v. Woo Jan, 245 U.S. 552, 556, 38 S.Ct. 207, 62 L.Ed. 466; White v. Chin Fong, 253 U.S. 90, 93, 40 S.Ct. 449, 64 L.Ed. 797.

It follows that Gin Sang Get and Gin Sang Mo are entitled to a judicial determination of their claims that they are citizens of the United States; but it does not follow that they should be discharged. The practice indicated in Chin Yow v. United States, supra, and approved in Kwock Jan Fat v. White, 253 U.S. 454, 465, 40 S.Ct. 566, 64 L.Ed. 1010, should be pursued. Therefore, as to Gin Sang Get and Gin Sang Mo, the judgment of the Circuit Court of Appeals is reversed, and the cause remanded to the District Court, for trial in that court of the question of citizenship, and for further proceedings in conformity with this opinion. As to Ng Fung Ho and Ng Yuen Shew, the judgment of the Circuit Court of Appeals is affirmed.

Judgment affirmed in part and reversed in part.

Writ of habeas corpus to issue as to Gin Sang Get and Gin Sang Mo.[e]

CROWELL v. BENSON

Supreme Court of the United States.
285 U.S. 22, 52 S.Ct. 285, 76 L.Ed. 598 (1932).

Mr. Chief Justice HUGHES delivered the opinion of the Court.[f]

* * *

(3) What has been said thus far relates to the determination of claims of employees within the purview of the act. A different question is presented where the determinations of fact are fundamental or "jurisdictional," in the sense that their existence is a condition precedent to the operation of the statutory scheme. These fundamental requirements are that the injury occurs upon the navigable waters of the United States, and that the relation of master and servant exists. These conditions are indispensable to the application of the statute, not only because the Congress has so provided explicitly (section 3), but also because the power of the Congress to enact the legislation turns upon the existence of these conditions.

[e] Footnotes of the court have been omitted.

[f] For the initial part of this opinion, see *supra* at p. 449.

In amending and revising the maritime law, the Congress cannot reach beyond the constitutional limits which are inherent in the admiralty and maritime jurisdiction. Unless the injuries to which the act relates occur upon the navigable waters of the United States, they fall outside that jurisdiction. Not only is navigability itself a question of fact, as waters that are navigable in fact are navigable in law, but, where navigability is not in dispute, the locality of the injury, that is, whether it has occurred upon the navigable waters of the United States, determines the existence of the congressional power to create the liability prescribed by the statute. Again, it cannot be maintained that the Congress has any general authority to amend the maritime law so as to establish liability without fault in maritime cases, regardless of particular circumstances or relations. It is unnecessary to consider what circumstances or relations might permit the imposition of such a liability by amendment of the maritime law, but it is manifest that some suitable selection would be required. In the present instance, the Congress has imposed liability without fault only where the relation of master and servant exists in maritime employment, and, while we hold that the Congress could do this, the fact of that relation is the pivot of the statute, and, in the absence of any other justification, underlies the constitutionality of this enactment. If the person injured was not an employee of the person sought to be held, or if the injury did not occur upon the navigable waters of the United States, there is no ground for an assertion that the person against whom the proceeding was directed could constitutionally be subjected, in the absence of fault upon his part, to the liability which the statute creates.

In relation to these basic facts, the question is not the ordinary one as to the propriety of provision for administrative determinations. Nor have we simply the question of due process in relation to notice and hearing. It is rather a question of the appropriate maintenance of the federal judicial power in requiring the observance of constitutional restrictions. It is the question whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency—in this instance a single deputy commissioner—for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend. The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion that there is no limitation of their use, and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the executive department. That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as

not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law.

In this aspect of the question, the irrelevancy of state statutes and citations from state courts as to the distribution of state powers is apparent. A state may distribute its powers as it sees fit, provided only that it acts consistently with the essential demands of due process and does not transgress those restrictions of the Federal Constitution which are applicable to state authority. In relation to the federal government, we have already noted the inappositeness to the present inquiry of decisions with respect to determinations of fact, upon evidence and within the authority conferred, made by administrative agencies which have been created to aid in the performance of governmental functions, and where the mode of determination is within the control of the Congress; as, e. g., in the proceedings of the Land Office pursuant to provisions for the disposition of public lands, of the authorities of the Post Office in relation to postal privileges, of the Bureau of Internal Revenue with respect to taxes, and of the Labor Department as to the admission and deportation of aliens. Ex parte Bakelite Corporation, supra. Similar considerations apply to decisions with respect to determinations of fact by boards and commissions created by the Congress to assist it in its legislative process in governing various transactions subject to its authority, as, for example, the rates and practices of interstate carriers, the Legislature thus being able to apply its standards to a host of instances which it is impracticable to consider and legislate upon directly and the action being none the less legislative in character because taken through a subordinate body. And where administrative bodies have been appropriately created to meet the exigencies of certain classes of cases and their action is of a judicial character, the question of the conclusiveness of their administrative findings of fact generally arises where the facts are clearly not jurisdictional and the scope of review as to such facts has been determined by the applicable legislation. None of the decisions of this sort touch the question which is presented where the facts involved are jurisdictional or where the question concerns the proper exercise of the judicial power of the United States in enforcing constitutional limitations.

Even where the subject lies within the general authority of the Congress, the propriety of a challenge by judicial proceedings of the determinations of fact deemed to be jurisdictional, as underlying the authority of executive officers, has been recognized. When proceedings are taken against a person under the military law, and enlistment is denied, the issue has been tried and determined de novo upon habeas corpus. In re Grimley, 137 U.S. 147, 154, 155, 11 S.Ct. 54, 34 L.Ed. 636. See, also, In re Morrissey, 137 U.S. 157, 158, 11 S.Ct. 57, 34 L.Ed. 644; Givens v. Zerbst, 255 U.S. 11, 20, 41 S.Ct. 227, 65 L.Ed. 475. While, in the administration of the public land system, questions of fact are for the consideration and judgment of the Land De-

partment and its decision of such questions is conclusive, it is equally true that, if lands "never were public property, or had previously been disposed of, or if Congress had made no provision for their sale, or had reserved them, the department would have no jurisdiction to transfer them." This Court has held that "matters of this kind, disclosing a want of jurisdiction, may be considered by a court of law. In such cases the objection to the patent reaches beyond the action of the special tribunal, and goes to the existence of a subject upon which it was competent to act." Smelting Company v. Kemp, 104 U.S. 636, 641, 26 L.Ed. 875. In such a case, the invalidity of the patent may be shown in a collateral proceeding. Polk's Lessee v. Wendal, 9 Cranch. 87, 3 L.Ed. 665; Patterson v. Winn, 11 Wheat. 380, 6 L.Ed. 500; Minter v. Crommelin, 18 How. 87, 15 L.Ed 279; Morton v. Nebraska, 21 Wall. 660, 675, 22 L.Ed. 639; Noble v. Union River Logging Railroad, 147 U.S. 165, 174, 13 S.Ct. 271, 37 L.Ed. 123. The question whether a publication is a "book" or a "periodical" has been reviewed upon the evidence received in a suit brought to restrain the Postmaster General from acting beyond his authority in excluding the publication from carriage as second class mail matter. Hitchcock v. Smith, 34 App.D.C. 521, 530–533; Id., 226 U.S. 54, 59, 33 S.Ct. 6, 57 L.Ed. 119.

In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function. The case of confiscation is illustrative, the ultimate conclusion almost invariably depending upon the decisions of questions of fact. This court has held the owner to be entitled to "a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts." Ohio Valley Water Company v. Ben Avon Borough, supra. See, also, Prendergast v. New York Telephone Company, 262 U.S. 43, 50, 43 S.Ct. 466, 67 L.Ed. 853; Tagg Bros. & Moorhead v. United States, supra; Phillips v. Commissioner, 283 U.S. 589, 600, 51 S.Ct. 608, 75 L.Ed. 1289. Jurisdiction in the executive to order deportation exists only if the person arrested is an alien, and while, if there were jurisdiction, the findings of fact of the executive department would be conclusive, the claim of citizenship "is thus a denial of an essential jurisdictional fact" both in the statutory and the constitutional sense, and a writ of habeas corpus will issue "to determine the status." Persons claiming to be citizens of the United States "are entitled to a judicial determination of their claims," said this Court in Ng Fung Ho v. White, supra, at page 285 of 259 U.S., 42 S.Ct. 492, 495, 66 L.Ed. 938, and in that case the cause was remanded to the federal District Court "for trial in that court of the question of citizenship."

In the present instance, the argument that the Congress has constituted the deputy commissioner a fact-finding tribunal is unavailing,

as the contention makes the untenable assumption that the constitutional courts may be deprived in all cases of the determination of facts upon evidence even though a constitutional right may be involved. Reference is also made to the power of the Congress to change the procedure in courts of admiralty, a power to which we have alluded in dealing with the function of the deputy commissioner in passing upon the compensation claims of employees. But when fundamental rights are in question, this Court has repeatedly emphasized "the difference in security of judicial over administrative action." Ng Fung Ho v. White, supra. Even where issues of fact are tried by juries in the federal courts, such trials are under the constant superintendence of the trial judge. In a trial by jury in a federal court the judge is "not a mere moderator," but "is the governor of the trial" for the purpose of assuring its proper conduct as well as of determining questions of law. Herron v. Southern Pacific Co., 283 U.S. 91, 95, 51 S.Ct. 383, 75 L.Ed. 857. In the federal courts, trial by jury "is a trial by a jury of 12 men in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict, if, in his opinion, it is against the law or the evidence." Capital Traction Co. v. Hof, 174 U.S. 1, 13, 14, 19 S.Ct. 580, 585, 43 L.Ed. 873. Where testimony in an equity cause is not taken before the court, the proceeding is still constantly subject to the court's control. And while the practice of obtaining the assistance of masters in chancery and commissioners in admiralty may be regarded, as we have pointed out, as furnishing a certain analogy in relation to the normal authority of the deputy commissioner in making what is virtually an assessment of damages, the proceedings of such masters and commissioners are always subject to the direction of the court, and their reports are essentially advisory, a distinction of controlling importance when questions of a fundamental character are in issue.

When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided. We are of the opinion that such a construction is permissible and should be adopted in the instant case. The Congress has not expressly provided that the determinations by the deputy commissioner of the fundamental or jurisdictional facts as to the locality of the injury and the existence of the relation of master and servant shall be final. The finality of such determinations of the deputy commissioner is predicated primarily upon the provision (section 19(a), 33 U.S.C.A. § 919(a) that he "shall have full power and authority to hear and determine all questions in respect of such claim." But "such claim" is the claim for compensation under the act and by its explicit provisions is that of an "employee," as defined in the act,

against his "employer." The fact of employment is an essential condition precedent to the right to make the claim. The other provision upon which the argument rests is that which authorizes the federal court to set aside a compensation order if it is "not in accordance with law." Section 21(b), 33 U.S.C.A. § 921(b). In the absence of any provision as to the finality of the determination by the deputy commissioner of the jurisdictional fact of employment, the statute is open to the construction that the court is determining whether a compensation order is in accordance with law may determine the fact of employment which underlies the operation of the statute. And, to remove the question as to validity, we think that the statute should be so construed. Further, the act expressly requires that, if any of its provisions is found to be unconstitutional, "or the applicability thereof to any person or circumstances" is held invalid, the validity of the remainder of the act and "the applicability of such provision to other persons and circumstances" shall not be affected. Section 50 (33 U.S.C.A. § 950). We think that this requirement clearly evidences the intention of the Congress, not only that an express provision found to be unconstitutional should be disregarded without disturbing the remainder of the statute, but also that any implication from the terms of the act which would render them invalid should not be indulged. This provision also gives assurance that there is no violation of the purpose of the Congress in sustaining the determinations of fact of the deputy commissioner where he acts within his authority in passing upon compensation claims while denying finality to his conclusions as to the jurisdictional facts upon which the valid application of the statute depends.

Assuming that the federal court may determine for itself the existence of these fundamental or jurisdictional facts, we come to the question, Upon what record is the determination to be made? There is no provision of the statute which seeks to confine the court in such a case to the record before the deputy commissioner or to the evidence which he has taken. The remedy which the statute makes available is not by an appeal or by a writ of certiorari for a review of his determination upon the record before him. The remedy is "through injunction proceedings mandatory or otherwise." Section 21(b). The question in the instant case is not whether the deputy commissioner has acted improperly or arbitrarily as shown by the record of his proceedings in the course of administration in cases contemplated by the statute, but whether he has acted in a case to which the statute is inapplicable. By providing for injunction proceedings, the Congress evidently contemplated a suit as in equity, and in such a suit the complainant would have full opportunity to plead and prove either that the injury did not occur upon the navigable waters of the United States or that the relation of master and servant did not exist, and hence that the case lay outside the purview of the statute. As the question is one of the constitutional authority of the deputy commis-

sioner as an administrative agency, the court is under no obligation to give weight to his proceedings pending the determination of that question. If the court finds that the facts existed which gave the deputy commissioner jurisdiction to pass upon the claim for compensation, the injunction will be denied in so far as these fundamental questions are concerned; if, on the contrary, the court is satisfied that the deputy commissioner had no jurisdiction of the proceedings before him, that determination will deprive them of their effectiveness for any purpose. We think that the essential independence of the exercise of the judicial power of the United States, in the enforcement of constitutional rights requires that the federal court should determine such an issue upon its own record and the facts elicited before it.

The argument is made that there are other facts besides the locality of the injury and the fact of employment which condition the action of the deputy commissioner. That contention in any aspect could not avail to change the result in the instant case. But we think that there is a clear distinction between cases where the locality of the injury takes the case out of the admiralty and maritime jurisdiction, or where the fact of employment being absent there is lacking under this statute any basis for the imposition of liability without fault, and those cases which fall within the admiralty and maritime jurisdiction and where the relation of master and servant in maritime employment exists. It is in the latter field that the provisions for compensation apply, and that, for the reasons stated in the earlier part of this opinion, the determination of the facts relating to the circumstances of the injuries received, as well as their nature and consequences, may appropriately be subjected to the scheme of administration for which the act provides.

It cannot be regarded as an impairment of the intended efficiency of an administrative agency that it is confined to its proper sphere, but it may be observed that the instances which permit of a challenge to the application of the statute, upon the grounds we have stated, appear to be few. Out of the many thousands of cases which have been brought before the deputy commissioners throughout the country, a review by the courts has been sought in only a small number, and an inconsiderable proportion of these appear to have involved the question whether the injury occurred within the maritime jurisdiction or whether the relation of employment existed.

We are of the opinion that the District Court did not err in permitting a trial de novo on the issue of employment. Upon that issue the witnesses who had testified before the deputy commissioner and other witnesses were heard by the District Court. The writ of certiorari was not granted to review the particular facts, but to pass upon the question of principle. With respect to the facts, the two courts below are in accord, and we find no reason to disturb their decision.

Decree affirmed.

Mr. Justice BRANDEIS (dissenting).

Knudsen filed a claim against Benson under section 19(a) of the Longshoremen's and Harbor Workers' Compensation Act, March 4, 1927, c. 509, 44 Stat. 1424, 1435, 33 U.S.C.A. § 919(a). Benson's answer denied, among other things, that the relation of employer and employee existed between him and the claimant. The evidence introduced before the deputy commissioner, which occupies 78 pages of the printed record, was directed largely to that issue and was conflicting. The deputy commissioner found that the claimant was in Benson's employ at the time of the injury, and filed an order for compensation under section 21(a), 33 U.S.C.A. § 921(a). Benson brought this proceeding under section 21(b) to set aside the order. The District Judge transferred the suit to the admiralty side of the court and held a trial de novo, refusing to consider upon any aspect of the case the record before the deputy commissioner. On the evidence introduced in court, he found that the relation of employer and employee did not exist, and entered a decree setting aside the compensation order. 33 F.2d 137, 38 F.(2d) 306. The Circuit Court of Appeals affirmed the decree. 45 F.2d 66. This Court granted certiorari. 283 U.S. 814, 51 S.Ct. 353, 75 L.Ed. 1430. In my opinion, the decree should be reversed, because Congress did not authorize a trial de novo.

The primary question for consideration is not whether Congress provided, or validly could provide, that determinations of fact by the deputy commissioner should be conclusive upon the District Court. The question is: Upon what record shall the District Court's review of the order of the deputy commissioner be based. The courts below held that the respondent was entitled to a trial de novo; that all the evidence introduced before the deputy commissioner should go for naught; and that respondent should have the privilege of presenting new, and even entirely different, evidence in the District Court. Unless that holding was correct, the judgment below obviously cannot be affirmed.

First. The initial question is one of construction of the Longshoremen's Act. The act does not in terms declare whether there may be a trial de novo either as to the issue whether the relation of employer and employee existed at the time of the injury, or as to any othr issue, tried or triable, before the deputy commissioner. It provides, by section 19(a), that "the deputy commissioner shall have full power and authority to hear and determine all questions in respect of" a claim; by section 21(a) that the compensation order made by the deputy commissioner "shall become effective" when filed in his office, and, "unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final * * *"; and by section 21(b) that, "if not in accordance with law, a compensation order may be suspended or

set aside, in whole or in part, through injunction proceedings * * * instituted in the Federal district court. * * *"

The phrase in section 21(b) providing that the order may be set aside "if not in accordance with law" was adopted from the statutory provision, enacted by the same Congress, for review by the Circuit Courts of Appeals of decisions of the Board of Tax Appeals. This Court has settled that the phrase as used in the tax statute means a review upon the record made before the Board. Phillips v. Commissioner, 283 U.S. 589, 600, 51 S.Ct. 608, 75 L.Ed. 1289. The Compensation Commission has consistently construed the Longshoremen's Act as providing for finality of the deputy commissioner's findings on all questions of fact; and care has been taken to provide for formal hearings appropriate to that intention. Compare Brown v. United States, 113 U.S. 568, 571, 5 S. Ct. 648, 28 L.Ed. 1079; Mason v. Routzahn, 275 U.S. 175, 178, 48 S.Ct. 50, 72 L.Ed. 223. The lower federal courts, except in the case at bar, have uniformly construed the act as denying a trial de novo of any issue determined by the deputy commissioner; have held that, in respect to those issues, the review afforded must be held upon the record made before the deputy commissioner; and that the deputy commissioner's findings of fact must be accepted as conclusive if supported by evidence, unless there was some irregularity in the proceeding before him. Nearly all the state courts have construed the state workmen's compensation laws, as limiting the judicial review to matters of law. Provisions in other federal statutes, similar to those here in question, creating various administrative tribunals, have likewise been treated as not conferring the right to a judicial trial de novo.

The safeguards with which Congress has surrounded the proceedings before the deputy commissioner would be without meaning if those proceedings were to serve merely as an inquiry preliminary to a contest in the courts. Specific provisions of the Longshoremen's Act make clear that it was the aim of Congress to expedite the relief afforded. With a view to obviating the delays incident to judicial proceedings the act substitutes an administrative tribunal for the court; and, besides providing for notice and opportunity to be heard, endows the proceedings before the deputy commissioner with the customary incidents of a judicial hearing. It prescribes that the parties in interest may be represented by counsel, section 19(d), 33 U.S.C.A. § 919(d); that the attendance of witnesses and the production of documents may be compelled, section 27(a), 33 U.S.C.A. § 927(a); that the hearings shall be public, and that they shall be stenographically reported, section 23(b), 33 U.S.C.A. § 923(b); that there shall be made "a record of the hearings and other proceedings before the deputy commissioners," section 23(b); that "the deputy commissioner shall have full power and authority to hear and determine all questions in respect of" a claim, section 19(a); and that his order shall become final after thirty days, unless a proceeding is filed un-

der section 21(b), 33 U.S.C.A. § 921(b) charging that it is "not in accordance with law." Procedure of this character, instead of expediting relief, would entail useless expense and delay if the proceedings before the deputy commissioner were to be repeated in court, and the case tried from the beginning, at the option of either party. The conclusion that Congress did not so intend is confirmed by reference to the legislative history of the act. Compare Caminetti v. United States, 242 U.S. 470, 490, 37 S.Ct. 192, 61 L.Ed. 442, L.R.A.1917F, 502, Ann.Cas.1917B, 1168.

Second. Nothing in the statute warrants the construction that the right to a trial de novo which Congress has concededly denied as to most issues of fact determined by the deputy commissioner has been granted in respect to the issue of the existence of the employer-employee relation. The language which is held sufficient to foreclose the right to such a trial on some issues forecloses it as to all. Whether the peculiar relation which the fact of employment is asserted to bear to the scheme of the statute and to the constitutional authority under which it was passed might conceivably have induced Congress to provide a special method of review upon that question, it is not necessary to inquire. For Congress expressly declared its intention to put, for purposes of review, all the issues of fact on the same basis, by conferring upon the deputy commissioner "full power to hear and determine all questions in respect of such claim," subject only to the power of the court to set aside his order "if not in accordance with law."

The suggestion that "such claim" may be construed to mean only a claim within the purview of the act seems to me without substance. Logically applied, the suggestion would leave the deputy commissioner powerless to hear or determine any issue of asserted nonliability under the act. For nonexistence of the employer-employee relation is only one of many grounds of nonliability. Thus, there is no liability if the injury was occasioned solely by the intoxication of the employee; or if the injury was due to the willful intention of the employee to injure or kill himself or another; or if it did not arise "out of or in the course of employment"; or if the employer was not engaged in maritime employment in whole or in part; or if the injured person was the employee of a subcontractor who has secured payment of compensation; or if the proceeding is brought against the wrong person as employer; or if the disability or death is that of a master or a member of the crew of any vessel; or if it is that of a person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or if it is that of an officer or employee of the United States or any agency thereof; or if it is that of an officer or employee of any state, or foreign government, or any political subdivision thereof; or if recovery for the disability or death through workmen's compensation proceedings may be validly provided by state law. And obviously there is no liability if there was in fact neither disability nor

death. It is not reasonable to suppose that Congress intended to set up a fact-finding tribunal of first instance, shorn of power to find a portion of the facts required for any decision of the case; or that, in enacting legislation designed to withdraw from litigation the great bulk of maritime accidents, it contemplated a procedure whereby the same facts must be twice litigated before a longshoreman could be assured the benefits of compensation.

The circumstance that Congress provided, in section 21 (b), of the act (33 U.S.C.A. § 921 (b), for review of orders of the deputy commissioner by injunction proceedings is urged as indicative of an intention that in such proceedings the complainant should have full opportunity to plead and prove any facts showing that the case lay outside the purview of the statute. But by this reasoning, again, many other questions besides those referred to by the Court would be open to retrial upon new, and different, evidence. The simple answer is that on bills in equity to set aside orders of a federal administrative board there is no trial de novo of issues of fact determined by that tribunal. As stated in Tagg Bros. & Moorhead v. United States, 280 U.S. 420, 443, 50 S.Ct. 220, 226, 74 L.Ed. 524, concerning orders of the Secretary of Agriculture under the Packers and Stockyards Act (7 U.S.C.A. § 181 et seq.):

"A proceeding under section 316 of the Packers and Stockyards Act [7 USCA § 217] is a judicial review, not a trial de novo. The validity of an order of the Secretary, like that of an order of the Interstate Commerce Commission, must be determined upon the record of the proceedings before him—save as there may be an exception of issues presenting claims of constitutional right, a matter which need not be considered or decided now."

In the review of the quasi judicial decisions of these federal administrative tribunals the bill in equity serves the purpose which at common law, and under the practice of many of the states, is performed by writs of certiorari. It presents to the reviewing court the record of the proceedings before the administrative tribunal in order that determination may be made, among other things, whether the authority conferred has been properly exercised. Neither upon bill in equity in the federal courts nor writ of certiorari in the states is it the practice to permit fresh evidence to be offered in the reviewing court. There is no foundation for the suggestion that Congress intended to provide otherwise in the Longshoremen's Act.

Third. It is said that the provision for a trial de novo of the existence of the employer employee relation should be read into the act in order to avoid a serious constitutional doubt. It is true that, where a statute is equally susceptible of two constructions, under one of which it is clearly valid and under the other of which it may be unconstitutional, the court will adopt the former construction. Presser v. Illinois, 116 U.S. 252, 269, 6 S.Ct. 580, 29 L.Ed. 615; Knights Templars' Indemnity Co. v. Jarman, 187 U.S. 197, 205, 23 S.Ct. 108, 47 L.Ed. 139;

Carey v. South Dakota, 250 U.S. 118, 122, 39 S.Ct. 403, 63 L.Ed. 886; Missouri Pacific R. R. Co. v. Boone, 270 U.S. 466, 471, 472, 46 S.Ct. 341, 70 L.Ed. 688. But this act is not equally susceptible to two constructions. The court may not, in order to avoid holding a statute unconstitutional, engraft upon it an exception or other provision. Butts v. Merchants' & Miners' Transportation Co., 230 U.S. 126, 133, 33 S.Ct. 964, 57 L.Ed. 1422; The Employers' Liability Cases, 207 U.S. 463, 500–502, 28 S.Ct. 141, 52 L.Ed. 297; Trade-Mark Cases, 100 U.S. 82, 99, 25 L.Ed. 550; United States v. Fox, 95 U.S. 670, 672, 673, 24 L.Ed. 538; United States v. Reese, 92 U.S. 214, 221, 23 L.Ed. 563. Compare Illinois Central R. R. Co. v. McKendree, 203 U.S. 514, 529, 27 S.Ct. 153, 51 L.Ed. 298; Cella Commission Co. v. Bohlinger (C.C.A.) 147 F. 419, 423, 424, 8 L.R.A. (N.S.) 537. Neither may it do so to avoid having to resolve a constitutional doubt. To hold that Congress conferred the right to a trial de novo on the issue of the employer employee relation seems to me a remaking of the statute and not a construction of it.

Fourth. Trial de novo of the issue of the existence of the employer employee relation is not required by the due process clause. That clause ordinarily does not even require that parties shall be permitted to have a judicial tribunal pass upon the weight of the evidence introduced before the administrative body. See Dahlstrom Metallic Door Co. v. Industrial Board, 284 U.S. 594, 52 S.Ct. 202, 76 L.Ed. 511. The findings of fact of the deputy commissioner, the Court now decides, are conclusive as to most issues, if supported by evidence. Yet as to the issue of employment the Court holds, not only that such findings may not be declared final, but that it would create a serious constitutional doubt to construe the act as committing to the deputy commissioner the simple function of collecting the evidence upon which the court will ultimately decide the issue.

It is suggested that this exception is required as to issues of fact involving claims of constitutional right. For reasons which I shall later discuss, I cannot believe that the issue of employment is one of constitutional right. But even assuming it to be so, the conclusion does not follow that trial of the issue must therefore be upon a record made in the District Court. That the function of collecting evidence may be committed to an administrative tribunal is settled by a host of cases, and supported by persuasive analogies, none of which justify a distinction between issues of constitutional right and any others. Resort to administrative remedies may be made a condition precedent to a judicial hearing. Northern Pacific Ry. Co. v. Solum, 247 U.S. 477, 483, 484, 38 S.Ct. 550, 62 L.Ed. 1221; First National Bank of Greeley v. Board of County Commissioners, 264 U.S. 450, 454, 455, 44 S.Ct. 385, 68 L.Ed. 784; United States Navigation Co. v. Cunard S. S. Co., 284 U.S. 474, 52 S.Ct. 247, 76 L.Ed. 408, decided February 15, 1932. This is so even though a party is asserting deprivation of rights secured by the Federal Constitution. First National Bank of Greeley v. Board of County Commissioners, supra. In federal equity suits, the taking of

evidence on any issue in open court did not become common until 1913, compare Los Angeles Brush Manufacturing Corporation v. James, 272 U.S. 701, 47 S.Ct. 286, 71 L.Ed. 481; and in admiralty it was not required by the rules of this Court until 1921. Compare The P. R. R. No. 35 (C.C.A.) 48 F.2d 122. On appeals in admiralty, further proof is now taken by a commission. As was said concerning a similar tribunal in Washington ex rel. Oregon Railroad & Navigation Co. v. Fairchild, 224 U.S. 510, 527, 32 S.Ct. 535, 56 L.Ed. 863, the function of the deputy commissioner is like that of a master in chancery who has been required to take testimony and report his findings of fact and conclusions of law. Compare Los Angeles Brush Corporation v. James, supra; Kimberly v. Arms, 129 U.S. 512, 524, 525, 9 S.Ct. 355, 32 L.Ed. 764; Armstrong v. Belding Bros. & Co. (C.C.A.) 297 F. 728, 729. The holding that the difference between the procedure prescribed by the Longshoremen's Act and these historic methods of hearing evidence transcends the limits of congressional power when applied to the issue of the existence of a relation of employment, as distinguished from that of the circumstances of an injury or the existence of a relation of dependency, seems to me without foundation in reality. Certainly there is no difference to the litigant.

Even in respect to the question, discussed by the Court, of the finality to be accorded administrative findings of fact in a civil case involving pecuniary liability, I see no reason for making special exception as to issues of constitutional right, unless it be that, under certain circumstances, there may arise difficulty in reaching conclusions of law without consideration of the evidence as well as the findings of fact. See Tagg Bros. & Moorhead v. United States, 280 U.S. 420, 443, 50 S.Ct. 220, 74 L.Ed. 524. Compare Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287, 40 S.Ct. 527, 64 L.Ed. 908. The adequacy of that reason need not be discussed. For as to the issue of employment no such difficulty can be urged. Two decades of experience in the states testify to the appropriateness of the administrative process as applied to this issue, as well as all others, in workmen's compensation controversies.

Fifth. Trial de novo of the existence of the employer employee relation is not required by the Judiciary Article of the Constitution. The mere fact that the act deals only with injuries arising on navigable waters, and that independently of legislation such injuries can be redressed only in courts of admiralty, obviously does not preclude Congress from denying a trial de novo. For the Court holds that it is compatible with the grant of power under article 3 to deny a trial de novo as to most of the facts upon which rest the allowance of a claim and the amount of compensation. Its holding that the Constitution requires a trial de novo of the issue of the employer employee relation is based on the relation which that fact bears to the statutory scheme propounded by Congress, and to the constitutional authority under which the act was passed. The argument is that existence of the re-

lation of employer and employee is, as a matter of substantive law, indispensable to the application of the statute, because the power of Congress to enact the legislation turns upon its existence; and that whenever the question of constitutional power depends upon an issue of fact that issue must, as a matter of procedure, be determinable independently upon evidence freshly introduced in a court. Neither proposition seems to me well founded.

Whether the power of Congress to provide compensation for injuries occurring on navigable waters is limited to cases in which the employer employee relation exists has not heretofore been passed upon by this Court and was not argued in this case. I see no justification for assuming, under those circumstances, that it is so limited. Without doubt the word "employee" was used in the Longshoremen's Act in the sense in which the common law defines it. But that definition is not immutable; and no provision of the Constitution confines the application of liability without fault to instances where the relation of employment, as so defined, exists. Compare Louis Pisitz Dry Goods Co. v. Yeldell, 274 U.S. 112, 116, 47 S.Ct. 509, 71 L.Ed. 952, 51 A.L.R. 1376. Whether an individual is an employee or an independent contractor depends upon criteria often subtle and uncertain of application, criteria which have been developed, by processes of judicial exclusion and inclusion, largely since the adoption of the Constitution and with reference, for the most part, to considerations foreign to industrial accident litigation. It is not to be assumed that Congress, having power to amend and revise the maritime law, is prevented from modifying those criteria and enlarging the liability imposed by this act so as to embrace all persons who are engaged or engage themselves in the work of another, including those now designated as independent contractors. In the Longshoremen's Act itself, Congress, far from declaring the relation of master and servant indispensable in all cases to the application of the statute, provided expressly that a contractor shall be liable to employees of a subcontractor who has failed to secure payment of compensation. Section 4 (a) of the Act (33 USCA § 904 (a). State Workmen's Compensation Laws almost invariably contain provisions for liability either to independent contractors or to their employees, sometimes absolute and sometimes conditioned upon default by the immediate employer; and these provisions appear to have been uniformly upheld. I cannot doubt that, even upon the view of the evidence taken by the District Court, Congress might have made Benson liable to Knudsen for the injury which he sustained.

Sixth. Even if the constitutional power of Congress to provide compensation is limited to cases in which the employer employee relation exists, I see no basis for a contention that the denial of the right to a trial de novo upon the issue of employment is in any manner subversive of the independence of the federal judicial power. Nothing in the Constitution, or in any prior decision of this Court to which attention has been called, lends support to the doctrine that a judicial finding of

any fact involved in any civil proceeding to enforce a pecuniary liability may not be made upon evidence introduced before a properly constituted administrative tribunal, or that a determination so made may not be deemed an independent judicial determination. Congress has repeatedly exercised authority to confer upon the tribunals which it creates, be they administrative bodies or courts of limited jurisdiction, the power to receive evidence concerning the facts upon which the exercise of federal power must be predicated, and to determine whether those facts exist. The power of Congress to provide by legislation for liability under certain circumstances subsumes the power to provide for the determination of the existence of those circumstances. It does not depend upon the absolute existence in reality of any fact.

It is true that, so far as Knudsen is concerned, proof of the existence of the employer employee relation is essential to recovery under the act. But under the definition laid down in Noble v. Union River Logging R. Co., 147 U.S. 165, 173, 174, 13 S.Ct. 271, 37 L.Ed. 123, that fact is not jurisdictional. It is quasi jurisdictional. The existence of a relation of employment is a question going to the applicability of the substantive law, not to the jurisdiction of the tribunal. Jurisdiction is the power to adjudicate between the parties concerning the subject-matter. Compare Reynolds v. Stockton, 140 U.S. 254, 268, 11 S.Ct. 773, 35 L.Ed. 464. Obviously, the deputy commissioner had not only the power but the duty to determine whether the employer employee relation existed. When a duly constituted tribunal has jurisdiction of the parties and of the subject-matter, that jurisdiction is not impaired by errors, however grave, in applying the substantive law. Dennison v. Payne (C.C.A.) 293 F. 333, 341. Compare Chicago, Rock Island & Pacific Ry. Co. v. Schendel, 270 U.S. 611, 617, 46 S.Ct. 420, 70 L.Ed. 757, 53 A.L.R. 1265; Marin v. Augedahl, 247 U.S. 142, 149, 38 S.Ct. 452, 62 L.Ed. 1038; Binderup v. Pathé Exchange, 263 U.S. 291, 305–307, 44 S.Ct. 96, 68 L.Ed. 308. This is true of tribunals of special as well as of those of general jurisdiction. It is true of administrative, as well as of judicial, tribunals. If errors in the application of law may not be made the basis of collateral attack upon the decision of an administrative tribunal, once that decision has become final, no "jurisdictional" defect can compel the independent re-examination in court, upon direct review, of the facts affecting such applicability.

The "judicial power" of article 3 of the Constitution is the power of the federal government, and not of any inferior tribunal. There is in that article nothing which requires any controversy to be determined as of first instance in the federal District Courts. The jurisdiction of those courts is subject to the control of Congress. Matters which may be placed within their jurisdiction may instead be committed to the state courts. If there be any controversy to which the judicial power extends that may not be subjected to the conclusive determination of administrative bodies or federal legislative courts, it is not because of

any prohibition against the diminution of the jurisdiction of the federal District Courts as such, but because, under certain circumstances, the constitutional requirement of due process is a requirement of judicial process. An accumulation of precedents, already referred to, has established that in civil proceedings involving property rights determination of facts may constitutionally be made otherwise than judicially; and necessarily that evidence as to such facts may be taken outside of a court. I do not conceive that article 3 has properly any bearing upon the question presented in this case.

Seventh. The cases cited by the Court in support of its conclusion that the statute would be invalid if construed to deny a trial de novo of issues of fact affecting the existence of the employer employee relation seem to me irrelevant. Most of those decisions dealt with tribunals exercising functions generically different from the function which Congress has assigned to the deputy commissioners under the Longshoremen's Act, and no question arose analogous to that now presented.

By the Longshoremen's Act, Congress created fact-finding and fact-gathering tribunals, supplementing the courts and intrusted with power to make initial determinations in matters within, and not outside, ordinary judicial purview. The purpose of these administrative bodies is to withdraw from the courts, subject to the power of judicial review, a class of controversy which experience has shown can be more effectively and expeditiously handled in the first instance by a special and expert tribunal. The proceedings of the deputy commissioners are endowed with every substantial safeguard of a judicial hearing. Their conclusions are, as a matter of right, open to re-examination in the courts on all questions of law; and, we assume for the purposes of this discussion, may be open even on all questions of the weight of the evidence.

The administrative bodies in the cases referred to by the Court, on the contrary, are in no sense fact-gathering or fact-finding tribunals of first instance. They are tribunals of final resort within the scope of their authority. Their concern is with matters ordinarily outside of judicial competence,—the deportation of aliens, the enforcement of military discipline, the granting of land patents, and the use of the mails—matters which are within the power of Congress to commit to conclusive executive determination. Compare Ex parte Bakelite Corporation, 279 U.S. 438, 451, 49 S.Ct. 411, 73 L.Ed. 789. Their procedure may be summary and frequently is. With respect to them, the function of the courts is not one of review but essentially of control—the function of keeping them within their statutory authority. No method of judicial review of the administrative action had been provided by Congress in any of the cases cited; and the question of the power to confine review to the administrative record accordingly did not arise. In each case, the Court held that, if the administrative officer had acted outside his authority, the unwritten law supplied a remedy,

and that relief could be had, according to the nature of the case, on bill in equity or habeas corpus. The question decided in each case was that Congress should not be taken, in the absence of specific provision, to have intended to subject the individual to the uncontrolled action of a public administrative officer. See American School of Magnetic Healing v. McAnnulty, 187 U.S. 94, 110, 23 S.Ct. 33, 47 L.Ed. 90. No comparable issue is presented here.

Reliance is also placed, as illustrative of the necessary independence of the federal judicial power, upon the decision in Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287, 40 S.Ct. 527, 64 L.Ed. 908. That case, however, involved only the question of the scope of review, upon the administrative record, in confiscation cases. It held that the reviewing court must have power to weigh the evidence upon which the administrative tribunal entered the order. It decided nothing concerning the right to a trial de novo in court; and the opinion made no reference to such a trial. It could not have decided anything as to the effect of article 3 of the Constitution. For the case came here from the highest court of the state, arose under the Fourteenth Amendment, and did not relate to the jurisdiction of the lower federal courts. Moreover, in no event, can the issues presented in the review of rate orders alleged to be confiscatory, which involve difficult questions of mixed law and fact, be deemed parallel to those presented in the review of workmen's compensation awards. Compare the issues in Ohio Valley Water Co. v. Ben Avon Borough, supra, with that in Dahlstrom Metallic Door Co. v. Industrial Board, 284 U.S. 594, 52 S.Ct. 202, 76 L.Ed. 511.

Whatever may be the propriety of a rule permitting special re-examination in a trial court of so-called "jurisdictional facts" passed upon by administrative bodies having otherwise final jurisdiction over matters properly committed to them, I find no warrant for extending the doctrine to other and different administrative tribunals whose very function is to hear evidence and make initial determinations concerning those matters which it is sought to re-examine. Such a doctrine has never been applied to tribunals properly analogous to the deputy commissioners, such as the Interstate Commerce Commission, the Federal Trade Commission, the Secretary of Agriculture acting under the Packers and Stockyards Act (7 USCA § 181 et seq.) and the like. Logically applied it would seriously impair the entire administrative process.

Eighth. No good reason is suggested why all the evidence which Benson presented to the District Court in this cause could not have been presented before the deputy commissioner; nor why he should have been permitted to try his case provisionally before the administrative tribunal, and then to retry it in the District Court upon additional evidence theretofore withheld. To permit him to do so violates the salutary principle that administrative remedies must first be exhausted before resorting to the court, imposes unnecessary and bur-

densome expense upon the other party and cripples the effective administration of the act. Under the prevailing practice, by which the judicial review has been confined to questions of law, the proceedings before the deputy commissioners have proved for the most part noncontroversial; and relatively few cases have reached the courts. To permit a contest de novo in the District Court of an issue tried, or triable, before the deputy commissioner will, I fear, gravely hamper the effective administration of the act. The prestige of the deputy commissioner will necessarily be lessened by the opportunity of relitigating facts in the courts. The number of controverted cases may be largely increased. Persistence in controversy will be encouraged. And since the advantage of prolonged litigation lies with the party able to bear heavy expenses, the purpose of the act will be in part defeated.

In my opinion the judgment of the Circuit Court of Appeals should be reversed and the case remanded to the District Court, sitting as a court of equity, for consideration and decision upon the record made before the deputy commissioner.

Mr. Justice STONE and Mr. Justice ROBERTS join in this opinion.[F]

Mr. Justice Frankfurter, concurring, in ESTEP v. UNITED STATES, 327 U.S. 114, 66 S.Ct. 423, 90 L.Ed. —— (1946), said, at p. 437 of 66 S.Ct.:

"This argument revives, if indeed it does not multiply, all the casuistic difficulties spawned by the doctrine of "jurisdictional fact." In view of the criticism which that doctrine, as sponsored by Crowell v. Benson, 285 U.S. 22, 52 S.Ct. 285, 76 L.Ed. 598, brought forth and of the attritions of that case through later decisions, one had supposed that the doctrine had earned a deserved repose." [For the remainder of this opinion, see *infra* at p. 1024. Ed.]

ST. JOSEPH STOCK YARDS CO. v. UNITED STATES

Supreme Court of the United States.
298 U.S. 38, 56 S.Ct. 720, 80 L.Ed. 1033 (1936).

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

This suit was brought by St. Joseph Stock Yards Company to restrain the enforcement of an order of the Secretary of Agriculture fixing maximum rates for the company's services. The District Court composed of three judges dismissed the bill of complaint (11 F.Supp. 322) and appeal lies directly to this Court. 7 U.S.C. § 217 (7 U.S.C.A. § 217); 28 U.S.C. § 47 (28 U.S.C.A. § 47).

In October, 1929, the Secretary of Agriculture initiated a general inquiry into the reasonableness of appellant's rates. After hearing,

[F] Footnotes of the court have been omitted.

the Secretary prescribed maximum rates which were enjoined by the District Court. St. Joseph Stock Yards Co. v. United States, 58 F.2d 290. The Secretary reopened the proceeding and hearing was had in 1933. While the matter was under consideration, appellant filed in February, 1934, a petition for a further hearing. On May 4, 1934, the Secretary denied the petition and made the order now in question.

The validity of the provisions of the Packers and Stockyards Act 1921 (42 Stat. 159, 7 U.S.C. §§ 181–229 [7 U.S.C.A. §§ 181–229]), authorizing the Secretary of Agriculture to prescribe maximum charges for the services of stockyards, has been sustained. Stafford v. Wallace, 258 U.S. 495, 42 S.Ct. 397, 66 L.Ed. 735, 23 A.L.R. 229; Tagg Bros. & Moorhead v. United States, 280 U.S. 420, 50 S.Ct. 220, 74 L.Ed. 524. In this suit appellant attacked the Secretary's order as lacking the support of essential findings, and also as confiscatory, thus violating the Fifth Amendment of the Federal Constitution. The denial of the request for a further hearing was assailed. No additional evidence was introduced in the District Court, and the case was submitted at the final hearing upon the record made before the Secretary.

* * *

Third. The Scope of Judicial Review upon the Issue of Confiscation.—The question is not one of fixing a reasonable charge for a mere personal service subject to regulation under the commerce power, as in the case of market agencies employing but little capital. See Tagg Bros. & Moorhead v. United States, supra, 280 U.S. 420, at pages 438, 439, 50 S.Ct. 220, 74 L.Ed. 524. Here a large capital investment is involved and the main issue is as to the alleged confiscation of that investment.

A preliminary question is presented by the contention that the District Court, in the presence of this issue, failed to exercise its independent judgment upon the facts. 11 F.Supp. 322, at pages 326–328. See Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287, 289, 40 S.Ct. 527, 64 L.Ed. 908; Prendergast v. New York Telephone Co., 262 U.S. 43, 50, 43 S.Ct. 466, 67 L.Ed. 853; Bluefield Water Works & Imp. Co. v. Public Service Commission, 262 U.S. 679, 689, 43 S.Ct. 675, 67 L.Ed. 1176; United Railways & Electric Co. v. West, 280 U.S. 234, 251, 50 S.Ct. 123, 74 L.Ed. 390; Tagg Bros. & Moorhead v. United States, supra, 280 U.S. 420, at pages 443, 444, 50 S.Ct. 220, 74 L.Ed. 524; Phillips v. Commissioner, 283 U.S. 589, 600, 51 S.Ct. 608, 75 L.Ed. 1289; Crowell v. Benson, 285 U.S. 22, 60, 52 S.Ct. 285, 76 L.Ed. 598; State Corporation Commission v. Wichita Gas Co., 290 U.S. 561, 569, 54 S.Ct. 321, 78 L.Ed. 500. The District Court thought that the question was still an open one under the Packers and Stockyards Act, and expressed the view that, even though the issue is one of confiscation, the court is bound to accept the findings of the Secretary if they are supported by substantial evidence and that it is not within the judicial province to weigh the evidence and pass upon the issues of fact. The government points out that, notwithstanding what was

said by the court upon this point, the court carefully analyzed the evidence, made many specific findings of its own, and in addition adopted, with certain exceptions, the findings of the Secretary. The government insists that appellant thus had an adequate judicial review, and, further, that the case is in equity and comes before the court on appeal, and that from every point of view the clear preponderance of the evidence shows that the prescribed rates were in fact just and reasonable. Hence the government says that the decree should be affirmed, irrespective of possible error in the reasoning of the District Court. See West v. Chesapeake & Potomac Telephone Co., 295 U.S. 662, 680, 55 S.Ct. 894, 79 L.Ed. 1640.

In view, however, of the discussion in the court's opinion, the preliminary question should be considered. The fixing of rates is a legislative act. In determining the scope of judicial review of that act, there is a distinction between action within the sphere of legislative authority and action which transcends the limits of legislative power. Exercising its rate-making authority, the Legislature has a broad discretion. It may exercise that authority directly, or through the agency it creates or appoints to act for that purpose in accordance with appropriate standards. The court does not sit as a board of revision to substitute its judgment for that of the Legislature or its agents as to matters within the province of either. San Diego Land & Town Co. v. Jasper, 189 U.S. 439, 446, 23 S.Ct. 571, 47 L.Ed. 892; Minnesota Rate Cases (Simpson v. Shepard), 230 U.S. 352, 433, 33 S.Ct. 729, 57 L.Ed. 1511, 48 L.R.A.(N.S.) 1151, Ann.Cas.1916A, 18; Los Angeles Gas & Elec. Corp. v. Railroad Commission, 289 U.S. 287, 304, 53 S.Ct. 637, 77 L.Ed. 1180. When the Legislature itself acts within the broad field of legislative discretion, its determinations are conclusive. When the Legislature appoints an agent to act within that sphere of legislative authority, it may endow the agent with power to make findings of fact which are conclusive, provided the requirements of due process which are specially applicable to such an agency are met, as in according a fair hearing and acting upon evidence and not arbitrarily. Interstate Commerce Commission v. Louisville & Nashville R. R. Co., 227 U.S. 88, 91, 33 S.Ct. 185, 57 L.Ed. 431; Virginian Railway Co. v. United States, 272 U.S. 658, 663, 47 S.Ct. 222, 71 L.Ed. 463; Tagg Bros. & Moorhead v. United States, supra, 280 U.S. 420, at page 444, 50 S.Ct. 220, 74 L.Ed. 524; Florida v. United States, 292 U.S. 1, 12, 54 S.Ct. 603, 78 L.Ed. 1077. In such cases the judicial inquiry into the facts goes no further than to ascertain whether there is evidence to support the findings, and the question of the weight of the evidence in determining issues of fact lies with the legislative agency acting within its statutory authority.

But the Constitution fixes limits to the rate-making power by prohibiting the deprivation of property without due process of law or the taking of private property for public use without just compensation. When the Legislature acts directly, its action is subject to ju-

dicial scrutiny and determination in order to prevent the transgression of these limits of power. The Legislature cannot preclude that scrutiny or determination by any declaration or legislative finding. Legislative declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained. Nor can the Legislature escape the constitutional limitation by authorizing its agent to make findings that the agent has kept within that limitation. Legislative agencies, with varying qualifications, work in a field peculiarly exposed to political demands. Some may be expert and impartial, others subservient. It is not difficult for them to observe the requirements of law in giving a hearing and receiving evidence. But to say that their findings of fact may be made conclusive where constitutional rights of liberty and property are involved, although the evidence clearly establishes that the findings are wrong and constitutional rights have been invaded, is to place those rights at the mercy of administrative officials and seriously to impair the security inherent in our judicial safeguards. That prospect, with our multiplication of administrative agencies, is not one to be lightly regarded. It is said that we can retain judicial authority to examine the weight of evidence when the question concerns the right of personal liberty. But, if this be so, it is not because we are privileged to perform our judicial duty in that case and for reasons of convenience to disregard it in others. The principle applies when rights either of person or of property are protected by constitutional restrictions. Under our system there is no warrant for the view that the judicial power of a competent court can be circumscribed by any legislative arrangement designed to give effect to administrative action going beyond the limits of constitutional authority. This is the purport of the decisions above cited with respect to the exercise of an independent judicial judgment upon the facts where confiscation is alleged. The question under the Packers and Stockyards Act is not different from that arising under any other act, and we see no reason why those decisions should be overruled. But this judicial duty to exercise an independent judgment does not require or justify disregard of the weight which may properly attach to findings upon hearing and evidence. On the contrary, the judicial duty is performed in the light of the proceedings already had and may be greatly facilitated by the assembling and analysis of the facts in the course of the legislative determination. Judicial judgment may be none the less appropriately independent because informed and aided by the sifting procedure of an expert legislative agency. Moreover, as the question is whether the legislative action has passed beyond the lowest limit of the permitted zone of reasonableness into the forbidden reaches of confiscation, judicial scrutiny must of necessity take into account the entire legislative process, including the reasoning and findings upon which the legislative action rests. We have said that "in a question of rate-making there is a strong presumption in favor of

the conclusions reached by an experienced administrative body after a full hearing." Darnell v. Edwards, 244 U.S. 564, 569, 37 S.Ct. 701, 703, 61 L.Ed. 1317. The established principle which guides the court in the exercise of its judgment on the entire case is that the complaining party carries the burden of making a convincing showing and that the court will not interfere with the exercise of the rate-making power unless confiscation is clearly established. Los Angeles Gas & Electric Co. v. Railroad Commission, 289 U.S. 287, 305, 53 S.Ct. 637, 77 L.Ed. 1180; Lindheimer v. Illinois Bell Telephone Co., 292 U.S. 151, 169, 54 S.Ct. 658, 78 L.Ed. 1182; Dayton Power & Light Co. v. Public Utilities Commission, 292 U.S. 290, 298, 54 S.Ct. 647, 78 L.Ed. 1267.

A cognate question was considered in Manufacturers' Railway Company v. United States, 246 U.S. 457, 470, 488–490, 38 S.Ct. 383, 392, 62 L.Ed. 831. There, appellees insisted that the finding of the Interstate Commerce Commission upon the subject of confiscation was conclusive, or at least that it was not subject to be attacked upon evidence not presented to the Commission. We did not sustain that contention. Nevertheless, we pointed out that correct practice required that "in ordinary cases, and where the opportunity is open," all the pertinent evidence should be submitted in the first instance to the Commission. The Court did not approve the course that was pursued in that case "of withholding from the Commission essential portions of the evidence that is alleged to show the rate in question to be confiscatory." And it was regarded as beyond debate that, where the Commission after full hearing had set aside a given rate as unreasonably high, it would require a "clear case" to justify a court, "upon evidence newly adduced but not in a proper sense newly discovered," in annulling the action of the Commission upon the ground that the same rate was so unreasonably low as to deprive the carrier of its constitutional right of compensation. With that statement the Court turned to an examination of the evidence. The principle thus recognized with respect to the weight to be accorded to action by the Commission after full hearing applies a fortiori when the case is heard upon the record made before the Commission or, as in this case, upon the record made before the Secretary of Agriculture. It follows, in the application of this principle, that, as the ultimate determination whether or not rates are confiscatory ordinarily rests upon a variety of subordinate or primary findings of fact as to particular elements, such findings made by a legislative agency after hearing will not be disturbed save as in particular instances they are plainly shown to be overborne.

As the District Court, despite its observations as to the scope of review, apparently did pass upon the evidence, making findings of its own and adopting findings of the Secretary, we do not think it necessary to remand the cause for further consideration, and we turn to the other questions presented by the appeal. * * *

Mr. Justice BRANDEIS (concurring).

I agree that the judgment of the District Court should be affirmed; but I do so on a different ground.

The question on which I differ was put thus by the District Court: "If in a judicial review of an order of the Secretary his findings supported by substantial evidence are conclusive upon the reviewing court in every case where a constitutional issue is not involved, why are they not conclusive when a constitutional issue is involved? Is there anything in the Constitution which expressly makes findings of fact by a jury of inexperienced laymen, if supported by substantial evidence, conclusive, that prohibits Congress making findings of fact by a highly trained and especially qualified administrative agency likewise conclusive, provided they are supported by substantial evidence?" 11 F.Supp. 322, 327.

Like the lower court, I think no good reason exists for making special exception of issues of fact bearing upon a constitutional right. The inexorable safeguard which the due process clause assures is, not that a court may examine whether the findings as to value or income are correct, but that the trier of the facts shall be an impartial tribunal; that no finding shall be made except upon due notice and opportunity to be heard; that the procedure at the hearing shall be consistent with the essentials of a fair trial; and that it shall be conducted in such a way that there will be opportunity for a court to determine whether the applicable rules of law and procedure were observed.

Suits to restrain or annul an order of the Secretary of Agriculture are governed by the provision which Congress has made for reviewing orders of the Interstate Commerce Commission. Tagg Bros. & Moorhead v. United States, 280 U.S. 420, 432-433, 442-444, 50 S.Ct. 220, 74 L.Ed. 524. That provision does not, in my opinion, permit a district court to set aside an order on the ground that the Secretary erred in making a finding of fact; and the jurisdiction of this Court to review its judgment is necessarily subject to the same limitation. As the District Court concluded that no applicable rule of law was disregarded by the Secretary, that for his findings there was ample support in the evidence, that, taken together, they support his conclusion that the rates are compensatory, and that the proceeding was in no respect irregular, it was in duty bound to dismiss the bill without enquiring into the correctness of his findings of subsidiary facts.

First. An order of the Secretary may, of course, be set aside for violation of the due process clause by prescribing rates which, on the facts found, are confiscatory; for the order of an administrative tribunal may be set aside for any error of law, substantive or procedural. Interstate Commerce Commission v. Union Pacific R. R., 222 U.S. 541, 547, 32 S.Ct. 108, 56 L.Ed. 308. Moreover, where what purports to be a finding upon a question of fact is so involved with and depend-

ent upon questions of law as to be in substance and effect a decision of the latter, the Court will, in order to decide the legal question, examine the entire record, including the evidence if necessary, as it does in cases coming from the highest court of a state. Compare Kansas City Southern Ry. v. C. H. Albers Commission Co., 223 U.S. 573, 591, 32 S.Ct. 316, 56 L.Ed. 556; Cedar Rapids Gas Light Co. v. Cedar Rapids, 223 U.S. 655, 668–669, 32 S.Ct. 389, 56 L.Ed. 594. It may set aside an order for lack of findings necessary to support it, Florida v. United States, 282 U.S. 194, 212–215, 51 S.Ct. 119, 75 L.Ed. 291; or because findings were made without evidence to support them, New England Divisions Case, 261 U.S. 184, 203, 43 S.Ct. 270, 67 L.Ed. 605; Chicago Junction Case, 264 U.S. 258, 262–266, 44 S.Ct. 317, 68 L.Ed. 667; or because the evidence was such "that it was impossible for a fairminded board to come to the result which was reached," San Diego Land & Town Co. v. Jasper, 189 U.S. 439, 442, 23 S.Ct. 571, 572, 47 L.Ed. 892; or because the order was based on evidence not legally cognizable, United States v. Abilene & Southern Ry., 265 U.S. 274, 286–290, 44 S.Ct. 565, 68 L.Ed. 1016; or because facts and circumstances which ought to have been considered were excuded from consideration, Interstate Commerce Commission v. Northern Pacific Ry. 216 U.S. 538, 544, 545, 30 S.Ct. 417, 54 L.Ed. 608; Northern Pacific Ry. v. Department of Public Works, 268 U.S. 39, 44, 45 S.Ct. 412, 69 L.Ed. 836; or because facts and circumstances were considered which could not legally influence the conclusion, Interstate Commerce Commission v. Diffenbaugh, 222 U.S. 42, 46, 47, 32 S.Ct. 22, 56 L.Ed. 83; Florida East Coast Ry. v. United States, 234 U.S. 167, 187, 34 S.Ct. 867, 58 L.Ed. 1267; or because it applied a rule thought wrong for determining the value of the property, St. Louis & O'Fallon Ry. v. United States, 279 U.S. 461, 49 S.Ct. 384, 73 L.Ed. 798. These cases deal with errors of law or irregularities of procedure.

Second. The contention of the appellant is that the Secretary of Agriculture erred in making findings on which rests his conclusion that the rates prescribed are compensatory. The matters here in controversy are questions of fact—subsidiary issues, about 63 in number, bearing upon two main issues of fact: What is the "value" of the property used and useful in the business? What will be the income earned on that valuation if the prescribed rates are put into force?

By the Packers and Stockyards Act, the duty of investigating and determining the facts was committed by Congress to the Secretary. It was not disputed that ordinarily his findings made upon substantial evidence in properly conducted proceedings are conclusive. Tagg Brothers & Moorhead v. United States, 280 U.S. 420, 444, 50 S.Ct. 220, 74 L.Ed. 524. This Court has consistently declared in cases arising under the Interstate Commerce Act (49 U.S.C.A. § 1 et seq.) that to "consider the weight of the evidence is beyond our province," Western Paper Makers' Chemical Co. v. United States, 271 U.S. 268, 271, 46 S.Ct. 500, 501, 70 L.Ed. 941; Chicago, R. I. & Pac. Ry. v. United

States, 274 U.S. 29, 33, 34, 47 S.Ct. 486, 71 L.Ed. 911; and that courts have no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions of fact, or with the alleged inconsistency of the findings with those made in other proceedings, Virginian Ry. v. United States, 272 U.S. 658, 663, 665, 666, 47 S.Ct. 222, 71 L.Ed. 463. Compare People of State of New York ex rel. New York & Queens Gas Co. v. McCall, 245 U.S. 345, 348, 38 S.Ct. 122, 62 L.Ed. 337; Georgia Ry. & Power Co. v. Railroad Commission, 262 U.S. 625, 634, 43 S.Ct. 680, 67 L.Ed. 1144; Silberschein v. United States, 266 U.S. 221, 225, 45 S.Ct. 69, 69 L.Ed. 256; Ma-King Products Co. v. Blair, 271 U.S. 479, 483, 46 S.Ct. 544, 70 L.Ed. 1046.

The cases are numerous in which the attempt was made to induce this Court to annul an order of the Commission for error of fact; but in every case relief was denied. See St. Louis & O'Fallon Ry. v. United States, 279 U.S. 461, 493, note 8, 49 S.Ct. 384, 73 L.Ed. 798. In this case also the Court refuses to set aside the order. But it declares that an exception to the rule of finality must be made, because a constitutional issue is involved, and that the Court, weighing the evidence, must in its independent judgment determine the correctness of the findings of fact made by the Secretary. That view finds support in Ohio Valley Water Co. v. Ben Avon Borough, 253 U.S. 287, 40 S.Ct. 527, 64 L.Ed. 908, and in general statements made in Manufacturers' Ry. Co. v. United States, 246 U.S. 457, 488–490, 38 S.Ct. 383, 62 L.Ed. 831, and other cases; but it is inconsistent with a multitude of decisions in analogous cases hereafter discussed.

Third. The Fifth Amendment, like the Fourteenth, declares that property may not be taken without due process of law. But there is nothing in the text of the Constitution (including the Amendments) which tells the reader whether to constitute due process it is necessary that there be opportunity for a judicial review of the correctness of the findings of fact made by the Secretary of Agriculture concerning the value of this property or its net income. To learn what the procedure must be in a particular situation, in order to constitute due process, we turn necessarily to the decisions of our Court. These tell us that due process does not require that a decision made by an appropriate tribunal shall be reviewable by another. Pittsburgh, etc., Ry. v. Backus, 154 U.S. 421, 426, 427, 14 S.Ct. 1114, 38 L.Ed. 1031; Reetz v. Michigan, 188 U.S. 505, 508, 23 S.Ct. 390, 47 L.Ed. 563; Dohany v. Rogers, 281 U.S. 362, 369, 50 S.Ct. 299, 74 L.Ed. 904, 68 A.L.R. 434. They tell us that due process is not necessarily judicial process. Den ex dem. Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272, 280, 15 L.Ed. 372; McMillen v. Anderson, 95 U.S. 37, 41, 24 L.Ed. 335; United States v. Ju Toy, 198 U.S. 253, 263, 25 S.Ct. 644, 49 L.Ed. 1040. And they draw distinctions which give clear indication when due process requires judicial process and when it does not.

The first distinction is between issues of law and issues of fact. When dealing with constitutional rights (as distinguished from privileges accorded by the government, United States v. Babcock, 250 U.S. 328, 331, 39 S.Ct. 464, 63 L.Ed. 1011), there must be the opportunity of presenting in an appropriate proceeding, at some time, to some court, every question of law raised, whatever the nature of the right invoked or the status of him who claims it. The second distinction is between the right to liberty of person and other constitutional rights. Compare Phillips v. Commissioner, 283 U.S. 589, 596, 597, 51 S.Ct. 608, 75 L.Ed. 1289. A citizen who claims that his liberty is being infringed is entitled, upon habeas corpus, to the opportunity of a judicial determination of the facts. And, so highly is this liberty prized, that the opportunity must be accorded to any resident of the United States who claims to be a citizen. Compare Ng Fung Ho v. White, 259 U.S. 276, 282–285, 42 S.Ct. 492, 66 L.Ed. 938, with United States v. Ju Toy, 198 U.S. 253, 25 S.Ct. 644, 49 L.Ed. 1040, and Tang Tun v. Edsell, 223 U.S. 673, 675, 32 S.Ct. 359, 56 L.Ed. 606. But a multitude of decisions tells us that when dealing with property a much more liberal rule applies. They show that due process of law does not always entitle an owner to have the correctness of findings of fact reviewed by a court, and that, in deciding whether such review is required, "respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law.' " Mr. Justice Bradley, in Davidson v. New Orleans, 96 U.S. 97, 107, 24 L.Ed. 616.

Our decisions tell us specifically that the final ascertainment of the facts regarding value or income may be submitted by Congress, or state legislatures, to an administrative tribunal, even where the constitutionality of the taking depends upon the value of the property or the amount of the net income. Thus:

(a) No taking of property by eminent domain is constitutional unless just compensation is paid. But in condemnation proceedings the value of the property, and hence the amount payable therefor, need not be determined by a court. "By the constitution of the United States, the estimate of the just compensation for property taken for the public use, under the right of eminent domain, is not required to be made by a jury, but may be intrusted by congress to commissioners appointed by a court or by the executive or to an inquest consisting of more or fewer men than an ordinary jury." Bauman v. Ross, 167 U.S. 548, 593, 17 S.Ct. 966, 983, 42 L.Ed. 270. In Long Island Water Supply Co. v. Brooklyn, 166 U.S. 685, 695, 17 S.Ct. 718, 722, 41 L.Ed. 1165, it was said that "there is no denial of due process in making the findings of fact by the triors of fact, whether commissioners or a jury, final as to such facts, and leaving open to the courts simply

the inquiry as to whether there was any erroneous basis adopted by the triors in their appraisal, or other errors in their proceedings." * * *

(b) No taking of property by taxation is constitutional unless the exaction is laid according to value, income, or other measure prescribed by law. But Congress has, with the sanction of this Court, broadly given finality to the determination by the Board of Tax Appeals of the facts concerning income. By its legislation the jurisdiction of courts is limited to deciding "whether the correct rule of law was applied to the facts found; and whether there was substantial evidence before the Board to support the findings made." Helvering v. Rankin, 295 U.S. 123, 131, 55 S.Ct. 732, 736, 79 L.Ed. 1343; Old Mission Portland Cement Co. v. Helvering, 293 U.S. 289, 294, 55 S.Ct. 158, 79 L.Ed. 367. Compare Cheatham v. United States, 92 U.S. 85, 88, 89, 23 L.Ed. 561. No court may pass upon the correctness in fact of any finding of the Board.

(c) The due process clause is not violated by giving in tariff acts finality to the valuations made by appraisers of imported merchandise belonging to American citizens. Hilton v. Merritt, 110 U.S. 97, 107, 3 S.Ct. 548, 28 L.Ed. 83. "It was certainly competent for congress," said the Court in Passavant v. United States, 148 U.S. 214, 219, 13 S.Ct. 572, 575, 37 L.Ed. 426, "to create this board of general appraisers, called 'legislative referees' in an early case in this court (Rankin v. Hoyt, 4 How. 327, 335 [11 L.Ed. 996]), and not only invest them with authority to examine and decide upon the valuation of imported goods, when that question was properly submitted to them, but to declare that their decision 'shall be final and conclusive as to the *dutiable value* of such merchandise against all parties interested therein.' "

(d) The due process clause is not violated by legislation which requires a fire insurance policy to provide that the amount of the loss (and hence values) shall be determined by a board of appraisers; and that their decision, if not grossly excessive, or inadequate, or procured by fraud, shall be conclusive as to the amount of the loss. Hardware Dealers Mutual Fire Insurance Co. v. Glidden Co., 284 U.S. 151, 52 S. Ct. 69, 76 L.Ed. 214.

(e) The due process clause is not violated by giving finality to assessments of value made for the purpose of ad valorem taxation, although in those proceedings the opportunity for a hearing is far less ample than under the statute here in question. Compare State Railroad Tax Cases, 92 U.S. 575, 610, 23 L.Ed. 663; Kentucky Railroad Tax Cases, 115 U.S. 321, 6 S.Ct. 57, 29 L.Ed. 414; King v. Mullins, 171 U.S. 404, 429–431, 18 S.Ct. 925, 43 L.Ed. 214.

As we said in San Diego Land & Town Co. v. Jasper, 189 U.S. 439, 446, 23 S.Ct. 571, 574, 47 L.Ed. 892: "We do not sit as a general appellate board of revision for all rates and taxes in the United States";

and in Coulter v. Louisville & Nashville R. R., 196 U.S. 599, 607, 25 S.Ct. 342, 344, 49 L.Ed. 615: "Of course, no court would venture to intervene merely on the ground of a mistake of judgment on the part of the officer to whom the duty of assessment was intrusted by the law." * * *

These cases show that in deciding when, and to what extent, finality may be given to an administrative finding of fact involving the taking of property, the Court has refused to be governed by a rigid rule. It has weighed the relative values of constitutional rights, the essentials of powers conferred, and the need of protecting both. It has noted the distinction between informal, summary administrative action based on ex parte casual inspection or unverified information, where no record is preserved of the evidence on which the official acted, and formal, deliberate quasi judicial decisions of administrative tribunals based on findings of fact expressed in writing, and made after hearing evidence and argument under the sanctions and the safeguards attending judicial proceedings. It has considered the nature of the facts in issue, the character of the relevant evidence, the need in the business of government for prompt final decision. It has recognized that there is a limit to the capacity of judges, and that the magnitude of the task imposed upon them, if there be granted judicial review of the correctness of findings of such facts as value and income, may prevent prompt and faithful performance. It has borne in mind that even in judicial proceedings the finding of facts is left, by the Constitution, in large part to laymen. It has inquired into the character of the administrative tribunal provided and the incidents of its procedure. Compare Humphrey's Executor v. United States, 295 U.S. 602, 628, 55 S.Ct. 869, 79 L.Ed. 1611. And, where that prescribed for the particular class of takings appeared "appropriate to the case, and just to the parties to be affected," and "adapted to the end to be attained," Hagar v. Reclamation District, 111 U.S. 701, 708, 4 S.Ct. 663, 667, 28 L.Ed. 569, the Court has held it constitutional to make the findings of fact of the administrative tribunal conclusive. Thus the Court has followed the rule of reason.

Fourth. Congress concluded that to give finality to the findings of the Secretary of Agriculture of the facts as to value and income is essential to the effective administration of the Packers and Stockyards Act (7 U.S.C.A. §§ 181–229). The Ben Avon Case, and the statements in Manufacturers' Ry. Co. v. United States, and casual references in other cases, should not lead us to graft upon the rule discussed, and so widely applied to other takings, a disabling exception applicable to rate cases. In none of the rate cases relied upon was there any reason given for denying to Congress that power; nor was there mention of the many decisions in which the power to prescribe finality was upheld. In none was there noted the distinction between challenging the correctness of findings of fact on which rest the conclusion as to confiscation and challenging the conclusion of law as to confiscation

on facts found. Here some reasons have been offered in support of making the exception; but no reason given seems to me sound. * * *

It is said that, since regulating rates is legislation, courts must have the same power to review facts which they possess in passing on the constitutionality of statutes—otherwise the supremacy of law could be impaired by delegation to an administrative tribunal of a power to make final determinations that the legislature lacks. To that argument there are several answers. It fails to note that a rate order may be complained of as being confiscatory, not because of error in a finding of value or income, but because the regulating body has, in reaching its conclusions, ignored established principles or incontestable facts, or been guilty of dishonesty or of other irregularity in the proceeding. Whenever a legislative body regulates a subject within the scope of its power, a presumption of constitutionality prevails, in the absence of some factual foundation of record for overthrowing the regulation, O'Gorman & Young v. Hartford Fire Insurance Co., 282 U.S. 251, 257, 258, 51 S.Ct. 130, 75 L.Ed. 324, 72 A.L.R. 1163; and this rule extends to such action by an administrative body, Pacific States Box & Basket Co. v. White, 296 U.S. 176, 185, 186, 56 S.Ct. 159, 80 L. Ed. 138, 101 A.L.R. 853. If there be in the record conflicting evidence as to the facts assumed, a court may not substitute its independent judgment for that of the legislative body. Mere denial of facts relied upon as conditioning the validity of legislation does not confer upon a court authority to decide what is called the truth; that is, the absolute existence in reality of facts alleged. "Where the constitutional validity of a statute depends upon the existence of facts, courts must be cautious about reaching a conclusion respecting them contrary to that reached by the Legislature; and if the question of what the facts established be a fairly debatable one, it is not permissible for the judge to set up his opinion in respect of it against the opinion of the lawmaker." Radice v. New York, 264 U.S. 292, 294, 44 S.Ct. 325, 326, 68 L.Ed. 690. Here the Court's duty is to determine merely whether there was evidence upon which reasonable men could have found as the Secretary did, with regard to value and income. Obviously the case at bar is not one in which "it was impossible for a fair-minded board to come to the result which was reached." Compare Van Dyke v. Geary, 244 U.S. 39, 48, 49, 37 S.Ct. 483, 487, 61 L.Ed. 973.

Moreover, argument based on the analogy of the review of statutes fails to note the distinction between determinations of fact made in a quasi judicial proceeding surrounded by all the safeguards which attend trials by a court, and assumptions, or conclusions, as to facts made by a Legislature on information which lacks those safeguards. It fails to note also the subsidiary character of the issue involved in a finding of value or income; and that it is only as to these subsidiary issues that finality of the finding is asserted here.

The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied

and whether the proceeding in which facts were adjudicated was conducted regularly. To that extent, the person asserting a right, whatever its source, should be entitled to the independent judgment of a court on the ultimate question of constitutionality. But supremacy of law does not demand that the correctness of every finding of fact to which the rule of law is to be applied shall be subject to review by a court. If it did, the power of courts to set aside findings of fact by an administrative tribunal would be broader than their power to set aside a jury's verdict. The Constitution contains no such command. * * *

Eighth. In deciding whether the Constitution prevents Congress from giving finality to findings as to value or income where confiscation is alleged, the Court must consider the effect of our decisions, not only upon the function of rate regulation, but also upon the administrative and judicial tribunals themselves. Responsibility is the great developer of men. May it not tend to emasculate or demoralize the rate-making body if ultimate responsibility is transferred to others? To the capacity of men there is a limit. May it not impair the quality of the work of the courts if this heavy task of reviewing questions of fact is assumed? * * *

Mr. Justice STONE and Mr. Justice CARDOZO (concurring in the result).

We think the opinion of Mr. Justice BRANDEIS states the law as it ought to be, though we appreciate the weight of precedent that has now accumulated against it. If the opinion of the Court did no more than accept those precedents and follow them, we might be moved to acquiescence. More, however, has been attempted. The opinion reexamines the foundations of the rule that it declares, and finds them to be firm and true. We will not go so far. The doctrine of stare decisis, however appropriate and even necessary at times, has only a limited application in the field of constitutional law. See the cases collected by BRANDEIS, J., dissenting, in Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 407, 408, 52 S.Ct. 443, 76 L.Ed. 815. If the challenged doctrine is to be reconsidered, we are unwilling to approve it.

For the reasons stated by Mr. Justice BRANDEIS the decree should be affirmed.[h]

In FEDERAL POWER COMMISSION v. HOPE NATURAL GAS COMPANY, 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333 (1944), the court, through Mr. Justice Douglas, at pp. 600-2 of 320 U.S. (287-8 of 64 S.Ct.), said:

Congress has provided in § 4(a) of the Natural Gas Act that all natural gas rates subject to the jurisdiction of the Commission "shall be just and reasonable, and, any such rate or charge that is not just

[h] Footnotes of the court have been omitted.

and reasonable is hereby declared to be unlawful." Sec. 5(a) gives the Commission the power, after hearing, to determine the "just and reasonable rate" to be thereafter observed and to fix the rate by order. Sec. 5(a) also empowers the Commission to order a "decrease where existing rates are unjust * * * unlawful, or are not the lowest reasonable rates." And Congress has provided in § 19(b) that on review of these rate orders the "finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." Congress, however, has provided no formula by which the "just and reasonable" rate is to be determined. It has not filled in the details of the general prescription of § 4(a) and § 5(a). It has not expressed in a specific rule the fixed principle of "just and reasonable". * * *

Rate-making is indeed but one species of price-fixing. Munn v. Illinois, 94 U.S. 113, 134, 24 L.Ed. 77. The fixing of prices, like other applications of the police power, may reduce the value of the property which is being regulated. But the fact that the value is reduced does not mean that the regulation is invalid. Block v. Hirsh, 256 U.S. 135, 155–157, 41 S.Ct. 458, 459, 460, 65 L.Ed. 865, 16 A.L.R. 165; Nebbia v. New York, 291 U.S. 502, 523–539, 54 S.Ct. 505, 509–517, 78 L.Ed. 940, 89 A.L.R. 1469, and cases cited. It does, however, indicate that "fair value" is the end product of the process of rate-making not the starting point as the Circuit Court of Appeals held. The heart of the matter is that rates cannot be made to depend upon "fair value" when the value of the going enterprise depends on earnings under whatever rates may be anticipated.

We held in Federal Power Commission v. Natural Gas Pipeline Co., supra, that the Commission was not bound to the use of any single formula or combination of formulae in determining rates. Its rate-making function, moreover, involves the making of "pragmatic adjustments." Id., 315 U.S. at page 586, 62 S.Ct. at page 743, 86 L.Ed. 1037. And when the Commission's order is challenged in the courts, the question is whether that order "viewed in its entirety" meets the requirements of the Act. Id., 315 U.S. at page 586, 62 S.Ct. at page 743, 86 L.Ed. 1037. Under the statutory standard of "just and reasonable" it is the result reached not the method employed which is controlling. Cf. Los Angeles Gas & Electric Corp. v. Railroad Commission, 289 U.S. 287, 304, 305, 314, 53 S.Ct. 637, 643, 644, 647, 77 L.Ed. 1180; West Ohio Gas Co. v. Public Utilities Commission (No. 1), 294 U.S. 63, 70, 55 S.Ct. 316, 320, 79 L.Ed. 761; West v. Chesapeake & Potomac Tel. Co., 295 U.S. 662, 692, 693, 55 S.Ct. 894, 906, 907, 79 L.Ed. 1640 (dissenting opinion). It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end. The fact that the method employed to reach that result may contain infirmities is not then important. Moreover, the Commission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judg-

ment which carries a presumption of validity. And he who would upset the rate order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences.[1]

SECTION 2. ADMINISTRATIVE FINALITY—CONCLUSIONS OF LAW

A. Introductory

In this section, the weight given administrative interpretations of the governing statutes upon which administrative orders or regulations are based will be explored, apart from the effect of an established administrative practice or implied legislative "acquiescence". For a consideration of the effect of a settled administrative practice, with or without legislative "adoption" by implication in connection with subsequent legislation, see Chapter IV, Section 1, B, *supra* at pp. 142ff. See also Chapter V, Part I, Section 5, at pp. 312ff. *supra,* which is directed in part to an examination of the effect of interpretations by administrative agencies of their own rules and regulations.

B. In Judicial Review of Administrative Orders

GRAY v. POWELL

Supreme Court of the United States.
314 U.S. 402, 62 S.Ct. 326, 86 L.Ed. 301 (1941).

Mr. Justice REED delivered the opinion of the Court.

Respondents, receivers of the Seaboard Air Line Railway Company, seek from the Bituminous Coal Division of the Department of the Interior an exemption of certain coal from the Bituminous Coal Code on the ground that they were both the producer and consumer of the coal. If Seaboard is held to be a producer-consumer, it is entitled to an exemption by virtue of Section 4 part II(*l*) and Section 4-A. These sections together with others pertinent to the discussion are set out in a note below.[1]

[1] Footnotes of the court have been omitted.

[1] Bituminous Coal Act of 1937, 50 Stat. 72, 15 U.S.C. § 828 et seq. (1940) 15 U.S.C.A. § 828 et seq. "Sec. 3. [§ 830.] (a) There is hereby imposed upon the sale or other disposal of bituminous coal produced within the United States when sold or otherwise disposed of by the producer thereof an excise

The application for exemption was filed before the National Bituminous Coal Commission August 4, 1937. The first hearing was in September 1937 before the examiners for the Commission. After

tax of 1 cent per ton of two thousand pounds.

"The term 'disposal' as used in this section includes consumption or use (whether in the production of coke or fuel, or otherwise) by a producer, and any transfer of title by the producer other than by sale.

"(b) In addition to the tax imposed by subsection (a) of this section, there is hereby imposed upon the sale or other disposal of bituminous coal produced within the United States, when sold or otherwise disposed of by the producer thereof, which would be subject to the application of the conditions and provisions of the code provided for in section 4, [831–833], or of the provisions of section 4-A, [834], an excise tax in an amount equal to 19½ per centum of the sale price at the mine in the case of coal disposed of by sale at the mine, or in the case of coal disposed of otherwise than by sale at the mine, and coal sold otherwise than through an arms' length transaction, 19½ per centum of the fair market value of such coal at the time of such disposal or sale. In the case of any producer who is a code member as provided in section 4 [831–833], and is so certified to the Commissioner of Internal Revenue by the Commission, the sale or disposal by such producer during the continuance of his membership in the code of coal produced by him shall be exempt from the tax imposed by this subsection.

* * * * * *

"Sec. 4. [§ 831.] The provisions of this section shall be promulgated by the Commission as the 'Bituminous Coal Code', and are herein referred to as the code.

"Producers accepting membership in the code as provided in section 5 [835] (a) shall be, and are herein referred to as, code members, and the provisions of such code shall apply only to such code members, except as otherwise provided by subsection (h) of part II [section 833] of this section.

"For the purpose of carrying out the declared policy of this Act [subchapter], the code shall contain the following conditions and provisions, which are intended to regulate interstate commerce in bituminous coal [prescribed in sections 832 and 833], and which shall be applicable only to matters and transactions in or directly affecting interstate commerce in bituminous coal:

* * * * * *

Part II—Marketing.

* * * * * *

"[§ 833.] (e) No coal subject to the provisions of this section shall be sold or delivered or offered for sale at a price below the minimum or above the maximum therefor established by the Commission, and 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: Provided, That the provisions of this paragraph shall not apply to a lawful and bona fide written contract entered into prior to June 16, 1933.

* * * * * *

"(l) The provisions of this section [sections 831, 832 and this section] shall not apply to coal consumed by the producer or to coal transported by the producer to himself for consumption by him.

"Sec. 4-A. [§ 834.] Whenever the Commission upon investigation instituted upon its own motion or upon petition of any code member, district board, State or political subdivision thereof, or the consumers' counsel, after hearing finds that transactions in coal in intrastate commerce by any person or in any locality cause any undue or unreasonable advantage, preference, or prejudice as between persons and localities in such commerce on the one hand and interstate commerce in coal on the other hand, or any undue, unreasonable, or unjust discrimination against interstate commerce in coal, or in any manner directly affect interstate commerce in coal, the Commission shall by order so declare and thereafter coal sold, delivered or offered for sale in such intrastate commerce shall be subject to the

the passage of the Reorganization Act of 1939, 53 Stat. 561, 5 U.S.C.A. § 133 et seq., and the acquiescence of Congress in Reorganization Plan No. II, 53 Stat. 1433, 5 U.S.C.A. § 133t note, a division headed by a Director was established by the Secretary of the Interior known as the Bituminous Coal Division. Order No. 1394, as amended by Order No. 1399 of July 5, 1939, 4 F.R. 2947. Thereafter the hearings proceeded before the Division and the order denying the exemption was passed by the Director, June 14, 1940. Better practice might have suggested a dismissal since the Director found Seaboard was not a producer. Subsequently Seaboard sought review under Section 6(b) and obtained the decree, now under consideration, reversing the Director's order. The opinion accompanying the decree held that the facts of this case brought the Seaboard under the classification of producer. *4 Cir.*, 114 *F.2d* 752. *As the question of federal law was important* and unsettled by any decision of this Court, certiorari was granted, J.C. § 240(a), 28 U.S.C.A. § 347(a), 311 U.S. 644, 61 S.Ct. 442, 85 L.Ed. 410, and the decree below affirmed by an equally divided Court, 312 U.S. 666, 61 S.Ct. 824, 85 L.Ed. 1111. The present consideration is upon a petition for rehearing. 313 U.S. 596, 61 S.Ct. 938, 85 L.Ed. 1550.

provisions of section 4 [831, 832 and 833].

"Any producer believing that any commerce in coal is not subject to the provisions of section 4 [831, 832 and 833], * * * may file with the Commission an application, verified by oath or affirmation for exemption, setting forth the facts upon which such claim is based. * * * Within a reasonable time after the receipt of any application for exemption the Commission shall enter an order granting, or, after notice and opportunity for hearing, denying or otherwise disposing of such application. * * * Any applicant aggrieved by an order denying or otherwise disposing of an application for exemption by the Commission may obtain a review of such order in the manner provided in subsection (b) of section 6 [836].

* * * * * *

"Sec. 6. [§ 836.] * * * (b) Any person aggrieved by an order issued by the Commission in a proceeding to which such person is a party may obtain a review of such order in the Circuit Court of Appeals of the United States, within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, and enforce or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged below. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive.

* * * * * *

"Sec. 17. [§ 847.] As used in this Act [subchapter]—

* * * * * *

"(c) The term 'producer' includes all individuals, firms, associations, corporations, trustees, and receivers engaged in the business of mining coal."

The Bituminous Coal Act of 1937, 50 Stat. 72, has been extended to April 26, 1943. Act of April 11, 1941, Pub. Law 34, 77th Cong., 1st Sess., 15 U.S.C.A. § 849.

Seaboard, a coal-burning railroad, is a large consumer of bituminous coal. The arrangements here in question are with three mines but as there are no significant differences in the plans by which the coal is extracted, we shall describe the contracts relating to one only, the William-Ann Mine, owned by the United Thacker Coal Company and the Cole and Crane Real Estate Trust.

This was the earliest arrangement. It originated in May, 1934, when the coal code of the National Industrial Recovery Act, 48 Stat. 195, was in effect. The first step was a lease of coal lands by the Seaboard from the landowners which granted to Seaboard the right to mine coal for fourteen months with the privilege of yearly renewals which originally were not to run beyond June 30, 1939. Successive extensions have continued its effect since that time. During the spring of 1936 two extensions of six weeks each were agreed upon, specifically in view of the case of Carter v. Carter Coal Co., 298 U.S. 238, 56 S.Ct. 855, 80 L.Ed. 1160, decided May 18, 1936. The Carter case involved the Bituminous Coal Act of 1935, 15 U.S.C.A. § 801 et seq., the predecessor of the present act. A per ton royalty, as rent, was reserved to the landowners with an annual minimum of $16,200 payable quarterly. The lease was terminable on fifteen days notice, if the landowners terminated the contractors' lease, about to be referred to, for the contractor's default.

The second step in this arrangement was for the landowner lessors of the lease just described to lease simultaneously to a contractor selected by Seaboard the mining equipment on the demised premises consisting of buildings, tipples, machinery and other appurtenances necessary or convenient for extracting the coal. This equipment was sufficient for reasonably economical mining. It was further provided in the coal lease that the term and the renewal privileges of the equipment lease should be coextensive with those of the coal lease.

The final step was an operating contract between the contractor, Daniel H. Pritchard, referred to in the land lease as the lessee of the facilities for mining, and Seaboard for the extraction of the coal by the contractor or supplier and the delivery of it to Seaboard for consumption. This contract also was made simultaneously with the coal lease. It contained a provision requiring the contractor to obtain a lease of the mining equipment in accordance with that segment of the entire plan referred to in the preceding paragraph. For a flat per ton cost on a sliding scale dependent upon volume, the supplier agreed to mine the coal. His compensation was subject to variation by fluctuations in costs beyond his control such as taxes, wages, machinery and explosives. Alternatively, payment could be made on a cost basis plus ten cents per ton for the contractor's compensation. This operating contract ran for the same term and had the same renewal privileges as the coal lease contract heretofore described and has been continued in effect by extensions made for the same terms as the extensions of the coal lease. The supplier was called an independent con-

tractor in the document. This he was, at least in the sense that he managed the mining in his own way without a right of direction in Seaboard. He agreed that the coal supplied would be clean, i. e., free of non-combustible matter, and would pass inspection of Seaboard for compliance with its specifications. The supplier paid and assumed all obligations to the landowner except the royalty, including taxes. He carried employer's liability and casualty insurance, and agreed to bear the cost of all repairs, additions or betterments even under the alternate cost plus plan, as well as those described as commissary or welfare expenses. Seaboard, in an extension agreement, obtained the privilege of termination on sixty days' notice, if the supplier defaulted by not lowering his contract price to meet the market price of similar coal.

The landowner, the contractor and Seaboard by this series of coordinated and synchronized contracts caused the entire output of the mine to be delivered to Seaboard for its consumption at a fixed price, subject to variations for factors beyond the supplier contractor's control. The alternative cost-plus plan was not employed. Under the contractor's agreement, the contractor assumed all risks of operation, as heretofore explained, and all obligations of Seaboard to the landowner except the royalty payments. This made a fixed cost to Seaboard for coal of supplier's contract price plus the royalty per ton as rent. It was a short term, one year, contract with the price controlled by the market in view of the competitive price provision. Seaboard furnished no facilities or equipment for mining or loading.

The other two arrangements, one with the Glamorgan Coal Lands Corporation, landowner, and Glamorgan Coals, Inc., the operator, for which latter corporation Peerless Coal Corporation is substituted by consent, and the other with Chilton Block Coal Company and the Dingess-Rum Coal Company, landowners by lease and in fee, and Daniel H. Pritchard, operator, vary only in details from the William-Ann contracts set out above.

From the several arrangements the Seaboard obtained about half of its annual requirements estimated for 1936 at one million tons. There is no question as to the interstate character of the commerce involved. The coal is mined in Virginia and West Virginia and consumed in a number of other South Atlantic states.

The Bituminous Coal Act of 1937 followed the invalidation of the Bituminous Coal Conservation Act of 1935 by Carter v. Carter Coal Co., 298 U.S. 238, 56 S.Ct. 855, 80 L.Ed. 1160, and the abandonment of the N. R. A. Code of Fair Competition after the decision in Schechter Corp. v. United States, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570, 97 A.L.R. 947. These legislative enactments sought a solution of the economic difficulties of the soft coal industry, which were bringing bankruptcy to operators and an even worse condition, unemployment, to the miners. Each time legislation was attempted, the conclusion was reached that price stabilization offered the best remedy. The

industry found the same answer. Appalachian Coals, Inc., v. United States, 288 U.S. 344, 53 S.Ct. 471, 77 L.Ed. 825. This Court has determined that the present 1937 act is within the constitutional powers of Congress. Sunshine Coal Co. v. Adkins, 310 U.S. 381, 60 S.Ct. 907, 84 L.Ed. 1263.

This purpose of stabilization of conditions through a fixed price scheme met a difficult problem in the captive coal mines. The 1935 act taxed the value of such coal at the mine. It defined captive coal as including "all coal produced at a mine for consumption by the producer or by a subsidiary or affiliate thereof." 49 Stat. 1008. As the coal consumed by a producer apparently was deemed by Congress when considering the present act not to offer the same disturbing effect to prices as non-code, open market coal, a method of exemption was provided. Sections 4, part II(*l*) and 4-A, note 1, supra. Congress, however, did not define exempt coal as it had captive coal in the 1935 act. While a definition was inserted in the Senate it was eliminated in the conference report. As a result the determination of exempt coal was left to the administrative body. Section 4-A, note 1, supra.

Determination of Producer. We are thus brought squarely to decide whether the Director's finding that Seaboard is not the producer of this coal is to be sustained. By Section 4-A, note 1, supra, the determination of this issue rests with the Director, subject to the review, as obtained herein, by a Circuit Court of Appeals, provided by Section 6(b). Section 4-A states: "Any producer believing that any commerce in coal is not subject to the provisions of section 4 [831, 832, and 833] * * * may file with the Commission an application, verified by oath or affirmation for exemption, setting forth the facts upon which such claim is based. * * * Within a reasonable time after the receipt of any application for exemption the Commission shall enter an order granting, or, after notice and opportunity for hearing, denying or otherwise disposing of such application." In a matter left specifically by Congress to the determination of an administrative body, as the question of exemption was here by Sections 4, part II(*l*) and 4-A, the function of review placed upon the courts by Section 6(b) is fully performed when they determine that there has been a fair hearing, with notice and an opportunity to present the circumstances and arguments to the decisive body, and an application of the statute in a just and reasoned manner. Shields v. Utah Idaho R. Co., 305 U.S. 177, 180, 181, 184, 185, 187, 59 S.Ct. 160, 162, 164, 165, 83 L.Ed. 111.

Such a determination as is here involved belongs to the usual administrative routine. Congress, which could have legislated specifically as to the individual exemptions from the code, found it more efficient to delegate that function to those whose experience in a particular field gave promise of a better informed, more equitable adjustment of the conflicting interests of price stabilization upon the one

hand and producer consumption upon the other. By thus committing the execution of its policies to the specialized personnel of the Bituminous Coal Division, the Congress followed a familiar practice. Of course, there is no difference between the skill of employees in a division of a department and those in a board, commission or administration.

Where as here a determination has been left to an administrative body, this delegation will be respected and the administrative conclusion left untouched. Certainly a finding on Congressional reference that an admittedly constitutional act is applicable to a particular situation does not require such further scrutiny. Although we have here no dispute as to the evidentiary facts, that does not permit a court to substitute its judgment for that of the Director. United States v. Louisville & Nashville R. R., 235 U.S. 314, 320, 35 S.Ct. 113, 114, 59 L.Ed. 245; Swayne & Hoyt, Ltd., v. United States, 300 U.S. 297, 304, 57 S.Ct. 478, 481, 81 L.Ed. 659; Helvering v. Clifford, 309 U.S. 331, 336, 60 S.Ct. 554, 557, 84 L.Ed. 788. It is not the province of a court to absorb the administrative functions to such an extent that the executive or legislative agencies become mere fact finding bodies deprived of the advantages of prompt and definite action.

Congress could not "define the whole gamut of remedies to effecuate these policies in an infinite variety of specific situations." Phelps Dodge Corp. v. National Labor Relations Board, 313 U.S. 177, 194, 61 S.Ct. 845, 852, 85 L.Ed. 1271, 133 A.L.R. 1217. Just as in the Adkins case the determination of the sweep of the term "bituminous coal" was for this same administrative agency, so here there must be left to it, subject to the basic prerequisites of lawful adjudication, the determination of "producer." The separation of production and consumption is complete when a buyer obtains supplies from a seller totally free from buyer connection. Their identity is undoubted when the consumer extracts coal from its own land with its own employees. Between the two extremes are the innumerable variations that bring the arrangements closer to one pole or the other of the range between exemption and inclusion. To determine upon which side of the median line the particular instance falls calls for the expert, experienced judgment of those familiar with the industry. Unless we can say that a set of circumstances deemed by the Commission to bring them within the concept "producer" is so unrelated to the tasks entrusted by Congress to the Commission as in effect to deny a sensible exercise of judgment, it is the Court's duty to leave the Commission's judgment undisturbed.

Consumers of bituminous coal are naturally desirous of obtaining supplies free of the tax and free of the risk and investment typical of production. If independent contractors are employed for extraction, there is an obvious breach in the full consumer-producer identity. This may create consequences which would not follow if the enterprise itself, through its own employees, accomplished the same ultimate re-

sult. Often in the law, the selection of a particular business form as, for instance, carrying on a common business through two corporations, may create legal liability, Edwards v. Chile Copper Company, 270 U.S. 452, 456, 46 S.Ct. 345, 346, 70 L.Ed. 678, although such relation to other connections may result in diversity of legal treatment. Compare, for instance, United States v. Delaware & Hudson Co., 213 U.S. 366, 29 S.Ct. 527, 53 L.Ed. 836, and United States v. Delaware, Lack. & West. R. R., 238 U.S. 516, 35 S.Ct. 873, 59 L.Ed. 1438.

The shortness of the leases, the freedom from investment in coal lands or mining facilities, the improbability of profit or loss from the mining operations, the right to cancel when cheaper coal may be obtained in the open market, all deny the position of producer to the railroad.

We view it as immaterial that the Company might have itself operated a captive mine and so escaped the price provisions of the act by virtue of the exception of Section 4, part II(*l*), note 1, supra. It chose to employ the scheme in question here. It considered it advantageous to avoid the risks of production and now must bear the burdens of a determination that other entities than itself are the producers. Cf. Superior Coal Co. v. Department of Finance, 377 Ill. 282, 36 N.E.2d 354, 358, 360. The choice of disregarding a deliberately chosen arrangement for conducting business affairs does not lie with the creator of the plan. Higgins v. Smith, 308 U.S. 473, 477, 60 S.Ct. 355, 357, 84 L.Ed. 406.

Code Coverage. Seaboard contends that the coal here involved is not affected by the code Section 4, part II because there is no sale or other transfer of the title to the coal by the producer. As to this point, in Seaboard's view, since it as lessee of the mineral rights is the owner of the coal when it is extracted and until it is consumed and therefore no title ever passes, it is immaterial whether or not it or its suppliers of the coal are determined to be the producer. Support for the conclusion that there must be a transfer of title to bring the coal under the Code, Section 4, part II, is found by Seaboard in the preoccupation of Congress in sales, which attitude it feels is shown by the continuous reference in the provisions of the Act to sales or other transfers of title. Further support is drawn for the position by reference to Section 3(a), where "disposal" is declared to include consumption by a producer or any transfer of title other than by sale. Reliance is placed also on Section 3(b), which by a tax of 19½ per cent of the selling price impels adherence to the code when coal "which would be subject to the application of the conditions and provisions of the code provided for in section 4 [831–833], or of the provisions of section 4-A [834]" is sold or otherwise disposed of by the producer.

Had we held that Seaboard was the producer, the pertinency of this argument would disappear because Seaboard would be both producer and consumer and therefore this coal would be entitled to exemption under Sections 4, part II(*l*) and 4-A. As we determine otherwise,

however, it is essential to examine the soundness of the position asserted by Seaboard, to wit, that coal produced by the instrumentalities is not subject to the provisions of Section 4, part II for the reason that it is not sold nor otherwise disposed of by the producers. We conclude that coal extracted under the circumstances of this case is within the scope of the code provisions of Section 4, part II.

Examination of the code discloses that minimum prices for code coal are fixed by joint action of the district boards and the Director. Section 4, parts I(a), II(a). Thereafter no code coal may be sold at prices less than the fixed minimum except at the risk of severe penalties. Code coal is that produced by code members, i. e., coal producers who accept membership in the code. Section 5(a). All producers of bituminous coal within the statutory districts are eligible for membership, and therefore all coal produced by any of these producers is potentially code coal. The code regulates the coal and not the producer. In order to force the eligible coal within the code, an excise tax of 19½% of the sale price is placed upon all bituminous coal "sold or otherwise disposed of by the producer thereof, which would be subject to the application of the conditions and provisions of the code" with a blanket exemption from this tax of sales or other disposal by code members.

The core of the Act is the requirement that coal be put under the code or pay the 19½ per cent excise. We said in Sunshine Coal Co. v. Adkins, 310 U.S. 381, 392, 60 S.Ct. 907, 912, 84 L.Ed. 1263, that the sanction tax applied to non-code members. Since they were not members, it was there contended that their coal would not be subject to the code, but it was explained in the Adkins case that the code was intended to apply to sales "in or directly affecting interstate commerce in bituminous coal," Section 4, 3rd paragraph, and that non-code coal "would be" subject to the code when it was interstate coal or coal affecting interstate commerce and therefore subject to the regulatory power of Congress. So here, 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. We find no necessity to so interpret the act. This conclusion seems to us in accord with the plain language of Section 3(a) and (b) providing for a tax on "other disposal" as well as sale. The definition of disposal as including "consumption or use * * * by a producer, and any transfer of title by the producer other than by sale" cannot be said to put a meaning on disposal limited to the inclusion. Cf. Federal Land Bank of St. Paul v. Bismarck Lumber Co., 314 U.S. 95, 62 S.Ct. 1, 86 L.Ed. 65, decided November 10, 1941, and cases cited page 3 of slip opinion [62 S.Ct. 3, 4]. It is true that Section 4, part II(e) speaks of a violation of the price provisions by "sale or delivery or offer for sale of coal at a price below" the minimum without reference to "other disposition," the

phrase generally used, but the failure to include those words at that point does not, we think, justify an interpretation that coal covered by the code may be disposed of otherwise than by a transfer of title without penalty. We think the language of Section 5(b) relating to findings on orders punishing for violation of the code shows this to be true. It reads so far as pertinent as follows: "* * * the Commission shall specifically find * * * the quantity of coal sold or otherwise disposed of in violation of the code * * *; the sales price at the mine or the market value at the mine if disposed of otherwise than by sale at the mine, or if sold otherwise than through an arms' length transaction, of the coal sold or otherwise disposed of by such code member in violation of the code or regulations thereunder." 50 Stat. 84.

This conclusion is fortified by an examination of the tax section of the 1935 act from which the present Section 3 is obviously derived. In the first or 1935 act captive coal was taxed along with other coal. The tax was laid upon the "sale or other disposal of all bituminous coal produced within the United States." It was "15 per centum on the sale price at the mine, or in the case of captive coal the fair market value of such coal at the mine." 49 Stat. 993, § 3. Evidently the draftsman thought of the sale of free coal and of the "other disposal" of captive coal. See further, on the question of the meaning of a sale, In re Bush Terminal Co., 2 Cir., 93 F.2d 661, 663.

Finally respondent contends that if the act is construed to apply to the contractual arrangements just considered it is beyond the power of Congress under the Commerce and Due Process Clauses of the Constitution. This is said to be so because there is no power in Congress to regulate the price paid for the service of mining coal or the consideration for mining rights and to do so would violate the Fifth Amendment. We are in this review by certiorari determining only the question of whether the Seaboard is a producer under the act. Congressional power over that problem is beyond dispute. Currin v. Wallace, 306 U.S. 1, 59 S.Ct. 379, 83 L.Ed. 441; United States v. Darby, 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609, 132 A.L.R. 1430; Sunshine Coal Co. v. Adkins, 310 U.S. 381, 60 S.Ct. 907, 84 L.Ed. 1263.

Reversed.

Mr. Justice JACKSON took no part in the consideration or decision of the case.

Mr. Justice ROBERTS (dissenting).

I think the judgment should be affirmed. There are limits to which administrative officers and courts may appropriately go in reconstructing a statute so as to accomplish aims which the legislature might have had but which the statute itself, and its legislative history, do not disclose. The present decision, it seems to me, passes that limitation.

The case involves an Act of Congress which, in implementing its declared purpose and intent, carefully delimits by inclusive and ex-

clusive definition those who shall and those who shall not be subject to its regulatory provisions. Upon a record in which there is not a single disputed fact, the bare question is presented whether the words the Congress used bring the respondents within the Bituminous Coal Code or exclude them from its operation. In answering that question the Director made no controverted finding of fact, exercised no judgment as to what the relevant circumstances were, but merely decided that the meaning of the statute was that the respondents' transactions required that they become members of the Code or suffer the penalty of the 19½% tax for failing to join the Code. If the Director was in error his error was a misconstruction of the Act which created his office and that error, under all relevant authorities, is subject to court review. It is specifically made so subject to review by the statute in question. * * *

Section 3(a) imposes a tax of 1% per ton on all coal "sold or otherwise disposed of by the producer" and defines disposal, for the purposes of this section alone, as including "consumption or use" by a producer and any transfer of title by a producer other than by sale. The acknowledged purpose of this subsection is the levy on all coal taken out of the ground, and used by whomsoever, of a small tax to pay the expense of the administration of the Act. The respondents admit their liability for this exaction. They have paid this tax and no question arises in respect of it.

Section 3(b), as a means of securing compliance with the regulatory provisions of § 4, imposes a penal tax of 19½% of the sale price of the coal, or of its fair market value when disposed of otherwise than by a sale, on all the coal sold or otherwise disposed of by a producer to whom the regulatory provisions as to price and unfair methods of competition included in § 4 are applicable. Only those who are producers of coal and would be subject to the provisions of the Code are liable to the penalty tax as an alternative to joining the Code and thus coming within the regulatory provisions applicable to such Code members. Such regulatory provisions are concerned only with those who sell or market coal.

Subdivision (*l*) of Part II of § 4 declares: "The provisions of this section [831, 832 and this section] shall not apply to coal consumed by the producer or to coal transported by the producer to himself for consumption by him." The respondents insist that this subsection plainly exempts them from becoming members of the Code and that, in pursuance of the subsection, the Director should have granted their application for exemption. * * *

The term "producer" is not a technical term or a term of art, but the statute has not left the Director or the courts without guides respecting the meaning of the word as used in the statute. It is the Director's duty to observe those guides in applying the statute and, if he fails so to do, it is the obligation of the courts to observe them in performing their statutory duty to review his determination. The

context, the purposes of the Act, and the means adopted to carry them into effect, make clear the meaning of the word "producer" as used in the statute. This court obviously fails in performing its duty and abdicates its function as a court of review if it accepts, as the opinion seems to do, the Director's definition of "producer" and then proceeds to accommodate the meaning of related provisions to the predetermined definition. So to do is a complete reversal of the normal and usual method of construing a statute.

The legislative history demonstrates, and the opinion of the court concedes, that the purpose of § 4 (Pt. II (*l*)) was to exclude from the provisions of the Act regulating prices and other matters of competition in interstate marketing, coal produced from "captive mines"; that is, coal produced by the owner of a mine and consumed by him without placing it on the market. It is, as it must be, also conceded that subdivision (*l*) excludes from the operation of the Act one who mines coal by his own employes, upon land owned or leased by him, and consumes it in his business or industry. The only possible differentiation between the respondents' method of conducting the business and that of the usual captive mine lies in the fact that the respondents' coal is mined by an independent contractor instead of by employes. That circumstance, however, will not justify the statement that respondents do not produce the coal any more than it would justify the statement that they would not transport coal to themselves, within the meaning of the Act, if they shipped it by a common carrier who was an independent contractor. The circumstance that the coal is mined by a contractor instead of an employe, or transported by a common carrier, cannot have any more, or any different, effect upon the subjects of regulation,—prices and unfair methods of competition—in the one case than in the other. In both cases the owner would consume coal which would otherwise come on the market. In neither case would the coal be brought into competition with marketed coal. In each case the owner would remain free to buy coal on the market whenever the market price fell below the cost of production at his own mine.

Subdivision (*l*) cannot appropriately be construed to deny respondents the right to be excluded from the operation of the Act upon their application as provided in § 4-A when there are plainly no affirmative provisions of the Act subjecting them to its regulation. It will hardly be denied that, by respondents' total operation, coal is produced. If they are not the producers, because they pay a contract price instead of wages for its production, they are not subject to the 19½% tax which applies only to producers; and they are thus exempt from the only sanction which would compel them to become Code members subject to the regulatory provisions of the Act. Since they market no coal, the provisions of § 4 relating to prices and methods of competition in the marketing of coal are not applicable to them. On the other hand, if the independent contractor whom respondents employ

to mine the coal is deemed the producer of the coal, he likewise is exempt from the regulatory provisions and also exempt from the 19½% penal tax. For, even if he be called a producer, he neither markets nor sells the coal and he cannot be said to dispose of coal which he does not own. Disposal must mean something more than physical production, delivery, or transportation of the coal of another. If it were otherwise, the superintendent of a captive mine would be subject to the tax because he is engaged in mining coal and delivering it to the owner who consumes it. It is well known that in many coal fields coal is gotten out by employing a miner who in turn employs his own gang to assist him in the mine. If the Director's position is correct, this method of operation would subject the owner and operator of a captive mine to regulation under the Act. That view would be plainly untenable.

The vice in the construction which the court now adopts, apparently only because the Director has adopted it, lies in the fact that this construction is of practical significance only as it is preliminary to regulation of features of the coal industry other than prices and methods of competition in the marketing of coal. Congress has not seen fit to prescribe such regulation. It is clear that the attempted subjection of respondents to the control of the Commission is without congressional authority.

The CHIEF JUSTICE and Mr. Justice BYRNES join in this opinion.[a]

MORGAN, STANLEY & CO. v. SECURITIES AND EXCHANGE COMMISSION

Circuit Court of Appeals of the United States, Second Circuit.
126 F.2d 325 (1942).

CLARK, Circuit Judge. This is a petition for review of an order of the Securities and Exchange Commission declaring petitioner, Morgan Stanley & Co., Inc., to be an affiliate of the Dayton Power & Light Co. for the purpose of denying underwriting fees to petitioner in connection with a refunding operation of Dayton. This order was issued pursuant to Rule U-12F-2 of the Commission under the Public Utility Holding Company Act, 15 U.S.C.A. § 79a et seq. Petitioner urges that the record lacks substantial evidence to support the order, and that the Rule is invalid under the Act. We do not agree with either contention of petitioner.

Before we take up the facts, some reference to the purposes of the Act and the Rule are necessary in order to place the problem in its proper perspective. The general background of the Act is well known.

[a] Footnotes of the court, except footnote No. 1 of majority opinion, have been omitted.

Both the unprecedented and generally unregulated growth of utilities, particularly electric, and the vicissitudes of the depression pointed the way for nationwide action. Because of the importance of holding companies as a means of obtaining credit, considerable attention was given to the financial practices of these companies. Here was found, among other evils, a close tieup between investment banking houses and large holding companies. As the National Power Policy Committee observed in its report to the President, transmitted by him to Congress: "Fundamentally, the holding-company problem always has been, and still is, as much a problem of regulating investment bankers as a problem of regulating the power industry." H. R. Doc. No. 137, 74th Cong., 1st Sess., 6.

This evil was one of the many aimed at by the bill. Section 1(b), 15 U.S.C.A. § 79a(b), observes that "the national public interest" is or "may be adversely affected—* * * (2) when subsidiary public-utility companies are subjected to excessive charges for services * * * or enter into transactions in which evils result from an absence of arm's-length bargaining or from restraint of free and independent competition; * * * (5) when in any other respect there is * * * lack of economies in the raising of capital." Many provisions of the Act, from the stringent requirements of registration with the Commission and approval of security transactions by the Commission to the disqualification of officials of banking institutions from serving as officers or directors of holding companies or their subsidiaries, implement the avowed purpose of protecting the public and investors from undue banker influence. In addition, the Commission is given broad rule-making powers for furthering the statutory provisions.

It is one of the Commission's rules which is in issue here. Rule U-12F-2 requires, in effect, that no underwriter's fee can be paid on security issues if the underwriter is in the holding-company system, is an affiliate,[2] or is a person "who the Commission finds stands in such relation to the [issuer], that there is liable to be or to have been an absence of arm's-length bargaining with respect to the transaction." The Rule is not applicable, however, if there is an effort to obtain competitive bids, or if competitive bidding is not practicable and

[2] An "affiliate" of a specified company is (a) a person holding 5% of outstanding voting securities; (b) a company, 5% of whose voting securities are held by the specified company; (c) an official or director of the specified company, or of a company under (a); and (d) any person found by the Commission "to stand in such relation to such specified company that there is liable to be such an absence of arm's-length bargaining in transactions between them" as to require his being called an "affiliate" for the purposes of the Act. This is to be considered in conjunction with the definitions of a "subsidiary company," which is (a) any company 10% of whose voting securities are held by a holding company; and (b) any person whose management or policies are subject to a controlling influence as found by the Commission. "Person," of course, is an individual or company. §§ 2(a) (1), (8), (11), 15 U.S.C.A. § 79b(a) (1), (8), (11).

the fees are otherwise reasonable. The purpose of the Rule is obvious. As we noted above, one of the objects of the Act is to reduce the cost of financing by encouraging competition. Such requirements as the Act itself imposes were found of little avail because, for example, even after the elimination of interlocking directorates many banking relations continued unchanged. And since there has always been an unwritten rule that investment bankers do not disturb existing issuer-banker relationships, it was evident that some further step was necessary. See Comment, Competitive Bidding in the Sale of Public Utility Bonds, 50 Yale L.J. 1071–1075; and the TNEC hearings there cited. Rule U-12F-2 was designed to find these subtle relationships and prevent their continuance.

The Rule became effective on March 1, 1939, and several cases soon arose in which it was applied without contest. The present case arose in January, 1940, when the Dayton Power & Light Co. filed its request to issue $25,000,000 in bonds. Representatives of the Commission indicated that they would question petitioner's status as principal underwriter under the Rule. To avoid delay in financing the issue, stipulation was entered into whereby petitioner's underwriting fees were impounded pending a determination of its status. After hearing, the Commission found "that the special relationship between Morgan Stanley and Dayton was such that there was liable to have been such an absence of arm's-length bargaining in the Dayton bond financing of 1940, that it is both necessary and appropriate in the public interest and for the protection of investors and consumers that Morgan Stanley be subject to the obligations, duties and liabilities of an affiliate of Dayton for the purposes of Rule U-12F-2." Matter of Dayton Power & Light Co., Holding Company Act Release No. 2654, Mar. 28, 1941. Subsequently the Commission ordered petitioner's underwriting fees, $100,562.50, paid over to Dayton. Holding Company Act Release No. 2693, Apr. 15, 1941. It is this finding and order which are contested.

The Commission's opinion—Matter of Dayton Power & Light Co., supra—is long and comprehensive, and we see no need for covering the same ground so thoroughly. Briefly, four steps are taken to adduce the likelihood of absence of arm's-length bargaining. They concern asserted connections from Dayton Power & Light to Columbia Gas & Electric Corporation, the parent of Dayton, from Columbia to United Corporation, a holding company having a substantial stock interest in Columbia, and from United to Morgan Stanley through the connection of both these latter corporations with the banking house of J. P. Morgan & Co. We consider each of these four relationships separately. First is the relationship between Dayton Power & Light and Columbia Gas & Electric, a conceded relationship because the former is wholly owned by the latter, with interlocking officers and directors. Second is the relationship between Columbia Gas & Electric and United, which owns 19.6% of Columbia's voting

stock. Although petitioner argues that the mere fact of Columbia's status as a "subsidiary company" within the definition of § 2(a) (8), 15 U.S.C.A. § 79b(a) (8)—as owning 10% of the stock—is not controlling, we think there is little need to discuss this point. Columbia has never carried through any attempt to have the Commission find that it is within the exceptions of § 2(a) (8); and in the absence of such action by Columbia, the Commission is warranted in relying on the statutory definition of a subsidiary company. Furthermore, the 20% holding of United is the largest block of voting securities; and there is supporting evidence in the record showing various connections between United and Columbia. We are not unaware that much less than a majority of stock is frequently sufficient for purposes of control, and we see no reason to contest the legislative view that 10% may be sufficient.

The third step is the relationship between United and J. P. Morgan & Co. This is the most difficult to establish, and we shall discuss it more fully below. The final step is the relationship between J. P. Morgan & Co. and Morgan Stanley. The latter was organized in 1935, when several partners and employees of J. P. Morgan & Co. and Drexel & Co., the Philadelphia office of J. P. Morgan & Co., left to form an investment banking house. Prior to 1933, J. P. Morgan & Co. had been both commercial bankers and investment bankers, but after the Banking Act of 1933, 48 Stat. 162, 188, and of 1935, 49 Stat. 684, 707, 12 U.S.C.A. § 377, it was necessary for one activity to be dropped. Investment banking was discontinued, and creation of Morgan Stanley soon followed. Most of the old business of the Morgan house went over to the new company, as anyone would have expected. Whether these facts alone would be sufficient to warrant a conclusion that whatever investment business J. P. Morgan & Co. might be able to influence would be thrown Morgan Stanley's way we need not decide, for the Commission adduced still further facts. It was shown that at the time of organization most of the capital was supplied by other Morgan partners than those who formed the new company. Though not so large as formerly, Morgan partners still hold about 30% of the capital and surplus in the form of approximately 44% of the non-voting preferred stock, 4% cumulative, 6% if earned. From this fact the Commission inferred that J. P. Morgan & Co., through its interested partners, stood to gain financially by getting business for Morgan Stanley. Petitioner claims that even all this is insufficient to support the Commission's conclusion. We admit that there are many facts in this case which require far-reaching inferences to support the conclusions announced. This is hardly one. Tangible proof of a goodly financial stake in successful business relationships should be enough to satisfy the most confirmed doubter that there is likely to be mutual effort expended in obtaining business.

We come, therefore, to what is undoubtedly the most tenuous step in establishing the likelihood of an absence of arm's-length bargain-

ing—the relationship between J. P. Morgan & Co. and United. Here again, we see no need to detail the story so fully as the Commission has done. See Matter of Dayton Power & Light Co., supra, pp. 8–13. We think the following facts substantially state the high lights of the Commission's case. First, United was organized by J. P. Morgan & Co. and Bonbright & Co. in 1929. The two houses held large holdings in several holding companies, and these were exchanged for stock in United, which was soon disposed of. From the beginning Morgan and Bonbright named the directors, who in turn chose the president of United, Howard, who is still president. At least one Morgan partner remained on the board until March 28, 1938, the day the Supreme Court upheld the constitutionality of the Act in Electric Bond & Share Co. v. S. E. C., 303 U.S. 419, 58 S.Ct. 678, 82 L.Ed. 936, 115 A.L.R. 105. The resignation was prompted, of course, by the requirement that United register, and this could hardly be done with a banker on the board of directors. After this director's resignation in 1938, United's president conferred with him on three occasions about what apparently were the more important financial transactions engaged in by United. Petitioner says these were not "conferences," but merely instances of conversations after the fact. This is neither here nor there. In and of themselves the conferences indicate continuing interest. And the fact that the Morgan partner made no "suggestions" may indicate anything from lack of interest to satisfaction that the right thing was done.

But this original dominant influence over United, decreasing through the years, is only one element of the story. After United was organized, some of the preexisting banking connections of companies put into the United structure were broken and the business sent to J. P. Morgan & Co. This was not, however, true of Columbia, which did not come into United's orbit until a short time after the formation of United. But Columbia's banker was the Guaranty Co., which was on extremely good terms with the Morgan house. In view of the unwritten rule that satisfactory banking arrangements are not disturbed, it seems reasonable for the Commission to have concluded that J. P. Morgan & Co. would not give the friendly Guaranty Co. the short shrift it gave others. Termination of Columbia's relation with Guaranty—resulting in its shift to Morgan Stanley—did, of course, become necessary with Guaranty's withdrawal from the investment business when the Banking Act outlawed commercial and investment banking combinations. Furthermore, after the formation of Morgan Stanley, all of the debt security flotations of the units of United, including Columbia Gas & Electric, were, with three minor exceptions, managed by Morgan Stanley. And no security flotation for gas and electric utilities outside the United orbit has been handled by them. This evidence is bulwarked by other evidence tending to show acceptance by the "Street" of the powerful position of Morgan Stanley in this as well as in other former Morgan lines.

Finally, there is the financing operation of Dayton here involved. It appears that of the $25,000,000 floated, only about $5,700,000 was new money. The rest involved refunding of bonds issued in 1935, maturing in 1960. Columbia officials, when they first approached Morgan Stanley, had in mind a flotation of only $5,700,000. The latter convinced them, however, that the additional refunding was desirable. True, there is an extension of maturity—until 1970—and a net saving to Dayton of $48,000 a year for twenty years, or nearly a million dollars. But the present value of this is, of course, less, and set against it is absence of a pressing need for refunding and the loss of investor good will through calling twenty-five-year bonds within five years of issuance. Furthermore, there were the underwriters' fees of about $400,000. Petitioner argues that the public, not Dayton, pays this, which in a sense is true. If, however, the issue could have been placed privately—as would have been likely for an issue covering only the required new money—there would have been no fees; and if there had been competitive bidding, the underwriting spread might have been less. All in all, we think the Commission could reasonably question whether this transaction would have taken place without some sort of prodding.

These, then, are the salient facts, elaborated in the record by various witnesses and from various points of view, by which the Commission sought to adduce a likelihood of an absence of arm's-length bargaining between Morgan Stanley and Dayton. The question for us is only whether or not the evidence is substantial. § 24(a), 15 U.S.C.A. § 79x(a). Petitioner seeks to detract from the evidence by implying that it in no wise supports the view that Morgan Stanley holds a club over Columbia and its subsidiaries, sufficient to force them, actually and legally, perhaps, to do Morgan Stanley's bidding. Obviously this is not the Commission's case; we do not understand the Commission to assert it or that the Rule requires it. The very wording of the Rule contemplates subtle relationships. There need not be an absence of arm's-length bargaining, only a likelihood that there is. "Arm's-length" can hardly be meant in the traditional sense of fiduciary relationships, for the very provisions of the Act require complete dissociation of banker and utility. The type of influence envisaged is not over-all control, but influence in choosing underwriters. In sum, the Rule aims at breaking up underwriting ties which owe their existence to factors other than competitive advantage, in the broadest sense of the word. In this light we think the Commission acted within its power of finding the facts by all reasonable inferences. N. L. R. B. v. Link-Belt Co., 311 U.S. 584, 61 S.Ct. 358, 85 L.Ed. 368; F. W. Woolworth Co. v. N. L. R. B., 2 Cir., 121 F.2d 658; and see Detroit Edison Co. v. S. E. C., 6 Cir., 119 F.2d 730.

Furthermore, the Supreme Court has recently observed that some leeway must be given to administrative bodies over and above simple fact finding. "It is not the province of a court to absorb the admin-

istrative functions to such an extent that the executive or legislative agencies become mere fact finding bodies deprived of the advantages of prompt and definite action." Gray v. Powell, 314 U.S. 402, 62 S.Ct. 326, 333, 86 L.Ed. 301. We do not read this to destroy full review of questions of law, but we do understand it to lessen somewhat the force of petitioner's argument based on Helvering v. Tex-Penn Oil Co., 300 U.S. 481, 491, 57 S.Ct. 569, 81 L.Ed. 755, as giving a court full power to review mixed questions of law and fact. Unless we find no warrant in the Act for the Rule, we are content to give the Commission some leeway in ascertaining what it conceives a likelihood of absence of arm's-length bargaining.

We turn, then, to petitioner's attack on the validity of the Rule. Petitioner first argues that the Rule cannot rest alone on § 12(f), because that section deals only with "affiliates," and the Rule covers persons not previously found to be affiliates under § 2(a) (11) (D). The Commission's reply is that the Rule combines §§ 2(a) (11) (D) and 12(f) in that a determination of "affiliate" under the Rule is both a determination of the need for "maintenance of competitive conditions" in security issuing, as covered by § 12(f), and a determination that a given issuer is an "affiliate" under § 2(a) (11) (D), and thus comes under § 12(f). In other words, the Commission presumably sought to avoid the absurd situation of holding hundreds of hearings involving many utilities and banking houses in order to find in advance all possible likelihood of absence of arm's-length bargaining. Surely petitioner would have objected to such waste motion. Instead, the Commission created an ad hoc method of determination, which seems to us an accommodation to underwriters such as petitioner. The argument is made, however, that the Rule does not contemplate a § 2(a) (11) (D) determination. But the Commission notes that it ought to be competent to construe its own rules, within the limits of statutory power. We agree, and shall, therefore, assume that the Rule is in effect a § 2(a) (11) (D) determination.

On this assumption, petitioner offers three objections to the validity of the Rule. First, it says that a § 2(a) (11) (D) determination requires notice, opportunity for hearing, and a finding of the status of affiliate, which shall not become effective for thirty days. § 2(b). Petitioner got its notice and hearing, and only the loss of the thirty-day period can be material. But the Commission would have been willing to wait thirty days had Dayton consented to hold up the bond issue. In fact, it was at petitioner's urgent request that the issue went through in advance of the determination. Apart from the question whether or not any objection to the thirty-day loss was waived, we feel sure that no attack could have been made on the Commission's insistence in holding up approval of the Dayton issue. And if that is so, this more reasonable and accommodating procedure is hardly invalid.

Petitioner's second objection is that one must be an "affiliate" for all purposes or for none at all, whereas the Rule limits a finding to the transaction in issue. It is enough to say that even petitioner admits it would be absurd to call itself an affiliate for all purposes. We cannot say that Congress required the Commission to make an absurd finding; if the lesser achieves the purpose of the Act, that is all the better. Finally, petitioner argues that § 2(a) (11) (D) requires a finding of affiliation to be "necessary or appropriate in the public interest or for the protection of investors or consumers," and that no evidence was introduced on this point. This argument may be answered, first, by noting that petitioner was given full opportunity to introduce any evidence on this point which it had, and second, by observing that the Commission specifically found that its order was in the public interest. We see no reason for the Commission to adduce special evidence on the point. "Maintenance of competitive conditions," as stated in § 12(f), is enough public interest; and if the Commission was justified in finding a likelihood of absence of arm's-length bargaining interference with "maintenance of competitive conditions" follows as a matter of course.

It remains only to say that the broad rule-making power under § 20(a), 15 U.S.C.A. § 79t(a), justifies the promulgation of the Rule under §§ 12(f) and 2(a) (11) (D). Our discussion above of the history of the Act and the reasons for the provisions relating to investment bankers amply demonstrates the Congressional purpose in this regard. Any ambiguity or debatable language in the substantive provisions should be resolved in favor of the Commission, which is best able to determine the most efficient ways of implementing the broad purpose of the Act. See United States v. American Trucking Ass'ns, 310 U.S. 534, 549, 60 S.Ct. 1059, 84 L.Ed. 1345; Gray v. Powell, supra; Hamilton and Braden, The Special Competence of the Supreme Court, 50 Yale L.J. 1319, 1364-1367.

Petitioner would apparently draw some conclusion of weakness in the Commission's position from the fact that it withdrew Rule U-12F-2 shortly after this order was entered. Since, however, the Commission did so because it found the old rule not stringent enough and substituted a new rule making competitive bidding mandatory (with very limited exceptions), Holding Company Act Release No. 2676, Apr. 8, 1941, we cannot see how any inferences favorable to the petitioner can be drawn from the change.

Order affirmed.

L. HAND, Circuit Judge (concurring).

I agree with what Judge CLARK has said, but I should like to say a few words of my own about the statute. If one translates the language into the particular relation of banker and utility company, the banker becomes an "affiliate," if the Commission finds him to "stand in such relation" to the company "that there is liable to be such an absence of

arm's-length bargaining * * * as to make * * * appropriate * * * for the protection of investors" the imposition upon him of "the * * * duties * * * imposed * * * upon affiliates." I read this clause as a whole as imposing upon the Commission the duty of deciding whether there is a danger—immediate enough to make its removal "appropriate" to the protection of investors—that the utility company in its bargaining with the banker may be actuated in part by motives other than driving the hardest bargain it can. The Commission is not charged with finding that such a motive has in fact entered into the bargaining, or will do so; it is enough that there is a fair chance that it may. I construe "liable" as including more than those cases in which the "absence" is more probable than not; that is, as covering cases in which the probability is enough to be what I have called "a fair chance." Again, I construe "arm's-length bargaining" as going beyond conventional fiduciary relations; indeed, this seems to me obvious, else the definition would have been redundant. Such an interpretation of the clause does indeed sweep along with transactions in which the evil aimed at actually exists, transactions as innocent as this one seems to have been. I see no objection to it on that score; it is a frequent consequence of legislation of this root and branch type. It is notoriously difficult to ascertain just what motives prompt an act—the actor is often the worst witness—and it is legitimate to avoid such a treacherous issue even at the expense of condemning transactions, blameless if the whole truth could be known. Indeed, the whole law of fiduciaries is built upon just the difficulty of learning the truth with the crude means available. It recognizes the fallibility of any conclusion, but considers the evils that will be prevented as outweighing the limitations imposed upon otherwise lawful conduct. The statute at bar merely extends such a precaution beyond those relations which the common-law thought to require it, and clearly we have no warrant for denying the power of Congress to go so far. There had been very grave evils in the marketing of the securities of utility companies, and it was at least a possible remedy to vest power in the Commission to declare when the motives of the utility companies—quite unconsciously perhaps, as in the case of an avowed fiduciary—might not be as untinctured as was "appropriate" to the uncompromising pursuit of their interests.

If the clause be so read, there was "substantial evidence" to support the finding; that is to say evidence from which a reasonable man might conclude that such a chance existed and that the danger was immediate enough to make its removal "appropriate." I do not say that personally I should have come to that conclusion, but there had been enough in the relations between the United Company and the Morgan firm to permit the conclusion that the familiarity, recourse for advice, reliance, control and habitude of the past might perhaps unconsciously prove the casting straw. Congress appears to me to

have been jealous of the results of the slow cumulation of such factors and to have wished to endue the Commission with power to decide when it was the course of prudence to eliminate the possibility of its influence. The Supreme Court in decisions of which Gray v. Powell, 314 U.S. 402, 62 S.Ct. 326, 86 L.Ed. 301, is the latest, has unequivocally set the narrowest limits upon our review in such situations. The vague outlines of the issue itself, coupled with this circumscription of our powers, leaves us little or no scope.

I have spoken only of the relations between the United Company and the Morgan firm because that is the only doubtful link in the chain. The Dayton Company and the Columbia Company were one in interest; and quite aside from any implications from the statutory definition of "subsidiary", § 2(a) (8), I think we can take judicial notice of the fact that the ownership of twenty per cent of the voting power of a company makes the owner "liable" to have practical control. Whether this action, or other such stringent action, was necessary, is not for me to say. The Commission has apparently found the regulation impracticable in application; and in order to cut out the possibility of influences which it could not detect, it has gone further and stopped all underwriting except upon competitive bidding. Nevertheless, while the regulation stood upon the books, it was valid and it authorized the action taken in this case.[b]

DOBSON v. COMMISSIONER OF INTERNAL REVENUE

Supreme Court of the United States.
320 U.S. 489, 64 S.Ct. 239, 88 L.Ed. 248 (1943).

Mr. Justice JACKSON delivered the opinion of the Court.

These four cases were consolidated in the Court of Appeals. The facts of one will define the issue present in all.

The taxpayer, Collins, in 1929 purchased 300 shares of stock of the National City Bank of New York which carried certain beneficial interests in stock of the National City Company. The latter company was the seller and the transaction occurred in Minnesota. In 1930 Collins sold 100 shares, sustaining a deductible loss of $41,600.80, which was claimed on his return for that year and allowed. In 1931 he sold another 100 shares, sustaining a deductible loss of $28,163.78, which was claimed in his return and allowed. The remaining 100 shares he retained. He regarded the purchases and sales as closed and completed transactions.

In 1936 Collins learned that the stock had not been registered in compliance with the Minnesota Blue Sky Laws and learned of facts indicating that he had been induced to purchase by fraudulent rep-

[b] The dissenting opinion of Judge Chase has been omitted. All footnotes, except footnote No. 2 of Judge Clark's opinion, have been omitted.

resentations. He filed suit against the seller alleging fraud and failure to register. He asked recission of the entire transaction and offered to return the proceeds of the stock, or an equivalent number of shares plus such interest and dividends as he had received. In 1939 the suit was settled, on a basis which gave him a net recovery of $45,150.63, of which $23,296.45 was allocable to the stock sold in 1930 and $6,454.18 allocable to that sold in 1931. In his return for 1939 he did not report as income any part of the recovery. Throughout that year adjustment of his 1930 and 1931 tax liability was barred by the statute of limitations.

The Commissioner adjusted Collins' 1939 gross income by adding as ordinary gain the recovery attributable to the shares sold, but not that portion of it attributable to the shares unsold. The recovery upon the shares sold was not, however, sufficient to make good the taxpayer's original investment in them. And if the amounts recovered had been added to the proceeds received in 1930 and 1931 they would not have altered Collins' income tax liability for those years, for even if the entire deductions claimed on account of these losses had been disallowed, the returns would still have shown net losses.

Collins sought a redetermination by the Board of Tax Appeals, now the Tax Court. He contended that the recovery of 1939 was in the nature of a return of capital from which he realized no gain and no income either actually or constructively, and that he had received no tax benefit from the loss deductions. In the alternative he argued that if the recovery could be called income at all it was taxable as capital gain. The Commissioner insisted that the entire recovery was taxable as ordinary gain and that it was immaterial whether the taxpayer had obtained any tax benefits from the loss deduction reported in prior years. The Tax Court sustained the taxpayer's contention that he had realized no taxable gain from the recovery.

The Court of Appeals [133 F.2d 732, 735] concluded that the "tax benefit theory" applied by the Tax Court "seems to be an injection into the law of an equitable principle, found neither in the statutes nor in the regulations." Because the Tax Court's reasoning was not embodied in any statutory precept, the court held that the Tax Court was not authorized to resort to it in determining whether the recovery should be treated as income or return of capital. It held as matter of law that the recoveries were neither return of capital nor capital gain, but were ordinary income in the year received. Questions important to tax administration were involved, conflict was said to exist, and we granted certiorari.

It is contended that the applicable statutes and regulations properly interpreted forbid the method of calculation followed by the Tax Court. If this were true, the Tax Court's decision would not be "in accordance with law" and the Court would be empowered to modify or reverse it. Whether it is true is a clear-cut question of law and is for decision by the courts.

The court below thought that the Tax Court's decision "evaded or ignored" the statute of limitation, the provision of the Regulations that "expenses, liabilities, or deficit of one year cannot be used to reduce the income of a subsequent year," and the principle that recognition of a capital loss presupposes some event of "realization" which closes the transaction for good. We do not agree. The Tax Court has not attempted to revise liability for earlier years closed by the statute of limitation, nor used any expense, liability, or deficit of a prior year to reduce the income of a subsequent year. It went to prior years only to determine the nature of the recovery, whether return of capital or income. Nor has the Tax Court reopened any closed transaction; it was compelled to determine the very question whether such a recognition of loss had in fact taken place in the prior year as would necessitate calling the recovery in the taxable year income rather than return of capital.

The 1928 Act provides that "the Board in redetermining a deficiency in respect of any taxable year shall consider such facts with relation to the taxes for other taxable years as may be necessary correctly to redetermine the amount of such deficiency * * *." The Tax Court's inquiry as to past years was authorized if "necessary correctly to redetermine" the deficiency. The Tax Court thought in this case that it was necessary; the Court of Appeals apparently thought it was not. This precipitates a question not raised by either counsel as to whether the court is empowered to revise the Tax Court's decision as "not in accordance with law" because of such a difference of opinion.

With the 1926 Revenue Act, Congress promulgated, and at all times since has maintained, a limitation on the power of courts to review Board of Tax Appeals (now the Tax Court) determinations. "* * * such courts shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board * * *." However, even a casual survey of decisions in tax cases, now over 5,000 in number, will demonstrate that courts including this Court have not paid the scrupulous deference to the tax laws' admonitions of finality which they have to similar provisions in statutes relating to other tribunals.[8] After thirty years of income tax history the volume of tax litigation necessary merely for statutory interpretation would seem due to subside. That it shows no sign of

[8] Compare Helvering v. Tex-Penn Oil Co., 300 U.S. 481, 57 S.Ct 569, 81 L.Ed. 755, and Bogardus v. Commissioner, 302 U.S. 34, 58 S.Ct. 61, 82 L.Ed. 32, with Rochester Telephone Corp. v. United States, 307 U.S. 125, 59 S.Ct. 754, 83 L. Ed. 1147 (Federal Communications Commission); Shields v. Utah Idaho Central Railroad Co., 305 U.S. 177, 59 S.Ct. 160, 83 L.Ed. 111 (Interstate Commerce Commission); Sunshine Coal Co. v. Adkins, 310 U.S. 381, 399, 400, 60 S.Ct. 907, 915, 84 L.Ed. 1263; Gray v. Powell, 314 U.S. 402, 62 S.Ct. 326, 86 L.Ed. 301 (Bituminous Coal Commission); National Labor Relations Board v. Waterman S. S. Corp., 309 U.S. 206, 60 S.Ct. 493, 84 L. Ed 704 (National Labor Relations Board).

diminution suggests that many decisions have no value as precedents because they determine only fact questions peculiar to particular cases. Of course frequent amendment of the statute causes continuing uncertainty and litigation, but all too often amendments are themselves made necessary by court decisions. Increase of potential tax litigation due to more taxpayers and higher rates lends new importance to observance of statutory limitations on review of tax decisions. No other branch of the law touches human activities at so many points. It can never be made simple, but we can try to avoid making it needlessly complex.

It is more difficult to maintain sharp separation of court and administrative functions in tax than in other fields. One reason is that tax cases reach circuit courts of appeals from different sources and do not always call for observance of any administrative sphere of decision. Questions which the Tax Court considers at the instance of one taxpayer may be considered by many district courts at the instance of others.

The Tucker Act authorizes district courts, sitting without jury as courts of claims, to hear suits for recovery of taxes alleged to have been "erroneously or illegally assessed or collected." District courts also entertain common law actions against collectors to recover taxes erroneously demanded and paid under protest. Trial may be by jury, but waiver of jury is authorized and in tax cases jury frequently is waived. In such cases the findings of the court may be either special or general. The scope of review on appeal may be affected by the nature of the proceeding, the kind of findings, and whether the jury was waived under a particular statutory authorization or independently of it. The multiplicity and complexity of rules is such that often it is easier to review the whole case on the merits than to decide what part of it is reviewable and under what rule. The reports contain many cases in which the question is passed over without mention.

Another reason why courts have deferred less to the Tax Court than to other administrative tribunals is the manner in which the Tax Court finality was introduced into the law.

The courts have rather strictly observed limitations on their reviewing powers where the limitation came into existence simultaneously with their duty to review administrative action in new fields of regulation. But this was not the history of the tax law. Our modern income tax experience began with the Revenue Act of 1913. The World War soon brought high rates. The law was an innovation, its constitutional aspects were still being debated, interpretation was just beginning, and administrators were inexperienced. The Act provided no administrative review of the Commissioner's determinations. It did not alter the procedure followed under the Civil War income tax by which an aggrieved taxpayer could pay under protest and then sue the Collector to test the correctness of the tax. The courts by force of this situation entertained all manner of tax questions, and prece-

dents rapidly established a pattern of judicial thought and action whereby the assessments of income tax were reviewed without much restraint or limitation. Only after that practice became established did administrative review make its appearance in tax matters.

Administrative machinery to give consideration to the taxpayer's contentions existed in the Bureau of Internal Revenue from about 1918 but it was subordinate to the Commissioner. In 1923, the situation was brought to the attention of Congress by the Secretary of the Treasury, who proposed creation of a Board of Tax Appeals, within the Treasury Department, whose decision was to conclude Government and taxpayer on the question of assessment and leave the taxpayer to pay the tax and then test its validity by suit against the collector. Congress responded by creating the Board of Tax Appeals as "an independent agency in the executive branch of the Government." The Board was to give hearings and notice thereof and "make a report in writing of its findings of fact and decision in each case." But Congress dealt cautiously with finality for the Board's conclusions, going only so far as to provide that in later proceedings the findings should be "prima facie evidence of the facts therein stated." So the Board's decisions first came before the courts under a statute which left them free to go into both fact and law questions. Two years later Congress reviewed and commended the work of the new Board, increased salaries and lengthened the tenure of its members, provided for a direct appeal from the Board's decisions to the circuit courts of appeals or the Court of Appeals of the District of Columbia, and enacted the present provision limiting review to questions of law.

But this restriction upon judicial review of the Board's decisions came only after thirteen years of income tax experience had established a contrary habit. Precedents had accumulated in which courts had laid down many rules of taxation not based on statute but upon their ideas of right accounting or tax practice. It was difficult to shift to a new basis. This Court applied the limitation, but with less emphasis and less forceful resolution of borderline cases in favor of administrative finality than it has employed in reference to other administrative determinations.[22]

[22] E. g., Helvering v. Rankin, 295 U. S. 123, 131, 55 S.Ct. 732, 736, 79 L.Ed. 1343; Helvering v. Tex-Penn Oil Co., 300 U.S. 481, 491, 57 S.Ct. 569, 573, 81 L.Ed. 755; Bogardus v. Commissioner, 302 U.S. 34, 38, 39, 58 S.Ct. 61, 64, 82 L.Ed. 32. For a sample of the diverse treatment of Board decisions when reviewed by this Court, see Elmhurst Cemetery Co. v. Commissioner, 300 U.S. 37, 57 S.Ct. 324, 81 L.Ed. 491; Palmer v. Commissioner, 302 U.S. 63, 70, 58 S.Ct. 67, 70, 82 L.Ed. 50; Helvering v. National Grocery Co., 304 U.S. 282, 294, 58 S.Ct. 932, 938, 82 L.Ed. 1346; Colorado National Bank v. Commissioner, 305 U.S. 23, 59 S.Ct. 48, 83 L.Ed. 20; Helvering v. Lazarus & Co., 308 U.S. 252, 60 S.Ct. 209, 84 L.Ed. 226; Griffiths v. Commissioner, 308 U.S. 355, 60 S.Ct. 277, 84 L.Ed. 319; Helvering v. Kehoe, 309 U.S. 277, 60 S.Ct. 549, 84 L.Ed. 751; Higgins v. Commissioner, 312 U.S. 212, 61 S.Ct. 475, 85 L.Ed. 783;

That neglect of the congressional instruction is a fortuitous consequence of this evolution of the Tax Court rather than a deliberate or purposeful judicial policy is the more evident when we consider that every reason ever advanced in support of administrative finality applies to the Tax Court.

The court is independent, and its neutrality is not clouded by prosecuting duties. Its procedures assure fair hearings. Its deliberations are evidenced by careful opinions. All guides to judgment available to judges are habitually consulted and respected. It has established a tradition of freedom from bias and pressures. It deals with a subject that is highly specialized and so complex as to be the despair of judges. It is relatively better staffed for its task than is the judiciary. Its members not infrequently bring to their task long legislative or administrative experience in their subject. The volume of tax matters flowing through the Tax Court keeps its members abreast of changing statutes, regulations, and Bureau practices, informed as to the background of controversies and aware of the impact of their decisions on both Treasury and taxpayer. Individual cases are disposed of wholly on records publicly made, in adversary proceedings, and the court has no responsibility for previous handling. Tested by every theoretical and practical reason for administrative finality, no administrative decisions are entitled to higher credit in the courts. Consideration of uniform and expeditious tax administrations require that they be given all credit to which they are entitled under the law.

Tax Court decisions are characterized by substantial uniformity. Appeals fan out into courts of appeal of ten circuits and the District of Columbia. This diversification of appellate authority inevitably produces conflict of decision, even if review is limited to questions of law. But conflicts are multiplied by treating as questions of law what really are disputes over proper accounting. The mere number of such questions and the mass of decisions they call forth become a menace to the certainty and good administration of the law.[25]

Powers v. Commissioner, 312 U.S. 259, 61 S.Ct. 509, 85 L.Ed. 817; Wilmington Trust Co. v. Helvering, 316 U.S. 164, 168, 62 S.Ct. 984, 986, 86 L.Ed. 1352; Merchants National Bank of Boston v. Commissioner, 320 U.S. 256, 64 S.Ct. 108. Compare the foregoing with the cases cited supra note 8.

[25] "Judge-made law is particularly prolific in connection with federal taxation, coming, as it does, from so many courts of coordinate jurisdiction. And the constant outpouring of decisions has steadily increased in volume. For the year 1920 a leading tax service catalogued only 300 decisions; (CCH Federal Tax Service (1921). * * * Today one must look to approximately 20,000 court and Board decisions, many pages of regulations, and about 5,000 rulings. Since 1924 the Board of Tax Appeals alone has published about 8,500 opinions, as well as approximately 4,000 unreported memorandum opinions For the fiscal years 1935, 1936 and 1937, the number of Board dockets appealed to the Circuit Courts of Appeal has amounted, on the average, to 509 each year. The Supreme Court's balance sheet shows that federal taxation was the principal concern of that Court during the 1934 term, with 44 decisions being handed down in that field. During the three years 1935, 1936, and 1937,

To achieve uniformity by resolving such conflicts in the Supreme Court is at best slow, expensive, and unsatisfactory. Students of federal taxation agree that the tax system suffers from delay in getting the final word in judicial review, from retroactivity of the decision when it is obtained, and from the lack of a roundly tax-informed viewpoint of judges.

Perhaps the chief difficulty in consistent and uniform compliance with the congressional limitation upon court review lies in the want of a certain standard for distinguishing "questions of law" from "questions of fact." This is the test Congress has directed, but its difficulties in practice are well known and have been subject of frequent comment. Its difficulty is reflected in our labeling some questions as "mixed questions of law and fact" and in a great number of opinions distinguishing "ultimate facts" from evidentiary facts.

It is difficult to lay down rules as to what should or should not be reviewed in tax cases except in terms so general that their effectiveness in a particular case will depend largely upon the attitude with which the case is approached. However, all that we have said of the finality of administrative determination in other fields is applicable to determinations of the Tax Court. Its decision, of course, must have "warrant in the record" and a reasonable basis in the law. But "the judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." Rochester Telephone Corp. v. United States, 307 U.S. 125, 146, 59 S.Ct. 754, 764, 83 L.Ed. 1147; Swayne & Hoyt v. United States, 300 U.S. 297, 304, 57 S.Ct. 478, 481, 81 L.Ed. 659; Mississippi Valley Barge Line Co. v. United States, 292 U.S. 282, 286, 287, 54 S.Ct. 692, 693, 694, 78 L.Ed. 1260; Gray v. Powell, 314 U.S. 402, 412, 62 S.Ct. 326, 332, 86 L.Ed. 301; Helvering v. Clifford, 309 U.S. 331, 336, 60 S.Ct. 554, 557, 84 L.Ed. 788; United States v. Louisville & N. R. Co., 235 U.S. 314, 320, 35 S.Ct. 113, 114, 59 L.Ed. 245; Wilmington Trust Co. v. Helvering, 316 U.S. 164, 168, 62 S.Ct. 984, 986, 86 L.Ed. 1352.

Congress has invested the Tax Court with primary authority for redetermining deficiencies, which constitutes the greater part of tax litigation. This requires it to consider both law and facts. Whatever latitude exists in resolving questions such as those of proper accounting, treating a series of transactions as one for tax purposes, or treating apparently separate ones as single in their tax consequences, exists in the Tax Court and not in the regular courts; when the court cannot separate the elements of a decision so as to identify a clear-cut mistake of law, the decision of the Tax Court must stand. In view of

the Supreme Court rendered decisions in 84 federal tax cases." Paul, Selected Studies in Federal Taxation (1938) 2, n. 2.

"As of December 31, 1936, 4,700 decisions had been appealed to the Circuit Courts of Appeal (or the Court of Appeals of the District of Columbia) of which 3,996 had been disposed of. This left a pending Appellate docket of 704." Id., 140, n. 133.

the division of functions between the Tax Court and reviewing courts it is of course the duty of the Tax Court to distinguish with clarity between what it finds as fact and what conclusion it reaches on the law. In deciding law questions courts may properly attach weight to the decision of points of law by an administrative body having special competence to deal with the subject matter. The Tax Court is informed by experience and kept current with tax evolution and needs by the volume and variety of its work. While its decisions may not be binding precedents for courts dealing with similar problems, uniform administration would be promoted by conforming to them where possible.

The Government says that "the principal question in this case turns on the application of the settled principle that the single year is the unit of taxation." But the Tax Court was aware of this principle and in no way denied it. Whether an apparently integrated transaction shall be broken up into several separate steps and whether what apparently are several steps shall be synthesized into one whole transaction is frequently a necessary determination in deciding tax consequences. Where no statute or regulation controls, the Tax Court's selection of the course to follow is no more reviewable than any other question of fact. Of course we are not here considering the scope of review where constitutional questions are involved. The Tax Court analyzed the basis of the litigation which produced the recovery in this case and the obvious fact that "regarding the series of transactions as a whole, it is apparent that no gain was actually realized." It found that the taxpayer had realized no tax benefits from reporting the transaction in separate years. It said the question under these circumstances was whether the amount the taxpayer recovered in 1939 "constitutes taxable income, even though he realized no economic gain." It concluded that the item should be treated as a return of capital rather than as taxable income. There is no statute law to the contrary, and the administrative rulings in effect at the time tended to support the conclusion. It is true that the Board in a well considered opinion reviewed a number of court holdings, but it did so for the purpose of showing that they did not fetter its freedom to reach the decision it thought sound. With this we agree.

Viewing the problem from a different aspect, the Government urges in this Court that although the recovery is capital return, it is taxable in its entirety because taxpayer's basis for the property in question is zero. The argument relies upon § 113(b) (1) (A) of the Internal Revenue Code, 26 U.S.C.A. Int.Rev.Code, § 113(b) (1) (A), which provides for adjusting the basis of property for "expenditures, receipts, losses, or other items, properly chargeable to capital account." This provision, it is said, requires that the right to a deduction for a capital loss be treated as a return of capital. Consequently, by deducting in 1930 and 1931 the entire difference between the cost of his stock and the proceeds of the sales, taxpayer reduced his basis

to zero. But the statute contains no such fixed rule as the Government would have us read into it. It does not specify the circumstances or manner in which adjustments of the basis are to be made, but merely provides that "Proper adjustment * * * shall in all cases be made" for the items named if "properly chargeable to capital account." What, in the circumstances of this case, was a proper adjustment of the basis was thus purely an accounting problem and therefore a question of fact for the Tax Court to determine. Evidently the Tax Court thought that the previous deductions were not altogether "properly chargeable to capital account" and that to treat them as an entire recoupment of the value of taxpayer's stock would not have been a "proper adjustment." We think there was substantial evidence to support such a conclusion.

The Government relies upon Burnet v. Sanford & Brooks Co., 282 U.S. 359, 51 S.Ct. 150, 75 L.Ed. 383, for the proposition that losses of one year may not offset receipts of another year. But the case suggested its own distinction: "While [the money received] equalled, and in a loose sense was a return of, expenditures made in performing the contract, still, as the Board of Tax Appeals found, the expenditures were made in defraying the expenses * * *. They were not capital investments, the cost of which, if converted, must first be restored from the proceeds before there is a capital gain taxable as income." 282 U.S. at pages 363, 364, 51 S.Ct. at page 151, 75 L.Ed. 383. It is also worth noting that the Court affirmed the Board's decision, which had been upset by the circuit court of appeals, and answered, in part, the contention of the circuit court that certain regulations were applicable by saying, " * * * nor on this record do any facts appear tending to support the burden, resting on the taxpayer, of establishing that the Commissioner erred in failing to apply them." 282 U.S. at pages 366, 367, 51 S.Ct. at page 152, 75 L.Ed. 383.

It is argued on behalf of the Commissioner that the Court should overrule the Board by applying to this question rules of law laid down in decisions on the analogous problem raised by recovery of bad debts charged off without tax benefit in prior years. The court below accepted the argument. However, instead of affording a reason for overruling the Tax Court, the history of the bad debt recovery question illustrates the mischief of overruling the Tax Court in matters of tax accounting. Courts were persuaded to rule as matter of law that bad debt recoveries constitute taxable income, regardless of tax benefit from the charge-off. The Tax Court had first made a similar holding, but had come to hold to the contrary. Substitution of the courts' rule for that of the Tax Court led to such hardships and inequities that the Treasury appealed to Congress to extend relief. It did so. The Government now argues that by extending legislative relief in bad debt cases Congress recognized that in the absence of specific exemption recoveries are taxable as income. We do not find

that significance in the amendment. A specific statutory exception was necessary in bad debt cases only because the courts reversed the Tax Court and established as matter of law a "theoretically proper" rule which distorted the taxpayer's income. Congress would hardly expect the courts to repeat the same error in another class of cases, as we would do were we to affirm in this case.

The Government also suggests that "If the tax benefit rule were judicially adopted the question would then arise of how it should be determined," and the difficulties of determining tax benefits, it says, create "an objection in itself to an attempt to adopt such a rule by judicial action." We are not adopting any rule of tax benefits. We only hold that no statute or regulation having the force of one and no principle of law compels the Tax Court to find taxable income in a transaction where as matter of fact it found no economic gain and no use of the transaction to gain tax benefit. The error of the court below consisted of treating as a rule of law what we think is only a question of proper tax accounting.

There is some difference in the facts of these cases. In two of them the Tax Court sustained deficiencies because it found that the deductions in prior years had offset gross income for those years and therefore concluded that the recoveries must to that extent be treated as taxable gain. The taxpayers object that this conclusion disregards certain exemptions and credits which would have been available to offset the increased gross income in the prior years, so that the deductions resulted in no tax savings. In determining whether the recoveries were taxable gain, however, the Tax Court was free to decide for itself what significance it would attach to the previous reduction of taxable income as contrasted with reduction of tax. The statute gives no inkling as to the correctness or incorrectness of the Tax Court's view, and we can find no compelling reason to substitute our judgment. In No. 47 the decision of the Tax Court was upheld by the court below, and in that case the judgment is affirmed. In Nos. 44, 45, and 46, the Court of Appeals reversed the Tax Court, and for the reasons stated its judgments in those cases are reversed.

Reversed.[a]

In BINGHAM'S TRUST v. COMMISSIONER OF INTERNAL REVENUE, 325 U.S. 365, 65 S.Ct. 1232, 89 L.Ed. 1670 (1945), Mr. Justice Frankfurter, in a concurring opinion in which he was joined by Mr. Justice Roberts and Mr. Justice Jackson, said, at 325 U.S. 377–82 (65 S.Ct. 1238–40):

[a] Footnotes of the court, except footnotes No. 8, 22 and 25, have been omitted.

Petition for rehearing denied, 321 U. S. 231, 64 S.Ct. 495, 88 L.Ed. 691 (1944).

But *cf.* Security Flour Mills Co. v. Commissioner, 321 U.S. 281, 64 S.Ct. 596, 88 L.Ed. 725 (1944), and the discussion in Paul, Dobson v. Commissioner: The Strange Ways of Law and Fact (1944) 57 Harv.L.Rev. 753.

This is one of those cases in which the ground of the decision is more important than the decision itself, except to the parties. And so, while I concur in the result, I feel bound to say that I think the manner in which it is reached is calculated to increase the already ample difficulties in judicial review of Tax Court determinations. The course of our decisions since Dobson v. Commissioner, 320 U.S. 489, 64 S.Ct. 239, 88 L.Ed. 248, calls for clarification and avoidance of further confusion.

In Dobson v. Commissioner, supra, this Court elaborately considered the special function of the Tax Court and the very limited functions of the Circuit Courts of Appeals and of this Court in reviewing the Tax Court. The unanimous opinion in the Dobson case was surely a case of much ado about nothing, if it did not emphasize the vast range of questions as to which the Tax Court should have the final say. In making the Dobson pronouncement, the Court was not unaware that "questions of fact" and "questions of law" were legal concepts around which dialectic conflicts have been fought time out of mind. The Dobson opinion took for granted that they are useful instruments of thought even though not amendable to fixed connotations. The terms are unmanageable and too confusing if it be assumed that unless they have invariant meaning, that is, unless they serve the same purpose for every legal problem in which they are invoked, they can serve no purpose for any problem. The contribution of the Dobson case, one had a right to believe, was the restriction of reviewable "questions of law" in tax litigation to issues appropriate for review in relation to the machinery which Congress has designed for such litigation. The Dobson case eschewed sterile attempts at differentiation between "fact" and "law" in the abstract. Instead, it found significance in the scheme devised by Congress for adjudicating tax controversies whereby Congress had in the main, centralized in the Tax Court review of tax determinations by the Treasury and had made the decisions of the Tax Court final unless they were "not in accordance with law," 44 Stat. 9, 110, 26 U.S.C. § 1141(c) (1), 26 U.S. C.A. Int.Rev.Code, § 1141(c) (1), with the result that, as a practical matter, only a small percentage of Tax Court decisions gets into the Circuit Courts of Appeals, and a still smaller percentage reaches this Court.[1] Therefore, the decisions of the Circuit Courts of Appeals,

[1] As a matter of historic survival, some tax litigation still reaches district courts throughout the country. To that extent there is a qualification upon the centralization of review in the Tax Court of Treasury determinations. But the overwhelming volume of tax litigation goes to the Tax Court. The ratio is about 6 to 1. The fact that the district courts continue to have vestigial jurisdiction may call for a scientific revamping of jurisdiction in tax cases. It does not counsel against giving the fullest efficacy to Tax Court decisions consonant with its special responsibility. See Griswold, The Need for a Court of Tax Appeals, 1944, 57 Harv.L.Rev. 1153; Miller, Can Tax Appeals Be Centralized? 1945, 23 Taxes 303.

and even more so of this Court, are bound to be more or less episodic and dependent upon contingencies that cannot give these appellate courts that feel of the expert which is so important for wise construction of such interrelated and complicated enactments as those which constitute our revenue laws. These factors, so decisive in the stream of tax litigation, weigh heavily in apportioning functions between the Tax Court and the courts reviewing the Tax Court. Accordingly, the vital guidance of the Dobson opinion was that a decision of the Tax Court should stand unless it involves "a clear-cut mistake of law," 320 U.S. 489, 502, 64 S.Ct. 239, 247, 88 L.Ed. 248. Considerations that may properly govern what are to be deemed questions of fact and questions of law as between judge and jury, or considerations relevant to the drawing of a line between questions of facts and questions of law on appeal from a court of first instance sitting without a jury, or in determining what is a foreclosed question of fact in cases coming to this Court from State courts on claims of unconstitutionality, may be quite misleading when a decision of the Tax Court is challenged in the various Circuit Courts of Appeals or here as "not in accordance with law."

Certainly, all disputed questions regarding events and circumstances —the raw materials, as it were, of situations which give rise to tax controversies—are for the Tax Court to settle and definitively so. Secondly, there are questions that do not involve disputes as to what really happened—as, for instance, what expenses were incurred or what distribution of assets was made—but instead turn on the meaning of what happened as a matter of business practice or business relevance. Here we are in the domain of financial and business interpretation in relation to taxation as to which the Tax Court presumably is as well informed by experience as are the appellate judges and certainly more frequently enlightened by the volume and range of its litigation. Such issues bring us treacherously near to what abstractly are usually characterized as questions of law, whether the question of division of labor in a litigation is between judges and lay juries, or between judges of first instance and of appellate courts when there is no difference of specialized experience between the two classes of judges. Thus, the construction of documents has for historic reasons been deemed to be a question of law in the sense that the meaning is to be given by judges and not by laymen. But this crude division between what is "law" and what is "fact" is not relevant to the proper demarcation of functions as between the Tax Court and the reviewing courts. To hold that the Circuit Courts of Appeals, and eventually this Court, must make an independent examination of the meaning of every word of tax legislation, no matter whether the words express accounting, business or other conceptions peculiarly within the special competence of the Tax Court, is to sacrifice the effectiveness of the judicial scheme designed by Congress especially for tax litigation to an abstract notion of "law" derived from the merely historic

function of courts generally to construe documents, including legislation. More than that. If the appellate courts must make an independent examination of the meaning of every word in tax legislation, on the assumption that the construction of legislative language is necessarily for the appellate courts, how can they reasonably refuse to consider claims that the words have been misapplied in the circumstances of a particular case? Meaning derives vitality from application. Meaning is easily thwarted or distorted by misapplication. If the appellate courts are charged with the duty of giving meaning to words because they are contained in tax legislation, they equally cannot escape the duty of examining independently whether a proper application has been given by the Tax Court.

The specialized equipment of the Tax Court and the trained instinct that comes from its experience ought to leave with the Tax Court the final say also as to matters which involve construction of legal documents and the application of legislation even though the process may be expressed in general propositions, so long as the Tax Court has not committed what was characterized in the Dobson case as a "clear-cut mistake of law."

That serves as a guide for judgment even though no inclusive definition or catalogue is essayed. The Tax Court of course must conform to the procedural requirements which the Constitution and the laws of Congress command. Likewise, in applying the provisions of the revenue laws, the Tax Court must keep within what may broadly be called the outward limits of categories and classifications expressing legislative policy. Congress has invested the Tax Court with primary—and largely with ultimate—authority for redetermining deficiencies. It is a tribunal to which mastery in tax matters must be attributed. The authority which Congress has thus given the Tax Court involves the determination of what really happened in a situation and what it means in the taxing world. In order to redetermine deficiencies the Tax Court must apply technical legal principles. The interpretation of tax statutes and their application to particular circumstances are all matters peculiarly within the competence of the Tax Court. On the other hand, constitutional adjudication, determination of local law questions and common law rules of property, such as the meaning of a "general power of appointment" or the application of the rule against perpetuities, are outside the special province of the Tax Court. See Paul, Dobson v. Commissioner: the Strange Ways of Law and Fact (1944) 57 Harv.L.Rev. 753, 847, 848. Congress did not authorize review of all legal questions upon which the Tax Court passed. It merely allowed modification or reversal if the decision of the Tax Court is "not in accordance with law." But if a statute upon which the Tax Court unmistakably has to pass allows the Tax Court's application of the law to the situation before it as a reasonable one—if the situation could, without violence to language, be brought within the terms under which the Tax Court placed it or

be kept out of the terms from which that Court kept it—the Tax Court cannot in reason be said to have acted "not in accordance with law." In short, there was no "clear-cut mistake of law" but a fair administration of it.

JOHN KELLEY CO. v. COMMISSIONER OF INTERNAL REVENUE

Supreme Court of the United States.
326 U.S. 521, 66 S.Ct. 299, 90 L.Ed. — (1946).

Mr. Justice REED delivered the opinion of the Court.

These writs of certiorari were granted to examine the deductibility as interest of certain payments which the taxpayer corporations made to holders of their corporate obligations. Although the obligations of the two taxpayers had only one striking difference, the non-cumulative in one and the cumulative quality in the other of the payments reserved under the characterization of interest, the Tax Court (formerly the Board of Tax Appeals, 56 Stat. 957, 26 U.S.C.A. Int.Rev.Code, § 1100; only its present name will be used herein) held that the payments under the former, the Kelley Company case, were interest and under the Talbot Mills were dividends. The Circuit Court of Appeals reversed the Tax Court in the Kelley case and another circuit affirmed the Talbot Mills decision. On account of the diversity of approach in the Tax Court and the reviewing courts, we granted certiorari.

In the Kelley case, a corporation, all of whose common and preferred stock was owned directly or as trustee by members of a family group, was reorganized by authorizing the issue of $250,000 income debenture bearer bonds, issued under a trust indenture, calling for 8% interest, non-cumulative. They were offered only to shareholders of the taxpayer but were assignable. The debentures were payable in twenty years, December 31, 1956, with payment of general interest conditioned upon the sufficiency of the net income to meet the obligation. The debenture holders had priority of payment over stockholders but were subordinated to all other creditors. The debentures were redeemable at the taxpayer's option and carried the usual acceleration provisions for specific defaults. The debenture holders had no right to participate in management. Other changes not material here were made in the corporate structure. Debentures were issued to the amount of $150,000 face value. The greater part, $114,-648, was issued in exchange for the original preferred, with six per cent cumulative guaranteed dividends, at its retirement price and the balance sold to stockholders at par, which was eventually paid with sums obtained by the purchasers from common stock dividends. Common stock was owned in the same proportions by the same stockholders before and after the reorganization.

In the Talbot Mills case the taxpayer was a corporation which, prior to its recapitalization, had a capital stock of five thousand shares of the par value of $100 or $500,000. All of the stock with the exception of some qualifying shares was held by members, through blood or marriage, of the Talbot family. In an effort to adjust the capital structure to the advantage of the taxpayer, the company was recapitalized just prior to the beginning of the fiscal year in question, by each stockholder surrendering four-fifths of his stock and taking in lieu thereof registered notes in aggregate face value equal to the aggregate par value of the stock retired. This amounted to an issue of $400,000 in notes to the then stockholders. These notes were dated October 2, 1939, and were payable to a specific payee or his assignees on December 1, 1964. They bore annual interest at a rate not to exceed 10% nor less than 2%, subject to a computation that took into consideration the net earnings of the corporation for the fiscal year ended last previous to the annual interest paying date. There was, therefore, a minimum amount of 2% and a maximum of 10% due annually and between these limits the interest payable varied in accordance with company earnings. The notes were transferable only by the owner's endorsement and the notation of the transfer by the company. The interest was cumulative and payment might be deferred until the note's maturity when "necessary by reason of the condition of the corporation." Dividends could not be paid until all then due interest on the notes was satisfied. The notes limited the corporation's right to mortgage its real assets. The notes could be subordinated by action of the Board of Directors to any obligation maturing not later than the maturity of the notes. For the fiscal year in question the maximum payment of 10% was made on the notes.

The payments in question on corporate obligations were for the years in the Kelley case, 1937, 1938 and 1939; in the Talbot Mills case for the year 1940. Both corporations deducted the payments as interest from their reports of gross income under statutory sections and regulations set out in the footnote.[2] The applicable statutes and

[2] Internal Revenue Code:

"Sec. 23. Deductions from gross income. In computing net income there shall be allowed as deductions:

* * * * * *

"(b) Interest. All interest paid or accrued within the taxable year on indebtedness, * * *." 26 U.S.C.A. Int.Rev. Code, § 23(b).

"Sec. 115. Distributions by corporations. (a) Definition of dividend. The term 'dividend' when used in this chapter (except in section 203(a) (3) and section 207(c) (1), relating to insurance companies) means any distribution made by a corporation to its shareholders, whether in money or in other property, (1) out of its earnings or profits accumulated after February 28, 1913, or (2) out of the earnings or profits of the taxable year * * *." 26 U.S.C.A. Int.Rev. Code, § 115.

Treasury Regulations 103.

"Sec. 19.23(b)-1. Interest.—Interest paid or accrued within the year on indebtedness may be deducted from gross income, * * *

* * * * *

"So-called interest on preferred stock, which is in reality a dividend thereon, cannot be deducted in computing net income. * * *"

regulations were identical for all periods. The Commissioner asserted deficiencies because the payments were considered dividends and not interest.

There is not present in either situation the wholly useless temporary compliance with statutory literalness which this Court condemned as futile, as a matter of law, in Gregory v. Helvering, 293 U.S. 465, 55 S.Ct. 266, 79 L.Ed. 596, 97 A.L.R. 1355. The demonstrated possibility of sales by the holders of the obligations to persons other than stockholders alone proves the differentiation. As material amounts of capital were invested in stock, we need not consider the effect of extreme situations such as nominal stock investments and an obviously excessive debt structure.

From the foregoing statements of facts, it appears that the characteristics of all the obligations in question and the surrounding circumstances were of such a nature that it is reasonably possible for determiners to reach the conclusion that the secured annual payments were interest to creditors in one case and dividends to stockholders in the other case. In the Kelley case there were sales of the debentures as well as exchanges of preferred stock for debentures, a promise to pay a certain annual amount, if earned, a priority for the debentures over common stock, the debentures were assignable without regard to any transfer of stock, and a definite maturity date in the reasonable future. These indicia of indebtedness support the Tax Court conclusion that the annual payments were interest on indebtedness. On the other hand, in the Talbot Mills case, the Tax Court found the factors there present of fluctuating annual payments with a two per cent minimum, the limitation of the issue of notes to stockholders in exchange only for stock, to be characteristics which distinguish the Talbot Mills notes from the Kelley Company debentures. Upon an appraisal of all the facts, the Tax Court reached the conclusion that the annual payments by Talbot Mills were in reality dividends and not interest.

We think these conclusions should be accepted by the Circuit Courts of Appeals and by ourselves. Judicial review of Tax Court decisions depends upon the Internal Revenue Code, Section 1141(c) Powers (1), 26 U.S.C.A. Int.Rev.Code § 1141(c) (1). It reads:

"To affirm, modify, or reverse. Upon such review, such courts shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require."

It is only recently that we gave careful consideration to the problems of review of Tax Court decisions. Dobson v. Commissioner, 320

See Revenue Acts of 1936 and 1938, 49 Stat. 1648, 1659, 52 Stat. 447, 460, 26 U.S.C.A. Int.Rev.Code § 23(b) and Treasury Regulations 94, Art. 23(b)-1, and 101, Art. 23(b)-1.

U.S. 489, 64 S.Ct. 239, 88 L.Ed. 248. That opinion emphasized that our interpretation of Congressional purpose, in enacting the statute, just quoted for judicial review of Tax Court decisions, was that Congress intended to leave to the final determination of the Tax Court all issues which were not clear-cut questions of law.

The provisions for review are the same now as they were when enacted in 1926. Congress, and all others interested, were then well aware of the difficulties in drawing a line between questions of fact and questions of law. The legislation was upon a subject, the collection of the revenue, in which federal administrative finality had been given wide scope. The Tax Court was originally established to "secure an impartial and disinterested determination of the issues involved," so that the taxpayer and the Government would have an independent review of the position of either on tax demands before payment of the tax or foreclosure of an asserted deficiency. Two years later its success was recognized by committee commendation and the enlargement of the finality of its decisions from "prima facie evidence of the facts contained therein" to reviewability only "if the decision of the Board is not in accordance with law". As to the mischief which the limitation of the scope of judicial review was to cure, we find only the words of the committee reports.[7] Without a clearer description by Congress of the intended line to separate reviewability of the Tax Court decisions from non-reviewability, courts must interpret the review statute, as best they can, to accomplish the declared

7 H.Rep.No.1, 69th Cong., 1st Sess., p. 19–20:

"*Court review—Questions of fact and law.*—The procedure is made to conform as nearly as may be to the procedure in the case of an original action in a Federal district court. Inasmuch as the complicated and technical facts governing tax liability require a determination by a body of experts, the review is taken directly to an appellate court, just as, for instance, in the case of orders of the Federal Trade Commission, and orders of the Secretary of Agriculture under the packers and stockyards act. In view of the grant of exclusive power to the board finally to determine the facts upon which tax liability is based, subdivision (b) of section 914 limits the review on appeal to what are commonly known as questions of law. The court upon review may consider, for example, questions as to the constitutionality of the substantive law applied, the constitutionality of the procedure used, failure to observe the procedure required by law, the proper interpretation and application of the statute or any regulation having the force of law, the existence of at least some evidence to support the findings of fact, and the validity of any ruling upon the admissibility of evidence (see subdivision (a) of section 907 and subdivision (b) of section 914). [§ 1003(b) of the Act as passed.] The court, therefore, may adequately control the action of the administrative officer or agency, but will not be burdened with the duty of substituting its opinion for that of the board upon the evidence".

Since the Federal Trade Commission and the Packers and Stockyards Acts, 15 U.S.C.A. § 41 et seq., and 7 U.S.C.A. § 183 et seq., differ as to the finality upon review of the determinations of the respective agencies, (38 Stat. 720; 42 Stat. 162 and 168), the reference to the Commission and to the Act was to show the choice of a circuit court of appeals for judicial review and was not intended to suggest the adoption for the Tax Court review of any standard of scope of review embodied in either act.

Congressional purpose of adequate control of administrative action without substituting judicial opinion for that of the Tax Court upon the evidence. Note 7, supra.

The illustrations in the report, note 7, supra, are legal questions without doubt, except the possibility that the words "application of the statute or any regulation having the force of law" may be thought to give a reviewing court power to pass upon the Tax Court's conclusion from the primary or evidential facts. So that in the present cases, it might be said to be a question of law as to whether the primary facts adduced made the payments under consideration dividends or interest. But we think such conclusion gives inadequate weight to the purpose of the Tax Court. The finality of the Tax Court's rulings was being enlarged by the 1926 Act. The then Board was spoken of as an impartial and independent tribunal of experts "for the determination of tax liabilities as between the Government and the taxpayer." H.Rep. No. 1, 69th Cong., 1st Sess., p. 17. There would hardly need to be experts in tax affairs to decide questions of dates or amounts or values or to calculate rates. Their usefulness lies primarily in their ability to examine relevant facts of business to determine whether or not they come under statutory language. Adequate reason for the use of the word "application" of course exists in situations where true legal questions arise, as in whether an act applies to transfers antecedent to its enactment or to income or estate taxes from trusts or to situations which involve conflicts of law. There is nothing in the context in which the word "application" is used which suggests to us that it should be given its widest connotation.

These cases now under consideration deal with well understood words as used in the tax statutes—"interest" and "dividends." They need no further definition. Equitable Life Assurance Society v. Commissioner, 321 U.S. 560, 64 S.Ct. 722, 88 L.Ed. 927; Deputy v. Du Pont, 308 U.S. 488, 498, 60 S.Ct. 363, 368, 84 L.Ed. 416. The Tax Court is fitted to decide whether the annual payments under these corporate obligations are to be classified as interest or dividends. The Tax Court decisions merely declare that the undisputed facts do or do not bring the payments under the definition of interest or dividends. The documents under consideration embody elements of obligations and elements of stock. There is no one characteristic, not even exclusion from management, which can be said to be decisive in the determination of whether the obligations are risk investments in the corporations or debts. So called stock certificates may be authorized by corporations which are really debts and promises to pay may be executed which have incidents of stock. Such situations seem to us to fall within the Dobson rule.

This leads us to affirm the Talbot Mills decree and to reverse the Kelley judgment. It is so ordered.

Judgment in No. 36 reversed; judgment in No. 47 affirmed.

Mr. Justice BLACK concurs in the result in No. 47. He is of the opinion that No. 36 should be affirmed for the reasons given by the Circuit Court of Appeals, 146 F.2d 466.

Mr. Justice BURTON concurs in the result in the Kelley case but dissents from the result in the Talbot Mills case on the grounds stated in the dissenting opinion of Magruder, J., in the Circuit Court of Appeals.

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

Mr. Justice RUTLEDGE. I think the judgments in both cases should be affirmed. On the records presented, I can see no satisfactory basis for deciding one case one way and the other differently. And I agree with the Courts of Appeals that, on the substantially identical facts, the payments were dividends and not interest.

In the first place, I do not believe that Congress has authorized the Tax Court to make or the reviewing courts to sustain directly conflicting determinations of tax liability in identical fact situations. Nor, in my opinion, was this the purpose or effect of the Dobson decisions, 320 U.S. 489, 64 S.Ct. 239, 88 L.Ed. 248. So to regard them or the statute nullifies the right to review expressly given by Congress. Moreover that view destroys the very uniformity which Dobson sought, transferring the conflict of decision from the Courts of Appeals back to the Tax Court, by making the conflicting decisions of its sixteen divisions final.[1] This affords relief to the taxpayer from judicial review and to the courts from judicially reviewing. But it defies Congress' mandate for review and, what is more, perpetuates chaos in the law.

All this presupposes, of course, that the records now here present fact situations identical in all material respects. That is true in my judgment. It is hardly necessary to attempt demonstration. But, besides referring to the opinions of the Courts of Appeals for the small details of the facts and their minute differences, it may be noted that there was no question of credibility. Substantially all of the evidentiary facts were stipulated in both cases. Nor is there any finding in either case that the arrangements were a sham. Cf. Gregory v. Helvering, 293 U.S. 465, 55 S.Ct. 266, 79 L.Ed. 596, 97 A.L.R. 1355. Apart from such considerations, the material facts in my opinion were not substantially different in any respect sufficient to support one ultimate

[1] The Internal Revenue Code provides that the chairman (now presiding judge of the Tax Court, § 1100, 26 U.S.C.A. Int.Rev.Code, § 1100) may "from time to time divide the Board into divisions of one or more members" and "a majority of the members of the Board or of any division thereof shall constitute a quorum for the transaction of the business of the Board or of the division, respectively." § 1108(c), (d). By § 1118(b), 26 U.S.C.A. Int.Rev.Code § 1118(b), the report of a division becomes the report of the Board within 30 days unless the chairman directs that it be reviewed by the Board.

Each of the two cases before us was decided by only one Tax Court judge, a different judge in each case. See Griswold, The Need for a Court of Tax Appeals (1944) 57 Harv.L.Rev. 1153, 1170–1172.

conclusion, whether labelled of "law," of "fact," or "mixed," for one case and the opposite conclusion for the other.

That is true whether the final conclusion of "interest" or "dividend" is to be drawn from a minute comparison of, and effort to differentiate, the multitudinous microscopic details by which in both cases it was sought to convert stock into "debentures" or "registered notes," without losing any of the stock's substantial advantages; or, on the other hand, the final plunge of judgment is to be made from wholesale weighing of the evidentiary facts. Neither approach discloses factors of substantial difference in what was done sufficient to sustain contrary judgments. * * *

The Court indeed does not attempt to find a substantial differentiating factor other than in the Tax Court's "appraisal of all the facts," in other words its ultimate conclusion. That is true as between the two cases and also as affects the positions of the respective shareholders before and after the wash. Rather the opinion concedes that in each case the circumstances were such that determiners reasonably could conclude that the so-called annual payments were either interest or dividends. Hence, it seems to follow, the conclusion may be drawn in squarely conflicting ways, if the Tax Court sees fit so to draw it; and it is immaterial that no factor of substantial difference is or can be pointed out.

One might entertain the view that in a close situation the Tax Court's judgment should be accepted whatever way the die were cast, although reviewing courts might differ on the direction. But it would not follow, and in my judgment should not, that they are powerless when the throw is in opposite directions at the same time. When this occurs, in my opinion a "clear-cut" question of law is presented, rising above the rubric of "expert administrative determination." The more apt characterization would be "expert administrative fog." * * *

Something more is at stake in these cases than nice distinctions between "stock" and "bonds" on the one hand or between ultimate conclusions of "fact" and "law" or "mixed fact and law," on the other, just as was true in the conveyancing cases. The border cutting across one set of normally opposing conceptions may be deliberately obscured and made into a no man's land as readily as that involved in the other. When this happens, the final link in the chain of judgment is decisive, whatever its label. If the ultimate conclusion of the Tax Court or its divisions can be made in exactly opposing ways, and must be left undisturbed, without substantial differentiating facts, or when hybrid arrangements bear tax indicia equally with marks of nontaxability, not only is the statutory review nullified. The right of taxpayers to be treated with equal justice before the law is denied.[d]

[d] Footnotes of the court, except footnotes No. 2 and 7 of the majority opinion, and 1 of the dissent, have been omitted.

NATIONAL LABOR RELATIONS BOARD v. HEARST PUBLICATIONS, INC.

Supreme Court of the United States.
321 U.S. 111, 64 S.Ct. 851, 88 L.Ed. 1170 (1944).

Mr. Justice RUTLEDGE delivered the opinion of the Court.

These cases arise from the refusal of respondents, publishers of four Los Angeles daily newspapers, to bargain collectively with a union representing newsboys who distribute their papers on the streets of that city. Respondents' contention that they were not required to bargain because the newsboys are not their "employees" within the meaning of that term in the National Labor Relations Act, 49 Stat. 450, 29 U.S.C. § 152, 29 U.S.C.A. § 152, presents the important question which we granted certiorari to resolve.

The proceedings before the National Labor Relations Board were begun with the filing of four petitions for investigation and certification by Los Angeles Newsboys Local Industrial Union No. 75. Hearings were held in a consolidated proceeding after which the Board made findings of fact and concluded that the regular full-time newsboys selling each paper were employees within the Act and that questions affecting commerce concerning the representation of employees had arisen. It designated appropriate units and ordered elections. 28 N.L.R.B. 1006. At these the union was selected as their representative by majorities of the eligible newsboys. After the union was appropriately certified, 33 N.L.R.B. 941, 36 N.L.R.B. 285, the respondents refused to bargain with it. Thereupon proceedings under Section 10, 49 Stat. 453-455, 29 U.S.C. § 160, 29 U.S.C.A. § 160, were instituted, a hearing was held and respondents were found to have violated Section 8(1) and (5) of the Act, 49 Stat. 452, 453, 29 U.S.C. § 158(1), (5), 29 U.S.C.A. § 158(1, 5). They were ordered to cease and desist from such violations and to bargain collectively with the union upon request. 39 N.L.R.B. 1245, 1256.

Upon respondents' petitions for review and the Board's petitions for enforcement, the Circuit Court of Appeals, one judge dissenting, set aside the Board's orders. Rejecting the Board's analysis, the court independently examined the question whether the newsboys are employees within the Act, decided that the statute imports common-law standards to determine that question, and held the newsboys are not employees. 136 F.2d 608. * * *

The papers are distributed to the ultimate consumer through a variety of channels, including independent dealers and newsstands often attached to drug, grocery or confectionery stores, carriers who make home deliveries, and newsboys who sell on the streets of the city and its suburbs. Only the last of these are involved in this case.

The newsboys work under varying terms and conditions. They may be "bootjackers," selling to the general public at places other

than established corners, or they may sell at fixed "spots." They may sell only casually or part-time, or full-time; and they may be employed regularly and continuously or only temporarily. The units which the Board determined to be appropriate are composed of those who sell full-time at established spots. Those vendors, misnamed boys, are generally mature men, dependent upon the proceeds of their sales for their sustenance, and frequently supporters of families. Working thus as news vendors on a regular basis, often for a number of years, they form a stable group with relatively little turnover, in contrast to schoolboys and others who sell as bootjackers, temporary and casual distributors.

Over-all circulation and distribution of the papers are under the general supervision of circulation managers. But for purposes of street distribution each paper has divided metropolitan Los Angeles into geographic districts. Each district is under the direct and close supervision of a district manager. His function in the mechanics of distribution is to supply the newsboys in his district with papers which he obtains from the publisher and to turn over to the publisher the receipts which he collects from their sales, either directly or with the assistance of "checkmen" or "main spot" boys. The latter, stationed at the important corners or "spots" in the district, are newsboys who, among other things, receive delivery of the papers, redistribute them to other newsboys stationed at less important corners, and collect receipts from their sales. For that service, which occupies a minor portion of their working day, the checkmen receive a small salary from the publisher. The bulk of their day, however, they spend in hawking papers at their "spots" like other full-time newsboys. A large part of the appropriate units selected by the Board for the News and the Herald are checkmen who, in that capacity, clearly are employees of those papers.

The newsboys' compensation consists in the difference between the prices at which they sell the papers and the prices they pay for them. The former are fixed by the publishers and the latter are fixed either by the publishers or, in the case of the News, by the district manager. In practice the newsboys receive their papers on credit. They pay for those sold either sometime during or after the close of their selling day, returning for credit all unsold papers. Lost or otherwise unreturned papers, however, must be paid for as though sold. Not only is the "profit" per paper thus effectively fixed by the publisher, but substantial control of the newsboys' total "take home" can be effected through the ability to designate their sales areas and the power to determine the number of papers allocated to each. While as a practical matter this power is not exercised fully, the newsboys' "right" to decide how many papers they will take is also not absolute. In practice, the Board found, they cannot determine the size of their established order without the cooperation of the district manager. And often the number of papers they must take is determined unilaterally by the district managers.

In addition to effectively fixing the compensation, respondents in a variety of ways prescribe, if not the minutiae of daily activities, at least the broad terms and conditions of work. This is accomplished largely through the superivisory efforts of the district managers, who serve as the nexus between the publishers and the newsboys. The district managers assign "spots" or corners to which the newsboys are expected to confine their selling activities. Transfers from one "spot" to another may be ordered by the district manager for reasons of discipline or efficiency or other cause. Transportation to the spots from the newspaper building is offered by each of respondents. Hours of work on the spots are determined not simply by the impersonal pressures of the market, but to a real extent by explicit instructions from the district managers. Adherence to the prescribed hours is observed closely by the district managers or other supervisory agents of the publishers. Sanctions, varying in severity from reprimand to dismissal, are visited on the tardy and the delinquent. By similar supervisory controls minimum standards of diligence and good conduct while at work are sought to be enforced. However wide may be the latitude for individual initiative beyond those standards, district managers' instructions in what the publishers apparently regard as helpful sales technique are expected to be followed. Such varied items as the manner of displaying the paper, of emphasizing current features and headlines, and of placing advertising placards, or the advantages of soliciting customers at specific stores or in the traffic lanes are among the subjects of this instruction. Moreover, newsboys are furnished with sales equipment, such as racks, boxes and change aprons, and advertising placards by the publishers. In this pattern of employment the Board found that the newsboys are an integral part of the publishers' distribution system and circulation organization. And the record discloses that the newsboys and checkmen feel they are employees of the papers and respondents' supervisory employees, if not respondents themselves, regard them as such. * * *

The principal question is whether the newsboys are "employees." Because Congress did not explicitly define the term, respondents say its meaning must be determined by reference to common-law standards. In their view "common-law standards" are those the courts have applied in distinguishing between "employees" and "independent contractors" when working out various problems unrelated to the Wagner Act's purposes and provisions.

The argument assumes that there is some simple, uniform and easily applicable test which the courts have used, in dealing with such problems, to determine whether persons doing work for others fall in one class or the other. Unfortunately this is not true. Only by a long and tortuous history was the simple formulation worked out which has been stated most frequently as "the test" for deciding whether one who hires another is responsible in tort for his wrongdoing. But

this formula has been by no means exclusively controlling in the solution of other problems. And its simplicity has been illusory because it is more largely simplicity of formulation than of application. Few problems in the law have given greater variety of application and conflict in results than the cases arising in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent entrepreneurial dealing. This is true within the limited field of determining vicarious liability in tort. It becomes more so when the field is expanded to include all of the possible applications of the distinction.

It is hardly necessary to stress particular instances of these variations or to emphasize that they have arisen principally, first, in the struggle of the courts to work out common-law liabilities where the legislature has given no guides for judgment, more recently also under statutes which have posed the same problem for solution in the light of the enactment's particular terms and purposes. It is enough to point out that, with reference to an identical problem, results may be contrary over a very considerable region of doubt in applying the distinction, depending upon the state or jurisdiction where the determination is made; and that within a single jurisdiction a person who, for instance, is held to be an "independent contractor" for the purpose of imposing vicarious liability in tort may be an "employee" for the purposes of particular legislation, such as unemployment compensation. See, e. g., Globe Grain & Milling Co. v. Industrial Commn., 98 Utah 36, 91 P.2d 512. In short, the assumed simplicity and uniformity, resulting from application of "common-law standards," does not exist. * * * Whether, given the intended national uniformity, the term "employee' includes such workers as these newsboys must be answered primarily from the history, terms and purposes of the legislation. The word "is not treated by Congress as a word of art having a definite meaning * * *." Rather "it takes color from its surroundings * * * [in] the statute where it appears," United States v. American Trucking Associations, Inc., 310 U.S. 534, 545, 60 S.Ct. 1059, 1065, 84 L.Ed. 1345, and derives meaning from the context of that statute, which "must be read in the light of the mischief to be corrected and the end to be attained." South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251, 259, 60 S.Ct. 544, 549, 84 L.Ed. 732; cf. New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552, 304 U.S. 542, 58 S.Ct. 703, 82 L.Ed. 1012; Milk Wagon Drivers' Union Local No. 753 v. Lake Valley Farm Products, Inc., 311 U.S. 91, 61 S.Ct. 122, 85 L.Ed. 63. * * *

It is not necessary in this case to make a completely definitive limitation around the term "employee." That task has been assigned primarily to the agency created by Congress to administer the Act. Determination of "where all the conditions of the relation require protection" involves inquiries for the Board charged with this duty. Everyday experience in the administration of the statute gives

it familiarity with the circumstances and backgrounds of employment relationships in various industries, with the abilities and needs of the workers for self organization and collective action, and with the adaptability of collective bargaining for the peaceful settlement of their disputes with their employers. The experience thus acquired must be brought frequently to bear on the question who is an employee under the Act. Resolving that question, like determining whether unfair labor practices have been committed, "belongs to the usual administrative routine" of the Board. Gray v. Powell, 314 U. S. 402, 411, 62 S.Ct. 326, 332, 86 L.Ed. 301. Cf. National Labor Relations Board v. Standard Oil Co., 7 Cir., 138 F.2d 885, 887, 888.

In making that body's determinations as to the facts in these matters conclusive, if supported by evidence, Congress entrusted to it primarily the decision whether the evidence establishes the material facts. Hence in reviewing the Board's ultimate conclusions, it is not the court's function to substitute its own inferences of fact for the Board's, when the latter have support in the record. National Labor Relations Board v. Nevada Consolidated Copper Corp., 316 U.S. 105, 62 S.Ct. 960, 86 L.Ed. 1305; cf. Walker v. Altmeyer, 2 Cir., 137 F.2d 531. Undoubtedly questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute. Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 53 S.Ct. 350, 77 L.Ed. 796; United States v. American Trucking Associations, Inc., 310 U.S. 534, 60 S.Ct. 1059, 84 L.Ed. 1345. But where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited. Like the commissioner's determination under the Longshoremen's & Harbor Workers' Act, that a man is not a "member of a crew" (South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251, 60 S.Ct. 544, 547, 84 L.Ed. 732) or that he was injured "in the course of his employment" (Parker v. Motor Boat Sales, Inc., 314 U.S. 244, 62 S.Ct. 221, 222, 86 L.Ed. 184) and the Federal Communications Commission's determination that one company is under the "control" of another (Rochester Telephone Corp. v. United States, 307 U.S. 125, 59 S.Ct. 754, 83 L.Ed. 1147), the Board's determination that specified persons are "employees" under this Act is to be accepted if it has "warrant in the record" and a reasonable basis in law.

In this case the Board found that the designated newsboys work continuously and regularly, rely upon their earnings for the support of themselves and their families, and have their total wages influenced in large measure by the publishers who dictate their buying and selling prices, fix their markets and control their supply of papers. Their hours of work and their efforts on the job are supervised and to some extent prescribed by the publishers or their agents.

Much of their sales equipment and advertising materials is furnished by the publishers with the intention that it be used for the publisher's benefit. Stating that "the primary consideration in the determination of the applicability of the statutory definition is whether effectuation of the declared policy and purposes of the Act comprehend securing to the individual the rights guaranteed and protection afforded by the Act," the Board concluded that the newsboys are employees. The record sustains the Board's findings and there is ample basis in the law for its conclusion. * * *

Mr. Justice ROBERTS. I think the judgment of the Circuit Court of Appeals should be affirmed. The opinion of that court reported in 136 F.2d 608, seems to me adequately to state the controlling facts and correctly to deal with the question of law presented for decision. I should not add anything were it not for certain arguments presented here and apparently accepted by the court.

I think it plain that newsboys are not "employees" of the respondents within the meaning and intent of the National Labor Relations Act. When Congress, in § 2(3), 29 U.S.C.A. § 152(3), said: "The term 'employee' shall include any employee, * * *" is stated as clearly as language could do it that the provisions of the Act were to extend to those who, as a result of decades of tradition which had become part of the common understanding of our people, bear the named relationship. Clearly also Congress did not delegate to the National Labor Relations Board the function of defining the relationship of employment so as to promote what the Board understood to be the underlying purpose of the statute. The question who is an employee, so as to make the statute applicable to him, is a question of the meaning of the Act and, therefore, is a judicial and not an administrative question.*

In SOCIAL SECURITY BOARD v. NIEROTKO, 327 U.S. 358, 66 S.Ct. 637, 90 L.Ed. ——, 162 A.L.R. 1445 (1946), the court, through Mr. Justice Reed, at pp. 368–9 of 327 U.S., (642–3 of 66 S.Ct.) said:

But it is urged by petitioner that the administrative construction on the question of whether "back pay" is to be treated as wages should lead us to follow the agencies' determination. There is a suggestion that the administrative decision should be treated as conclusive, and reliance for that argument is placed upon National Labor Relations Board v. Hearst Publications, 322 U.S. 111, 130, 64 S.Ct. 851, 860, 88 L.Ed. 1170, and Gray v. Powell, 314 U.S. 402, 411, 62 S. Ct. 326, 332, 86 L.Ed. 301. In the acts which were construed in the cases just cited, as in the Social Security Act, the administrators of those acts were given power to reach preliminary conclusions as to

* Footnotes of the court have been omitted.

coverage in the application of the respective acts. Each act contains a standardized phrase that Board findings supported by substantial evidence shall be conclusive. The validity of regulations is specifically reserved for judicial determination by the Social Security Act Amendments of 1939, sec. 205(g).

The Social Security Board and the Treasury were compelled to decide, administratively, whether or not to treat "back pay" as wages and their expert judgment is entitled, as we have said, to great weight. The very fact that judicial review has been accorded, however, makes evident that such decisions are only conclusive as to properly supported findings of fact. Both N.L.R.B. v. Hearst Publications, page 131, of 322 U.S., page 860 of 64 S.Ct., 88 L.Ed. 1170, and Gray v. Powell, page 411 of 314 U.S., page 332 of 62 S.Ct., 86 L.Ed. 301, advert to the limitations of administrative interpretations. Administrative determinations must have a basis in law and must be within the granted authority. Administration when it interprets a statute so as to make it apply to particular circumstances acts as a delegate to the legislative power. Congress might have declared that "back pay" awards under the Labor Act should or should not be treated as wages. Congress might have delegated to the Social Security Board to determine what compensation paid by employers to employees should be treated as wages. Except as such interpretive power may be included in the agencies' administrative functions, Congress did neither. An agency may not finally decide the limits of its statutory power. That is a judicial function.[1]

In UNEMPLOYMENT COMPENSATION COMMISSION OF ALASKA v. ARAGAN, —— U.S. ——, 67 S.Ct. 245, —— L.Ed. —— (1946), the Court, at p. —— of —— U.S. (p. 250 of 67 S.Ct.), said: Respondents urge that, assuming their unemployment was due to a labor dispute, there was no labor dispute in "active progress" within the meaning of the Act after the passage of the deadline dates. It is argued that when the expeditions were abandoned by the companies, the dispute must necessarily have terminated since there was no possible way in which negotiations could have brought about a settlement. It should be observed, however, that the record does not reveal that negotiations abruptly terminated with the passing of the last deadline date. Conferences continued at Seattle in which both the companies and the union were represented. The respondents considered the negotiations sufficiently alive to make an offer of terms at least as late as May 29. Even if it be assumed that at some time within the eight week period of disqualification of the point was reached when all possibility of settlement disappeared, it does not follow that the Commission's finding of a dis-

[1] Footnotes of the court have been omitted. For the remainder of this opinion, see p. 153, *supra*.

pute in "active progress" must be overturned. Here, as in National Labor Relations Board v. Hearst Publications, Inc., 1944, 322 U.S. 111, 131, 64 S.Ct. 851, 860, 861, 88 L.Ed. 1170, the question presented "is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially." To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings. The "reviewing court's function is limited". All that is needed to support the Commission's interpretation is that it has "warrant in the record" and a "reasonable basis in law". National Labor Relations Board v. Hearst Publications, Inc., supra; Rochester Telephone Corporation v. United States, 1939, 307 U.S. 125, 59 S.Ct. 754, 83 L.Ed. 1147.

In inquiring into the scope of judicial review of administrative conclusions of law, the implications of Texas & Pacific Railway Co. v. Abilene Cotton Oil Company, 204 U.S. 425, 27 S.Ct. 350, 51 L.Ed. 553, 9 Ann.Cas. 1075 (1907), *supra* at p. 596; Texas & Pacific Railway Company v. American Tie & Timber Co., 234 U.S. 138, 34 S.Ct. 885, 58 L.Ed. 1255 (1914), *supra* at p. 604; Great Northern Railway Company v. Merchants Elevator Company, 259 U.S. 285, 42 S.Ct. 477, 66 L.Ed. 943 (1922), *supra* at p. 609; and the other cases examined in Chapter VII, Part I, Section 1, should be taken into account. See also Landis, The Administrative Process (1938), 143-6, 152-3.

C. In Judicial Review of Administrative Regulations

HOUSTON v. ST. LOUIS INDEPENDENT PACKING COMPANY

Supreme Court of the United States.
249 U.S. 479, 39 S.Ct. 332, 63 L.Ed. 717 (1919).

Mr. Justice CLARKE delivered the opinion of the Court.

The Secretary of Agriculture, assuming to exercise authority under the Meat Inspection Act, approved June 30, 1906 (34 Stat. 669, 676, 678, c. 3913), promulgated a regulation, effective April 1, 1913, in part as follows, viz.:

"Washington, D. C., Feb. 28, 1913.

"For the purpose of preventing the use in interstate or foreign commerce of meat or meat food products under any false or deceptive name, under the authority conferred on the Secretary of Agriculture by the provisions of the act of Congress, approved June 30, 1906 (34 Stat. 674), regulation 18 is hereby amended by the addition of sections 15 and 16, to read as hereinafter set out.

"James Wilson, Secretary of Agriculture.

"(Section 16, paragraph 1.) Sausage shall not contain cereal in excess of two per cent.; when cereal is added its presence shall be stated on the label or on the product.

"(Paragraph 2.) Water or ice shall not be added to sausage, except for the purpose of facilitating grinding, chopping and mixing, in which case the added water or ice shall not exceed three per cent., except as provided in the following paragraph."

Immediately after the effective date of this regulation the appellee, an extensive manufacturer of sausage correctly interpreting it as prohibiting the marking, stamping or labeling as "sausage" any compound of chopped or minced meats containing cereal in excess of 2 per cent. and water or ice in excess of 3 per cent. (except as otherwise provided), filed the bill in this case in the District Court of the United States for the Eastern Division of the Eastern District of Missouri, averring that "sausage" made by it with cereal and water in excess of the requirements of the regulation was wholesome and fit for human food and that the effect of the order would be to exclude its product from interstate commerce, to its great and irreparable damage. The prayer was that the defendants, the Secretary of Agriculture and the officers subordinate to him, be enjoined from refusing to mark as "Inspected and passed" all "sausage" manufactured by the petitioner found to be sound, healthful, and wholesome, and which contained no dyes, chemicals, preservatives or ingredients which would render such "sausage" unsound, unwholesome or unfit for human food; that they be required by mandatory injunction to mark such "sausage" as "Inspected and passed," and that the regulation be declared to be unauthorized by law, null and void.

The District Court denied the application, on the bill, for an injunction (St. Louis Independent Packing Co. v. Houston, 204 F. 120), but on appeal that holding was reversed and the case was remanded by the Circuit Court of Appeals (St. Louis Independent Packing Co. v. Houston, 215 F. 553, 132 C.C.A. 65).

The Secretary of Agriculture then answered admitting that it was the purpose of the Department to refuse, and that it had refused, to mark as "Inspected and passed" as "sausage" the product of the appellee unless manufactured in compliance with the regulations complained of, and, as warrant therefor, he quoted in his answer from the act of Congress the following:

"No such meat or meat food products shall be sold or offered for sale by any person, firm, or corporation in interstate or foreign commerce under any false or deceptive name; but established tradename or names which are usual to such products and which are not false and deceptive and which shall be approved by the Secretary of Agriculture are permitted, and that said Secretary of Agriculture shall, from time to time make such rules and regulations as are necessary for the efficient execution of the provisions of this act, and all inspections and examinations made under this act shall be such

and made in such manner as described in the rules and regulations prescribed by the Secretary of Agriculture not inconsistent with the provisions of this act."

Answering the allegation of the bill that the appellee's trade in "sausage" would be ruined by the enforcement of the regulation, the Secretary of Agriculture averred that the appellee manufactured and sold large quantities of sausage which did not contain any cereal or added water, and added:

"That the manufacture and sale of a product as sausage which product contains added cereal and water in quantities as described in plaintiff's bill, or in any quantities in excess of the amount designated in said regulation, effective April 1, 1913, is false and deceptive; that the ordinary consumer of sausage manufactured by the plaintiff has no knowledge or information that sausage contains cereal and added water, that such information is not conveyed to persons who purchase plaintiff's sausage at retail by any method of marking or branding now or heretofore in use by plaintiff, and that it is impracticable and impossible in the ordinary course of manufacture and distribution of sausage to mark or brand the same so that the purchaser at retail or the consumer will be informed as to the amount of cereal and water added thereto."

An elaborate trial on the merits resulted in the dismissal of the bill by the District Court (231 F. 779), but this judgment was reversed by a divided Circuit Court of Appeals (242 F. 337, 155 C.C.A. 113) and the case was remanded with directions to award the appellee injunctions substantially as prayed for. The case is here for review on appeal.

The claim made by the government in the lower courts that the compound of meats, cereal and water, which the appellee claimed the right to sell as "sausage" was unwholesome is abandoned in this court and the only question argued and submitted is whether it was within the power of the Secretary of Agriculture to prohibit the use of the word "sausage" as false and deceptive, within the meaning of the act, when applied to the appellee's product.

The foregoing statement shows that the question for decision in this court is: Whether, in promulgating the regulation assailed, the Secretary of Agriculture acted arbitrarily and in excess of the authority given him by the act of Congress, to make, from time to time, such rules and regulations as are necessary for the efficient enforcement of the act, or whether he acted in good faith and upon substantial grounds in deciding that the sale of appellee's product as "sausage" resulted in deception of purchasers and consumers, so that his determination of such question of fact was within the power conferred upon him as the head of an executive department of the government and is not subject to review by the courts.

The contention of the government is that the product of the appellee being a meat food product, put up in containers—casings or

canvas coverings—it falls within the prohibition of the act that such product shall not be sold or offered for sale by any corporation in interstate commerce "under any false or deceptive name," and that the regulation being for the purpose of preventing its sale under the false or deceptive name of "sausage," it is plainly within the authority given to the Secretary of Agriculture to make rules and regulations for the efficient execution of the act.

On the other hand, the contention of the appellee is that the product being wholesome and containing no dyes or chemicals, which render it unfit for human food, an earlier provision of the act applies, which it is asserted deprives the Secretary of all discretion in such a case and requires that he shall cause the product to be marked "Inspected and passed," and also, it is claimed, that the word "sausage," when qualified as was required by prior regulations by including in the label such expressions as "Cereal added," or "Sausage and cereal," was not a false or deceptive name.

The contention of the appellee that if its product is wholesome, and if it does not contain dyes and chemicals, the act imperatively requires the Secretary to mark its product as "Inspected and passed" is clearly unsound if the word "sausage" as applied to it is false and deceptive, for plainly the provision of the act requiring the marking of the product must be harmonized with the subsequent provision that no such meat or meat food product shall be sold or offered for sale under any false or deceptive name.

Whether or not the term "sausage," when applied to the product of the appellee, in which more than the permitted amount of cereal and water is used, is false and deceptive is a question of fact, the determination of which is committed to the decision of the Secretary of Agriculture by the authority given him to make rules and regulations for giving effect to the act, and the law is that the conclusion of the head of an executive department on such a question will not be reviewed by the courts, where it is fairly arrived at with substantial evidence to support it.

This rule has been most frequently applied in Land Department cases, but often also to decisions by heads of other departments.

Thus, to the action of the Secretary of the Navy in Decatur v. Paulding, 14 Pet. 497, 599 Appx., 10 L.Ed. 559, 609, to the action of the Secretary of the Interior, on full consideration of the subject, in Gaines v. Thompson, 7 Wall. 347, 19 L.Ed. 62, and in Burfenning v. Chicago, etc., Ry. Co., 163 U.S. 321, 16 Sup.Ct. 1018, 41 L.Ed. 175, and to decisions of the Postmaster General in Bates & Guild Co. v. Payne, 194 U.S. 106, 24 S.Ct. 595, 48 L.Ed. 894, and Smith v. Hitchcock, 226 U.S. 53, 33 S.Ct. 6, 57 L.Ed. 119. The doctrine has been extended by act of Congress to decisions by the Secretary of Commerce and Labor. Tang Tun v. Edsell, 223 U.S. 673, 32 S.Ct. 359, 56 L.Ed. 606; Zakonaite v. Wolf, 226 U.S. 272, 33 S.Ct. 31. 57 L.Ed. 218; Levis v. Frick, 233 U.S. 291, 34 S.Ct. 488, 58 L.Ed. 967.

The scope of the rule is illustrated by this court, saying in Johnson v. Drew, 171 U.S. 93, 99, 18 S.Ct. 800, 802 (43 L.Ed. 88):

"If there is any one thing respecting the administration of the public lands which must be considered as settled by repeated adjudications of this court, it is that the decision of the land department upon mere questions of fact is, in the absence of fraud or deceit, conclusive, and such questions cannot thereafter be relitigated in the courts."

And in New Orleans v. Paine, 147 U.S. 261, 264, 13 S.Ct. 303, 305 (37 L.Ed. 162):

"In Noble v. Union River Logging Railroad, decided at the present term [147 U.S. 165, 13 S.Ct. 271, 37 L.Ed. 123], we had occasion to examine the question as to when a court was authorized to interfere by injunction with the action of the head of a department, and came to the conclusion that it was only where, in any view of the facts that could be taken, such action was beyond the scope of his authority. If he were engaged in the performance of a duty which involved the exercise of discretion or judgment, he was entitled to protection from any interference by the judicial power."

That the case before us is one for the application of this rule is shown by the record, which contains an interesting history of what large manufacturers have come, in a more or less gradual progress, to regard as the proper ingredients of the product which they have sold as sausage, and which also shows, without conflict, that the ultimate purchaser and consumer of the product is not informed and in general does not know of the presence of cereal and added water in it. The evidence shows that the poorer classes of beef and pork are used in making sausage, such as trimmings, hearts, ears, cheeks, liver, snouts and tripe, "and all that kind of things," but the preferred material is bull meat; that such meat, other than bull meat, is dry and has not the cohesive properties which will unite it when ground or minced into the mass popularly known as "sausage" and that, for this reason, corn meal, potato flour and other like substances have come to be used by the trade as "binders" to give it the desired cohesiveness and appearance.

The president of the appellee testified that when he first began making sausage 25 years ago he used anywhere from 5 per cent. to 12 per cent. of cereal and that when the regulation was promulgated he was using 2 or 3 per cent. to 10 per cent., when he used any at all, but that in a part of his product he did not use any, notably in that which was sent into Pennsylvania, where the use of cereal was prohibited by statute; that when he used 10 per cent. of cereal he added from 15 to 20 per cent. of water, and that in general water was added in double the percentage of cereal used; and that the cereal, usually corn meal or corn flour, was resorted to to cheapen the product and cost about 2 cents a pound, while the meat used cost from 6 to 15 cents a pound.

Before the regulation assailed was promulgated cereal and water were generally used by large manufacturers of sausage, but all of the representatives of manufacturers, other than those of the appellee, who were called as witnesses, testified that they were obeying the regulation, and the agreement of such witnesses was general that retail purchasers and consumers did not know of the presence of cereal in what they were buying as sausage.

There is conflict in the evidence as to whether the use of cereal in excess of the prescribed amounts renders the product less digestible and wholesome, whether it reduces its food value, and whether the sausage will ferment in a shorter time than when cereal is not used at all, or when used in smaller quantities.

The result, thus stated, of the examination of the record before us shows beyond controversy, that the Secretary of Agriculture in promulgating the regulation complained of acted on substantial evidence and with sufficient reason in concluding that persons purchasing or using as "sausage" the appellee's compound of various meats, cereal and water would be deceived as to its composition and as to its value as a food product, and we cannot say that it was an abuse of discretion to prohibit the use of the word "sausage" as applied to it, rather than to prescribe qualifying terms explanatory of it. Few purchasers read long labels, many cannot read them at all, and the act of Congress having committed to the head of the department, constantly dealing with such matters, the discretion to determine as to whether the use of the word "sausage" in a label would be false and deceptive or not, under such circumstances as we have here this court will not review, and the Circuit Court of Appeals should not have reviewed and reversed the decision of the Secretary of Agriculture.

The decree of the Circuit Court of Appeals for the Eighth Circuit is reversed and the case remanded for further proceedings not inconsistent with this opinion.

Reversed.[g]

UNITED STATES v. GEORGE S. BUSH & CO., INC.

Supreme Court of the United States.
310 U.S. 371, 60 S.Ct. 944, 84 L.Ed. 1259 (1940).

Mr. Justice DOUGLAS delivered the opinion of the Court.

The Court of Customs and Patent Appeals held invalid the Proclamation made by the President of the United States on May 1, 1934, No. 2081, 48 Stat. 1739, increasing the duty on canned clams imported

[g] See Miller v. United States, 294 U.S. 435, 55 S.Ct. 440, 79 L.Ed. 977 (1935); Manhattan General Equipment Co. v. Commissioner of Internal Revenue, 297 U.S. 129, 134-5, 56 S.Ct. 397, 400, 80 L. Ed. 528 (1936).

from Japan. 104 F.2d 368. We granted certiorari because of the importance of that decision to the administration of the flexible tariff provisions of the Tariff Act of 1930, 46 Stat. 590, 19 U.S.C.A. § 1001 et seq. 309 U.S. 643, 60 S.Ct. 514, 84 L.Ed. 997.

In compliance with § 336(a) of that Act, 19 U.S.C.A. § 1336(a), the Tariff Commission, in response to an application for an increased duty on canned clams, instituted an investigation in June 1932, gave public notice of the hearing, held the hearing in October 1932 and gave interested parties an opportunity to be present, to produce evidence, and to be heard. As a result of that investigation the Commission found that the statutory duty of 35% ad valorem on the foreign dutiable value did not equalize the difference in the costs of production of the domestic article and the Japanese article. On such a finding the Commission was authorized by § 336(a) to recommend to the President an increase or decrease in the statutory rate but not in excess of 50 per cent; or in case the differences could not be equalized in that manner, it was empowered by § 336(b) to specify such ad valorem rate of duty based upon the American selling price of the domestic article as it found necessary to equalize such differences. In the latter event, however, the statutory rate could not be increased. The Commission found that the rate of duty on foreign value which would be necessary to equalize the difference in costs exceeded the then existing statutory rate by more than 50 per cent. Accordingly it proceeded under § 336 (b) to specify an ad valorem rate based on American selling price, and recommended to the President an increase in the duty, to be effected by assessing the rate of 35 per cent ad valorem on the American selling price.

It is provided in § 336(c) that the President "shall by proclamation approve the rates of duty and changes in classification and in basis of value specified in any report of the commission under this section, if in his judgment such rates of duty and changes are shown by such investigation of the commission to be necessary to equalize such differences in costs of production." The Proclamation referred to the report and findings of the Commission and concluded that the change in duty recommended was "in the judgment of the President" necessary for that purpose. After the President issued his Proclamation, respondent imported some canned clams and they were appraised on the basis of the American selling price. It was on an appeal for reappraisement pursuant to § 501 that the Proclamation was held invalid by the Court of Customs and Patent Appeals. Its invalidity, according to that court, flowed from the basis on which the Commission computed the Japanese cost of production. By § 336(e) (2) the Commission was authorized, when the cost of production of a foreign article was not "readily ascertainable," to accept as evidence thereof the "weighted average of the invoice prices or values for a representative period." The Commission took the weighted average of such prices for the period from December 1, 1930 to September 30, 1932. Those prices were in Japanese

yen. Sec. 336 contains no provision for conversion of currency. But the Commission in order to compare those prices with domestic costs converted them into United States dollars, at the average rate of exchange for 1932. That period was selected because Japan went off the gold standard in December 1931 and the value of the yen in terms of United States dollars declined steadily from that date to November 1932.

The Court of Customs and Patent Appeals held that it was error to convert invoice prices for one period into United States dollars at the average rate of exchange for another period. In its view the phrase "weighted average of the invoice prices or values for a representative period" contained in § 336(e) (2) must be construed as though it read, "weighted average of the invoice prices or values in United States currency for a representative period." The government, however, urges that if the Commission were forced to take the conversion rate for the earlier period, to which it had to resort in order to obtain the invoice prices, it would use a rate which had merely an historical interest and which did not reflect the conditions which made desirable an increase in duties, viz. the depreciation in the value of the yen.

The determination of foreign exchange value was prescribed, in the procedure outlined by Congress, neither for the action of the Commission nor for that of the President. There is no express provision in the Act that the rate of exchange must be taken for the same period as the invoice prices. To imply it would be to add what Congress has omitted and doubtless omitted in view of the very nature of the problem. The matter was left at large. The President's method of solving the problem was open to scrutiny neither by the Court of Customs and Patent Appeals nor by us. Whatever may be the scope of appellate jurisdiction conferred by § 501 of the Tariff Act of 1930, it certainly does not permit judicial examination of the judgment of the President that the rates of duty recommended by the Commission are necessary to equalize the differences in the domestic and foreign costs of production.

The powers which Congress has entrusted to the President under the Act of 1930 do not essentially differ in kind from those which have been granted him under the tariff acts for well over a century. See Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 308 et seq., 53 S.Ct. 350, 355, 77 L.Ed. 796, for a review of the statutes. Since its creation in 1916 the Commission has acted as an adviser to the Congress or to the President. Under § 336 of the Act of 1930 the Commission serves the President in that role. It does not increase or decrease the rates of duty; it is but the expert body which investigates and submits the facts and its recommendations to the President. It is the judgment of the President on those facts which is determinative of whether or not the recommended rates will be promulgated. In substance and to a great extent in form (Norwegian Nitrogen Products Co. v. United States, supra) the action of the Commission and the

President is but one stage of the legislative process. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 48 S.Ct. 348, 72 L.Ed. 624. "No one has a legal right to the maintenance of an existing rate or duty." Norwegian Nitrogen Products Co. v. United States, supra, 288 U.S. page 318, 53 S.Ct. page 359, 77 L.Ed. 796. And the judgment of the President that on the facts, adduced in pursuance of the procedure prescribed by Congress, a change of rate is necessary is no more subject to judicial review under this statutory scheme than if Congress itself had exercised that judgment. It has long been held that where Congress has authorized a public officer to take some specified legislative action when in his judgment that action is necessary or appropriate to carry out the policy of Congress, the judgment of the officer as to the existence of the facts calling for that action is not subject to review. Martin v. Mott, 12 Wheat. 19, 6 L.Ed. 537; President, etc., of Monongahela Bridge Co. v. United States, 216 U.S. 177, 30 S.Ct. 356, 54 L.Ed. 435; Dakota Central Telephone Co. v. South Dakota, 250 U.S. 163, 39 S.Ct. 507, 63 L.Ed. 910, 4 A.L.R. 1623; United States v. Chemical Foundation, Inc., 272 U.S. 1, 47 S.Ct. 1, 71 L.Ed. 131. As stated by Mr. Justice Story in Martin v. Mott, supra, 12 Wheat. pages 31, 32, 6 L.Ed. 537: "Whenever a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts."

For the judiciary to probe the reasoning which underlies this Proclamation would amount to a clear invasion of the legislative and executive domains. Under the Constitution it is exclusively for Congress, or those to whom it delegates authority, to determine what tariffs shall be imposed. Here the President acted in full conformity with the statute. No question of law is raised when the exercise of his discretion is challenged.

The other points raised are so unimportant as not to merit discussion.

Reversed.

Mr. Justice McREYNOLDS is of the opinion that the judgment below should be affirmed.[h]

[h] Footnotes of the court have been omitted.

NATIONAL BROADCASTING CO., INC. v. UNITED STATES

Supreme Court of the United States.
319 U.S. 190, 63 S.Ct. 997, 87 L.Ed. 1344 (1943).

Mr. Justice FRANKFURTER delivered the opinion of the Court.

In view of our dependence upon regulated private enterprise in discharging the far-reaching rôle which radio plays in our society, a somewhat detailed exposition of the history of the present controversy and the issues which it raises is appropriate.

These suits were brought on October 30, 1941, to enjoin the enforcement of the Chain Broadcasting Regulations promulgated by the Federal Communications Commission on May 2, 1941, and amended on October 11, 1941. We held last Term in Columbia Broadcasting System v. United States, 316 U.S. 407, 62 S.Ct. 1194, 86 L.Ed. 1563, and Nat. Broadcasting Co. v. United States, 316 U.S. 447, 62 S.Ct. 1214, 86 L.Ed. 1586, that the suits could be maintained under § 402(a) of the Communications Act of 1934, 48 Stat. 1093, 47 U.S.C. § 402(a), 47 U.S.C.A. § 402(a) (incorporating by reference the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 219, 28 U.S.C. § 47, 28 U.S.C.A. § 47), and that the decrees of the District Court dismissing the suits for want of jurisdiction should therefore be reversed. On remand the District Court granted the Government's motions for summary judgment and dismissed the suits on the merits. 47 F.Supp. 940. The cases are now here on appeal. 28 U.S.C. § 47, 28 U.S.C.A. § 47. Since they raise substantially the same issues and were argued together, we shall deal with both cases in a single opinion.

On March 18, 1938, the Commission undertook a comprehensive investigation to determine whether special regulations applicable to radio stations engaged in chain broadcasting were required in the "public interest, convenience, or necessity". The Commission's order directed that inquiry be made, inter alia, in the following specific matters: the number of stations licensed to or affiliated with networks, and the amount of station time used or controlled by networks; the contractual rights and obligations of stations under their agreements with networks; the scope of network agreements containing exclusive affiliation provisions and restricting the network from affiliating with other stations in the same area; the rights and obligations of stations with respect to network advertisers; the nature of the program service rendered by stations licensed to networks; the policies of networks with respect to character of programs, diversification, and accommodation to the particular requirements of the areas served by the affiliated stations; the extent to which affiliated stations exercise control over programs, advertising contracts, and related matters; the nature and extent of network program duplication by stations serving the same area; the extent to which particular networks have exclusive coverage in some areas; the competitive practices of stations engaged in

chain broadcasting; the effect of chain broadcasting upon stations not licensed to or affiliated with networks; practices or agreements in restraint of trade, or in furtherance of monopoly, in connection with chain broadcasting; and the scope of concentration of control over stations, locally, regionally, or nationally, through contracts, common ownership, or other means.

On April 6, 1938, a committee of three Commissioners was designated to hold hearings and make recommendations to the full Commission. This committee held public hearings for 73 days over a period of six months, from November 14, 1938, to May 19, 1939. Order No. 37, announcing the investigation and specifying the particular matters which would be explored at the hearings, was published in the Federal Register, 3 Fed.Reg. 637, and copies were sent to every station licensee and network organization. Notices of the hearings were also sent to these parties. Station licensees, national and regional networks, and transcription and recording companies were invited to appear and give evidence. Other persons who sought to appear were afforded an opportunity to testify. 96 witnesses were heard by the committee, 45 of whom were called by the national networks. The evidence covers 27 volumes, including over 8,000 pages of transcript and more than 700 exhibits. The testimony of the witnesses called by the national networks fills more than 6,000 pages, the equivalent of 46 hearing days.

The committee submitted a report to the Commission on June 12, 1940, stating its findings and recommendations. Thereafter, briefs on behalf of the networks and other interested parties were filed before the full Commission, and on November 28, 1940, the Commission issued proposed regulations which the parties were requested to consider in the oral arguments held on December 2 and 3, 1940. These proposed regulations dealt with the same matters as those covered by the regulations eventually adopted by the Commission. On January 2, 1941, each of the national networks filed a supplementary brief discussing at length the questions raised by the committee report and the proposed regulations.

On May 2, 1941, the Commission issued its Report on Chain Broadcasting, setting forth its findings and conclusions upon the matters explored in the investigation, together with an order adopting the Regulations here assailed. Two of the seven members of the Commission dissented from this action. The effective date of the Regulations was deferred for 90 days with respect to existing contracts and arrangements of network-operated stations, and subsequently the effective date was thrice again postponed. On August 14, 1941, the Mutual Broadcasting Company petitioned the Commission to amend two of the Regulations. In considering this petition the Commission invited interested parties to submit their views. Briefs were filed on behalf of all of the national networks, and oral argument was had before the Commission on September 12, 1941. And on October 11, 1941, the

Commission (again with two members dissenting) issued a Supplemental Report, together with an order amending three Regulations. Simultaneously, the effective date of the Regulations was postponed until November 15, 1941, and provision was made for further postponements from time to time if necessary to permit the orderly adjustment of existing arrangements. Since October 30, 1941, when the present suits were filed, the enforcement of the Regulations has been stayed either voluntarily by the Commission or by order of court.

Such is the history of the Chain Broadcasting Regulations. We turn now to the Regulations themselves, illumined by the practices in the radio industry disclosed by the Commission's investigation. The Regulations, which the Commission characterized in its Report as "the expression of the general policy we will follow in exercising our licensing power", are addressed in terms to station licensees and applicants for station licenses. They provide, in general, that no licenses shall be granted to stations or applicants having specified relationships with networks. Each Regulation is directed at a particular practice found by the Commission to be detrimental to the "public interest", and we shall consider them seriatim. In doing so, however, we do not overlook the admonition of the Commission that the Regulations as well as the network practices at which they are aimed are interrelated: "In considering above the network practices which necessitate the regulations we are adopting, we have taken each practice singly, and have shown that even in isolation each warrants the regulation addressed to it. But the various practices we have considered do not operate in isolation; they form a compact bundle or pattern, and the effect of their joint impact upon licensees necessitates the regulations even more urgently than the effect of each taken singly." (Report, p. 75.)

The Commission found that at the end of 1938 there were 660 commercial stations in the United States, and that 341 of these were affiliated with national networks. 135 stations were affiliated exclusively with the National Broadcasting Company, Inc., known in the industry as NBC, which operated two national networks, the "Red" and the "Blue." NBC was also the licensee of 10 stations, including 7 which operated on so-called clear channels with the maximum power available, 50 kilowatts; in addition, NBC operated 5 other stations, 4 of which had power of 50 kilowatts, under management contracts with their licensees. 102 stations were affiliated exclusively with the Columbia Broadcasting System, Inc., which was also the licensee of 8 stations, 7 of which were clear-channel stations operating with power of 50 kilowatts. 74 stations were under exclusive affiliation with the Mutual Broadcasting System, Inc. In addition, 25 stations were affiliated with both NBC and Mutual, and 5 with both CBS and Mutual. These figures, the Commission noted, did not accurately reflect the relative prominence of the three companies, since the stations affiliated with Mutual were, generally speaking, less desirable in frequency, power, and coverage. It pointed out that the stations affiliated with the na-

tional networks utilized more than 97% of the total night-time broadcasting power of all the stations in the country. NBC and CBS together controlled more than 85% of the total night-time wattage, and the broadcast business of the three national network companies amounted to almost half of the total business of all stations in the United States.

The Commission recognized that network broadcasting had played and was continuing to play an important part in the development of radio. "The growth and development of chain broadcasting", it stated, "found its impetus in the desire to give widespread coverage to programs which otherwise would not be heard beyond the reception area of a single station. Chain broadcasting makes possible a wider reception for expensive entertainment and cultural programs and also for programs of national or regional significance which would otherwise have coverage only in the locality of origin. Furthermore, the access to greatly enlarged audiences made possible by chain broadcasting has been a strong incentive to advertisers to finance the production of expensive programs. * * * But the fact that the chain broadcasting method brings benefits and advantages to both the listening public and to broadcast station licensees does not mean that the prevailing practices and policies of the networks and their outlets are sound in all respects, or that they should not be altered. The Commission's duty under the Communications Act of 1934, 47 U.S.C.A. § 151 et seq., is not only to see that the public receives the advantages and benefits of chain broadcasting, but also, so far as its powers enable it, to see that practices which adversely affect the ability of licensees to operate in the public interest are eliminated." (Report, p. 4.)

The Commission found that eight network abuses were amenable to correction within the powers granted it by Congress:

Regulation 3.101—Exclusive affiliation of station. The Commission found that the network affiliation agreements of NBC and CBS customarily contained a provision which prevented the station from broadcasting the programs of any other network. The effect of this provision was to hinder the growth of new networks, to deprive the listening public in many areas of service to which they were entitled, and to prevent station licensees from exercising their statutory duty of determining which programs would best serve the needs of their community. * * * Accordingly, the Commission adopted Regulation 3.101, providing as follows: "No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, broadcasting the programs of any other network organization."

Regulation 3.102—Territorial exclusivity. The Commission found another type of "exclusivity" provision in network affiliation agreements whereby the network bound itself not to sell programs to any

other station in the same area. The effect of this provision, designed to protect the affiliate from the competition of other stations serving the same territory, was to deprive the listening public of many programs that might otherwise be available. * * * Regulation 3.102, promulgated to remedy this particular evil, provides as follows: "No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which prevents or hinders another station serving substantially the same area from broadcasting the network's programs not taken by the former station, or which prevents or hinders another station serving a substantially different area from broadcasting any program of the network organization. This regulation shall not be construed to prohibit any contract, arrangement, or understanding between a station and a network organization pursuant to which the station is granted the first call in its primary service area upon the programs of the network organization."

Regulation 3.103—Term of affiliation. The standard NBC and CBS affiliation contracts bound the station for a period of five years, with the network having the exclusive right to terminate the contracts upon one year's notice. The Commission, relying upon § 307(d) of the Communications Act of 1934, under which no license to operate a broadcast station can be granted for a longer term than three years, found the five-year affiliation term to be contrary to the policy of the Act: * * * Accordingly, the Commission adopted Regulation 3.103: "No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which provides, by original term, provisions for renewal, or otherwise for the affiliation of the station with the network organization for a period longer than two years. Provided, That a contract, arrangement, or understanding for a period up to two years, may be entered into within 120 days prior to the commencement of such period."

Regulation 3.104—Option time. The Commission found that network affiliation contracts usually contained so-called network optional time clause. Under these provisions the network could upon 28 days' notice call upon its affiliates to carry a commercial program during any of the hours specified in the agreement as "network optional time". * * *

Regulation 3.104 called for the modification of the option-time provision in three respects: the minimum notice period for exercise of the option could not be less than 56 days; the number of hours which could be optioned was limited; and specific restrictions were placed upon exercise of the option to the disadvantage of other networks. * * *

Regulation 3.105—Right to reject programs. The Commission found that most network affiliation contracts contained a clause de-

fining the right of the station to reject network commercial programs. * * *

The Commission undertook in Regulation 3.105 to formulate the obligations of licensees with respect to supervision over programs: "No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding, express or implied, with a network organization which (a), with respect to programs offered pursuant to an affiliation contract, prevents or hinders the station from rejecting or refusing network programs which the station reasonably believes to be unsatisfactory or unsuitable; or which (b), with respect to network programs so offered or already contracted for, prevents the station from rejecting or refusing any program which, in its opinion, is contrary to the public interest, or from substituting a program of outstanding local or national importance."

Regulation 3.106—Network ownership of stations. The Commission found that NBC, in addition to its network operations, was the licensee of 10 stations, 2 each in New York, Chicago, Washington, and San Francisco, 1 in Denver, and 1 in Cleveland. CBS was the licensee of 8 stations, 1 in each of these cities: New York, Chicago, Washington, Boston, Minneapolis, St. Louis, Charlotte, and Los Angeles. These 18 stations owned by NBC and CBS, the Commission observed, were among the most powerful and desirable in the country, and were permanently inaccessible to competing networks. * * *

Regulation 3.106 reads as follows: "No license shall be granted to a network organization, or to any person directly or indirectly controlled by or under common control with a network organization, for more than one standard broadcast station where one of the stations covers substantially the service area of the other station, or for any standard broadcast station in any locality where the existing standard broadcast stations are so few or of such unequal desirability (in terms of coverage, power, frequency, or other related matters) that competition would be substantially restrained by such licensing." * * *

Regulation 3.107—Dual network operation. * * *

In its Supplemental Report of October 11, 1941, the Commission announced the indefinite suspension of this regulation. * * *

Regulation 3.108—Control by networks of station rates. The Commission found that NBC's affiliation contracts contained a provision empowering the network to reduce the station's network rate, and thereby to reduce the compensation received by the station, if the station set a lower rate for non-network national advertising than the rate established by the contract for the network programs. Under this provision the station could not sell time to a national advertiser for less than it would cost the advertiser if he bought the time from NBC. * * * Accordingly, the Commission adopted Regulation 3.108, which provides as follows: "No license shall be granted to a standard broadcast station having any contract, arrangement, or understanding,

express or implied, with a network organization under which the station is prevented or hindered from, or penalized for, fixing or altering its rates for the sale of broadcast time for other than the network's programs."

The appellants attack the validity of these Regulations along many fronts. They contend that the Commission went beyond the regulatory powers conferred upon it by the Communications Act of 1934; that even if the Commission were authorized by the Act to deal with the matters comprehended by the Regulations, its action is nevertheless invalid because the Commission misconceived the scope of the Act, particularly § 313 which deals with the application of the antitrust laws to the radio industry; that the Regulations are arbitrary and capricious; that if the Communications Act of 1934 were construed to authorize the promulgation of the Regulations, it would be an unconstitutional delegation of legislative power; and that, in any event, the Regulations abridge the appellants' right of free speech in violation of the First Amendment. We are thus called upon to determine whether Congress has authorized the Commission to exercise the power asserted by the Chain Broadcasting Regulations, and if it has, whether the Constitution forbids the exercise of such authority.

Federal regulation of radio begins with the Wireless Ship Act of June 24, 1910, 36 Stat. 629, 46 U.S.C.A. § 484 et seq., which forbade any steamer carrying or licensed to carry fifty or more persons to leave any American port unless equipped with efficient apparatus for radio communication, in charge of a skilled operator. The enforcement of this legislation was entrusted to the Secretary of Commerce and Labor, who was in charge of the administration of the marine navigation laws. But it was not until 1912, when the United States ratified the first international radio treaty, 37 Stat. 1565, that the need for general regulation of radio communication became urgent. In order to fulfill our obligations under the treaty, Congress enacted the Radio-Communications Act of August 13, 1912, 37 Stat. 302, 47 U.S.C.A. § 51 et seq. This statute forbade the operation of radio apparatus without a license from the Secretary of Commerce and Labor; it also allocated certain frequencies for the use of the Government, and imposed restrictions upon the character of wave emissions, the transmission of distress signals, and the like. * * *

The plight into which radio fell prior to 1927 was attributable to certain basic facts about radio as a means of communication—its facilities are limited; they are not available to all who may wish to use them; the radio spectrum simply is not large enought to accommodate everybody. There is a fixed natural limitation upon the number of stations that can operate without interfering with one another. Regulation of radio was therefore as vital to its development as traffic control was to the development of the automobile. In enacting the Radio Act of 1927, the first comprehensive scheme of control over radio communication, Congress acted upon the knowledge that if

the potentialities of radio were not to be wasted, regulation was essential.

The Radio Act of 1927 created the Federal Radio Commission, composed of five members, and endowed the Commission with wide licensing and regulatory powers. We do not pause here to enumerate the scope of the Radio Act of 1927 and of the authority entrusted to the Radio Commission, for the basic provisions of that Act are incorporated in the Communications Act of 1934, 48 Stat. 1064, 47 U.S.C. § 151 et seq., 47 U.S.C.A. § 151 et seq., the legislation immediately before us. * * *

Section 1 of the Communications Act states its "purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges". Section 301 particularizes this general purpose with respect to radio: "It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license." To that end a Commission composed of seven members was created, with broad licensing and regulatory powers.

Section 303 provides:

"Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

"(a) Classify radio stations;

"(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

* * * * * * * * * *

"(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act * * *;

"(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

* * * * * * * * * *

"(i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

* * * * * * * * * *

"(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act * * *."

The criterion governing the exercise of the Commission's licensing power is the "public interest, convenience, or necessity". §§ 307(a) (d), 309(a), 310, 312. In addition, § 307(b) directs the Commission that "In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

The Act itself establishes that the Commission's powers are not limited to the engineering and technical aspects of regulation of radio communication. Yet we are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. But the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic. The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply. And since Congress itself could not do this, it committed the task to the Commission.

The Commission was, however, not left at large in performing this duty. The touchstone provided by Congress was the "public interest, convenience, or necessity", a criterion which "is as concrete as the complicated factors for judgment in such a field of delegated authority permit." Federal Communications Comm. v. Pottsville Broadcasting Co., 309 U.S. 134, 138, 60 S.Ct. 437, 439, 84 L.Ed. 656. "This criterion is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power. Compare N. Y. Cent. Securities Corp. v. United States, 287 U.S. 12, 24, 53 S.Ct. 45 [48], 77 L.Ed. 138. The requirement is to be interpreted by its context, by the nature of radio transmission and reception, by the scope, character, and quality of services * * *." Federal Radio Comm. v. Nelson Bros. Bond & Mortgage Co., 289 U. S. 266, 285, 53 S.Ct. 627, 636, 77 L.Ed. 1166, 89 A.L.R. 406.

The "public interest" to be served under the Communications Act is thus the interest of the listening public in "the larger and more effective use of radio". § 303(g). The facilities of radio are limited and therefore precious; they cannot be left to wasteful use without detriment to the public interest. "An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts." Federal Communications Comm. v. Sanders Bros. Radio Station, 309 U.S. 470, 475, 642, 60 S.Ct. 693, 697, 84 L.Ed. 869, 1037. The Commission's licensing function cannot be discharged, therefore, merely by finding that there are no technological objections to the granting of a license. If the criterion of "public interest" were limited to such matters, how could the Commission

choose between two applicants for the same facilities, each of whom is financially and technically qualified to operate a station? Since the very inception of federal regulation by radio, comparative considerations as to the services to be rendered have governed the application of the standard of "public interest, convenience, or necessity". See Federal Communications Comm. v. Pottsville Broadcasting Co., 309 U.S. 134, 138 n. 2, 60 S.Ct. 437, 439, 84 L.Ed. 656.

The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States. To that end Congress endowed the Communications Commission with comprehensive powers to promote and realize the vast potentialities of radio. Section 303(g) provides that the Commission shall "generally encourage the larger and more effective use of radio in the public interest"; subsection (i) gives the Commission specific "authority to make special regulations applicable to radio stations engaged in chain broadcasting"; and subsection (r) empowers it to adopt "such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act".

These provisions, individually and in the aggregate, preclude the notion that the Commission is empowered to deal only with technical and engineering impediments to the "larger and more effective use of radio in the public interest". We cannot find in the Act any such restriction of the Commission's authority. Suppose, for example, that a community can, because of physical limitations, be assigned only two stations. That community might be deprived of effective service in any one of several ways. More powerful stations in nearby cities might blanket out the signals of the local stations so that they could not be heard at all. The stations might interfere with each other so that neither could be clearly heard. One station might dominate the other with the power of its signal. But the community could be deprived of good radio service in ways less crude. One man, financially and technically qualified, might apply for and obtain the licenses of both stations and present a single service over the two stations, thus wasting a frequency otherwise available to the area. The language of the Act does not withdraw such a situation from the licensing and regulatory powers of the Commission, and there is no evidence that Congress did not mean its broad language to carry the authority it expresses.

In essence, the Chain Broadcasting Regulations represent a particularization of the Commission's conception of the "public interest" sought to be safeguarded by Congress in enacting the Communications Act of 1934. The basic consideration of policy underlying the Regulations is succinctly stated in its Report: "With the number of radio channels limited by natural factors, the public interest demands that those who are entrusted with the available channels shall make the fullest and most effective use of them. If a licensee enters into a

contract with a network organization which limits his ability to make the best use of the radio facility assigned him, he is not serving the public interest. * * * The net effect [of the practices disclosed by the investigation] has been that broadcasting service has been maintained at a level below that possible under a system of free competition. Having so found, we would be remiss in our statutory duty of encouraging 'the larger and more effective use of radio in the public interest' if we were to grant licenses to persons who persist in these practices." (Report, pp. 81, 82.)

We would be asserting our personal views regarding the effective utilization of radio were we to deny that the Commission was entitled to find that the large public aims of the Communications Act of 1934 comprehend the considerations which moved the Commission in promulgating the Chain Broadcasting Regulations. True enough, the Act does not explicitly say that the Commission shall have power to deal with network practices found inimical to the public interest. But Congress was acting in a field of regulation which was both new and dynamic. "Congress moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field." Federal Communications Comm. v. Pottsville Broadcasting Co., 309 U.S. 134, 137, 60 S.Ct. 437, 439, 84 L.Ed. 656. In the context of the developing problems to which it was directed, the Act gave the Commission not niggardly but expansive powers. It was given a comprehensive mandate to "encourage the larger and more effective use of radio in the public interest", if need be, by making "special regulations applicable to radio stations engaged in chain broadcasting." § 303(g) (i).

Generalities unrelated to the living problems of radio communication of course cannot justify exercises of power by the Commission. Equally so, generalities empty of all concrete considerations of the actual bearing of regulations promulgated by the Commission to the subject-matter entrusted to it, cannot strike down exercises of power by the Commission. While Congress did not give the Commission unfettered discretion to regulate all phases of the radio industry, it did not frustrate the purposes for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency. That would have stereotyped the powers of the Commission to specific details in regulating a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding. And so Congress did what experience had taught it in similar attempts at regulation, even in fields where the subject-matter of regulation was far less fluid and dynamic than radio. The essence of that experience was to define broad areas for regulation and to establish standards for judgment adequately related in their application to the problems to be solved.

For the cramping construction of the Act pressed upon us, support cannot be found in its legislative history. The principal argument is that § 303(i), empowering the Commission "to make special regulations applicable to radio stations engaged in chain broadcasting," intended to restrict the scope of the Commission's powers to the technical and engineering aspects of chain broadcasting. This provision comes from § 4(h) of the Radio Act of 1927. It was introduced into the legislation as a Senate committee amendment to the House bill (H.R. 9971, 69th Cong., 1st Sess.) This amendment originally read as follows:

"(C) The commission, from time to time, as public convenience, interest, or necessity requires, shall—

* * * * * * * * * *

"(j) When stations are connected by wire for chain broadcasting, determine the power each station shall use and the wave lengths to be used during the time stations are so connected and so operated, and make all other regulations necessary in the interest of equitable radio service to the listeners in the communities or areas affected by chain broadcasting."

The report of the Senate Committee on Interstate Commerce, which submitted this amendment, stated that under the bill the Commission was given "complete authority * * * to control chain broadcasting." Sen.Rep.No.772, 69th Cong., 1st Sess., p. 3. The bill as thus amended was passed by the Senate, and then sent to conference. The bill that emerged from the conference committee, and which became the Radio Act of 1927, phrased the amendment in the general terms now contained in § 303(i) of the 1934 Act: the Commission was authorized "to make special regulations applicable to radio stations engaged in chain broadcasting." The conference reports do not give any explanation of this particular change in phrasing, but they do state that the jurisdiction conferred upon the Commission by the conference bill was substantially identical with that conferred by the bill passed by the Senate. See Sen.Doc.No.200, 69th Cong., 2d Sess., p. 17; H.Rep.1886, 69th Cong., 2d Sess., p. 17. We agree with the District Court that in view of this legislative history, § 303(i) cannot be construed as no broader than the first clause of the Senate amendment, which limited the Commission's authority to the technical and engineering phases of chain broadcasting. There is no basis for assuming that the conference intended to preserve the first clause, which was of limited scope, and abandon the second clause, which was of general scope, by agreeing upon a provision which was broader and more comprehensive than those it supplanted.

A totally different source of attack upon the Regulations is found in § 311 of the Act, which authorizes the Commission to withhold licenses from persons convicted of having violated the anti-trust laws. Two contentions are made—first, that this provision puts considerations relating to competition outside the Commission's concern be-

fore an applicant has been convicted of monopoly or other restraints of trade, and second, that in any event, the Commission misconceived the scope of its powers under § 311 in issuing the Regulations. Both of these contentions are unfounded. Section 311 derives from § 13 of the Radio Act of 1927, which expressly commanded, rather than merely authorized, the Commission to refuse a license to any person judicially found guilty of having violated the anti-trust laws. The change in the 1934 Act was made, in the words of Senator Dill, the manager of the legislation in the Senate, because "it seemed fair to the committee to do that". 78 Cong.Rec. 8825. The Commission was thus permitted to exercise its judgment as to whether violation of the anti-trust laws disqualified an applicant from operating a station in the "public interest". We agree with the District Court that "The necessary implication from this [amendment in 1934] was that the Commission might infer from the fact that the applicant had in the past tried to monopolize radio, or had engaged in unfair methods of competition, that the disposition so manifested would continue and that if it did it would make him an unfit licensee." 47 F.Supp. 940, 944.

That the Commission may refuse to grant a license to persons adjudged guilty in a court of law of conduct in violation of the anti-trust laws certainly does not render irrelevant consideration by the Commission of the effect of such conduct upon the "public interest, convenience, or necessity". A licensee charged with practices in contravention of this standard cannot continue to hold his license merely because his conduct is also in violation of the anti-trust laws and he has not yet been proceeded against and convicted. By clarifying in § 311 the scope of the Commission's authority in dealing with persons convicted of violating the anti-trust laws, Congress can hardly be deemed to have limited the concept of "public interest" so as to exclude all considerations relating to monopoly and unreasonable restraints upon commerce. Nothing in the provisions or history of the Act lends support to the inference that the Commission was denied the power to refuse a license to a station not operating in the "public interest", merely because its misconduct happened to be an unconvicted violation of the anti-trust laws.

Alternatively, it is urged that the Regulations constitute an ultra vires attempt by the Commission to enforce the anti-trust laws, and that the enforcement of the anti-trust laws is the province not of the Commission but of the Attorney General and the courts. This contention misconceives the basis of the Commission's action. The Commission's Report indicates plainly enough that the Commission was not attempting to administer the anti-trust laws:

"The prohibitions of the Sherman Act [15 U.S.C.A. §§ 1–7, 15 note], apply to broadcasting. This Commission, although not charged with the duty of enforcing that law, should administer its regulatory powers with respect to broadcasting in the light of the purposes which

the Sherman Act was designed to achieve. * * * While many of the network practices raise serious questions under the antitrust laws, our jurisdiction does not depend on a showing that they do in fact constitute a violation of the antitrust laws. It is not our function to apply the antitrust laws as such. It is our duty, however, to refuse licenses or renewals to any person who engages or proposes to engage in practices which will prevent either himself or other licensees or both from making the fullest use of radio facilities. This is the standard of public interest, convenience or necessity which we must apply to all applications for licenses and renewals. * * * We do not predicate our jurisdiction to issue the regulations on the ground that the network practices violate the antitrust laws. We are issuing these regulations because we have found that the network practices prevent the maximum utilization of radio facilities in the public interest." (Report, pp. 46, 83, 83 n. 3.)

We conclude, therefore, that the Communications Act of 1934 authorized the Commission to promulgate regulations designed to correct the abuses disclosed by its investigation of chain broadcasting. There remains for consideration the claim that the Commission's exercise of such authority was unlawful.

The Regulations are assailed as "arbitrary and capricious". If this contention means that the Regulations are unwise, that they are not likely to succeed in accomplishing what the Commission intended, we can say only that the appellants have selected the wrong forum for such a plea. What was said in Board of Trade v. United States, 314 U.S. 534, 548, 62 S.Ct. 366, 372, 86 L.Ed. 432, is relevant here: "We certainly have neither technical competence nor legal authority to pronounce upon the wisdom of the course taken by the Commission." Our duty is at an end when we find that the action of the Commission was based upon findings supported by evidence, and was made pursuant to authority granted by Congress. It is not for us to say that the "public interest" will be furthered or retarded by the Chain Broadcasting Regulations. The responsibility belongs to the Congress for the grant of valid legislative authority and to the Commission for its exercise.

It would be sheer dogmatism to say that the Commission made out no case for its allowable discretion in formulating these Regulations. Its long investigation disclosed the existence of practices which it regarded as contrary to the "public interest". The Commission knew that the wisdom of any action it took would have to be tested by experience: "We are under no illusion that the regulations we are adopting will solve all questions of public interest with respect to the network system of program distribution. * * * The problems in the network field are interdependent, and the steps now taken may perhaps operate as a partial solution of problems not directly dealt with at this time. Such problems may be examined again at some future time after the regulations here adopted have

been given a fair trial." (Report, p. 88.) The problems with which the Commission attempted to deal could not be solved at once and for all time by rigid rules-of-thumb. The Commission therefore did not bind itself inflexibly to the licensing policies expressed in the Regulations. In each case that comes before it the Commission must still exercise an ultimate judgment whether the grant of a license would serve the "public interest, convenience, or necessity." If time and changing circumstances reveal that the "public interest" is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations.

Since there is no basis for any claim that the Commission failed to observe procedural safeguards required by law, we reach the contention that the Regulations should be denied enforcement on constitutional grounds. Here, as in New York Cent. Securities Corp. v. United States, 287 U.S. 12, 24, 25, 53 S.Ct. 45, 48, 77 L.Ed. 138, the claim is made that the standard of "public interest" governing the exercise of the powers delegated to the Commission by Congress is so vague and indefinite that, if it be construed as comprehensively as the words alone permit, the delegation of legislative authority is unconstitutional. But, as we held in that case, "It is a mistaken assumption that this is a mere general reference to public welfare without any standard to guide determinations. The purpose of the Act, the requirements it imposes, and the context of the provision in question show the contrary." Id. See Federal Radio Comm. v. Nelson Bros. Bond & Mortgage Co., 289 U.S. 266, 285, 53 S.Ct. 627, 636, 77 L.Ed. 1166, 89 A.L.R. 406; Federal Communications Comm. v. Pottsville Broadcasting Co., 309 U.S. 134, 137, 138, 60 S.Ct. 437, 439, 84 L.Ed. 656. Compare Panama Refining Co. v. Ryan, 293 U.S. 388, 428, 55 S.Ct. 241, 251, 79 L.Ed. 446. Intermountain Rate Cases (United States v. Atchison, T. S. F. R. Co.), 234 U.S. 476, 486–489, 34 S.Ct. 986, 991–992, 58 L.Ed. 1408; United States v. Lowden, 308 U.S. 225, 60 S.Ct. 248, 84 L.Ed. 208.

We come, finally, to an appeal to the First Amendment. The Regulations, even if valid in all other respects, must fall because they abridge, say the appellants, their right of free speech. If that be so, it would follow that every person whose application for a license to operate a station is denied by the Commission is thereby denied his constitutional right of free speech. Freedom of utterance is abridged to many who wish to use the limited facilities of radio. Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation. Because it cannot be used by all, some who wish to use it must be denied. But Congress did not authorize the Commission to choose among applicants upon the basis of their political, economic or social views, or upon any other capricious basis. If it did, or if the Commission by these Regulations proposed a choice among applicants upon some such basis, the

issue before us would be wholly different. The question here is simply whether the Commission, by announcing that it will refuse licenses to persons who engage in specified network practices (a basis for choice which we hold is comprehended within the statutory criterion of "public interest"), is thereby denying such persons the constitutional right of free speech. The right of free speech does not include, however, the right to use the facilities of radio without a license. The licensing system established by Congress in the Communications Act of 1934 was a proper exercise of its power over commerce. The standard it provided for the licensing of stations was the "public interest, convenience, or necessity". Denial of a station license on that ground, if valid under the Act, is not a denial of free speech.

A procedural point calls for just a word. The District Court, by granting the Government's motion for summary judgment, disposed of the case upon the pleadings and upon the record made before the Commission. The court below correctly held that its inquiry was limited to review of the evidence before the Commission. Trial de novo of the matters heard by the Commission and dealt with in its report would have been improper. See Tagg Bros. v. United States, 280 U.S. 420, 50 S.Ct. 220, 74 L.Ed. 524; Acker v. United States, 298 U.S. 426, 56 S.Ct. 824, 80 L.Ed. 1257.

Affirmed.

Mr. Justice BLACK and Mr. Justice RUTLEDGE took no part in the consideration or decision of these cases.

Mr. Justice MURPHY, dissenting.

I do not question the objectives of the proposed regulations, and it is not my desire by narrow statutory interpretation to weaken the authority of government agencies to deal efficiently with matters committed to their jurisdiction by the Congress. Statutes of this kind should be construed so that the agency concerned may be able to cope effectively with problems which the Congress intended to correct, or may otherwise perform the functions given to it. But we exceed our competence when we gratuitously bestow upon an agency power which the Congress has not granted. Since that is what the Court in substance does today, I dissent.[1]

[1] Footnotes of the court have been omitted. *Cf.* Gemsco, Inc. v. Walling, 324 U.S. 244, 65 S.Ct. 605, 89 L.Ed. 921 (1945).

MORGAN, STANLEY & CO. v. SECURITIES AND EXCHANGE COMMISSION

Circuit Court of Appeals of the United States, Second Circuit.
126 F.2d 325, 331–2 (1942).

See at pp. 834–5, *supra*.[j]

AMERICAN TELEPHONE & TELEGRAPH CO. v. UNITED STATES

Supreme Court of the United States.
299 U.S. 232, 57 S.Ct. 170, 81 L.Ed. 142 (1936).

See at p. 336, *supra*.

SECTION 3. ADMINISTRATIVE FINALITY—TERMS OF THE ORDER

A. Adjustment of the Scope of the Order to Conform to the Findings

(1) Adjustment by the Decree of the Reviewing Court

STATE OF FLORIDA v. UNITED STATES

Supreme Court of the United States.
282 U.S. 194, 51 S.Ct. 119, 75 L.Ed. 291 (1931).

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

The state of Florida and the members of its Railroad Commission (appellants in No. 16) brought suit in the District Court to restrain the enforcement of that part of an order of the Interstate Commerce Commission which dealt with certain intrastate rates of the Atlantic Coast Line Railroad Company in Florida. The order, made August 2, 1928, required the railroad company to establish carload rates for logs (except walnut, cherry, and cedar) in intrastate commerce "within the State of Florida" which should be the same as the rates prescribed by the Interstate Commerce Commission as reasonable for transportation in interstate commerce from points in the northern portion of Florida to destinations in Georgia. The order in that respect was assailed as being outside the scope of the issues raised in the proceeding in which the order was entered and without substan-

[j] See, also, Gillespie-Rogers-Pyatt v. Bowles, 144 F.2d 361 (Emerg.Ct.App. 1944), *supra* at p. 370.

tial evidence to support it, and as extending beyond the statutory authority of the Commission and the limits of federal power under the Constitution.

Suits for similar relief were brought by the Brooks-Scanlon Corporation and other corporations (appellants in No. 17) and by the Wilson Lumber Company (appellant in No. 18), manufacturers and shippers of lumber in Florida. The Public Service Commission of Georgia was permitted to intervene, and the three suits were consolidated and heard before a court of three judges as required by the applicable statute.

The court was of the opinion that the order of the Commission touching intrastate rates could be construed as being limited to points of origin on the Atlantic Coast Line Railroad in the northern part of Florida, as the Commission had confined its order to these points of origin in fixing interstate rates. Taking the view that, if construed so as to apply to intrastate rates throughout the state, the order would probably be invalid, the court sustained it upon the narrower construction. Decrees were entered accordingly in January, 1929, dismissing the bills. 30 F.2d 116.

Thereupon the Interstate Commerce Commission amended its order by inserting additional exceptions of logs, and also with respect to intrastate rates, "for the purpose of clarification," by substituting for the phrase "within the State of Florida" the words "within and throughout the entire State of Florida, without exception." Petitions for rehearing and for leave to file supplemental bills were then presented to the District Court and were granted. The Atlantic Coast Line Railroad Company was allowed to intervene. On the rehearing, both the original and supplemental bills were dismissed. 31 F.2d 580. The court upheld the amended order of the Commission as to intrastate rates, in its state-wide operation, not "because of undue prejudice to shippers and localities, or because of undue discrimination against the particular interstate commerce" in the described logs, but solely upon the ground that the order was aimed at a discrimination "against general interstate commerce," caused by intrastate rates which were so low as to throw an undue burden upon the interstate revenues of the carrier.

From the decrees entered accordingly the present appeals are brought.

The proceeding before the Interstate Commerce Commission was begun by the filing of a complaint by the Georgia Public Service Commission against the Atlantic Coast Line Railroad Company. The complaint stated that its object was to secure reasonable rates on logs from points on the railroad company's line within Florida to all destinations on its line in Georgia, and to remove any unjust discrimination found to exist as provided in the Interstate Commerce Act (49 USCA § 1 et seq.). The complaint alleged that there was competition between mills and consumers in Georgia and those in

Florida in the purchase and transportation of logs from points in Florida to destinations in Georgia. The intrastate log rates of that railroad in Florida, and its interstate log rates between Florida and Georgia, for distances up to 170 miles, were set forth, and it was alleged that the interstate rates greatly exceeded the intrastate rates for like distances upon traffic moving under substantially similar conditions. The complaint charged that the interstate rates were unjust and unreasonable in violation of section 1, were unjustly discriminatory in violation of section 2, and were unduly prejudicial to the interstate shipper and preferential in favor of the intrastate shipper in violation of section 3, of the Interstate Commerce Act. It was also charged that the carrier's intrastate rates in Florida gave unreasonable preference to intrastate shippers in that state and were unduly prejudicial to interstate shippers in Georgia, causing an unjust discrimination against interstate commerce in violation of section 13 of the act. The complainants asked for an order requiring the Atlantic Coast Line Railroad Company to desist from the described violations of the act, and prescribing just, reasonable, and nondiscriminatory interstate rates to be charged by the defendant carrier for the transportation of carload shipments of logs from all Florida points to all destinations in Georgia, and that the measure of such rates should be no higher than those concurrently in effect for the same kind of property moving in intrastate commerce in Florida.

The state of Florida was notified of the proceeding, and the Florida Railroad Commission appeared in defense of the Florida intrastate rates. There were a number of interveners, including shippers of logs in intrastate commerce in Florida, Georgia lumber companies, and railroad companies operating in Florida and between Florida and Georgia, and all parties were fully heard.

In its report, the Interstate Commerce Commission stated that, while the complainant assailed the rates from all Florida points, the record showed that, so far as interstate rates were concerned, relief was desired only with respect to the rates on logs "from that portion of Florida lying north of and including Jacksonville, Gainesville, Burnett's Lake, and High Springs," described as North Florida, "to destinations in Georgia for distances not exceeding 170 miles." The Commission pointed out that the Florida intrastate rates under attack were published for carload lots for 170 miles and less. The history of these rates was reviewed. With certain modifications and extensions, they were what was generally known as the "Cummer scale," which had originally been established by contract between a predecessor railroad company and a lumber company. This contract, the obligations of which were assumed by the Atlantic Coast Line Railroad Company, expired in 1918 and was not renewed. Meanwhile, in 1914, the railroad company had entered into a similar contract with the predecessor in interest of the intervener Brooks-Scanlon Corporation, and this contract was to continue in effect

until certain timber, tributary to the line of the railroad, had been transported. Accordingly, the railroad company filed schedules with the Florida Railroad Commission extending the Cummer scale for described distances. The State Commission refused to permit the proposed rates to become effective because they were applicable only on trainloads and were not available to all shippers. That Commission further advised the railroad company that the rates were too low and such as might be deemed confiscatory. The rates were republished to apply on carloads over all of the company's lines in Florida. These rates, extended with respect to distances and modified by certain increases and reductions, have been continued by the railroad company for the purpose of complying with its contractual obligations and not because it has considered the scale to be a proper one for general application on intrastate traffic within Florida.

While not admitting that the interstate rates were unreasonable, the railroad company submitted to the Interstate Commerce Commission a proposal for their revision. The Commission made a tabular comparison of the existing interstate and intrastate rates and the proposed interstate rates from North Florida, and after a further statement of the evidence concluded that the interstate rates thus proposed were reasonable.

The Commission then made the following findings as to interstate and intrastate rates:

"We find that the interstate rates on logs, except walnut, cherry, and cedar, in carloads, from points on defendant's lines in Florida north of and including Jacksonville, Gainesville, Burnett's Lake, and High Springs, to destinations on its lines in Georgia for distances not exceeding 170 miles are, and for the future will be, unreasonable to the extent that they exceed, or may exceed, the following distance scale of rates in cents per 100 pounds, minimum weight 40,000 pounds, which rates we find are and will be reasonable" (inserting schedule).

* * *

"We further find that the Florida intrastate rates assailed, which are lower than the interstate rates herein found reasonable for corresponding distances, result, and will result, in undue preference and advantage of shippers of intrastate traffic within the State of Florida, in undue prejudice to shippers of interstate traffic from points in the State of Florida to points in the State of Georgia, and in unjust discrimination against interstate commerce.

"We further find that said undue preference and advantage, undue prejudice, and unjust discrimination can and should be removed by the establishment of rates for intrastate application within Florida which shall correspond with the rates herein found reasonable for interstate application from Florida to Georgia.

"We further find that whether the aforesaid rates pertain to transportation in interstate commerce or to transportation in intrastate commerce the transportation services in each instance are performed

by defendant under substantially similar circumstances and conditions."

The order of the Commission, entered upon this report, after prescribing the interstate rates from Northern Florida to Georgia, continued with respect to intrastate rates in Florida as follows:

"It is further ordered, That said defendant be, and it is hereby notified and required to cease and desist from practicing the undue preference and advantage, undue prejudice, and unjust discrimination found in said report to exist in the relation of intrastate and interstate rates and to establish, put in force and maintain rates for the transportation of logs, except walnut, cherry, and cedar, in carloads, minimum weight 40,000 pounds, in intrastate commerce within the State of Florida which shall be the same as those prescribed in the next preceding paragraph hereof as reasonable for transportation in interstate commerce from points in the State of Florida to destinations in the State of Georgia."

This order, as already stated, was amended so as definitely to provide that the requirement as to intrastate rates should apply throughout the entire state of Florida, without exception. In making this amendment there was no further report or finding of the Commission.

We agree with the conclusion of the District Court, that, on the facts that have been found by the Commission, the order with respect to intrastate rates in its state-wide application cannot be sustained by reason of a proper determination of undue prejudice "as between persons or localities in intrastate commerce on the one hand and interstate * * * commerce on the other hand." Interstate Commerce Act, § 13(4), as added by Transportation Act § 416 (49 US CA § 13(4). The limitation of the Commission's finding as to interstate rates, and of the order prescribing them, to transportation from points in the northern part of Florida to points in Georgia, defined the interstate commerce which was deemed to be concerned. All of this commerce was potential, no actual movement from Florida to Georgia having been shown. It would be an extreme and unwarranted assumption that, to protect this interstate commerce from unjust discrimination as between persons or localities, it was necessary to alter the existing rates for the transportation of logs between all points whatever within Florida. Such a conclusion would not only require evidence to support it but findings of appropriate definiteness to express it. Illinois Central Railroad Co. v. State Public Utilities Commission, 245 U.S. 493, 507, 508, 38 S.Ct. 170, 62 L.Ed. 425; Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy Railroad Co., 257 U.S. 563, 579, 580, 42 S.Ct. 232, 66 L.Ed. 371, 22 A.L.R. 1086; New York v. United States, 257 U.S. 591, 600, 42 S.Ct. 239 66 L.Ed. 385. The District Court, again examining the record upon the rehearing, reaffirmed its opinion that there was no such evidence, and it is sufficient on this appeal to observe that there are no findings of proper explicitness to that effect. Recognizing that the state-wide

order of the Commission as to intrastate rates was upheld only because the intrastate rates were deemed to be so low as to cause "undue discrimination against the carrier's general interstate commerce," the government and the Commission have addressed their argument before this court to the defense of the order upon that ground.

Dealing with the order in this aspect, we may briefly dismiss the appellants' preliminary objections in relation to the scope of the proceeding and the adequacy of the hearing before the Commission. As the Florida Railroad Commission appeared in defense of the intrastate rates, and the railroad company, the rates of which were in question, and other parties in interest, both shippers and carriers, were heard, the question now presented relates to the substance of the determination of the Commission and its support in the evidence rather than to mere matters of pleading and procedure. In making its order, the Commission could exercise all the authority conferred by the Interstate Commerce Act for the purpose of removing such unjust discrimination as was found to exist. If the Commission had made adequate findings supported by evidence upon the point under consideration, we should not be disposed to conclude that the order must be upset because of the manner in which the proceeding was initiated or of the generality of the allegations of the complaint.

* * *

As intrastate rates and the income from them must play a most important part in maintaining such a system, the effective operation of the act requires that intrastate traffic should pay "a fair proportionate share" of the cost of maintenance. And if there is interference with the accomplishment of the purpose of the Congress because of a disparity of intrastate rates as compared with interstate rates, the Commission is authorized to end the disparity by directly removing it. Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy Railroad Co., pages 585, 586 of 257 U.S., 42 S.Ct. 239, supra; New York v. United States, supra.

The question in the present cases, then, is not one of authority, but of its appropriate exercise. The propriety of the exertion of the authority must be tested by its relation to the purpose of the grant and with suitable regard to the principle that, whenever the federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the federal power must clearly appear. Illinois Central Railroad Co. v. State Public Utilities Commission, supra. The Commission has no general authority to regulate intrastate rates, and the mere existence of a disparity between particular rates on intrastate and interstate traffic does not warrant the Commission in prescribing intrastate rates. Arkansas Railroad Commission v. Chicago, Rock Island & Pacific Railway Co., supra. If the action of the Commission is not simply for the removal of undue prejudice against interstate commerce as between persons or localities, and the Commission undertakes to prescribe a state-wide

level of intrastate rates in order to avoid an undue burden, from a revenue standpoint, upon the interstate carrier, there should be appropriate findings upon evidence to support an order directed to that end. Thus, in Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy Railroad Co., supra, at page 566 of 257 U.S., 42 S.Ct. 232, where the question related to the general level of intrastate passenger fares, there were findings as to the effect of the maintenance of the intrastate fares upon the revenues of the carriers, warranting the ultimate finding of undue discrimination against interstate commerce as a whole. * * *

In the paragraph, which we have quoted, containing the ultimate finding of the Commission with respect to the unjust discrimination caused by the existing intrastate rates as between persons and localities, there is a concluding clause that the intrastate rates result "in unjust discrimination against interstate commerce." This general statement in the language of the statute, neither standing alone nor taken in its context, could be regarded as sufficient to support a state-wide order from the standpoint of income, in the absence of supporting findings of fact as to the revenue from the traffic in question.

In its report, the Commission stated that the Florida Railroad Commission, and the interveners from that state, had contended that the intrastate rates were remunerative to the carrier. The State Commission introduced a cost study to support its contention, and the carrier also submitted evidence as to the cost of transporting logs on its line. The Interstate Commerce Commission said that both cost studies were based on "arbitrary assumptions" and that neither could be accepted "to show the approximate actual cost of transporting logs in single carloads intrastate throughout Florida." The Commission made a comparison of "present interstate and intrastate rates and the proposed interstate rates from north Florida in cents per 100 pounds, and the earnings thereunder per car of 50,000 pounds for distances to 170 miles." The "earnings" thus set forth were merely the amounts receivable per car for the given number of pounds under the rates for the prescribed distances. The Commission also stated that the carrier had shown that the earnings under the Florida intrastate rates on logs were materially lower than the earnings under the interstate rates from Florida to Georgia on brick, sand, lime and cement. Comparing the Florida intrastate rates on logs with other intrastate rates and with interstate rates, the Commission reached the conclusion that the intrastate rates assailed were less than reasonably compensatory.

But to justify the Commission in the alteration of intrastate rates, it was not enough for the Commission merely to find that the existing intrastate rates on the particular traffic were not remunerative or reasonably compensatory. The authority to determine the reasonableness per se of intrastate rates lay with the state authorities and not with the Interstate Commerce Commission. In dealing with un-

just discrimination as between persons and localities in relation to interstate commerce, the question is one of the relation of rates to each other. * * *

The Commission made no findings as to the revenue which had been derived by the carrier from the traffic in question, or which could reasonably be expected under the increased rates, or that the alteration of the intrastate rates would produce, or was likely to produce, additional income necessary to prevent an undue burden upon the carrier's interstate revenues and to maintain an adequate transportation service.

The question is not merely one of the absence of elaboration or of a suitably complete statement of the grounds of the commission's determination, to the importance of which this court has recently adverted (Beaumont, Sour Lake & Western Railway Co. v. United States, decided November 24, 1930, 282 U.S. 74, 51 S.Ct. 1, 75 L.Ed. 221), but of the lack of the basic or essential findings required to support the Commission's order. In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. The Commission is the fact-finding body, and the Court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported. If the facts as to intrastate transportation of logs in Florida are such as to justify an order as to intrastate rates in order to end an unjust discrimination as against interstate commerce either as between persons and localities, or because of an undue burden upon the revenues of the carrier, the Interstate Commerce Commission is still at liberty, acting in accordance with the authority conferred by the statute, to make such determinations as the situation may require.

We conclude that the portion of the order of the Commission which is now under review, with respect to intrastate rates, is not supported by the findings of the Commission and this part of the order must be set aside.

Decrees reversed.

NATIONAL LABOR RELATIONS BOARD v. EXPRESS PUBLISHING CO.

Supreme Court of the United States.
312 U.S. 426, 61 S.Ct. 693, 85 L.Ed. 930 (1941).

Mr. Justice STONE delivered the opinion of the Court.

The National Labor Relations Board ordered respondent affirmatively to bargain collectively with the San Antonio Newspaper Guild, the authorized representative of respondent's employees. In addition it ordered respondent, (1) to "cease and desist" from refusing

to bargain collectively with the Guild; (2) to "cease and desist" from "interfering with, restraining or coercing its employees in the exercise of their rights to self-organization", and other rights guaranteed by § 7 of the National Labor Relations Act, 49 Stat. 449, 29 U.S.C.Supp.V, § 151 et seq., 29 U.S.C.A. § 151 et seq.; (3) to post notices stating, among other things, that respondent will "cease and desist as aforesaid" and will bargain collectively with the organized representative of its employees. On the record before us the question for our decision is whether the provisions of the order which we have enumerated are supported by the Board's finding that the respondent had refused to bargain collectively with the authorized representative of its employees, and had interfered with such bargaining negotiation, and had thereby interfered with the exercise of the rights guaranteed by § 7 of the Act.

The Board issued its complaint charging respondent, a publisher of a newspaper, with refusal to bargain collectively with the Guild as the authorized representative of the employees in respondent's editorial department, and that by such refusal and by statements made by respondent at a meeting of those employees it "did interfere with, restrain and coerce" its employees in the exercise of the rights guaranteed by § 7 of the Act [1] and did engage in unfair labor practices defined by §§ 8(1) and 8(5). The usual proceedings and hearings before the Board resulted in findings by the Board to the effect that although respondent had throughout recognized the organization of respondent's editorial room employees and the Guild as their representative, and had met with the Guild representatives whenever requested for the purpose of discussing the employee's demands, it nevertheless had persistently refused to discuss in detail the proposals of the Guild, to make any counter proposals or to enter into any agreement with it, and had not negotiated in good faith in a genuine effort to compose the differences between employer and employees.

The Board found that respondent had refused to bargain as required by § 8(5) of the Act. It found that respondent had made the statements charged in the complaint at a meeting of its employees and that these statements were an "interference with the Guild's efforts to negotiate". Treating respondent's action in refusing to bargain and in interfering with the bargaining negotiations as an infringement of all the rights guaranteed to the employees by the Act, it found broadly, in the words of the statute, a violation of § 8(1) which declares that it is an unfair labor practice for the employer

[1] The statements alleged to have been made by officers or agents of respondent were "Existing independent employment relations may be continued by the individual employees or by employees as a group". "No one can compel you to join any organization". And referring to respondent's treatment of its employees, it was alleged that respondent's officer stated: "Each of you know we were not forced to do this by any labor organization and no labor organization can force us to do these things".

"to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in § 7 [section 157 of this title]". Section 7 provides: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."

From all this the Board concluded that the "appropriate remedy" was an order directing respondent "upon request to bargain collectively with the * * * Guild" as the "exclusive representative" of respondent's editorial room employees and "if understandings are reached to embody such understandings in a signed agreement if requested to do so by the Guild." Having provided the recommended remedy by the provisions of its order directing the respondent to bargain and to cease and desist from refusing to bargain the Board went further and ordered broadly that respondent should in effect refrain from violating the Act in any manner whatsoever. This it did by paragraph 1(b) of the order which directed respondent to cease and desist from

"In any manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purposes of collective bargaining or other mutual aid and protection, as guaranteed in Section 7 of the Act."

It is this and the provisions of the order other than that part of it directing respondent to bargain which are the subjects of the present controversy.

Upon petition of the Board to enforce the order, the Court of Appeals for the Fifth Circuit struck from it all the provisions except that which directed respondent to bargain with the Guild on request, and to embody any understanding in a signed agreement. For so much of the order as directed the posting of notices the court substituted a requirement that respondent notify the Guild of its willingness to comply with the order as modified and to notify a specified agent of the Board what steps respondent had taken to comply with the order. 111 F.2d 588. We granted certiorari November 12, 1940, 311 U.S. 638, 61 S.Ct. 134, 85 L.Ed. 406, the questions raised being of importance in the administration of the National Labor Relations Act.

Although respondent has not sought certiorari it seeks to retain such advantages as it may have gained from the modification of the Board's order below, by arguing broadly that the Board's finding of respondent's refusal to bargain is without support in the evidence, which it is said shows only that respondent refused to yield to the Guild demands as it was free to do. But in the absence of a cross-petition for certiorari by respondent that question is not open here.

Without the findings relating to respondent's refusal to bargain there was no basis for any order by the Board and we think that the purpose and effect of the judgment sustaining so much of the Board's order as directed that respondent bargain with the Guild was to sustain the findings on which it was based. This appears both from the opinion of the Court of Appeals, the purport of which is that respondent in its negotiations with the Guild had not acted in good faith and so had failed to bargain as the statute requires, and also from the terms of the judgment modifying the Board's order. The judgment affirming the Board's order as modified retained, as the foundation of the judgment, the recital contained in the Board's original order that it was made upon the basis of all the Board's findings. In this state of the record our review is limited to the sufficiency of the Board's findings to support the order.

We conclude also that it is not open to respondent to challenge the judgment below, as it attempts to do, on the ground that the Board's complaint in charging a failure to bargain did not sufficiently inform respondent of the contention that it had failed to bargain in good faith. This is the case both because respondent has sought no review of the judgment below and because it sufficiently appears from the record that in the course of the hearings before the Board respondent was fully advised of the nature of the Board's contention.

But it is the Board which has brought the judgment below here for review and on it rests the burden of showing in what respects the judgment is erroneous. Cf. Federal Trade Commission v. Beech Nut Co., 257 U.S. 441, 42 S.Ct. 150, 66 L.Ed. 307, 19 A.L.R. 882 To sustain that burden the Board insists that all the provisions of its order were lawfully made and that it is entitled to have the order enforced in its entirety. Section 10(c) of the Act provides that if the Board "upon all the testimony taken * * * shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action * * * as will effectuate the policies of this Act [chapter]." The Board, having found in this case that respondent had refused to bargain, that part of its order directing respondent to "cease and desist from refusing to bargain collectively" with the Guild, was in exact compliance with the statute and should have been left undisturbed by the judgment below.

A question of a different nature is presented by Paragraph 1(b) of the order by which the Board, on the basis of respondent's action in refusing to bargain and its statements interfering with the bargaining negotiations, has directed respondent not to violate "in any manner" the duties imposed on the employer by the statute. Petitioner argues that since respondent's refusal to bargain, which is a violation of § 8(5), is also a violation of § 8(1) which in terms incorporates by

reference all the rights enumerated in § 7, the Board is not only free to restrain violations like those which respondent has committed, but any other unfair labor practices of any kind which likewise infringe any of the rights enumerated in § 7, however unrelated those practices may be to the acts of respondent which alone emerged in course of the hearing and which the Board has found.

But we think it does not follow that, because the acts of respondent which the Board has found to be an unfair labor practice defined by § 8(5) are also a technical violation of § 8(1), the Board, in the circumstances of this case, is justified in making a blanket order restraining the employer from committing any act in violation of the statute, however unrelated it may be to those charged and found, or that courts are required for the indefinite future to give effect in contempt proceedings to an order of such breadth.

We cannot find such authority or requirement in the carefully chosen language of § 10(c), which directs the Board to state its findings of fact showing the unfair labor practice charged and to order the person accused to "cease and desist from such unfair labor practice", or in § 10(e) of the Act which authorizes the court on application of the Board to enter a "decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board." It is obvious that the order of the Board, which when judicially confirmed, the courts may be called on to enforce by contempt proceedings, must, like the injunction order of a court, state with reasonable specificity the acts which the respondent is to do or refrain from doing. It would seem equally clear that the authority conferred on the Board to restrain the practice which it has found the employer to have committed is not an authority to restrain generally all other unlawful practices which it has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct.

Congress has itself afforded a guide pointing to the appropriate limits of the order which the Board is to make in restraining unfair labor practices. By its definition and classification of unfair labor practices in the statute it has shown that they are not always so similar or related that the commission of one necessarily merits or rightly admits of an order restraining all. Here the whole controversy between respondent and the Guild was with respect to the Guild's requests to bargain and respondent's attempt to influence the negotiations and its ultimate refusal to enter into an agreement from all of which the Board inferred the refusal to bargain in good faith. In all other respects respondent has consistently left the Guild and its activities undisturbed. The Board made no finding and there is nothing in the record to suggest that the failure of the bargaining negotiations and all that attended them gave any indication that in the future respondent would engage in all or any of the numerous other unfair labor practices defined by the Act.

Refusal to bargain, defined as an unfair labor practice by § 8(5), may be, as we think it was here, wholly unrelated to the domination of a labor union or the interference with its formation or administration or financial or other support to it, all of which are defined as unfair labor practices by § 8(2). Refusal to bargain may be, as we think it was here, wholly unrelated to "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization," all of which are unfair labor practices as defined by § 8(3). Here the Board made no finding, based either on the specific circumstances disclosed by the record or on its own expert judgment of their relation to the policy embodied in § 7, or as to any relationship or probable relationship of respondent's refusal to bargain and the other types of unfair practices some of which are enumerated in § 8. Yet, if the contention which it makes is to be sustained subsequent violations of § 8(2) and (3), which are also violations of § 8(1) may be the subject of a contempt order merely because respondent by the refusal to bargain has violated § 8(5) which is similarly a violation of § 8(1).

In view of the authority given to the Board by § 10(c), carefully restricted to the restraint of such unfair labor practices as the Board has found the employer to have committed, and of the broad language of § 10(e) authorizing the courts to modify the order of the Board wholly or in part, we can hardly suppose that Congress intended that the Board should make or the court should enforce orders which could not appropriately be made in judicial proceedings. This is the more so because § 10(a), which authorizes the Board "as hereinafter provided, to prevent any person from engaging in any unfair labor practice," specifically directs that "This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise". In the light of these provisions we think that Congress did not contemplate that the courts should, by contempt proceedings, try alleged violations of the National Labor Relations Act not in controversy and not found by the Board and which are not similar or fairly related to the unfair labor practice which the Board has found.

A federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future unless enjoined, may fairly be anticipated from the defendant's conduct in the past. But the mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged. This Court will strike from an injunction decree restraints upon the commission of unlawful acts which are thus dissociated from those which a defendant has committed. Swift & Co. v.

United States, 196 U.S. 375, 25 S.Ct. 276, 49 L.Ed. 518; New York, New Haven & Hartford R. Co. v. Interstate Commerce Commission, 200 U.S. 361, 404, 26 S.Ct. 272, 282, 50 L.Ed. 515, and see under the National Labor Relations Act, National Labor Relations Board v. Swift & Co., 7 Cir., 108 F.2d 988.

It is a salutary principle that when one has been found to have committed acts in violation of a law he may be restrained from committing other related unlawful acts. But we think that without sacrifice of that principle, the National Labor Relations Act does not contemplate that an employer who has unlawfully refused to bargain with his employees shall for the indefinite future, conduct his labor relations at the peril of a summons for contempt on the Board's allegation, for example, that he has discriminated against a labor union in the discharge of an employee, or because his supervisory employees have advised other employees not to join a union. See e. g., H. J. Heinz Co. v. National Labor Relations Board, 311 U.S. 514, 61 S.Ct. 320, 85 L.Ed. 309, decided January 6, 1941.

Having found the acts which constitute the unfair labor practice the Board is free to restrain the practice and other like or related unlawful acts. But as the Court has held in the case of the Federal Trade Commission, see Federal Trade Commission v. Beech Nut Co., supra, 257 U.S. 455, 42 S.Ct. 155, 66 L.Ed. 307, 19 A.L.R. 882, an order not so related should be appropriately restricted on review. The breadth of the order, like the injunction of a court, must depend upon the circumstances of each case, the purpose being to prevent violations, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts which the Board has found to have been committed by the employer in the past. See United States v. Trans-Missouri Freight Association, 166 U.Sd. 290, 308, 309, 17 S.Ct. 540, 546, 41 L.Ed. 1007; Standard Oil Co. v. United States, 221 U.S. 1, 77, 31 S.Ct. 502, 522, 55 L.Ed. 619, 34 L.R.A.,N.S., 834, Ann.Cas.1912D, 734; Texas & New Orleans R. R. Co. v. Brotherhood of Railway Clerks, 281 U.S. 548, 50 S.Ct. 427, 74 L.Ed. 1034; Local 167 v. United States, 291 U.S. 293, 54 S.Ct. 396, 78 L.Ed. 804; Virginian Railway Co. v. System Federation No. 40, 300 U.S. 515, 541, 543, 544, 57 S.Ct. 592, 596, 597, 81 L.Ed. 789. We hold only that the National Labor Relations Act does not give the Board an authority, which courts cannot rightly exercise, to enjoin violations of all the provisions of the statute merely because the violation of one has been found. To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed or that danger of their commission in the future is to be anticipated from the course of his conduct in the past. That justification is lacking here. To require it is no more onerous or embarrassing to the Board than to a court. And since we are in a field where subtleties of conduct may play no small part, it is appropriate to add that an order of the Board, like the injunction of a court, is not to

be evaded by indirections or formal observances which in fact defy it. After an order to bargain collectively in good faith, for example, discriminatory discharge of union members may so affect the bargaining process as to establish a violation of the order.

The Board places strong reliance on National Labor Relations Board v. Fansteel Metallurgical Corporation, 306 U.S. 240, 59 S.Ct. 490, 83 L.Ed. 627, 123 A.L.R. 599, and on Texas & New Orleans Railroad Co. v. Brotherhood of Railway Clerks, supra, 281 U.S. 555, 567, 568, 571, 50 S.Ct. 428, 432, 433, 434, 74 L.Ed. 1034, and Virginian Railway Co. v. System Federation No. 40, supra, 300 U.S. 543, 544, 57 S.Ct. 597, 81 L.Ed. 789. In those cases the cease and desist order and the injunctions were substantially like paragraph 1(b) of the Board's order in the present case. But in them the unfair labor practices did not appear to be isolated acts in violation of the right of self-organization, like the refusal to bargain here, but the record disclosed persistent attempts by varying methods to interfere with the right of self-organization in circumstances from which the Board or the court found or could have found the threat of continuing and varying efforts to attain the same end in the future.

An appropriate order in the circumstances of the present case would go no further than to restrain respondent from any refusal to bargain and from any other acts in any manner interfering with the Guild's efforts to negotiate. So far as respondent's past conduct may be thought to have had any effect on the rights guaranteed by § 7, such consequences would be effectively prevented by the prohibition of such an order without drawing it so broadly as to forbid all other unrelated unfair labor practices.

Only a word need be said of that part of the Board's order requiring the posting of notices. We have often held that the posting of notices advising the employees of the Board's order and announcing the readiness of the employer to obey it is within the authority conferred on the Board by § 10(c) of the Act "to take such affirmative action * * * as will effectuate the policies" of the Act. See National Labor Relations Board v. Pennsylvania Greyhound Lines, 303 U.S. 261, 268, 58 S.Ct. 571, 575, 82 L.Ed. 831, 115 A.L.R. 307; H. J. Heinz Co. v. National Labor Relations Board, supra.

But respondent argues that the authority of the Board does not extend to the requirement, such as was made in this case, that the employer confess violation of the Act by a published announcement that he will "cease and desist" from violating it. See National Labor Relations Board v. A. S. Abell Co., 4 Cir., 97 F.2d 951; Burlington Co. v. National Labor Relations Board, 4 Cir., 104 F.2d 736; Swift & Co. v. National Labor Relations Board, 10 Cir., 106 F.2d 87; Art Metals Construction Co. v. National Labor Relations Board, 2 Cir., 110 F.2d 148, 151, 152; Hartsell Mills Co. v. National Labor Relations Board, 4 Cir., 111 F.2d 291, 293. Since the Board has changed its practice and now provides in all orders that the employers' notices

shall state "that he will not engage in the conduct from which he is ordered to cease and desist" it consents that the present order be modified accordingly.

What we have said requires a reversal of the judgment below and the reestablishment of the Board's order with the following exceptions:

Paragraph 1(b) of the order will be modified so as to require only that respondent shall cease and desist from "In any manner interfering with the efforts of the Guild to bargain collectively with Express Publishing Company, San Antonio, Texas".

Paragraph 2(b) of the order will be modified by striking from it the words: "will cease and desist as aforesaid" and substituting for them the words "will not engage in the conduct from which it is ordered to cease and desist as aforesaid."

It is so ordered.

Reversed.[a]

Mr. Justice DOUGLAS (dissenting). I think the cease and desist order should be enforced in full. * * * But I think it is important to remind that we do not sit as an administrative agency with discretion to adjust the remedies accorded by the Act to what we think are the needs of particular cases, with power to write or rewrite administrative orders in light of what we think are the exigencies of specific situations, with the duty to pass on the wisdom of administrative policies. Congress has invested the Board, not us, with discretion to choose and select the remedies necessary or appropriate for the evil at hand.

The Board concluded (so we must presume) that its order directing respondent to bargain collectively with the Guild need be buttressed by broad protective provisions good against any and all methods of evasion. Formal recitals could hardly make that plainer than it is.[2] And clearly those provisions are no broader than the wide reaches of the controversy disclosed in this record.

[a] *To similar effect:* May Department Store Co. v. National Labor Relations Board, 326 U.S. 376, 66 S.Ct. 203, 90 L. Ed. —— (1945).

[2] In this connection it should be observed that the Board found that respondent had "interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act" by reading to them a statement which "presented a distorted concept" of the employees' rights under the Act. The Circuit Court of Appeals set aside that finding. While the Board did not raise that issue in its petition for certiorari, that episode is nevertheless relevant to the scope of the cease and desist order. If it be assumed, as does the majority, that such a broad order must be founded at least on some evidence that other related unlawful acts "may fairly be anticipated from the defendant's conduct in the past", that episode is of significance. For though it might not of itself support an additional finding of a separate violation of § 8, it certainly is some evidence for the exercise of the Board's expert judgment that the refusal to bargain did not have an improbable relationship to other likely obstructive tactics of a related order.

Whether the remedy chosen by the Board was reasonably necessary in this case is not for us to determine. Nor it is for us to say what language is adequate to safeguard the labor rights which are in issue. To cut down the language of this order not only substitutes our judgment for that of the Board; it will also result in the creation of a host of uncertainties. The original order makes clear that any attempted evasion, no matter how devious, is banned. As modified the order clearly subtracts from those sanctions. But the precise extent of its dilution remains uncertain. The Board may, of course, in case of future violations institute new administrative proceedings. Yet the method here chosen for settlement of this labor controversy does not promise peace. It invites a prolongation of the dispute which should be deemed to have been settled, with the employer's acquiescence, once and for all. That practical aspect of the matter is of great importance on the merits; and it also emphasizes the seriousness of our intrusion into the administrative domain. See Note (1940) 53 Harv.L.Rev. 472.

Mr. Justice BLACK and Mr. Justice REED join in this opinion.

(2) Setting Aside of the Order for Lack of Support by Findings, With or Without Remand to the Administrative Agency for Adjustment to Conform to the Findings

MAHLER v. EBY

Supreme Court of the United States.
264 U.S. 32, 44 S.Ct. 283, 68 L.Ed. 549 (1924).

This is an appeal from a judgment of the District Court of the United States for Northern Illinois, dismissing five writs of habeas corpus and remanding the appellants, who are aliens, to the custody of the Immigration Inspector at Chicago for deportation, in pursuance to warrants issued by the Secretary of Labor. The cases were consolidated in the court below. * * *

Mr. Chief Justice TAFT, after stating the case as above, delivered the opinion of the Court.

The theory of the draftsman of the petition for the writ and of the assignment of errors was that the same constitutional restrictions apply to an alien deportation act as to a law punishing crime. It is well settled that deportation, while it may be burdensome and severe for the alien, is not a punishment. Fong Yue Ting v. United States, 149 U.S. 698, 730, 13 S.Ct. 1016, 37 L.Ed. 905; Bugajewitz v. Adams, 228 U.S. 585, 591, 33 S.Ct. 607, 57 L.Ed. 978. The right to expel aliens is a sovereign power, necessary to the safety of the country,

and only limited by treaty obligations in respect thereto entered into with other governments. Fong Yue Ting v. United States, supra. The inhibition against the passage of an ex post facto law by Congress in section 9 of article 1 of the Constitution applies only to criminal laws, Calder v. Bull, 3 Dall. 386, 1 L.Ed. 648; Johannessen v. United States, 225 U.S. 227, 242, 32 S.Ct. 613, 56 L.Ed. 1066; and not to a deportation act like this, Bugajewitz v. Adams, 228 U.S. 585, 591, 33 S.Ct. 607, 57 L.Ed. 978. Congress by the act of 1920 was not increasing the punishment for the crimes of which petitioners had been convicted, by requiring their deportation if found undesirable residents. It was, in the exercise of its unquestioned right, only seeking to rid the country of persons who had shown by their career that their continued presence here would not make for the safety or welfare of society. In Hawker v. New York, 170 U.S. 189, 18 S.Ct. 573, 42 L.Ed. 1002, the validity of a law of New York which forbade, on penalty, any one who had been convicted of a felony from practicing medicine, was upheld as a reasonable exercise of the police power, and not an increase of the punishment for the felony. The present is even a clearer case than that.

The brief for appellants insists that, as the laws under which the appellants were convicted have been repealed, the fact of their conviction cannot be made the basis for deportation. It was their past conviction that put them in the class of persons liable to be deported as undesirable citizens. That record for such a purpose was not affected by the repeal of the laws which they had violated, and under which they had suffered punishment. The repeal did not take the convicted persons out of the enumerated classes, or take from the convictions any probative force rightly belonging to them.

Nor is the act invalid in delegating legislative power to the Secretary of Labor. The sovereign power to expel aliens is political, and is vested in the political departments of the government. Even if the executive may not exercise it without congressional authority, Congress cannot exercise it effectively save through the executive. It cannot, in the nature of things, designate all the persons to be excluded. It must accomplish its purpose by classification and by conferring power of selection within classes upon an executive agency. Tiaco v. Forbes, 228 U.S. 549, 557, 33 S.Ct. 585, 57 L.Ed. 960. That is what it has done here. It has established classes of persons who in its judgment constitute an eligible list for deportation, of whom the Secretary is directed to deport those he finds to be undesirable residents of this country. With the background of a declared policy of Congress to exclude aliens classified in great detail by their undesirable qualities in the Immigration Act of 1917, and in previous legislation of a similar character, we think the expression "undesirable residents of the United States" is sufficiently definite to make the delegation quite within the power of Congress. * * *

But the Secretary made no express finding so far as the warrant for deportation discloses. It is contended that this renders the warrant invalid. It is answered on behalf of the appellee that, in habeas corpus proceedings, the prisoner is not to be discharged for defects in the original arrest or commitment, because the object of the proceeding is not like an action to recover damages for an unlawful arrest or commitment, but is to ascertain whether the prisoner can lawfully be detained in custody, citing Nishimura Ekiu v. United States, 142 U.S. 651, 662, 12 S.Ct. 336, 35 L.Ed. 1146. What that case really decided was that, even if the arrest was unjustified by the warrant or commitment on its face, yet if the evidence on the hearing of the petition for habeas corpus showed either that facts existed at the time of the arrest or had occurred since, which made the detention legal, the court would not release the prisoner, but would do what justice required and would dispose of the prisoner accordingly. Iasigi v. Van De Carr, 166 U.S. 391, 17 S.Ct. 595, 41 L.Ed. 1045; Stallings v. Splain, 253 U.S. 339, 343, 40 S.Ct. 537, 64 L.Ed. 940; United States ex rel. Bilokumsky v. Tod, 263 U.S. 149, 158, 44 S.Ct. 54, 68 L.Ed. 221; United States ex rel. Mensevich v. Tod, 264 U.S. 134, 44 S.Ct. 282, 68 L.Ed. 591, decided this day.

In the case before us the defect in the warrants of deportation has not been supplied. The defect is jurisdictional. There is no authority given to the Secretary to deport, except upon his finding after a hearing that the petitioners were undesirable residents. There is no evidence that he made such a finding, except what is found in the warrant of deportation. The warrants recite that upon the evidence the Secretary has become satisfied that the petitioner aliens have been found in the United States in violation of the Act of May 10, 1920, and that they were finally convicted of the offenses named in the act. They could not have been found in the United States in violation of the act of 1920 until after the Secretary had found that they were undesirable residents. Appellees' argument is that, therefore, this must be taken to mean that he finds them undesirable citizens. But the words "have been found" naturally refer to a time when the warrant of arrest was served on them, and before he had them before him. They exclude a possible meaning that he was then making their stay in the country illegal by implication of a finding that they were undesirable. This conclusion is borne out by the language of the Secretary in the warrant of arrest, which before the hearings he issued against the petitioners, and in which he directed their arrest on the ground that they had been found in the United States in violation of the Act of May 10, 1920. It would clearly appear from these two documents, which are naturally to be construed in pari materia, that the Secretary did not deem his finding that the petitioners were undesirable citizens essential to enable him to deport them. Indeed, he seems to have used forms applicable to aliens of a fixed excluded class, to be deported on identification with the class, without any fur-

ther finding by him. The natural construction of his language is that he has become satisfied that they are in the country in violation of the act solely because they have been convicted as stated.

Does this omission invalidate the warrant? The finding is made a condition precedent to deportation by the statute. It is essential that, where an executive is exercising delegated legislative power he should substantially comply with all the statutory requirements in its exercise, and that, if his making a finding is a condition precedent to this act, the fulfillment of that condition should appear in the record of the act. In Wichita R. R. & Light Co. v. Public Utilities Commission, 260 U.S. 48, 43 S.Ct. 51, 67 L.Ed. 124, a statute of a state required that a Public Utility Commission should find existing rates to be unreasonable before reducing them, but there was no specific requirement that the order should contain the finding. We held that the order in that case, made after a hearing and ordering a reduction, was void for lack of the express finding in the order. We put this conclusion, not only on the language of the statute, but also on general principles of constitutional government. After pointing out the necessity for such delegation of certain legislative power to executive agencies we said (page 59 [43 S.Ct. 55]):

"In creating such an administrative agency the Legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its action. When, therefore, such an administrative agency is required as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective.

"It is pressed on us that the lack of an express finding may be supplied by implication and by reference to the averments of the petition invoking the action of the commission. We cannot agree to this."

* * *

We need not discharge the petitioners at once because of the defective warrant. By section 761 of the Revised Statutes (Comp.St. § 1289) the duty of the court or judge in habeas corpus proceedings is prescribed as follows:

"The court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require."

Under this section, this court has often delayed the discharge of the petitioner for such reasonable time as may be necessary to have him taken before the court where the judgment was rendered, that defects which render discharge necessary may be corrected. In re Bonner, Petitioner, 151 U.S. 242, 261, 14 S.Ct. 323, 38 L.Ed. 149; Med-

ley, Petitioner, 134 U.S. 160, 174, 10 S.Ct. 384, 33 L.Ed. 835; Coleman v. Tennessee, 97 U.S. 509, 24 L.Ed. 1118; United States v. McBratney, 104 U.S. 621, 624, 26 L.Ed. 869; Bryant v. United States, 214 F. 51, 53, 130 C.C.A. 491. The same rule should be applied in habeas corpus proceedings to test the legality of confinement under the decision of an administrative tribunal like the Secretary of Labor in deportation cases. No time limitation is imposed upon proceedings under the Act of May 10, 1920. If upon the evidence the Secretary finds that these petitioners are undesirable residents and issues warrants of deportation reciting that finding with the other jurisdictional facts, there will then be no reason, so far as this record discloses, why they should not be deported.

Accordingly the judgment of the District Court is reversed with directions not to discharge the petitioners until the Secretary of Labor shall have reasonable time in which to correct and perfect his finding on the evidence produced at the original hearing, if he finds it adequate, or to initiate another proceeding against them.

CITY OF YONKERS v. UNITED STATES

Supreme Court of the United States.
320 U.S. 685, 64 S.Ct. 327, 88 L.Ed. 400 (1944).

Mr. Justice DOUGLAS delivered the opinion of the Court.

The Interstate Commerce Act confers upon the Interstate Commerce Commission authority to issue certificates of public convenience and necessity allowing any carrier subject to the Act to abandon "all or any portion" of its line of railroad. Sec. 1(18), (19), (20), 49 U.S.C. § 1(18), (19), (20), 49 U.S.C.A. § 1(18–20), 24 Stat. 379, 41 Stat. 477, 478. But the Act also provides that that authority of the Commission "shall not extend" to the abandonment "of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation." Sec. 1(22), 49 U.S.C. § 1(22), 49 U.S.C.A. § 1(22).

The New York Central Railroad Co. filed an application with the Commission for a certificate under § 1(18–20) of the Act authorizing it to abandon an electric branch line extending 3.1 miles from Van Cortlandt Park Junction, New York City, to Getty Square, Yonkers, New York. This line was constructed in 1888 by a predecessor company for the purpose of developing suburban business between Yonkers and New York City. The line was electrified in 1926 with the hope that the suburban business would increase. It is now a physical part of the New York Central's Putnam Division with which it connects at Van Cortlandt Park Junction. The Putnam Division in turn connects with the Hudson Division which is part of the main line of the New York Central from New York City to Chicago. The Hudson

Division follows the east bank of the Hudson River through Yonkers to Albany. The Putnam Division extends north from Sedgwick Avenue and West 161st Street, New York City, through Yonkers to Brewster, New York. The Putnam Division lies east of, and is roughly parallel with, the Hudson Division. In the City of Yonkers the two divisions are about a mile apart. The electric line in question is between the Hudson and Putnam Divisions. Getty Square, its terminal in Yonkers, is .3 mile east of the Yonkers station on the Hudson Division. The New York Central system is for the most part operated by steam. Some portions of its lines are electrified, including the Hudson Division between New York City and Harmon, New York, and Harlem Division so far as White Plains, New York, the Putnam Division between Sedgwick Avenue and Van Cortlandt Park Junction, and the Yonkers line in question. With the exception noted, no part of the Putnam Division is electrified, its trains being operated by steam.

This Yonkers electric branch handles no freight, mail, express, or milk traffic and no industries are dependent on it for such service. Its traffic is exclusively passenger traffic, principally commuter travel between Getty Square and three other stations in Yonkers and Grand Central Station in New York City. The trains serving stations on this Yonkers electric branch do not go through to Grand Central Station on account of the congested condition of the main-line tracks funnelling into Grand Central Station. Accordingly, these trains run only from Getty Square to Van Cortlandt Park Junction and thence over the main line of the Putnam Division to the terminal at Sedgwick Avenue. Passengers from Yonkers to Grand Central Station must transfer to Hudson Division trains at either High Bridge or University Heights stations which are north of the Sedgwick Avenue Station. Tariffs of the New York Central provide for one-way, monthly-commutation, and other tickets usable between the stations in Yonkers and Grand Central Station. Time tables of the New York Central disclose the service on this electric branch. And its operating results are reflected in the accounts of the New York Central.

The trains running on this electric branch are composed of two, three or four cars. The trains are hauled not by a locomotive but by so-called multiple unit cars. The structure of the line is such that locomotives cannot be used on it. The trains on this electric branch proceed only to Getty Square, Yonkers, and not beyond.

The Commission though adverting to a number of the facts which we have mentioned did not address itself to the question whether this electric branch line was or was not "operated as a part or parts of a general steam railroad system of transportation" within the meaning of § 1(22). The Commission did not undertake to review the evidence relevant to that issue. It made no findings respecting it. It authorized the abandonment on the grounds that continued operation would impose "an undue and unnecessary burden" upon the New

York Central and upon interstate commerce. The Commission says that the question of its jurisdiction under § 1(22) was neither presented in limine nor urged in the briefs, in the exceptions to the examiner's report, or in the oral arguments. It was, however, presented in petitions for reconsideration which the Commission denied without opinion.

This suit to enjoin the order of the Commission, brought before a District Court of three judges, 38 Stat. 219, 220, 28 U.S.C. § 47, 28 U.S.C.A. § 47, was initiated by the Public Service Commission of New York, the City of Yonkers, and a committee of Yonkers commuters. The jurisdiction of the Commission was challenged before the District Court. And that objection which was overruled there (50 F.Supp. 497) has been renewed on the appeal which brings the case here. 28 U.S.C. §§ 47a, 345, 28 U.S.C.A. §§ 47a, 345.

The District Court in sustaining the order of the Commission, reviewed the evidence and concluded that the operation of this electric branch was "intertwined with the operation of the system as a whole." It relied especially on the fact that the bulk of the traffic on this electric branch transfers at High Bridge or University Heights to the Hudson Division and that those transfers made it necessary for the New York Central to provide seats on the Hudson Division trains for all the transferred Yonkers passengers for the remaining short run to Grand Central Station.

The Commission itself has noted that in the "construction of these exclusion clauses great difficulty has been experienced, particularly in determining the roads properly classifiable as interurban electric railways." Annual Report (1928), p. 80. That difficulty is apparent here by the division of opinion which exists in the Court whether this Yonkers branch is an 'interurban electric" railway which is "operated as a part" of the New York Central system. § 1(22). As stated by Mr. Justice Brandeis in United States v. Idaho, 298 U.S. 105, 109, 56 S.Ct. 690, 692, 80 L.Ed. 1070, the determination of what is included within the exemption of § 1(22) involves a "mixed question of fact and law." Congress has not left that question exclusively to administrative determination; it has given the courts the final say. Id., 298 U.S. at page 109, 56 S.Ct. at page 692, 80 L.Ed. 1070. It is settled that the aid of the Commission need not be sought before the jurisdiction of a court is invoked to enjoin violations of the provisions in question. Texas & Pacific Ry. Co. v. Gulf, C. & S. F. Ry. Co., 270 U.S. 266, 46 S.Ct. 263, 70 L.Ed. 578. And the fact that the Commission fails to make a finding on this jurisdictional question obviously does not preclude the reviewing court from making that determination initially. But we deem it essential in cases involving a review of orders of the Commission for the courts to decline to make that determination without the basic jurisdictional findings first having been made by the Commission.

The power of the Commission to control the abandonment of intrastate branches of interstate carriers stems from the power of Congress to protect interstate commerce from undue burdens or discriminations. Colorado v. United States, 271 U.S. 153, 46 S.Ct. 452, 70 L.Ed. 878; Transit Commission v. United States, 284 U.S. 360, 52 S.Ct. 157, 76 L.Ed. 342; Purcell v. United States, 315 U.S. 381, 62 S.Ct. 709, 86 L.Ed. 910. And see United States v. Hubbard, 266 U.S. 474, 45 S.Ct. 160, 69 L.Ed. 389, for an application of the doctrine of the Shreveport case (Houston, E. & W. T. R. Co. v. United States, 234 U.S. 342, 34 S.Ct. 833, 58 L.Ed. 1341) to the intrastate rates of interurban electric railroads. The exemptions contained in § 1(22) do not necessarily reflect the lack of constitutional power to deal with the excepted phases of railroad enterprise. Underlying § 1(22) is a Congressional policy of reserving exclusively to the states control over that group of essentially local activities. See H.Rep. No. 456, 66th Cong., 1st Sess., p. 18. We recently stated that the extension of federal control into these traditional local domains is a "delicate exercise of legislative policy in achieving a wise accommodation between the needs of central control and the lively maintenance of local institutions." Palmer v. Massachusetts, 308 U.S. 79, 84, 60 S.Ct. 34, 36, 84 L.Ed. 93. In the application of the doctrine of the Shreveport case, this Court has required the Commission to show meticulous respect for the interests of the States. It has insisted on a "suitable regard to the principle that, whenever the federal power is exerted within what would otherwise be the domain of state power, the justification of the exercise of the federal power must clearly appear." Florida v. United States, 282 U.S. 194, 211, 212, 51 S.Ct. 119, 124, 75 L.Ed. 291. In that case this Court set aside an intrastate rate order of the Commission because of the "lack of the basic or essential findings required to support the Commission's order." Id., 282 U.S. at page 215, 51 S.Ct. at page 125, 75 L.Ed. 291. The principle of the Florida case is applicable here. The question is not merely one of elaborating the grounds of decision and bringing into focus what is vague and obscure. See United States v. Chicago, M. St. P. & P. R. Co., 294 U.S. 499, 55 S.Ct. 462, 79 L.Ed. 1023. Cf. Securities & Exchange Commission v. Chenery Corp., 318 U.S. 80, 63 S.Ct. 454. Here as in the Florida case the problem is whether the courts should supply the requisite jurisdictional findings which the Commission did not make and to which it even failed to make any reference.

Congress has withheld from the Commission any power to authorize abandonment of certain types of railroad lines. It is hardly enough to say that the Commission's orders may be set aside by the courts where the Commission exceeds its authority. The Commission has a special competence to deal with the transportation problems which are reflected in these questions. The Congress has entrusted to the Commission the initial responsibility for determining through application of the statutory standards the appropriate line between the

federal and state domains. Proper regard for the rightful concern of local interests in the management of local transportation facilities makes desirable the requirement that federal power be exercised only where the statutory authority affirmatively appears. The sacrifice of these legitimate local interests may be as readily achieved through the Commission's oversight or neglect (Illinois Commerce Commission v. Thomson, 318 U.S. 675, 63 S.Ct. 834) as by improper findings. The insistence that the Commission make these jurisdictional findings before it undertakes to act not only gives added assurance that the local interest for which Congress expressed its solicitude will be safe-guarded. It also gives to the reviewing courts the assistance of an expert judgment on a knotty phase of a technical subject.

We are asked to presume that the Commission, knowing the limit of its authority considered this jurisdictional question and decided to act because of its conviction that this branch line was not exempt by reason of § 1(22). But that is to deal too cavalierly with the Congressional mandate and with the local interests which are pressing for recognition. Where a federal agency is authorized to invoke an overriding federal power except in certain prescribed situations and then to leave the problem to traditional state control, the existence of federal authority to act should appear affirmatively and not rest on inference alone.

This is not to insist on formalities and to burden the administrative process with ritualistic requirements. It entails a matter of great substance. It requires the Commission to heed the mandates of the Act and to make the expert determinations which are conditions precedent to its authority to act.

We intimate no opinion on the merits of the controversy. For in absence of the requisite jurisdictional findings we think the order of the Commission should have been set aside.[b]

Reversed.

Mr. Justice FRANKFURTER, dissenting.

Congress has empowered the Interstate Commerce Commission to authorize a railroad, when public convenience permits, to abandon any portion of its line. But when such portion is a suburban or interurban electric railway abandonment may be authorized only if it is part of a general steam railroad system of transportation. Section 1(18) and (22) of the Interstate Commerce Act, as amended 49 U.S.C. § 1(18) and (22), 49 U.S.C.A. § 1(18, 22). This Court has held that whether such a line is of a character to permit abandonment under federal authority need not be determined in the first instance by the Interstate Commerce Commission; and such determination when made does not foreclose an independent judi-

[b] *Cf.* the dissenting opinion of Mr. Justice Douglas in Interstate Commerce Commission v. Parker, 326 U.S. 60, 74, 65 S.Ct. 1490, 1497, 89 L.Ed. 2051 (1945). But *cf.* Texas & Pacific Railway Company v. Gulf, Coronado & Santa Fe Railway Co., 270 U.S. 266, 46 S.Ct. 263, 70 U.Ed. 578 (1926), *supra* at p. 609, n. a

cial judgment. Texas & Pac. R. v. Gulf, etc., R. Co., 270 U.S. 266, 46 S.Ct. 263, 70 L.Ed. 578, and United States v. Idaho, 298 U.S. 105, 56 S.Ct. 690, 80 L.Ed. 1070. On such an independent examination of the issue the court below had no doubt that the Yonkers branch of the New York Central, the portion of the Central lines for which abandonment was here sought, was not "a suburban or interurban line unconnected with the rest of the Central's railroad system" but was in fact "intertwined with the operation of the [New York Central Railroad] system as a whole". 50 F.Supp. 497, 498. The record amply sustains this conclusion. If this Court, however, on its own estimate of the various elements in the financial, physical and transportation relations between the rest of the New York Central lines and this Yonkers branch, had struck a contrary balance and found that the Yonkers branch was not operated as a part of the general New York Central system, I should not have deemed the matter of sufficient importance to warrant expression of dissent.

But the Court does not decide on the merits. In effect, it remits the controversy to the Interstate Commerce Commission on the ground that the Commission did not make a formal finding, described as "jurisdictional", that the Yonkers branch was in fact "operated as a part * * * of a general steam railroad system of transportation". The Commission may very well now formally make such a finding of a connection between the Yonkers branch and the New York Central, which in fact is writ large in the Commission's report in granting the application for abandonment, and the weary round of litigation may be repeated to the futile end of having this Court then, forsooth, express an opinion on the merits opposed to that of the Commission and the District Court. This danger if not likelihood of thus marching the king's men up the hill and then marching them down again seems to me a mode of judicial administration to which I cannot yield concurrence. I think the case should be disposed of on the merits by affirming the judgment of the District Court.

This seems to me all the more called for since I find no defect in the foundation of the Commission's order. No doubt the Interstate Commerce Commission like other administrative agencies should keep within legal bounds and courts should keep them there, in so far as Congress has entrusted them with judicial review over administrative acts. Of course when a statute makes indispensable "an express finding", an express finding is imperative, see Wichita R. & Light Co. v. Public Util. Comm., 260 U.S. 48, 59, 43 S.Ct. 51, 55, 67 L.Ed. 124. But the history of the Interstate Commerce Act and its amendments illumine the different legal functions expressed by the term findings. When Congress exacts from the Commission formal findings there is an end to the matter. For certain duties of the Commission and at certain stages in the history of the Interstate Commerce Act, Congress did require formal findings, but experience led Congress later to dispense with such formal requirements. See Manufacturers R. Co. v. United

States, 246 U.S. 457, 489, 490, 38 S.Ct. 383, 392, 62 L.Ed. 831. But courts have also spoken of the need of findings as the basis of validity of an order by the Interstate Commerce Commission in the absence of a Congressional direction for findings. The requirement of findings in such a context is merely part of the need for courts to know what it is that the Commission has really determined in order that they may know what to review. "We must know what a decision means before the duty becomes ours to say whether it is right or wrong." See United States v. Chicago, M., St. P. & P. R. Co., 294 U.S. 499, 509–511, 55 S.Ct. 462, 466, 467, 79 L.Ed. 1023.

This is the real ground for the decisions which have found Interstate Commerce Commission orders wanting in necessary findings. They have all been cases where the determination of an issue is not open to independent judgment by this Court, and where the case as it came here rested on conflicting inferences of fact left unresolved by the Commission. Such were the circumstances, for instance, in Florida v. United States, 282 U.S. 194, particularly at pages 214, 215, 51 S.Ct. 119, at pages 124, 125, 75 L.Ed. 291, and United States v. Baltimore & O. R. Co., 293 U.S. 454, 455, particularly at 463, 464, 55 S.Ct. 268, at page 272, 79 L.Ed. 587. Findings in this sense is a way of describing the duty of the Commission to decide issues actually in controversy before it. Analysis is not further by speaking of such findings as "jurisdictional" and not even when—to adapt a famous phrase—jurisdictional is softened by a quasi. "Jurisdiction" competes with "right" as one of the most deceptive of legal pitfalls. The opinions in Crowell v. Benson, 285 U.S. 22, 52 S.Ct. 285, 76 L.Ed. 598, and the casuistries to which they have given rise bear unedifying testimony of the morass into which one is led in working out problems of judicial review over administrative decisions by loose talk about jurisdiction.

The nub of the matter regarding the requirement of findings, where the formal making of them is not legislatively commanded, is indicated in United States v. Louisiana, 290 U.S. 70, 54 S.Ct. 28, 78 L.Ed. 181. Reviewing the validity of the Commission's order is the serious business of sitting in judgment upon a tribunal of great traditions and large responsibility. An order of the Commission should not be viewed in a hypercritical spirit nor even as though elegantia juris were our concern. We should judge a challenged order of the Commission by, "the report, read as a whole," 290 U.S. supra at page 80, 54 S.Ct. at page 33, 78 L.Ed. 181, and by the record as a whole out of which the report arose.

Viewing its order in this light makes plain enough why the Commission never formally stated that the line which it authorized to be abandoned was in fact operated as part of the New York Central system. It never formally made this statement because it was never questioned before it. * * *

The case is now sent back to the Commission. The facts regarding the relation of the Yonkers branch to the New York Central are

spread at large upon the record and are not in controversy. In view of the three proceedings before the Commission it is reasonable to assume that the Commission will add to its report the formal finding now requested of it. If the case then returns here I find it too hard to believe that this Court would reject the conclusion of the Commission and of the lower Court that the Yonkers branch is an operating part of the New York Central within § 1(22). Is not insistence on such an empty formalism a reversion to seventeenth century pleading which required talismanic phrases, as for instance that a seller could not be held to warrant that he sold what he purported to sell unless the buyer pleaded warrantizando vendidit or barganizasset? On the other hand, if the Court with all the facts before it does not think the Yonkers branch is a part of the railway operations of the New York Central, now is the time to say so.

Mr. Justice REED and Mr. Justice JACKSON join in this opinion.[c]

B. Adjustment of the Terms of the Order to Conform to the Underlying Conclusions of Law as Corrected by the Reviewing Court

(1) Adjustment by Decree of the Reviewing Court

FEDERAL TRADE COMMISSION v. BEECH-NUT PACKING CO.

Supreme Court of the United States.
257 U.S. 441, 42 S Ct. 150, 66 L.Ed. 307, 19 A.L.R. 882 (1922).

Mr. Justice DAY delivered the opinion of the Court.

This case is here upon a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, which court set aside an order of the Federal Trade Commission requiring the Beech-Nut Packing Company, a corporation engaged in the manufacture and sale of food and other products throughout the United States, to cease and desist from carrying out a plan of resale of its products. Beech-Nut Packing Co. v. Federal Trade Commission, 264 F. 885.

The Commission condemned the plan as an unfair method of competition within the meaning of section 5 of the Federal Trade Commission Act. 38 Stat. 719. * * *

The case was heard before the Commission upon an agreed statement of facts, from which, among other things, it found:

The Beech-Nut Packing Company customarily markets its products principally through jobbers and wholesalers in the grocery, drug, candy and tobacco lines, who in turn resell to retailers in these lines.

[c] Footnotes of the court have been omitted.

Such wholesale and retail dealers are selected as desirable customers because they are known or believed to be of good credit standing; who are willing to resell at the resale prices suggested by the company and who do resell at such prices; are willing to refuse to sell and who do refuse to sell to jobbers, wholesalers, and retailers who do not resell at the resale prices suggested by the company, and who do not sell to such jobbers, wholesalers, and retailers, who in other respects are good and satisfactory merchandisers. Such jobbers, wholesalers and retailers are designated by the company as "selected" or "desirable" dealers. In a few instances the company also sells "direct" to certain large retailers who are selected as the jobbers, wholesalers and retailers. The total number of such dealers, handling the products of the company, includes the greater portion of the jobbers, wholesalers, and retailers, respectively, in the grocery trades, and a large proportion of the jobbers, wholesalers and retailers in the drug, candy, and tobacco trades respectively, throughout the United States.

The company has adopted and maintained, and still maintained at the time complaint was filed by the Commission, in the sale and distribution of its products a policy known as the "Beech-Nut policy," and requests the co-operation therein of all dealers selling the products manufactured by it, dealing with each customer separately.

In order to secure such co-operation and to carry out the Beech-Nut policy the company:

Issues circulars, price lists, and letters to the trade generally showing suggested uniform resale prices, both wholesale and retail, to be charged for Beech-Nut products.

Requests and insists that the selected jobbers, wholesalers, and retailers sell only to such other jobbers, wholesalers, and retailers as have been and are willing to resell and do resell at the prices so suggested by the company, and requests and insists that such jobbers, wholesalers and retailers discontinue selling to other jobbers, wholesalers, and retailers who fail to resell at the prices so suggested by the company.

Makes it known broadcast to such selected jobbers, wholesalers and retailers, whether sold "direct" or not, that if they, or any of them fail to sell at the resale prices suggested by the company, it will absolutely refuse to sell further supplies of its product to them, or any of them, and will also absolutely refuse to sell to any jobbers, wholesalers, and retailers whatsoever who sell to other jobbers, wholesalers, and retailers failing to resell at the prices suggested by the company.

* * *

The company has maintained and does maintain card records containing the names of thousands of jobbing, wholesale, and retail distributors, including the selected distributors, and in furtherance of its refusal to sell goods either to distributors selling at less than the suggested resale prices, or to distributors selling to other distributors sell-

ing at less than the suggested resale prices, has listed upon those cards, bearing the names of such distributors, the words "Undesirable—Price Cutters," "Do Not Sell," or "D. N. S.," the abbreviation for "Do Not Sell," or expressions of a like character, to indicate that the particular distributor was in the future not to be supplied with respondent's goods on account of failure to maintain the suggested resale prices, or on account of failure to discontinue selling to dealers failing to maintain such suggested resale prices. When the company has received declarations, assurances, statements, promises, or similar expressions, as the case may be, by distributors which satisfy it that such distributors will resell at the prices suggested by it, and discontinue selling to distributors failing to maintain the resale prices suggested by it, it has issued instructions to "clear the record," or directions of similar import, notation of which is made on the cards, and it has thereafter permitted shipments of its products to be made to such distributors; and such distributors to whom shipments are thus allowed to go forward constitute the company's list of so-called "selected" jobbers, wholesalers, and retailers, and no distributor is thus listed on such card record as one to whom goods are allowed to go forward who fails to maintain the resale prices suggested by it or sells to distributors failing to resell at such suggested price; and when a jobber, wholesaler, or retailer is reported as failing to maintain the suggested resale prices, and has been entered in the card records as one to whom shipments should not go forward, respondent notifies those jobbers, wholesalers, and retailers who supply the distributor, of this fact, and also notifies its specialty salesmen, and gives similar notices to such jobbers, wholesalers, and retailers and to its specialty salesmen when reinstatements are made in its list of "selected" jobbers, wholesalers, and retailers.

The Circuit Court of Appeals was of opinion that the only difference between the price-fixing policy condemned as unlawful in Miles Medical Co. v. Park & Sons Co., 220 U.S. 373, 31 S.Ct. 376, 55 L.Ed. 502, and the price-fixing plan embodied in the Beech-Nut policy was that in the former case there was an agreement in writing, while in this case the success or failure of the plan depended upon a tacit understanding with purchasers and prospective purchasers. While it expressed its difficulty in seeing any difference between a written agreement and a tacit understanding in their effect upon the restraint of trade, it, nevertheless, regarded the case as governed by the decision of this court in United States v. Colgate & Co., 250 U.S. 300, 39 S.Ct. 465, 63 L.Ed. 992, 7 A.L.R. 443, and, accordingly, held that the Commission had exceeded its power in making the order appealed from.

The Colgate Case was prosecuted under the Sherman Anti-Trust Act (Comp.St. § 8820 et seq.), and came to this Court under the Criminal Appeals Act (Comp.St. § 1704). We therein held that this Court must accept the construction of the indictment as made in the District Court; and, that upon such construction, the only act charg-

ed amounted to the exercise of the right of the trader, or manufacturer, engaged in private business, to exercise his own discretion as to those with whom he would deal, and to announce the circumstances under which he would refuse to sell, and that thus interpreted no act was charged in the indictment which amounted to a violation of the Sherman Act prohibiting monopolies, contracts, combinations, and conspiracies in restraint of interstate commerce. * * * The system here disclosed necessarily constitutes a scheme which restrains the natural flow of commerce and the freedom of competition in the channels of interstate trade which it has been the purpose of all the Anti-Trust Acts to maintain. In its practical operation it necessarily constrains the trader, if he would have the products of the Beech-Nut Company, to maintain the prices "suggested" by it. If he fails so to do, he is subject to be reported to the company either by special agents, numerous and active in that behalf, or by dealers whose aid is enlisted in maintaining the system and the prices fixed by it. Furthermore, he is enrolled upon a list known as "Undesirable—Price Cutters," to whom goods are not to be sold, and who are only to be reinstated as one whose record is "clear" and to whom sales may be made upon his giving satisfactory assurance that he will not resell the goods of the company except at the prices suggested by it, and will refuse to sell to distributors who do not maintain such prices.

From this course of conduct a court may infer—indeed, cannot escape the conclusion—that competition among retail distributors is practically suppressed for all who would deal in the company's products are constrained to sell at the suggested prices. Jobbers and wholesale dealers who would supply the trade may not get the goods of the company, if they sell to those who do not observe the prices indicated or who are on the company's list of undesirables until they are restored to favor by satisfactory assurances of future compliance with the company's schedules of resale prices. Nor is the inference overcome by the conclusion stated in the Commission's findings that the merchandising conduct of the company does not constitute a contract or contracts whereby resale prices are fixed, maintained, or enforced. The specific facts found show suppression of the freedom of competition by methods in which the company secures the cooperation of its distributors and customers, which are quite as effectual as agreements express or implied intended to accomplish the same purpose. By these methods the company, although selling its products at prices satisfactory to it, is enabled to prevent competition in their subsequent disposition by preventing all who do not sell at resale prices fixed by it from obtaining its goods.

Under the facts established we have no doubt of the authority and power of the Commission to order a discontinuance of practices in trading, such as are embodied in the system of the Beech-Nut Company.

We are, however, of opinion that the order of the Commission is too broad. The order should have required the company to cease and desist from carrying into effect its so-called Beech-Nut policy by co-operative methods in which the respondent and its distributors, customers and agents undertake to prevent others from obtaining the company's products at less than the prices designated by it—(1) by the practice of reporting the names of dealers who do not observe such resale prices; (2) by causing dealers to be enrolled upon lists of undesirable purchasers who are not to be supplied with the products of the company unless and until they have given satisfactory assurances of their purpose to maintain such designated prices in the future; (3) by employing salesmen or agents to assist in such plan by reporting dealers who do not observe such resale prices, and giving orders of purchase only to such jobbers and wholesalers as sell at the suggested prices and refusing to give such orders to dealers who sell at less than such prices, or who sell to others who sell at less than such prices; (4) by utilizing numbers and symbols marked upon cases containing their products with a view to ascertaining the names of dealers who sell the company's products at less than the suggested prices, or who sell to others who sell at less than such prices in order to prevent such dealers from obtaining the products of the company; or (5) by utilizing any other equivalent co-operative means of accomplishing the maintenance of prices fixed by the company.

The judgment of the Circuit Court of Appeals is reversed, and the cause remanded to that court, with instructions to enter judgment in conformity with this opinion.

Reversed.[d]

(2) Judicial Remand for Adjustment by the Administrative Agency

FEDERAL TRADE COMMISSION v. A. P. W. PAPER CO., INC.

Supreme Court of the United States.
328 U.S. 193, 66 S.Ct. 932, 90 L.Ed. — (1946).

Mr. Justice DOUGLAS delivered the opinion of the Court.

Respondent manufactures and sells toilet tissues and paper towels in interstate commerce. On each package or roll of one brand are a Greek red cross and the words "Red Cross." Respondent registered the words "Red Cross" and the Red Cross symbol as a trade mark; and it features them in its advertisements and on its letterheads.

By § 4 of the American Red Cross Act of January 5, 1905, 33 Stat. 600, 36 U.S.C. § 4, 36 U.S.C.A. § 4, it was made unlawful "for any

[d] The dissenting opinion of Mr. Justice Holmes, in which Mr. Justice McKenna and Mr. Justice Brandeis joined, has been omitted.

person or corporation, other than the Red Cross of America, not now lawfully entitled to use the sign of the Red Cross, hereafter to use such sign or any insignia colored in imitation thereof for the purposes of trade or as an advertisement to induce the sale of any article whatsoever." That section was amended by the Act of June 23, 1910, 36 Stat. 604, 36 U.S.C. § 4, 36 U.S.C.A. § 4. Sec. 4 of that Act made unlawful the use of the Greek red cross on a white ground or the words "Red Cross" for the purpose of trade or as an advertisement "to induce the sale of any article" or "for any business or charitable purpose" by any person other than the American National Red Cross or its duly authorized employees and agents or the sanitary and hospital authorities of the army and navy. It contained, however, a proviso which reads as follows: "That no person, corporation, or association that actually used or whose assignor actually used the said emblem, sign, insignia, or words for any lawful purpose prior to January fifth, nineteen hundred and five, shall be deemed forbidden by this Act to continue the use thereof for the same purpose and for the same class of goods."

Petitioner's use of the trade name and emblem antedate January 5, 1905. But in 1942 the Federal Trade Commission charged petitioner with a violation of § 5(a) of the Federal Trade Commission Act, 38 Stat. 719, as amended 52 Stat. 111, 15 U.S.C. § 45, 15 U.S.C.A. § 45, which makes unlawful "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce."

A hearing was had, findings were made and a cease and desist order was issued. The Commission found that "the use by respondent of the words 'Red Cross' and of the mark of the Greek red cross to designate its products has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public, in that such name and mark represent or imply that respondent's products are sponsored, endorsed, or approved by the Red Cross; that the Red Cross is financially interested in the sale of the products; that the products are used by the Red Cross; that the products are manufactured in accordance with sanitary standards set up by the Red Cross; or that there is some other connection between the products and the Red Cross. Not only are these, in the opinion of the Commission, reasonable inferences to be drawn from the use of the name and mark, but the record affirmatively shows that the name and mark are in fact so understood and interpreted by many members of the public." The Commission also found that statements on respondent's products that they are made by respondent and that the name and mark are registered "do not serve to correct the erroneous and misleading impression created through the use of the trade name and mark." The Commission entered an order which, among other things, forbade respondent from using the words "Red Cross" to describe its products and from displaying the Greek red cross on them. 38 F.T.C. 1.

On a petition for review the Circuit Court of Appeals, by a divided vote, reversed the order of the Commission. 149 F.2d 424. It held that the order went beyond permissible limits in forbidding any use of the words and the mark. It remanded the case to the Commission for the formulation of a new order which, though not forbidding the use of the words and the symbol, might require statements which would avoid any inference that the goods were sponsored or approved or in any way connected with the American National Red Cross. The case is here on petition for a writ of certiorari which we granted because of the importance of the problem in the administration of the Federal Trade Commission Act.

There is no suggestion that the pre-1905 use of the words and the symbol was an unlawful one within the meaning of either the 1905 or the 1910 Act. Nor has the Commission found that respondent has engaged in any fraudulent activity or made any untruthful statements in connection with its use of the words and the symbol. Therefore this is not a case where the words and symbols were either adopted or used pursuant to a fraudulent design, aimed at creating the impression that these products were sponsored by or otherwise carried the imprimatur of the Red Cross. Hence, here, as in Siegel Co. v. Federal Trade Commission, 327 U.S. 608, 66 S.Ct. 758, 90 L.Ed. ——, we have no problem involving the power of the Commission to uproot a fraudulent scheme in its entirety. But it is argued that however lawful the earlier use may have been, it cannot survive a finding by the Commission that the use constitutes an unfair or deceptive act or practice in commerce. It is pointed out that the 1938 amendment to the Federal Trade Commission Act gave the Commission power to protect consumers, as well as competitors, against unfair or deceptive practices. It is said that there are no exceptions to that broad power and none should be implied from the Red Cross Act of 1910. The latter Act, it is said, confers no general rights but only a limited immunity and should not be construed as exempting pre-1905 users of the name and emblem from regulatory legislation of general application which Congress may from time to time enact for the protection of the public. It is also argued that by the Geneva Convention of 1929, which was ratified by the United States in 1932, the United States agreed to prohibit the use by private persons of the name and the symbol and that the Red Cross Act and the Federal Trade Commission Act should not be construed in favor of conduct which this nation is under international obligation to terminate.

We agree, however, with the Circuit Court of Appeals. It is clear that the 1910 Act granted, or at least recognized, the right of pre-1905 users to continue the use of the words and the symbol. The House Report stated that the Act as amended "will permit the use of the symbol * * * by such persons, corporations, and associations as actually used the emblem prior to January 5, 1905, for the purposes for which they were so entitled to use it and for the same class of

goods. The section, as so amended, grants to the American National Red Cross the fullest protection it is possible to afford it by congressional enactment and at the same time amply protects the concerns possessing vested property rights in the emblem." H.Rep.No.1256, 61st Cong., 2d Sess., pp. 2–3. It is apparent from the terms of the 1905 Act and the 1910 Act that Congress was concerned not only with protecting the Red Cross against pretenders but also with protecting the public against the false impression that goods purchased were the products of the Red Cross or were sponsored by it. Congress, however, did not go the full distance. It preserved the right of earlier, good faith users to continue the use of the words and the symbol. It may have concluded that the mark which had been acquired was a valuable business asset which should not be destroyed. Or it may have thought that the extent and manner of the use by the established concerns were not likely to injure the public. But whatever the purpose, the fact remains that the good faith use of the mark by the pre-1905 users was intended to be preserved unimpaired.

We cannot lightly infer that this specific right was intended to be swept away under the 1938 amendment to the Federal Trade Commission Act. Repeals by implication are not favored. Yet if the order of the Commission stands, the right granted or recognized by the 1910 Act becomes a nullity. For the use of the words and the symbol by good faith pre-1905 users becomes, per se unlawful. As the 1910 Act, like the Federal Trade Commission Act, was in part directed towards protection of the public against deceptive practices, we think the two Acts must be read in pari materia. The problem is to reconcile the two, if possible, and to give effect to each. We think that may be done by recognizing that while the good faith use of the words and symbols by pre-1905 users is permissible, the Commission may require the addition of language which removes any misleading inference that the products are in fact sponsored, approved, or in any manner associated with the American National Red Cross.

We need comment only briefly on the Geneva Convention of 1929, which was ratified by the United States in 1932. The undertaking "to prevent the use by private persons" of the words or symbol is a matter for the executive and legislative departments. The problem has been before the Congress in recent years. No action has yet been taken. But we can find in that inaction no basis for concluding that the rights of good faith, pre-1905 users granted or recognized by the 1910 Act are today in any way impaired. Indeed, the existence of that right was recognized as giving rise to the need for additional legislation. That assumption can hardly be reconciled with the conclusion that complete relief is already accorded under the Federal Trade Commission Act.

We do not undertake to prescribe the order which the Commission should enter. The fashioning of the remedy is a matter entrusted to the Commission, which has wide latitude for judgment. Siegel Co. v.

Trade Commission, supra. We only hold that under the facts of this case the Commission may not absolutely forbid the use of the words and the symbol by respondent.

Affirmed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.*

C. Judicial Review of Administrative Discretion in the Choice of Remedies

(1) Judicial Modification of the Remedies Applied by Terms of the Order

FEDERAL TRADE COMMISSION v. EASTMAN KODAK COMPANY

Supreme Court of the United States.
274 U.S. 619, 47 S.Ct. 688, 71 L.Ed. 1238 (1927).

Mr. Justice SANFORD delivered the opinion of the Court.

This writ brings up for review a decree of the Circuit Court of Appeals setting aside in part an order of the Federal Trade Commission, entered after a due hearing in a proceeding instituted by it under section 5 of the Federal Trade Commission Act, by which the Eastman Kodak Company, the Allied Laboratories Association, Inc., and others were required to desist from acts held by the Commission to constitute unfair methods of competition in the manufacture and sale of positive cinematograph films in interstate and foreign commerce.

These positive films are raw materials used by film laboratories in making positive prints of motion pictures that are thrown upon the screen. The Eastman Company originated the commercial manufacture of such films many years ago. In 1920 it manufactured and sold 94 per cent. of those used in the United States; but in 1921, owing to competition by importers of films manufactured in foreign countries, its sales decreased to 81 per cent. Upon an agreed statement of facts, and the inferences which it drew therefrom, the Commission found, in effect that thereafter the Eastman Company, with the purpose and intent of maintaining its monopoly and lessening competition in the sale of such films, acquired three laboratories used in making motion picture prints, whose combined capacity exceeded that of all the other laboratories east of Chicago, and announced its intention of entering upon the manufacture of such prints; that this constituted an effective threat of overpowering competitive force which com-

* Footnotes of the court have been omitted.

pelled the members of the Allied Laboratories—an association of manufacturers of such prints—to enter into an agreement or understanding with the Eastman Company that the members of the Allied Laboratories would use American-made films only, to the exclusion of foreign-made films, so long as the Company did not compete with them in manufacturing prints, and that the Company—which continued to maintain its laboratories in readiness for operation—would not manufacture prints in competition with them so long as they used American-made films exclusively; that this agreement or understanding had the effect of lessening competition in the sale of the films in interstate and foreign commerce and sustaining the monopoly of the Company therein; and that its ownership of the three laboratories and their maintenance in condition for operation, continued to have the effect of inducing and compelling the manufacturers of prints to use only the films made by the Company.

On these and subsidiary findings, the Commission entered an order requiring the defendants to cease and desist from combining and cooperating in restraining competition in the manufacture and sale of positive films and maintaining the monopoly of the Eastman Company in their sale in interstate and foreign commerce, by the agreement and understanding that the members of the Allied Laboratories would use American-made films exclusively, provided the Company would not operate its laboratories in competition with them, and that the Company would not operate its laboratories for the manufacture of prints in competition with them, provided they used and continued to use American-made films exclusively; and by other incidental means. And the Commission further ordered that for the purpose of preventing the maintenance of the monopoly of the Eastman Company in the manufacture and sale of positive films and restoring competitive freedom in their distribution and sale, the Company should with due diligence sell and convey its three laboratories to parties not directly connected, or indirectly interested, with it.

On a petition by the Eastman Company and the Allied Laboratories for a review of this order, the Circuit Court of Appeals—without referring specifically to the purpose for which the Eastman Company acquired and maintained the three laboratories—held, in substance, that the reciprocal agreement or understanding between the Eastman Company and the Allied Laboratories that their members would use only American-made films in the manufacture of prints, and the Company would not operate its laboratories for the manufacture of prints, was an unfair method of competition which the Commission had authority to prevent; but that—one judge dissenting—it was not unlawful for the Eastman Company to equip itself to enter upon the business of manufacturing prints, there being nothing unfair in its going into this business, and the Commission had no authority to order the Company to divest itself of the laboratories which it had lawfully acquired. Eastman Kodak Co. v. Federal Trade Commission, 7 F.2d

994. A decree was accordingly entered affirming the order of the Commission in so far as it required the Eastman Company and the Allied Laboratories to desist from their agreement or understanding in reference to the use of American-made films and the operation of the Eastman Company's laboratories, but setting aside the order in so far as it required the Eastman Company to sell its laboratories, and in other incidental respects.

This writ of certiorari was then granted on a petition by the Commission which challenged the correctness of the decree of the Court of Appeals only in respect to the setting aside of so much of the order as required the Eastman Company to dispose of its laboratories. 269 U.S. 546, 46 S.Ct. 102, 70 L.Ed. 404.

For present purposes we do not find it necessary to determine the questions whether the finding of the Commission as to the purpose for which the Eastman Company acquired the three laboratories —based in part at least upon inferences from the agreed statement of facts—was correct, and whether, in any event, it was conclusive upon the Court of Appeals; but, in the absence of any specific reference to this matter by the Court of Appeals, we shall assume the correctness of the Commission's finding, and proceed, on that assumption, to the consideration of the only other question presented in the petition for the writ of certiorari and pressed in this Court, namely, whether the Commission had authority to order the Eastman Company to sell and convey its laboratories to other parties.

The proceeding before the Commission was instituted under section 5 of the Federal Trade Commission Act, and its authority did not go beyond the provisions of that section. By these the Commission is empowered to prevent the using of "unfair methods of competition" in interstate and foreign commerce, and, if it finds that "any unfair method of competition" is being used, to issue an order requiring the offender "to cease and desist from using such method of competition." The Commission exercises only the administrative functions delegated to it by the Act, not judicial powers. National Harness, etc., Association v. Federal Trade Commission (C.C.A.) 268 F. 705, 707; Chamber of Commerce v. Federal Trade Commission (C.C.A.) 280 F. 45, 48. It has not been delegated the authority of a court of equity. And a Circuit Court of Appeals on a petition to review its order is limited to the question whether or not it has properly exercised the administrative authority given it by the Act, and may not sustain or award relief beyond the authority of the Commission; such review being appellate and revisory merely, and not an exercise of original jurisdiction by the court itself.

The question here presented is in effect ruled by Federal Trade Commission v. Western Meat Co., 272 U.S. 554, 561, 563, 47 S.Ct. 175, 71 L.Ed. 405, in which the decisions in Federal Trade Commission v. Thatcher Mfg. Co. (C.C.A.) 5 F.2d 615, and Swift & Co. v. Federal Trade Commission (C.C.A.) 8 F.2d 595, that were relied upon by the

Commission in its petition for the writ of certiorari, were reversed by this Court. In that case it was held that—although the Commission, having been granted specific authority by section 11 of the Clayton Act to require a corporation that had acquired the stock of a competitive corporation in violation of law "to cease and desist from such violations, and divest itself of the stock held," might require the corporation to divest itself of such stock in a manner preventing its use for the purpose of securing the competitor's property—it could not, after the corporation by the use of such stock had acquired the property of the competitor, require it to divest itself of the property thus acquired so as to restore the prior lawful condition. As to this we said:

"The Act has no application to ownership of a competitor's property and business obtained prior to any action by the Commission, even though this was brought about through stock unlawfully held. The purpose of the Act was to prevent continued holding of stock and the peculiar evils incident thereto. If purchase of property has produced an unlawful status a remedy is provided through the courts."

And they "must administer whatever remedy there may be in such situation." Distinct reference was there made (page 561 [47 S.Ct. 178]) to section 15 of the Clayton Act (Comp.St. § 8835n), where express provision is made for the invocation of judicial remedies as need therefor may arise.

So here, the Commission had no authority to require that the Company divest itself of the ownership of the laboratories which it had acquired prior to any action by the Commission. If the ownership or maintenance of these laboratories has produced any unlawful status, the remedy must be administered by the courts in appropriate proceedings therein instituted.

The decree of the Circuit Court of Appeals is accordingly

Affirmed.

Mr. Justice STONE (dissenting). I am unable to agree that the Federal Trade Commission, in the performance of its duties under the Federal Trade Commission Act, lacks the power to order the divestment of physical property, or that the decision in Federal Trade Commission v. Western Meat Co., 272 U.S. 554, 47 S.Ct. 175, 71 L.Ed. 405, forecloses our consideration of that question here. In the Thatcher and Swift Cases considered in that opinion, the stock of competing corporations had been acquired in violation of section 7 of the Clayton Act (Comp.St. § 8835g), which prohibits the acquisition by one corporation of the capital stock of another "where the effect of such acquisition may be to substantially lessen competition." The stock control having been followed by purchase of the physical assets of the competing corporation, the Commission, proceeding under sections 7 and 11, ordered the offending corporation to divest itself of both the stock and the physical property. In deciding that the Commission had exceeded its

authority, so far as the property was concerned, the Court expressly limited its consideration to the grant of power under sections 7 and 11 of the Clayton Act, section 11 in terms authorizing the Commission to make an order "requiring such person to cease and desist from such violations, and divest itself of the stock held * * * contrary to the provisions of section 7. * * *" The effect of section 5 of the Federal Trade Commission Act, dealing with the different subject of unfair competition, was put to one side, the Court saying:

"This section [referring to section 5] is not presently important; the challenged orders sought to enforce obedience to $7 of the Clayton Act." Page 557 (47 S.Ct. 177).

The scope of the decision was thus stated:

"When the Commission institutes a proceeding based upon the holding of stock contrary to section 7 of the Clayton Act, its power is limited by section 11 to an order requiring the guilty person to cease and desist from such violation, effectually to divest itself of the stock, and to make no further use of it." Page 561 (47 S.Ct. 178).

It was not held that the Commission under no circumstances could compel the sale of physical property, and there was in fact a clear intimation in the opinion that under section 7 of the Clayton Act the acquisition of the property after a complaint had been filed against the corporation for illegal stock purchases would not find the Commission powerless.

Section 5 of the Trade Commission Act, with which we are now concerned, declares unlawful "unfair methods of competition in commerce," and empowers and directs the Commission to prevent the use of such methods. The Commission is directed upon finding that the method of competition under investigation is prohibited by the act, to issue its order "requiring such person, partnership, or corporation to cease and desist from using such method of competition."

The powers thus broadly given sharply contrast with the specific enumeration of sections 7 and 11 of the Clayton Act. * * *

The comprehensive language of section 5 neither invites nor supports a narrow construction. It is general in terms, and in the authorized prevention of unfair methods of competition the Commission is not limited to any particular method of making its orders effective. The power does not any the less exist because the Commission framed the present order in part in affirmative terms specifying the manner in which the company should abandon the unfair method of competition it found had been practiced. Nor does the fact that the Commission is not a court of equity lessen the power conferred upon it by the statute. It is of course essentially an administrative agency. Its orders never have the effect of an injunction and are enforceable only by proceedings instituted in the appropriate Circuit Court of Appeals. Its powers are not enhanced by the circumstance that its orders are enforceable in courts having in their own right equity powers. But it

is likewise true that it cannot be denied powers granted by Congress merely because its orders resemble in form familiar equitable decrees. To make its want of equity powers ground for limiting those expressly conferred by the statute is to condemn all the orders ever made by the Commission. * * *

The conclusion seems to me unavoidable, therefore, that this case cannot be disposed of without determining whether the acquisition and retention of the film laboratories by the Eastman Company, under the circumstances disclosed by the record, constituted in itself or was a part of or a step in an unfair method of competition. Until that is determined we cannot say that the Commission was without power under section 5 to make any appropriate order to prevent the use of such methods. * * * But the evidence is sufficient to justify the inference drawn by the Commission that suppression of competition in the sale of foreign films, consummated by this agreement, was accomplished in part at least by the acquisition and retention of these laboratories as a constant and imminent threat to members of the Association of competition in the business field they occupy.

Superficial examination might suggest that the respondent's course of conduct involves nothing more than the innocuous process of extending its business to include an allied trade, but the matter may not be thus lightly disposed of. We may lay aside the question whether one already possessing monopoly powers in one field, especially where as here there is no available substitute for his products may make use of his strategic position to dominate all phases of the industry from production to consumption. For here it seems fairly inferable from the stipulated facts that there was no intention of permanent expansion. The Eastman Company threatened to engage in temporary competition with the manufacturers of prints in order to attain its objective—the suppression of foreign competition in raw film. When that was attained, the laboratories were allowed to remain idle, and the assumed advantages to the public from permanent competition were lacking. I have no difficulty in concluding that this threat of temporary competition was unfair to the Eastman Company's purchasers and to its foreign competitors, and was an unfair method of competition within the meaning of section 5. Compare Tuttle v. Buck, 107 Minn. 145, 119 N.W. 946, 22 L.R.A.(N.S.) 599, 131 Am.St.Rep. 446, 16 Ann. Cas. 87; Dunshee v. Standard Oil Co., 152 Iowa 618, 626, 627, 132 N.W. 371, 36 L.R.A.,N.S., 263; United States v. Corn Products Refining Co. (D.C.) 234 F. 964, 984, 1010; United States v. Central West Publishing Co., Decrees and Judgments in Federal Anti-Trust Cases, 359, 360, 362; Thomsen v. Cayser, 243 U.S. 66, 87, 37 S.Ct. 353, 61 L.Ed. 597, Ann.Cas.1917D, 322; for cases which, although not exactly in point, lend support to this view.

It would seem that that part of the order which still stands, forbidding the agreement for the suppression of competition, is futile if the Eastman Company may retain the laboratories as a threat to compel

the manufacturers of prints to do that which they could not lawfully agree to do. In my view, the decree below should be reversed and the order of the Commission upheld.

Mr. Justice BRANDEIS joins in this dissent.

BEAR MILL MFG. CO. v. FEDERAL TRADE COMMISSION

Circuit Court of Appeals of the United States, Second Circuit.
98 F.2d 67 (1938).

AUGUSTUS N. HAND, Circuit Judge. The petitioner, Bear Mill Manufacturing Company, Inc., was incorporated in 1907 under the laws of the State of New York. For many years before, a partnership, of which it was the successor, bore the same name. Neither it, nor its predecessor, was strictly a manufacturer, nor did either own or operate a mill or factory. They purchased unfinished cotton or rayon goods, had them sent to another concern which they did not own, control or operate, for finishing, bleaching, dyeing, or printing and then sold them to be made up into garments. The petitioner is technically known as a "converter", that is, a person that buys unfinished goods from the mills, has them finished by a processor and sells the finished products.

The Commission filed a complaint against Bear Mill Manufacturing Company, Inc., alleging that it was using its name containing the words "mill" and "manufacturing" on its letterheads, invoices and other stationery and folders for samples and was selling its product under the representation that it was a manufacturer, when it was not a manufacturer and did not own, control, or operate any mill or factory. The complaint also alleged that certain retail merchants believe that by dealing directly with a mill owner or manufacturer they can buy goods at a lower price and on more favorable terms than they can obtain them from others who are not manufacturers, and can thus eliminate the profits of middlemen. The complaint further alleged that the use of the words "mill" and "manufacturing" by Bear Mill Manufacturing Company, Inc., tends to mislead purchasers and prospective purchasers and to divert trade from concerns that actually manufacture similar goods and thus results in unfair trade.

There was testimony that certain persons in the trade believe buying from a manufacturer rather than from a converter or jobber an advantage both in eliminating the profit of the middleman and in obtaining the newest and best designs. While many of the witnesses said that they could often secure advantageous bargains from converters and jobbers and that price, quality and service would determine their purchases irrespective of whether they were made from a manufacturer or converter, nevertheless some of them testified that they regarded dealing with the manufacturer as desirable and that the

descriptive words might lead customers, who did not know that Bear Mill Manufacturing Company was a converter, to suppose that it was a manufacturer.

The proof indicated that the retail trade of the company was trivial and that its customers generally knew that it was not itself manufacturing and that those who did not know usually did not care. Indeed, the line between manufacturing itself and supervising the finishing of the product as to color, style and workmanship where, as here, the orders are given to an independent contractor is so tenuous that, upon the record, we regard the damage, if any, to customers or competitors as highly speculative. Yet accuracy of representations implicit in a trade-name indicating whether a concern is a manufacturer, converter or jobber is in general important and it cannot be denied that a misleading name may lead to injurious misapprehensions on the part of customers, actual or prospective, and damage to competitors. We think that the Commission is authorized to guard the public against such dangers. Indeed, it exists to promote fair rules of trade and in so doing to curb practices that involve a likelihood of injury to the public, even if in a particular case the acts complained of are, as here, innocent in purpose and may thus far have done little harm.

Upon the foregoing record the Federal Trade Commission made findings that a substantial portion of the fabric buying public has a preference for dealing direct with a manufacturer of the fabrics being purchased; that such purchasers believe they obtain better prices, superior quality and other advantages in so dealing, rather than with a broker or middleman; that many of petitioner's competitors who sell and distribute cotton and rayon in interstate commerce do not manufacture the products sold by them and do not in any way represent that they are the manufacturers of such products; and that there are also among petitioner's competitors manufacturers of cotton and rayon fabrics sold in interstate commerce who employ the terms "mill" and "manufacturing", or other terms of similar import and meaning, in their corporate names and advertising. The Commission made the further findings that petitioner's practice of representing itself as a manufacturer through the use of the terms "mill" and "manufacturing" has the tendency to mislead a substantial portion of the purchasing public into the erroneous belief that petitioner actually owns and operates or directly controls a mill wherein the products which it sells are manufactured and, that as a result, the buying public has purchased a substantial volume of petitioner's products and trade has been unfairly diverted from competitors who truthfully represent the character of their goods. There can be no doubt that a finding should stand that the erroneously descriptive words in the corporate title and stationery have the tendency to mislead prospective purchasers and the public. Although we may think the likelihood of misleading the class of customers with which the petitioner generally deals is slight, the words have a tendency to mis-

lead customers not entirely familiar with the fact that Bear Mill Manufacturing Company, Inc., is not the manufacturer of the goods they are buying. Just how far the buying public has purchased petitioner's goods and there has been a diversion of trade to it because of the representation that it is a manufacturer cannot be known but, in view of the testimony that some of the purchasing public believes that trade with the manufacturer affords advantages in price and style, we think the finding that the descriptive words have had the effect of diverting some trade and have tended to injure customers to some extent was justified.

While a reading of the record fails to convince us that the prejudice, so far as it may have existed or may continue to exist, is of serious importance, yet we cannot say that the findings are not supported by substantial evidence or that the order to cease and desist from the use of the words "mill" and "manufacturing" which the Commission issued in consequence of the findings was without foundation. Federal Trade Comm. v. Pure Silk Hosiery Mills, 7 Cir., 3 F.2d 105.

The injury to the petitioner by the requirement of the order of the Commission that it should abandon a well known corporate and tradename of many years standing and of evidently excellent repute, seems to us a far too drastic method of remedying a slight and, we believe, unconscious infraction of proper trade practice when the inaccuracy can be cured by requiring the petitioner to append to and use in connection with its corporate name, stationery, folders, labels, cartons and any advertising the words "Converters, Not Manufacturers of Textiles". Federal Trade Comm. v. Royal Milling Co., 288 U.S. 212, 53 S.Ct. 335, 77 L.Ed. 706; Federal Trade Comm. v. Mid West Mills, Inc., 7 Cir., 90 F.2d 723. We accordingly hold that these words descriptive of the nature of the petitioner's business should be added to the corporate title on all stationery, folders, labels, cartons and advertising without the necessity of amending the certificate of incorporation.

The order of the Commission is so modified and, as thus modified, may be enforced after thirty days which are allowed petitioner in order that it may change its stationery, folders, labels, cartons and any advertising so as to conform to the views we have expressed.

Order modified. Motion to enforce the order as so modified granted.[1]

[1] *To similar effect:* Educators' Ass'n, Inc. v. Federal Trade Commission, 108 F.2d 470 (C.C.A.2nd, 1940); Id., 110 F.2d 72 (C.C.A.2nd, 1940); Id., 118 F.2d 562 (C.C.A.2nd, 1941).

NATIONAL LABOR RELATIONS BOARD v. FANSTEEL METALLURGICAL CORP.

Supreme Court of the United States.
306 U.S. 240, 59 S.Ct. 490, 83 L.Ed. 627, 123 A.L.R. 599 (1939).

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

The Circuit Court of Appeals set aside an order of the National Labor Relations Board requiring respondent to desist from labor practices found to be in violation of the National Labor Relations Act, 29 U.S.C.A. § 151 et seq., and to offer reinstatement to certain discharged employees with back pay. While the other portions of the Board's order are under review, the principal question presented relates to the authority of the Board to require respondent to reinstate employees who were discharged because of their unlawful conduct in seizing respondent's property in what is called a "sit-down strike".

Respondent, Fansteel Metallurgical Corporation, is engaged at North Chicago, Illinois, in the manufacture and sale of products made from rare metals. No question is raised as to the intimate relation of its operations to interstate commerce or the effect upon that commerce of the unfair labor practices with which the corporation is charged. The findings of the Board show that in the summer of 1936 a group of employees organized Lodge 66 under the auspices of a committee of the Amalgamated Association of Iron, Steel and Tin Workers of North America; that respondent employed a "labor spy" to engage in espionage within the Union and his employment was continued until about December 1, 1936; that on September 10, 1936, respondent's superintendent was requested to meet with a committee of the Union and the superintendent required that the committee should consist only of employees of five years' standing; that a committee, so constituted, presented a contract relating to working conditions; that the superintendent objected to "closed-shop and check-off provisions" and announced that it was respondent's policy to refuse recognition to "outside" unions; that on September 21, 1936, the superintendent refused to confer with the committee in which an "outside" organizer had been included; that meanwhile, and later, respondent's representatives sought to have a "company union" set up but the attempt proved abortive; that from November, 1936, to January, 1937, the superintendent required the president of the Union to work in a room adjoining the superintendent's office with the purpose of keeping him away from the other workers; that while in September, 1936, the Union did not have a majority of the production and maintenance employees, an appropriate unit for collective bargaining, by February 17, 1937, 155 of respondent's 229 employees in that unit had joined the Union and had designated it as their collective bargaining representative; that on that date, a committee of the Union met twice with the superintendent who refused to bargain with the Union as to rates of pay, hours and conditions of employment, the

refusal being upon the ground that respondent would not deal with an "outside" union.

Shortly after the second meeting in the afternoon of February 17th the Union committee decided upon a "sit-down strike" by taking over and holding two of respondent's "key" buildings. These were thereupon occupied by about 95 employees. Work stopped and the remainder of the plant also ceased operations. Employees who did not desire to participate were permitted to leave, and a number of Union members who were on the night shift and did not arrive for work until after the seizure did not join their fellow members inside the buildings. At about six o'clock in the evening the superintendent, accompanied by police officials and respondent's counsel, went to each of the buildings and demanded that the men leave. They refused and respondent's counsel "thereupon announced in loud tones that all the men in the plant were discharged for the seizure and retention of the buildings." The men continued to occupy the buildings until February 26, 1937. * * *

Upon the basis of these findings and its conclusions of law, the Board made its order directing respondent to desist from interfering with its employees in the exercise of their right to self-organization and to bargain collectively through representatives of their own choosing as guaranteed in Section 7 of the Act, 29 U.S.C.A. § 157; from dominating or interfering with the formation or administration of the Rare Metal Workers of America, Local No. 1, or any other labor organization of its employees or contributing support thereto; and from refusing to bargain collectively with the Amalgamated Association of Iron, Steel and Tin Workers of North America, Lodge 66, as the exclusive representative of the employees described. The Board also ordered the following affirmative action which it was found would "effectuate the policies" of the Act;—that is, upon request, to bargain collectively with the Amalgamated Association as stated above; to offer, upon application, to the employees who went on strike on February 17, 1937, and thereafter, "immediate and full reinstatement to their former positions", with back pay, dismissing, if necessary, all persons hired since that date; to withdraw all recognition from Rare Metal Workers of America, Local No. 1, as a representative of the employees for the purpose of dealing with respondent as to labor questions and to "completely disestablish" that organization as such representative; and to post notices of compliance. 5 N.L.R.B. 930.

The Board found that respondent had not engaged in unfair labor practices by "discrimination in regard to hire or tenure of employment" in order to "encourage or discourage membership in any labor organization", and accordingly the complaint under Section 8(3) of the Act, 29 U.S.C.A. § 158(3), was dismissed. Id.

On respondent's petition, the Circuit Court of Appeals set aside the Board's order (7 Cir., 98 F.2d 375) and this Court granted certiorari, 305 U.S. 590, 59 S.Ct. 230, 83 L.Ed. 373, November 21, 1938. * * *

Third.—The authority of the Board to require the reinstatement of the employees thus discharged. The contentions of the Board in substance are these: (1) That the unfair labor practices of respondent led to the strike and thus furnished ground for requiring the reinstatement of the strikers; (2) That under the terms of the Act employees who go on strike because of an unfair labor practice retain their status as employees and are to be considered as such despite discharge for illegal conduct; (3) That the Board was entitled to order reinstatement or reemployment in order to "effectuate the policies" of the Act.

(1) For the unfair labor practices of respondent the Act provided a remedy. Interference in the summer and fall of 1936 with the right of self-organization could at once have been the subject of complaint to the Board. The same remedy was available to the employees when collective bargaining was refused on February 17, 1937. But reprehensible as was that conduct of the respondent, there is no ground for saying that it made respondent an outlaw or deprived it of its legal rights to the possession and protection of its property. The employees had the right to strike but they had no license to commit acts of violence or to seize their employer's plant. * * *

To say that respondent could resort to the state court to recover damages or to procure punishment, but was powerless to discharge those responsible for the unlawful seizure, would be to create an anomalous distinction for which there is no warrant unless it can be found in the terms of the National Labor Relations Act. We turn to the provisions which the Board invokes.

(2) In construing the Act in National Labor Relations Board v. Jones & Laughlin Steel Corporation, 301 U.S. 1, 45, 46, 57 S.Ct. 615, 628, 81 L.Ed. 893, 108 A.L.R. 1352, we said that it "does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them"; that the employer "may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion". See, also, Associated Press v. National Labor Relations Board, 301 U.S. 103, 132, 57 S.Ct. 650, 655, 81 L.Ed. 953. Compare Texas & New Orleans R. R. Co. v. Brotherhood of Ry. & S. S. Clerks, 281 U.S. 548, 571, 50 S.Ct. 427, 434, 74 L.Ed. 1034; Virginian Railway Co. v. System Federation No. 40, 300 U.S. 515, 559, 57 S.Ct. 592, 605, 81 L.Ed. 789.

It is apparent under that construction of the Act that had there been no strike, and employees had been guilty of unlawful conduct in seizing or committing depredations upon the property of their employer, that conduct would have been good reason for discharge, as discharge on that ground would not be for the purpose of intimidating or coercing employees with respect to their right of self-organization

or representation, or because of any lawful union activity, but would rest upon an independent and adequate basis.

But the Board, in exercising its authority under Section 10(c), 29 U.S.C.A. § 160(c), to reinstate "*employees*", insists that here the status of the employees was continued, despite discharge for unlawful conduct, by virtue of the definition of the term "*employee*" in Section 2(3), 29 U.S.C.A. § 152(3). By that definition the term includes "any individual whose work has ceased as a consequence of, or in connection with any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, * * *".

We think that the argument misconstrues the statute. We are unable to conclude that Congress intended to compel employers to retain persons in their employ regardless of their unlawful conduct,—to invest those who go on strike with an immunity from discharge for acts of trespass or violence against the employer's property, which they would not have enjoyed had they remained at work. Apart from the question of the constitutional validity of an enactment of that sort, it is enough to say that such a legislative intention should be found in some definite and unmistakable expression. We find no such expression in the cited provision.

We think that the true purpose of Congress is reasonably clear. Congress was intent upon the protection of the right of employees to self-organization and to the selection of representatives of their own choosing for collective bargaining without restraint or coercion. National Labor Relations Board v. Jones & Laughlin Steel Corporation, supra, page 33, 57 S.Ct. page 622. To assure that protection, the employer is not permitted to discharge his employees because of union activity or agitation for collective bargaining. Associated Press v. National Labor Relations Board, supra. The conduct thus protected is lawful conduct. * * * Here the strike was illegal in its inception and prosecution. As the Board found, it was initiated by the decision of the Union committee "to take over and hold two of the respondent's 'key' buildings". It was pursuant to that decision that the men occupied the buildings and the work stopped. This was not the exercise of "the right to strike" to which the Act referred. It was not a mere quitting of work and statement of grievances in the exercise of pressure recognized as lawful. It was an illegal seizure of the buildings in order to prevent their use by the employer in a lawful manner and thus by acts of force and violence to compel the employer to submit. When the employees resorted to that sort of compulsion they took a position outside the protection of the statute and accepted the risk of the termination of their employment upon grounds aside from the exercise of the legal rights which the statute was designed to conserve.

(3) The Board contends that its order is valid under the terms of the Act "regardless of whether the men remained employees". The

Board bases its contention on the general authority, conferred by Section 10(c), to require the employer to take such affirmative action as will "effectuate the policies" of the Act. Such action, it is argued, may embrace not only reinstatement of those whose status as employees has been continued by virtue of Section 2(3), but also a requirement of the "reemployment" of those who have ceased to be employed.

The authority to require affirmative action to "effectuate the policies" of the Act is broad but it is not unlimited. It has the essential limitations which inhere in the very policies of the Act which the Board invokes. Thus in Consolidated Edison Company v. National Labor Relations Board, 305 U.S. 197, 59 S.Ct. 206, 83 L.Ed. 126, decided December 5, 1938, we held that the authority to order affirmative action did not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board is of the opinion that the policies of the Act may be effectuated by such an order. We held that the power to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act.

We repeat that the fundamental policy of the Act is to safeguard the rights of self-organization and collective bargaining, and thus by the promotion of industrial peace to remove obstructions to the free flow of commerce as defined in the Act. There is not a line in the statute to warrant the conclusion that it is any part of the policies of the Act to encourage employees to resort to force and violence in defiance of the law of the land. On the contrary, the purpose of the Act is to promote peaceful settlements of disputes by providing legal remedies for the invasion of the employees' rights. Elections may be ordered to decide what representatives are desired by the majority of employees in appropriate units as determined by the Board. To secure the prevention of unfair labor practices by employers, complaints may be filed and heard and orders made. The affirmative action that is authorized is to make these remedies effective in the redress of the employees' rights, to assure them self-organization and freedom in representation, not to license them to commit tortious acts or to protect them from the appropriate consequences of unlawful conduct. We are of the opinion that to provide for the reinstatement or reemployment of employees guilty of the acts which the Board finds to have been committed in this instance would not only not effectuate any policy of the Act but would directly tend to make abortive its plan for peaceable procedure.

What we have said also meets the point that the question whether reinstatement or reemployment would effectuate the policies of the Act is committed to the decision of the Board in the exercise of its

discretion subject only to the limitation that its action may not be "arbitrary, unreasonable or capricious". The Board recognizes that in "many situations" reinstatement or reemployment after discharge for illegal acts would not be proper, but the Board insists that it was proper in this instance. For the reasons we have given we disagree with that view. We think that a clearer case could hardly be presented and that, whatever discretion may be deemed to be committed to the Board, its limits were transcended by the order under review. * * *

The provisions of the Board's order contained in Paragraph 1, subdivisions (a) and (b), in Paragraph 2, subdivision (d), and in Paragraph 2, subdivisions (e) and (f) so far as these refer to the first-mentioned provisions, and the final Paragraph of the order dismissing the charge under Section 8(3) of the Act, are sustained. The other provisions of the order are set aside.

The judgment of the Circuit Court of Appeals is modified accordingly and as modified is affirmed. It is so ordered.

Modified and as modified, affirmed.

Mr. Justice FRANKFURTER took no part in the consideration and decision of this case.

Mr. Justice STONE, concurring in part. I concur in so much of the Court's decision as holds that the Board was without statutory authority to order reinstatement of those employees who were discharged on February 17, 1937. But I rest this conclusion solely on the construction of § 2(3) and § 10(c) of the National Labor Relations Act, 29 U.S.C.A. §§ 152(3), 160(c). By § 10(c) the Board is given authority to reinstate in their employment only those who are "employees". Before the Board made its order, respondent's employees, by reason of their lawful discharge for cause, had lost their status as such, which would otherwise have been preserved to them under § 2(3). * * *

Mr. Justice REED, dissenting in part.

This Court agrees with the conclusion of the Labor Board that the respondent was guilty of unfair labor practices, prior to the strike, in campaigning for a company union, isolating the union president, making, through its superintendent, anti-union statements and employing a labor spy. It also accepts the Board's conclusion that there was further pre-strike violation by respondent of the Labor Relations Act by refusal to bargain collectively. None questions the power of the Board to reinstate striking employees as a means of redress for unfair labor practices. The issue while important is narrow. Can an employee, on strike or let out by an unfair labor practice, be discharged, finally, by an employer so as to be ineligible for reinstatement under the act?

The issue so stated glows feebly apart from the fire of controversy. But it may permit a more objective appraisal than to examine it

when illustrated by conduct on the part of the employees which is thought to put "a premium on resort to force" and to subvert "the principles of law and order which lie at the foundations of society." None on either side of the disputed issue need be suspected of "countenancing lawlessness," or of encouraging employees to resort to "violence in defiance of the law of the land." Disapproval of a sit-down does not logically compel the acceptance of the theory that an employer has the power to bar his striking employee from the protection of the Labor Act.

The Labor Act was enacted in an effort to protect interstate commerce from the interruptions of labor disputes. This object was sought through prohibition of certain practices deemed unfair to labor, and the sanctions adopted to enforce the prohibitions included reinstatement of employees. To assure that the status of strikers was not changed from employees to individuals beyond the protection of the act, the term employee was defined to include "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice * * *." § 2(3), Act of July 5, 1935. Without this assurance of the continued protection of the act, the striking employee would be quickly put beyond the pale of its protection by discharge. As now construed by the Court, the employer may discharge any striker, with or without cause, so long as the discharge is not used to interfere with self-organization or collective bargaining. Friction easily engendered by labor strife may readily give rise to conduct, from nose-thumbing to sabotage, which will give fair occasion for discharge on grounds other than those prohibited by the Labor Act.

The Congress sought by clear language to eliminate this prolific source of ill feeling by the provision just quoted which should be interpreted in accordance with its language as continuing the eligibility of a striker for reinstatement, regardless of conduct by the striker or action by the employer. * * *

The point is made that an employer should not be compelled to reemploy an employee guilty, perhaps, of sabotage. This depends upon circumstances. It is the function of the Board to weigh the charges and countercharges and determine the adjustment most conducive to industrial peace. Courts certainly should not interfere with the normal action of administrative bodies in such circumstances. Here both labor and management had erred grievously in their respective conduct. It cannot be said to be unreasonable to restore both to their former status. Such restoration would apply to the sit-down strikers and those striking employees who aided and abetted them.

I am of the view that the provisions of the order of the Board ordering an offer of reinstatement to the employees discussed above should be sustained. As the remainder of the order is affected by the determination upon this issue but not wholly controlled by the con-

clusions, no opinion is expressed as to the other requirements of the order.

Mr. Justice BLACK concurs in this dissent.

In SOUTHERN STEAMSHIP CO. v. NATIONAL LABOR RELATIONS BOARD, 316 U.S. 31, 62 S.Ct. 886, 86 L.Ed. 1246 (1942), the respondent, Southern Steamship Co., had refused to bargain with a union which had been duly certified as the exclusive bargaining representative of the respondent's employees. As a consequence, a strike had occurred aboard one of respondent's vessels while in port. The respondent had subsequently discharged certain of the strikers. In proceedings thereafter brought against the respondent by the National Labor Relations Board, the respondent sought to justify the discharge on the ground that the strike had been in violation of §§ 292 and 293 of the United States Criminal Code, which prohibited "revolt or mutiny on shipboard". The Board rejected the attempted justification, and issued an order by which, among other things, it directed the respondent to reinstate the dismissed strikers. The order was affirmed by the Circuit Court of Appeals for the Third Circuit, and the Supreme Court granted *certiorari*. The Supreme Court held that the strike had violated §§ 292 and 293 of the Criminal Code, and that "Consequently, and despite the initial unfair labor practice which caused the strike, * * * the reinstatement provisions of the order exceeded the Board's authority to make such requirements 'as will effectuate the purpose of the Act'." (316 U.S. at p. 48, 62 S.Ct. at p. 895). In reaching its decision, the Court remarked: "* * * the courts may not lightly disturb the Board's choice of remedies. But it is also true that this discretion has its limits, and we have already begun to define them." (316 U.S. at p. 46, 62 S.Ct. at p. 894).

REPUBLIC STEEL CORPORATION v. NATIONAL LABOR RELATIONS BOARD

Supreme Court of the United States.
311 U.S. 7, 61 S.Ct. 77, 85 L.Ed. 6 (1940).

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

The National Labor Relations Board, finding that the Republic Steel Corporation had engaged in unfair labor practices in violation of Section 8(1), 8(2) and 8(3) of the National Labor Relations Act, 29 U.S.C.A. § 158(1–3), ordered the company to desist from these practices, to withdraw recognition from a labor organization found to be dominated by the company, and to reinstate certain employees, with back pay, found to have been discriminatorily discharged or denied reinstatement. The Board, in providing for back pay, directed

the company to deduct from the payments to the reinstated employees the amounts they had received for work performed upon "work relief projects" and to pay over such amounts to the appropriate governmental agencies. Except for a modification, not now important, the Circuit Court of Appeals directed enforcement of the Board's order. 3 Cir., 107 F.2d 472.

In view of conflict with decisions in National Labor Relations Board v. Leviton Manufacturing Co., 2 Cir., 111 F.2d 619 and National Labor Relations Board v. Tovrea Packing Co., 9 Cir., 111 F.2d 626, we granted certiorari limited to the question whether the Board had authority to require the company to make the described payments to the agencies of the Government. 310 U.S. 655, 60 S.Ct. 1072, 84 L.Ed. 1419.

The amounts earned by the employees before reinstatement were directed to be deducted from their back pay manifestly because, having already been received, these amounts were not needed to make the employees whole. That principle would apply whether the employees had earned the amounts in public or private employment. Further, there is no question that the amounts paid by the governmental agencies were for services actually performed. Presumably these agencies, and through them the public, received the benefit of services reasonably worth the amounts paid. There is no finding to the contrary.

The Board urges that the work relief program was designed to meet the exigency of large-scale unemployment produced by the depression; that projects had been selected, not with a single eye to costs or usefulness, but with a view to providing the greatest amount of employment in order to serve the needs of unemployed workers in various communities; in short, that the Work Projects Administration has been conducted as a means of dealing with the relief problem. Hence it is contended that the Board could properly conclude that the unfair labor practices of the company had occasioned losses to the Government financing the work relief projects.

The payments to the Federal, State, County, or other governments concerned are thus conceived as being required for the purpose of redressing, not an injury to the employees, but an injury to the public,—an injury thought to be not the less sustained although here the respective governments have received the benefit of the services performed. So conceived, these required payments are in the nature of penalties imposed by law upon the employer,—the Board acting as the legislative agency in providing that sort of sanction by reason of public interest. We need not pause to pursue the application of this theory of the Board's power to a variety of circumstances where community interests might be asserted. The question is,—Has Congress conferred the power upon the Board to impose such requirements.

We think that the theory advanced by the Board proceeds upon a misconception of the National Labor Relations Act, 29 U.S.C.A. § 151 et seq. The Act is essentially remedial. It does not carry a penal program declaring the described unfair labor practices to be crimes. The Act does not prescribe penalties or fines in vindication of public rights or provide indemnity against community losses as distinguished from the protection and compensation of employees. Had Congress been intent upon such a program, we cannot doubt that Congress would have expressed its intent and would itself have defined its retributive scheme.

The remedial purposes of the Act are quite clear. It is aimed, as the Act says (Section 1) at encouraging the practice and procedure of collective bargaining and at protecting the exercise by workers of full freedom of association, of self-organization and of negotiating the terms and conditions of their employment or other mutual aid or protection through their freely chosen representatives. This right of the employees is safeguarded through the authority conferred upon the Board to require the employer to desist from the unfair labor practices described and to leave the employees free to organize and choose their representatives. They are thus protected from coercion and interference in the formation of labor organizations and from discriminatory discharge. Whether the Act has been violated by the employer—whether there has been an unfair labor practice—is a matter for the Board to determine upon evidence. When it does so determine the Board can require the employer to disestablish organizations created in violation of the Act; it can direct the employer to bargain with those who appear to be the chosen representatives of the employees and it can require that such employees as have been discharged in violation of the Act be reinstated with back pay. All these measures relate to the protection of the employees and the redress of their grievances, not to the redress of any supposed public injury after the employees have been made secure in their right of collective bargaining and have been made whole.

As the sole basis for the claim of authority to go further and to demand payments to governments, the Board relies on the language of Section 10(c) which provides that if upon evidence the Board finds that the person against whom the complaint is lodged has engaged in an unfair labor practice, the Board shall issue an order—"requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act [chapter]".

This language should be construed in harmony with the spirit and remedial purposes of the Act. We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act. We have said

that "this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order". We have said that the power to command affirmative action is remedial, not punitive. Consolidated Edison Company v. National Labor Relations Board, 305 U.S. 197, 235, 236, 59 S.Ct. 206, 219, 83 L.Ed. 126. See, also, National Labor Relations Board v. Pennsylvania Greyhound Lines, 303 U.S. 261, 267, 268, 58 S.Ct. 571, 574, 575, 82 L.Ed. 831, 115 A.L.R. 307. We adhere to that construction.

In that view, it is not enough to justify the Board's requirements to say that they would have the effect of deterring persons from violating the Act. That argument proves too much, for if such a deterrent effect is sufficient to sustain an order of the Board, it would be free to set up any system of penalties which it would deem adequate to that end. * * *

In truth, the reasons assigned by the Board for the requirement in question—reasons which relate to the nature and purpose of work relief projects and to the practice and aims of the Works Project Administration—indicate that its order is not directed to the appropriate effectuating of the policies of the National Labor Relations Act, but to the effectuating of a distinct and broader policy with respect to unemployment. The Board has made its requirement in an apparent effort to provide adjustments between private employment and public work relief, and to carry out supposed policies in relation to the latter. That is not the function of the Board. It has not been assigned a rôle in relation to losses conceived to have been sustained by communities or governments in connection with work relief projects. The function of the Board in this case was to assure to petitioner's employees the right of collective bargaining through their representatives without interference by petitioner and to make good to the employees what they had lost through the discriminatory discharge.

We hold that the additional provision requiring the payments to governmental agencies was beyond the Board's authority, and to that extent the decree below enforcing the Board's order is modified and the cause is remanded with directions to enter a decree enforcing the Board's order with that provision eliminated. It is so ordered.

Modified and remanded, with directions.[g]

[g] The separate opinion of Mr. Justice Black and Mr. Justice Douglas has been omitted.

In VIRGINIA ELECTRIC & POWER CO. v. NATIONAL LABOR RELATIONS BOARD, 319 U.S. 533, 63 S.Ct. 1214, 87 L.Ed. 1568 (1943), the Court, at 319 U.S. 541, 544, 63 S.Ct. 1219, 1220, said:

It is argued that disestablishment of the I. O. E. sufficiently effectuates the policies of the Act by restoring to the employees of the Company their freedom of association. But the Board need not be satisfied with the remedy alone. It has here determined that, to effectuate fully the policies of the Act, it is necessary to expunge the effects of the unfair labor practices by ordering the reimbursement of checked-off dues. Such a determination seems manifestly reasonable. It returns to the employees what has been taken from them to support an organization not of their free choice and places the burden upon the Company whose unfair labor practices brought about the situation. The deduction of dues from wages under the circumstances of this case is not unlike a loss occasioned by a discriminatory discharge, and an order for the return of those checked-off dues promotes the policies of the Act in substantially the same manner as would a back pay award. By returning their money to the employees, the order severs possible economic ties which they may have with the employer dominated I. O. E. and to this extent aids in completely disestablishing that organization and restoring to the employees that truly unfettered freedom of choice which the Act demands. If employees have some assurance that an employer may not with impunity impose upon them the cost of maintaining an organization which he has dominated, any more than he can make them bear the burden of a discriminatory discharge, they may be more confident in the exercise of their statutory rights. * * *

This reimbursement order cannot be labelled "penal". The purpose of the order is not to penalize the Company by requiring repayment of sums it did not retain in its treasury. Those sums did go into the treasury of the Company's creature to accomplish purposes the Company evidently believed to be to its advantage, and the order of reimbursement is intended to remove the effects of this unfair labor practice by restoring to the employees what would not have been taken from them if the Company had not contravened the Act. This is not a case in which the Board has ordered the payment of sums to third parties, or has made employees more than whole. Cf. Republic Steel Corp. v. National Labor Relations Board, 311 U.S. 7, 61 S.Ct. 77, 85 L.Ed. 6.

(2) Judicial Remand for Administrative Modification of the Remedies Applied by the Terms of the Order

PHELPS-DODGE CORPORATION v. NATIONAL LABOR RELATIONS BOARD

Supreme Court of the United States.
313 U.S. 177, 61 S.Ct. 845, 85 L.Ed. 1271, 133 A.L.R. 1217 (1941).

Mr. Justice FRANKFURTER delivered the opinion of the Court.

The dominating question which this litigation brings here for the first time is whether an employer subject to the National Labor Relations Act may refuse to hire employees solely because of their affiliations with a labor union. Subsidiary questions grow out of this central issue relating to the means open to the Board to "effectuate the policies of this Act [chapter]", if it finds such discrimination in hiring an "unfair labor practice". Other questions touching the remedial powers of the Board are also involved. We granted a petition by the Phelps Dodge Corporation and a cross-petition by the Board, 312 U.S. 669, 61 S.Ct. 447, 85 L.Ed. 1112; 312 U.S. 669, 61 S.Ct. 450, 85 L.Ed. 1112, to review a decision by the Circuit Court of Appeals for the Second Circuit, 113 F.2d 202, which enforced the order of the Board, 19 N.L.R.B., p. 547, with modifications. The main issue is intrinsically important and has stirred a conflict of decisions. National Labor Relations Board v. Waumbec Mills, 1 Cir., 114 F.2d 226.

* * *

Second. Since the refusal to hire Curtis and Daugherty solely because of their affiliation with the Union was an unfair labor practice under § 8(3), the remedial authority of the Board under § 10(c) became operative. Of course it could issue, as it did, an order "to cease and desist from such unfair labor practice" in the future. Did Congress also empower the Board to order the employer to undo the wrong by offering the men discriminated against the opportunity for employment which should not have been denied them?

Reinstatement is the conventional correction for discriminatory discharges. Experience having demonstrated that discrimination in hiring is twin to discrimination in firing, it would indeed be surprising if Congress gave a remedy for the one which it denied for the other. The powers of the Board as well as the restrictions upon it must be drawn from § 10(c), which directs the Board "to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act". It could not be seriously denied that to require discrimination in hiring or firing to be "neutralized", National Labor Relations Board v. Mackay Radio & Telegraph Co., 304 U.S. 333, 348, 58 S.Ct. 904, 911, 82 L.Ed. 1381, by requiring the discrimination to cease not abstractly but in the concrete victimizing instances, is an "affirmative action" which "will effectuate the policies of this Act". Therefore, if § 10(c), had em-

powered the Board to "take such affirmative action * * * as will effectuate the policies of this Act [chapter]", the right to restore to a man employment which was wrongfully denied him could hardly be doubted. Even without such a mandate from Congress this Court compelled reinstatement to enforce the legislative policy against discrimination represented by the Railway Labor Act, 45 U.S. C.A. § 151 et seq. Texas & N. O. R. Co. v. Brotherhood of Ry. & S. S. Clerks, 281 U.S. 548, 50 S.Ct. 427, 74 L.Ed. 1034. Attainment of a great national policy through expert administration in collaboration with limited judicial review must not be confined within narrow canons for equitable relief deemed suitable by chancellors in ordinary private controversies. Compare Virginian R. Co. v. System Federation, 300 U.S. 515, 552, 57 S.Ct. 592, 601, 81 L.Ed. 789. To differentiate between discrimination in denying employment and in terminating it, would be a differentiation not only without substance but in defiance of that against which the prohibition of discrimination is directed.

But, we are told, this is precisely the differentiation Congress has made. It has done so, the argument runs, by not directing the Board "to take such affirmative action as will effectuate the policies of this Act", simpliciter, but, instead, by empowering the Board "to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act". To attribute such a function to the participial phrase introduced by "including" is to shrivel a versatile principle to an illustrative application. We find no justification whatever for attributing to Congress such a casuistic withdrawal of the authority which, but for the illustration, it clearly has given the Board. The word "including" does not lend itself to such destructive significance. Helvering v. Morgan's, Inc., 293 U.S. 121, 125, 55 S.Ct. 60, 61, 79 L.Ed. 232, note. * * *

Fourth. There remain for consideration the limitations upon the Board's power to undo the effects of discrimination. Specifically, we have the question of the Board's power to order employment in cases where the men discriminated against had obtained "substantially equivalent employment." The Board as a matter of fact found that no such employment had been obtained, but alternatively concluded that, in any event, the men should be offered employment. The court below, on the other hand, in harmony with three other circuits, Mooresville Cotton Mills v. National Labor Relations Board, 4 Cir., 94 F.2d 61; National Labor Relations Board v. Botany Worsted Mills, 3 Cir., 106 F.2d 263; National Labor Relations Board v. Carlisle Lumber Co., 9 Cir., 99 F.2d 533, ruled that employment need not be offered any worker who had obtained such employment, and since the record as to some of the strikers who had gone to work at the Shattuck Denn Company was indecisive on this issue, remanded the case to the Board for further findings. This aspect of the Board's authority depends on the relation of the general remedial powers conferred by § 10(c) to the provisions of § 2(3).

The specific provisions of the Act out of which the proper conclusion is to be drawn should be before us. Section 10(c), as we already know, authorizes the Board "to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act [chapter]". The relevant portions of Section 2(3) follow: "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment". * * *

Denial of the Board's power to order opportunities of employment in this situation derives wholly from an infiltration of a portion of § 2 (3) into § 10(c). The argument runs thus: § 10(c) specifically refers to "reinstatement of employees"; the latter portion of § 2(3) refers to an "employee" as a person "who has not obtained any other regular and substantially equivalent employment"; therefore, there can be no reinstatement of an employee who has obtained such employment. The syllogism is perfect. But this is a bit of verbal logic from which the meaning of things has evaporated. In the first place, we have seen that the Board's power to order an opportunity for employment does not derive from the phrase "including reinstatement of employees with or without back pay", and is not limited by it. * * *

To deny the Board power to neutralize discrimination merely because workers have obtained compensatory employment would confine the "policies of this Act" to the correction of private injuries. The Board was not devised for such a limited function. It is the agency of Congress for translating into concreteness the purpose of safeguarding and encouraging the right of self-organization. The Board, we have held very recently, does not exist for the "adjudication of private rights"; it "acts in a public capacity to give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining". National Licorice Co. v. National Labor Relations Board, 309 U.S. 350, 362, 60 S.Ct. 569, 576, 84 L.Ed. 799; and see Amalgamated Utility Workers v. Consolidated Edison Co., 309 U.S. 261, 60 S.Ct. 561, 84 L.Ed. 738. To be sure, reinstatement is not needed to repair the economic loss of a worker who, after discrimination, has obtained an equally profitable job. But to limit the significance of discrimination merely to questions of monetary loss to workers would thwart the central purpose of the Act, directed as that is toward the achievement and maintenance of workers' self-organization. That there are factors other than loss of wages to a particular worker to be considered is suggested even by a meager knowledge of industrial affairs. Thus, to give only one illustration, if men were discharged who were leading efforts at organization in a plant having a low wage scale, they would not unnaturally be com-

pelled by their economic circumstances to seek and obtain employment elsewhere at equivalent wages. In such a situation, to deny the Board power to wipe out the prior discrimination by ordering the employment of such workers would sanction a most effective way of defeating the right of self-organization.

Therefore, the mere fact that the victim of discrimination has obtained equivalent employment does not itself preclude the Board from undoing the discrimination and requiring employment. But neither does this remedy automatically flow from the Act itself when discrimination has been found. A statute expressive of such large public policy as that on which the National Labor Relations Board is based must be broadly phrased and necessarily carries with it the task of administrative application. There is an area plainly covered by the language of the Act and an area no less plainly without it. But in the nature of things Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration. The exercise of the process was committed to the Board, subject to limited judicial review. Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy. On the other hand, the power with which Congress invested the Board implies responsibility—the responsibility of exercising its judgment in employing the statutory powers.

The Act does not create rights for individuals which must be vindicated according to a rigid scheme of remedies. It entrusts to an expert agency the maintenance and promotion of industrial peace. According to the experience revealed by the Board's decisions, the effectuation of this important policy generally requires not only compensation for the loss of wages but also offers of employment to the victims of discrimination. Only thus can there be a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination. But even where a worker has not secured equivalent employment, the Board, under particular circumstances, may refuse to order his employment because it would not effectuate the policies of the Act. It has, for example, declined to do so in the case of a worker who had been discharged for union activities and had sought re-employment after having offered his services as a labor spy. Matter of Thompson Cabinet Company, 11 N.L.R.B. 1106, 1116, 1117.

From the beginning the Board has recognized that a worker who has obtained equivalent employment is in a different position from one who has lost his job as well as his wages through an employer's unfair labor practice. In early decisions, the Board did not order rein-

statement of workers who had secured such equivalent employment. See Matter of Rabhor Company, Inc., 1 N.I.R.B. 470, 481; Matter of Jeffery-De Witt Insulator Company, 1 N.L.R.B. 618, 628. It apparently focussed on the absence of loss of wages in determining the applicable remedy. But other factors may well enter into the appropriateness of ordering the offending employer to offer employment to one illegally denied it. Reinstatement may be the effective assurance of the right of self-organization. Again, without such a remedy industrial peace might be endangered because workers would be resentful of their inability to return to jobs to which they may have been attached and from which they were wrongfully discharged. On the other hand, it may be, as was urged on behalf of the Board in Mooresville Cotton Mills v. National Labor Relations Board, 4 Cir., 97 F.2d 959, 963, that, in making such an order for reinstatement the necessity for making room for the old employees by discharging new ones, as well as questions affecting the dislocation of the business, ought to be considered. All these and other factors outside our domain of experience may come into play. Their relevance is for the Board, not for us. In the exercise of its informed discretion the Board may find that effectuation of the Act's policies may or may not require reinstatement. We have no warrant for speculating on matters of fact the determination of which Congress has entrusted to the Board. All we are entitled to ask is that the statute speak through the Board where the statute does not speak for itself.

The only light we have on the Board's decision in this case is its statement that, if any of the workers discriminated against had obtained substantially equivalent employment, they should be offered employment "for the reasons set forth in" Matter of Eagle-Picher Mining & Smelting Co., 16 N.L.R.B. 727, 833. But in that case the Board merely concluded that § 2(3) did not deny it the power to order reinstatement; it did not consider the appropriateness of its exercise. Thus the Board determined only the dry legal question of its power, which we sustain; it did not consider whether in employing that power the policies of the Act would be enforced. The court below found, and the Board has not challenged the finding, that the Board left the issue of equivalence of jobs at the Shattuck Denn Company in doubt, and remanded the order to the Board for further findings. Of course, if the Board finds that equivalent employment has not been obtained, it is within its province to require offers of re-employment in accordance with its general conclusion that a worker's loss in wages and in general working conditions must be made whole. Even if it should find that equivalent jobs were secured by the men who suffered from discrimination, it may order employment at Phelps Dodge if it finds that to do so would effectuate the policies of the Act. We believe that the procedure we have indicated will likewise effectuate the policies of the Act by making workable the system of restricted judicial review in relation to the wide discretionary authority which Congress has given the Board.

From the record of the present case we cannot really tell why the Board has ordered reinstatement of the strikers who obtained subsequent employment. The Board first found that the men had not obtained substantially equivalent employment within the meaning of § 2(3); later it concluded that even if they had obtained such employment it would order their reinstatement. It did so, however, as we have noted, merely because it asserted its legal power so to do. When the court below held that proof did not support the Board's finding concerning equivalence of employment at Shattuck Denn and remanded the case to the Board for additional evidence on that issue, the Board took this issue out of the case by expressly declining to ask for its review here.

The administrative process will best be vindicated by clarity in its exercise. Since Congress has defined the authority of the Board and the procedure by which it must be asserted and has charged the federal courts with the duty of reviewing the Board's orders (§ 10(e) and (f), it will avoid needless litigation and make for effective and expeditious enforcement of the Board's order to require the Board to disclose the basis of its order. We do not intend to enter the province that belongs to the Board, nor do we do so. All we ask of the Board is to give clear indication that it has exercised the discretion with which Congress has empowered it. This is to affirm most emphatically the authority of the Board.

Fifth. As part of its remedial action against the unfair labor practices, the Board ordered that workers who had been denied employment be made whole for their loss of pay. In specific terms, the Board ordered payment to the men of a sum equal to what they normally would have earned from the date of the discrimination to the time of employment less their earnings during this period. The court below added a further deduction of amounts which the workers "failed without excuse to earn", and the Board here challenges this modification.

Making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces. Since only actual losses should be made good, it seems fair that deductions should be made not only for actual earnings by the worker but also for losses which he willfully incurred. To this the Board counters that to apply this abstractly just doctrine of mitigation of damages to the situations before it, often involving substantial numbers of workmen, would put on the Board details too burdensome for effective administration. Simplicity of administration is thus the justification for deducting only actual earnings and for avoiding the domain of controversy as to wages that might have been earned.

But the advantages of a simple rule must be balanced against the importance of taking fair account, in a civilized legal system, of every socially desirable factor in the final judgment. The Board, we

believe, overestimates administrative difficulties and underestimates its administrative resourcefulness. Here again we must avoid the rigidities of an either-or rule. The remedy of back pay, it must be remembered, is entrusted to the Board's discretion; it is not mechanically compelled by the Act. And in applying its authority over back pay orders, the Board has not used stereotyped formulas but has availed itself of the freedom given it by Congress to attain just results in diverse, complicated situations. See (1939) 48 Yale L.J. 1265. The Board has a wide discretion to keep the present matter within reasonable bounds through flexible procedural devices. The Board will thus have it within its power to avoid delays and difficulties incident to passing on remote and speculative claims by employers, while at the same time it may give appropriate weight to a clearly unjustifiable refusal to take desirable new employment. By leaving such an adjustment to the administrative process we have in mind not so much the minimization of damages as the healthy policy of promoting production and employment. This consideration in no way weakens the enforcement of the policies of the Act by exerting coercion against men who have been unfairly denied employment to take employment elsewhere and later, because of their new employment, declaring them barred from returning to the jobs of their choice. This is so because we hold that the power of ordering offers of employment rests with the Board even as to workers who have obtained equivalent employment.

But though the employer should be allowed to go to proof on this issue, the Board's order should not have been modified by the court below. The matter should have been left to the Board for determination by it prior to formulating its order and should not be left for possible final settlement in contempt proceedings. * * *

The decree below should be modified in accordance with this opinion, remanding to the Board the two matters discussed under *Fourth* and *Fifth* herein, for the Board's determination of these issues. So ordered.

Remanded.[h]

In AMERICAN POWER AND LIGHT CO. v. SECURITIES AND EXCHANGE COMMISSION, —— U.S. ——, ——, 67 S.Ct. 133, 145–8, —— L.Ed. —— (1946), the Court said:

The major objection raised by American and Electric relates to the Commission's Choice of dissolution as "necessary to ensure" that the evils would be corrected and the standards of § 11(b) (2) effectuated. Emphasis is placed upon alternative plans which are less drastic in nature and which allegedly would meet the statutory standards.

[h] Footnotes of the court; the opinion of Mr. Justice Murphy, dissenting in part, in which Mr. Justice Black and Mr. Justice Douglas concurred; and the opinion of Mr. Justice Stone, dissenting in part, in which Mr. Chief Justice Hughes joined, have been omitted.

It is a fundamental principle, however, that where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy "the relation of remedy to policy is peculiarly a matter for administrative competence." Phelps Dodge Corp. v. National Labor Relations Board, supra, 313 U.S. 194, 61 S.Ct. 852, 85 L.Ed. 1271, 133 A.L.R. 1217. In dealing with the complex problem of adjusting holding company systems in accordance with the legislative standards, the Commission here has accumulated experience and knowledge which no court can hope to attain. Its judgment is entitled to the greatest weight, while recognizing that the Commission's discretion must square with its responsibility. * * * Nor can we say that the Commission's choice of dissolution with respect to American and Electric is so lacking in reasonableness as to constitute an abuse of its discretion. * * * In view of the rational basis for the Commission's choice, the fact that other solutions might have been selected becomes immaterial.

JACOB SIEGEL CO. v. FEDERAL TRADE COMMISSION

Supreme Court of the United States.
327 U.S. 608, 66 S.Ct. 758, 90 L.Ed. — (1946).

Mr. Justice DOUGLAS delivered the opinion of the Court.

The alpaca and the vicuna are animals whose fleece is used in the manufacture of fabrics. The fleece of the vicuna is, indeed, one of the finest and is extremely rare; and fabrics made of it command a high price. Petitioner manufactures overcoats and topcoats and markets them under the name Alpacuna. They contain alpaca, mohair, wool, and cotton but no vicuna.

The Federal Trade Commission in proceedings under § 5 of the Federal Trade Commission Act (52 Stat. 111, 15 U.S.C. § 45, 15 U.S. C.A. § 45) found that petitioner had made certain misrepresentations in the marketing of its coats. It found, for example, that the representations that the coats contained imported angora and guanaco were false. It also found that the name Alpacuna is deceptive and misleading to a substantial portion of the purchasing public, because it induces the erroneous belief that the coats contain vicuna. But there was no finding that petitioner had made representations that Alpacuna in fact contained vicuna. It accordingly issued a cease and desist order which, among other things, banned the use of the word Alpacuna to describe petitioner's coats. 36 F.T.C. 563. The Circuit Court of Appeals affirmed. 3 Cir., 150 F.2d 751. It held that the Commission's findings respecting the use of the name Alpacuna were supported by substantial evidence. It was of the view, however, that the prohibition of the use of the name was far too harsh; and it stated that it would have modified the order to permit Alpacuna to be used with qualifying language had it thought that Federal Trade Commission v. Royal Milling Co., 288 U.S. 212, 53 S.Ct. 335, 77 L.Ed.

706, was still a controlling authority. But it concluded that that case had been so limited by subsequent decisions of the Court, involving other administrative agencies, that control of the remedy lay exclusively with the Commission. The case is here on a petition for a writ of certiorari which we granted because of the importance of the question presented.

By the Federal Trade Commission Act Congress made unlawful "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce." § 5(a). It provided that when the Commission's cease and desist orders were challenged in the courts, the findings of the Commission "as to the facts, if supported by evidence, shall be conclusive." § 5(c). But it did not limit the reviewing court to an affirmance or reversal of the Commission's order. It gave the court power to modify the order as well.

The power to modify extends to the remedy as Federal Trade Commission v. Royal Milling Co., supra, indicates. In that case, the Commission barred the use of the words "milling company" since the company, though blending and mixing flour, did not manufacture it. The Court concluded that a less drastic order was adequate for the evil at hand and remanded the case so that the Commission might add appropriate qualifying words which would eliminate any deception lurking in the trade name. On the other hand, the excision of a part of the trade name was sustained in Federal Trade Commission v. Algoma Lumber Co., 291 U.S. 67, 54 S.Ct. 315, 78 L.Ed. 655. In that case, "California white pine" was being used to describe what was botanically a yellow pine. The Commission prohibited the use of the word "white" in conjunction with "pine" to describe the product. The Court sustained the order.

The Commission has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices in this area of trade and commerce. Here, as in the case of orders of other administrative agencies under comparable statutes, judicial review is limited. It extends no further than to ascertain whether the Commission made an allowable judgment in its choice of the remedy. As applied to this particular type of case, it is whether the Commission abused its discretion in concluding that no change "short of the excision" of the trade name would give adequate protection. Federal Trade Commission v. Algoma Lumber Co., supra, at pp. 81, 82 of 291 U.S., at page 321 of 54 S.Ct. The issue is stated that way for the reason that we are dealing here with trade names which, as Federal Trade Commission v. Royal Milling Co., supra, at p. 217 of 288 U.S., at page 337 of 53 S.Ct., 77 L.Ed. 706, emphasizes, are valuable business assets. The fact that they were adopted without fraudulent design or were registered as trade-marks does not stay the Commission's hand. Federal Trade Commission v. Algoma Lumber Co., supra at p. 79 of 291 U.S., at page 320 of 54 S.Ct., 78 L.Ed. 655; Charles of the Ritz Distributors Corp. v. Federal Trade Commission, 2 Cir., 143 F.2d

676, 679. But the policy of the law to protect them as assets of a business indicates that their destruction "should not be ordered if less drastic means will accomplish the same result." Federal Trade Commission v. Royal Milling Co., supra, at p. 217 of 288 U.S., at page 337 of 53 S.Ct., 77 L.Ed. 706. The problem is to ascertain whether that policy and the other policy of preventing unfair or deceptive trade practices can be accommodated. That is a question initially and primarily for the Commission. Congress has entrusted it with the administration of the Act and has left the courts with only limited powers of review. The Commission is the expert body to determine what remedy is necessarily to eliminate the unfair or deceptive trade practices which have been disclosed. It has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist.

But in the present case, we do not reach the question whether the Commission would be warranted in holding that no qualifying language would eliminate the deception which it found lurking in the word Alpacuna. For the Commission seems not to have considered whether in that way the ends of the Act could be satisfied and the trade name at the same time saved. We find no indication that the Commission considered the possibility of such an accommodation. It indicated that prohibition of the use of the name was in the public interest since the cease and desist order prohibited the further use of the name. But we are left in the dark whether some change of name short of excision would in the judgment of the Commission be adequate. Yet that is the test, as the Algoma Lumber Co. and the Royal Milling Co. cases indicate. Its application involves the exercise of an informed, expert judgment. The Commission is entitled not only to appraise the facts of the particular case and the dangers of the marketing methods employed (Federal Trade Commission v. Winsted Hosiery Co., 258 U.S. 483, 494, 42 S.Ct. 384, 385, 66 L.Ed. 729) but to draw from its generalized experience. See Republic Aviation Corp. v. National Labor Relations Board, 324 U.S. 793, 801–805, 65 S.Ct. 982, 987, 988, 157 A.L.R. 1081. Its expert opinion is entitled to great weight in the reviewing courts. But the courts are not ready to pass on the question whether the limits of discretion have been exceeded in the choice of the remedy until the administrative determination is first made.

The judgment is reversed and the cause is remanded to the Circuit Court of Appeals for further proceedings in conformity with this opinion.

Reversed.[1]

[1] See, to similar effect, Federal Trade Commission v. Royal Milling Co., 288 U.S. 212, 53 S.Ct. 335, 77 L.Ed. 706 (1933).

Footnotes of the court have been omitted.

SECTION 4. JUDICIAL REVIEW OF THE CONDUCT OF THE ADMINISTRATIVE PROCEEDING

See Chapter VI, Part II, Section 2, pp. 460ff.; and Chapter V, Part II, Section 2, pp. 391ff. and Part I, Section 3, at pp. 274–6, 281ff. *supra*.

SECTION 5. SCOPE OF REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT

ADMINISTRATIVE PROCEDURE ACT § 10(e)

5 U.S.C.Supp. § 1009(e).

Sec. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

* * *

(e) SCOPE OF REVIEW.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

PART III. PERSONS BY WHOM JUDICIAL REVIEW MAY BE INVOKED

THE CHICAGO JUNCTION CASE

Supreme Court of the United States.
264 U.S. 258, 44 S.Ct. 317, 68 L.Ed. 667 (1924).

See part "Second" of the opinion, *supra* at p. 698ff.

ALEXANDER SPRUNT & SON, INC. v. UNITED STATES

Supreme Court of the United States.
281 U.S. 249, 50 S.Ct. 315, 74 L.Ed. 832 (1929).

Mr. Justice BRANDEIS delivered the opinion of the Court.

The Interstate Commerce Commission entered, on April 4, 1927, an order directed to the railroads operating in Oklahoma, Arkansas, Texas, and Louisiana, which required them to remove, in a manner prescribed, undue prejudice and preference caused by their rates on cotton shipped from interior points to Houston and other ports on the Gulf of Mexico. Application of Rates on Cotton to Gulf Ports, 100 I.C.C. 159; Id., 123 I.C.C. 685. Two suits, under the Act of June 18, 1910, c. 309, 36 Stat. 539, as amended by Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 220 (28 USCA § 47), were promptly brought in the federal court for Southern Texas, to enjoin the enforcement of the order and to set it aside. The first suit was brought by Alexander Sprunt & Son, Inc., and others interested in cotton compresses and warehouses located at wharves on the water front. The second, by the Texas & New Orleans Railroad Company and other rail carriers. The two cases were, with the consent of the parties, ordered consolidated as a single cause with a single record. The consolidated case was heard by three judges. An interlocutory injunction issued. Upon final hearing, the District Court sustained the validity of the order; dissolved the injunction; and entered a decree dismissing the bills. 23 F.2d 874.

None of the carriers appealed from the decree. Acquiescing in the decision of the District Court, and in the order of the Commission, the railroads promptly established the prescribed rate adjustment; and it is now in force. This appeal was taken by Alexander Sprunt & Son, Inc., and those shippers and associations of shippers which had joined below as coplaintiffs in the bill filed by it. No stay of the decree pending the appeal was granted or sought. And no railroad was

made a party to the proceedings on the appeal. At the argument, this court raised the preliminary question whether there is any substantive ground for appeal by the shippers alone. In order to answer that question, a fuller statement is necessary of the matter in controversy before the commission and of the terms of the order entered by it.

From interior points in Texas, Louisiana, Oklahoma, and Arkansas to the several ports on the Gulf of Mexico there were on all the railroads two schedules of rates on cotton—the domestic or city-delivery rates and the export or ship side rates. The latter were, prior to the entry of the order complained of, 3 or 3.5 cents per 100 pounds higher than the former. All rates permit concentration and compression in transit and include free switching, to and from the warehouses and compresses. Complaint was made that in applying these rates the railroads unjustly discriminated against other shippers and in favor of Alexander Sprunt & Son, Inc., and other owners of warehouses and compresses at the wharves, by applying the domestic rates on shipments to their plants of cotton intended for export or for transshipment by vessel coastwise. It was sought to justify this practice on the ground that the conditions which had led to charging the higher rate for export cotton were absent in the case of these water front plants.

The difference of about 3.5 cents per 100 pounds between the domestic and the export rates is approximately equal to the cost of transporting the cotton, by dray or by switching, from uptown concentrating and high density compressing plants in the ports to ship side. This difference served to equalize rates as between the uptown plants and the interior plants. Louisiana Cotton, 46 I.C.C. 451; Galveston Commercial Ass'n v. Alabama & Vicksburg Ry. Co., 77 I.C.C. 388. In 1921 and later, warehouses and high density compressing plants were located at the water front, almost within reach of the ship's tackle. From these plants, there was no need of local transportation, by dray or switching, to shipside. The lower domestic rates were accordingly applied on cotton shipped to them, even though intended for export.

This practice gave to the water front plants an obvious advantage over those located up town in the ports and over those located in the interior. Widespread complaint of undue prejudice and preference led the Commission to institute, upon its own motion, a general investigation concerning the lawfulness of the practices of the carriers in connection with the application of the city-delivery and ship side rates, with a view to determining, among other things, "whether any change should be made in existing tariff regulations or rates in order to avoid or remove such undue preference, if any, that results or may result in favor of said water-front shippers or localities." Practically all the railroads operating in the four southwestern states were made respondents to that proceeding.

After extended hearings, the Commission found that the existing adjustment of rates to ports was unduly prejudicial to the warehouses

and compresses uptown and in the interior; that it was unduly preferential of those at the water front; and that the rates should be readjusted so that one rate would apply for all deliveries within the usual switching limits of the respective ports, except that the export rates should be made higher than the domestic rates by an amount equal to the wharfage. The Commission did not, at first specify the particular rate adjustment to be established to accomplish the result directed. Without inquiring into the reasonableness of the rates, it stated that the equality of treatment might be effected by any readjustment which would preserve, but not increase, the carriers' revenues. 100 I.C.C. 159, 167. But upon reopening the proceeding, pursuant to petitions therefor, the Commission prescribed specifically what the rate adjustment should be. It found that "for the purposes of this case a fair and reasonable basis for equalizing the city-delivery and ship-side rates will be to increase the city-delivery rates 1 cent per 100 pounds and reduce the ship-side rates exclusive of wharf or pier terminal charges equivalent to 2 cents per 100 pounds, to the basis of the increased city-delivery rates." 123 I.C.C. 685, 695.

First. The appellants contend that there is no basis for the Commission's finding of undue prejudice and preference. We are of opinion that appellants have no standing, in their own right, to make this attack. In so far as the order directs elimination of the rate differential previously existing, it worsened the economic position of the appellants. It deprived them of an advantage over other competitors of almost 3.5 cents per hundred pounds. The enjoyment of this advantage gave them a distinct interest in the proceeding before the Commission under section 3 of the Interstate Commerce Act (49 US CA § 3). For, their competitive advantage was threatened. Having this interest, they were entitled to intervene in that administrative proceeding. And, if they did so, they became entitled under section 212 of the Judicial Code (28 USCA § 45a) to intervene, as of right, in any suit "wherein is involved the validity" of the order entered by the Commission. But that interest alone did not give them the right to maintain an independent suit, to vacate and set aside the order. Such a suit can be brought by a shipper only where a right of his own is alleged to have been violated by the order. And his independent right to relief is no greater where by intervention or otherwise he has become a party to the proceeding before the Commission or to a suit brought by a carrier. In the case at bar, the appellants have no independent right which is violated by the order to cease and desist. They are entitled as shippers only to reasonable service at reasonable rates and without unjust discrimination. If such service and rates are accorded them, they cannot complain of the rate or practice enjoyed by their competitors or of the retraction of a competitive advantage to which they are not otherwise entitled. The advantage which the appellants enjoyed under the former tariff was merely an incident of, and hence was dependent upon, the right, if any, of the

carriers to maintain that tariff in force and their continuing desire to do so.

Why the carriers filed the new rate structure now in force is no concern of the appellants. If the carriers had done so wholly of their own motion, obviously these shippers would have had no ground of complaint, before any tribunal, unless the new rates were unreasonable or unjust. If they were believed by the appellants to be so, a complaint before the Commission would be the appropriate remedy. Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 27 S. Ct. 350, 51 L.Ed. 553, 9 Ann.Cas. 1075; United States v. Merchants' & Manufacturers' Traffic Association, 242 U.S. 178, 188, 37 S.Ct. 24, 61 L.Ed. 233; Great Northern Ry. Co. v. Merchants' Elevator Co., 259 U.S. 285, 295, 42 S.Ct. 477, 66 L.Ed. 943. The appellants' position is legally no different from what it would have been if the carriers had filed the rates freely, pursuant to an informal suggestion of the Commission or one of its members; or if the filing had been made by carriers voluntarily after complaint filed before the Commission, which had never reached a hearing, because the rate structure complained of was thus superseded. The carriers who were respondents before the Commission filed the new rates, presumably because they now desire them. Nothing to the contrary is shown. So far as the carriers are concerned, it is as if the new rates had been filed wholly of their own accord and as if there had never been a controversy before the Commission. Since the appellants' economic advantage as shippers was an incident of the supposed right exercised by the carriers, the appellants cannot complain after the carriers are satisfied or prefer not to press their right, if any.

Appellants' present position resembles in all essentials one which was put forward in Edward Hines Trustees v. United States, 263 U.S. 143, 147, 148, 44 S.Ct. 72, 68 L.Ed. 216, and United States v. Merchants' & Manufacturers' Traffic Association, 242 U.S. 178, 188, 37 S.Ct. 24, 61 L.Ed. 233. There, as here, the plaintiffs were deprived by the order of the Commission of a competitive advantage. But the plaintiffs there, as here, were not subjected to or threatened with any legal wrong. And, since the carriers acquiesced in the order of the Commission, the plaintiffs could not maintain an independent action to annul the orders. Appellants' present position is unlike that of the plaintiffs in the cases relied upon. United States v. Village of Hubbard, 266 U.S. 474, 45 S.Ct. 160, 69 L.Ed. 389; The Chicago Junction Case, 264 U.S. 258, 44 S.Ct. 317, 68 L.Ed. 667; Skinner & Eddy Corporation v. United States, 249 U.S. 557, 39 S.Ct. 375, 63 L.Ed. 772; Interstate Commerce Commission v. Diffenbaugh, 222 U.S. 42, 32 S.Ct. 22, 56 L.Ed. 83. In each of those cases, an independent legal right of the plaintiff was affected by the order which it was sought to set aside.

Moreover, by the action of the carriers, the issue of undue prejudice and unjust preference, which had been passed upon by the

Commission, has become moot. Compare United States v. Anchor Coal Co., 279 U.S. 812, 49 S.Ct. 262, 73 L.Ed. 971. Most of the carriers never sought to annul the order. Those that joined in the suit to set it aside have since voluntarily severed themselves from the shippers who object to it. The fact that some carriers at one time protested is of no significance, among other reasons, because their protest may have been directed, not against that part of the order which commanded an equalization of rates, but against the particular figure at which equalization was ordered. There is nothing to show that any carrier is now in sympathy with the appellants' attack on the order. A judgment in appellants' favor would be futile. It would not restore the appellants to the advantage previously enjoyed. If the Commission's order is set aside, the carriers would still be free to continue to equalize the rates; and for aught that appears would continue to do so.

Second. Appellants complain of the order also on the ground that it authorized an increase in the local or domestic delivery rates without a hearing and findings as to the reasonableness of the level of either the old or the new rates. It is urged that section 15 of the act (49 U.S.C.A. § 15) does not authorize the Commission to fix the rates necessary to remove undue prejudice without such hearing and findings. But plainly appellants cannot, in their own right, be heard to complain in this suit of this part of the order. The Commission's first order left the carriers free to choose the method for the removal of the preference. Compare American Express Co. v. Caldwell, 244 U.S. 617, 625, 37 S.Ct. 656, 61 L.Ed. 1352; United States v. Illinois Cent. R. Co., 263 U.S. 515, 521, 44 S.Ct. 189, 68 L.Ed. 417. If the carriers had, of their own accord, adopted the plan later prescribed by the Commission, appellants could, obviously, not be heard to complain of the reasonableness of the rate adopted, except in a proceeding before the Commission instituted under sections 13 and 15 of the act (49 U.S.C.A. §§ 13, 15). For reasons which it is unnecessary to detail, the carriers were unable to agree upon a plan. They petitioned the Commission for help. In reopening the proceedings, the Commission notified the parties that one of the issues to be decided was "what rates shall be established to comply with [its] findings and order." The carriers have accepted the rate fixed by the Commission. In prescribing the rate, the Commission in no way prejudiced any pre-existing rights or remedies of the appellants. Any question as to the reasonableness of the level of the rate was expressly left open by the Commission. It did not prescribe any rate as the minimum. If appellants are aggrieved by the level of the new rates, they still have their remedy before the Commission under sections 13 and 15 of the act. * * *

The decree below dismissed the consolidated suit on the merits. As the matter, in so far as it relates to the bill filed by these appellants, has become moot since the decree was entered, the decree should be

reversed, so far as it concerns appellants; and the District Court should be directed to dismiss their bill without costs. See United States v. Anchor Coal Co., 279 U.S. 812, 49 S.Ct. 262, 73 L.Ed. 971. So far as concerns the carriers—no appeal having been taken by them—the decree entered below should stand.

Reversed, with dirctions to dismiss.[a]

PITTSBURGH & WEST VIRGINIA RY. CO. v. UNITED STATES

Supreme Court of the United States.
281 U.S. 479, 50 S.Ct. 378, 74 L.Ed. 980 (1930).

Mr. Justice BRANDEIS delivered the opinion of the Court.

In 1921, the Interstate Commerce Commission authorized the New York Central Railroad and other rail carriers to join in establishing a union passenger station at Cleveland, through a subsidiary, the Cleveland Union Terminals Company. The Cleveland Passenger Terminal Case, 70 I.C.C. 659. The Wheeling & Lake Erie Railway Company had for some years owned and maintained an independent passenger station at Ontario street in Cleveland in the line of the easterly approach to the proposed union terminal. It was apparent from the outset that either ownership of or an easement in the Wheeling's site would be indispensable in order to provide the necessary easterly approach to the terminal. Long negotiations culminated in a plan whereby the Wheeling consented to sell its site and become a tenant in the new terminal at an annual rental of $20,000. Contracts were made embodying this plan, subject to approval of the Interstate Commerce Commission.

Thereupon, the Wheeling filed before the Commission two applications for certificates of public convenience and necessity, one permitting it to abandon its Ontario Street station, the other authorizing it to use the facilities of the union terminal and, pending its completion, to use the facilities of the station of the Erie Railroad and the tracks of the Big Four. These applications were heard together as one case. The Pittsburgh & West Virginia Railway, a minority stockholder and connecting carrier of the Wheeling, was permitted to intervene and was heard in opposition to the applications. It opposed them on the grounds that the Ontario Street Station was ample for both the present and future needs of the Wheeling; that the Wheeling's applications were authorized by directors elected by the votes of stock owned in violation of the Clayton Act (38 Stat. 730) by the Baltimore & Ohio Railroad, the New York Central, and the Nickel Plate (Interstate Commerce Commission v. Baltimore & Ohio R. R. Co., 152 I.C.C. 721); that the contracts executed by the Wheeling were made without first

[a] Footnotes of the court have been omitted.

securing the consent of its stockholders, as required by the laws of Ohio; that the Wheeling's directors were interested in the union terminal project, and did not give the Wheeling the benefit of their unbiased judgment; that the price to be paid the Wheeling for its site was inadequate and not the best price obtainable; that the Terminals Company is a common carrier whose rates are subject to regulation; that the yearly rental to be paid by the Wheeling is unduly low and unreasonably preferential of the Wheeling; that it is therefore subject to be increased by the Interstate Commerce Commission; and that, if increased so as to eliminate the preference, it would confessedly be much more than the Wheeling could afford to pay and would imperil its financial condition.

The Commission held that the violation of the Clayton Act was immaterial since the election of the directors occurred prior to the Commission's finding of violation, and the finding was not made retroactive; that it lacked jurisdiction to pass upon the alleged violations of Ohio law or upon the adequacy of the price agreed to be paid for the Wheeling's site; that, under paragraph 4 of section 3 of the Interstate Commerce Act (49 U.S.C.A. § 3(4), the agreed rental for the Wheeling's use of the Union Station was not subject to be increased by it; and that, in view of all the circumstances, the rental was not unduly preferential of the Wheeling. It found that public convenience and necessity would be served by the granting of both applications; and accordingly issued its certificate as prayed for. Operation of Passenger Terminal Facilities at Cleveland, Ohio, by Wheeling & Lake Erie Ry. Co., 154 I.C.C. 516.

The Pittsburgh & West Virginia then brought this suit in the District Court for Northern Ohio, Eastern Division. It joined as defendants the Wheeling, the Erie, the Big Four, the Terminals Company, the Building Company, the Interstate Commerce Commission and the United States. The purpose of the suit, as stated in the complaint, was twofold: First, to enjoin the Wheeling from abandoning its Ontario Street Station and from performing its contracts with the other defendants; secondly, to set aside and annul the order of the Interstate Commerce Commission granting the certificate of public convenience and necessity. Separate relief was prayed for accordingly. As against the Wheeling, the prayer was founded on the several grounds advanced before the Commission. As against the United States and the Commission, on the additional ground that the order was based on erroneous conclusions of law, to wit, that the Commission had no jurisdiction to pass on the adequacy of the price to be paid for the land and on the alleged violations of the laws of Ohio; that the Wheeling's directors were competent to act for it in this matter; and that the rental agreed to be paid by the Wheeling for the use of the union terminal facilities was not subject to be increased by the Commission.

The Pittsburgh moved for an interlocutory injunction. As the bill sought to suspend and set aside an order of the Interstate Commerce Commission, the District Judge called to his assistance two additional judges pursuant to the Urgent Deficiencies Act, October 22, 1913, c. 32, 38 Stat. 208, 219, 220 (28 U.S.C.A. § 47). By consent of the parties, the case was then heard, as upon final hearing; and the court entered a final decree dismissing the bill on the merits as to both classes of relief prayed for. It declared, however, that the questions concerning the alleged violation of Ohio law, the competency of the Wheeling's directors, and the other grounds of attack on the Wheeling's action were not properly before it as a three judge court. But, since diversity of citizenship existed and the District Judge concurred in the judgment, the court passed on them and reserved to appellant the right to sever these issues for purposes of appeal and treat its decision on them as the decision of a single judge. Pittsburgh & West Virginia Ry. Co. v. United States, 41 F.2d 806. Appellant did not avail itself of this privilege, but prosecuted a direct appeal to this Court from the whole decree. It repeats here the several grounds of attack urged before the District Court. We have no occasion to consider the merits of the controversy. For we are of opinion that appellant had no standing to bring this suit as one to set aside an order of the Commission; and that, in so far as the suit may be treated as one within the general equity jurisdiction of the District Court, we have no jurisdiction on a direct appeal to review its decision.

First. The District Court held that the appellant was entitled to bring this suit under the Urgent Deficiencies Act to set aside the order, because it had intervened in the proceedings before the Commission, and because it is a connecting carrier and a minority stockholder of the Wheeling. The court erred in so holding. The mere fact that appellant was permitted to intervene before the Commission does not entitle it to institute an independent suit to set aside the Commission's order in the absence of resulting actual or threatened legal injury to it. Alexander Sprunt & Son v. United States, 281 U.S. 249, 50 S.Ct. 315, 74 L.Ed. 832 (No. 19, decided April 14, 1930). Nor does the mere fact that its lines connect with those of the Wheeling near the city of Pittsburgh, Pa., entitle it to bring the suit. Its lines do not extend to Cleveland; and there is no suggestion that the order can affect it as carrier. Finally, the claim that the order threatens the Wheeling's financial stability, and consequently appellant's financial interest as a minority stockholder, is not sufficient to show a threat of the legal injury necessary to entitle it to bring a suit to set aside the order. This financial interest does not differ from that of every investor in Wheeling securities or from an investor's interest in any business transaction or lawsuit of his corporation. Unlike orders entered in cases of reorganization, and in some cases of acquisition of control of one carrier by another, the order under attack does not deal with the interests of investors. The injury feared is the indirect harm

which may result to every stockholder from harm to the corporation. Such stockholder's interest is clearly insufficient to give the Pittsburgh a standing independently to institute suit to annul this order. The bill should have been dismissed without inquiry into the merits.

Second. The prayer that the contemplated action of the Wheeling should be enjoined because its directors hold office illegally, are faithless to their trust, are acting in violation of the rights of stockholders under the Ohio law, and, hence, that the Wheeling could not legally exercise the authority granted to it by the Commission, was not properly joined in this suit and is not subject to review in this Court on a direct appeal. An application for such relief may not be included in a bill under the Urgent Deficiencies Act to set aside an order of the Interstate Commerce Commission. Compare Cleveland, etc., Ry. Co. v. United States, 275 U.S. 404, 414, 48 S.Ct. 189, 72 L.Ed. 338; Great Northern Ry. Co. v. United States, 277 U.S. 172, 181, 48 S.Ct. 466, 72 L.Ed. 838. It is neither ancillary to nor dependent upon the judgment as to the order. Relief of that character may be had only in a suit invoking the plenary equity jurisdiction of the District Court. Such a suit would be heard in ordinary course by a single judge; and it would be appealable only to the Circuit Court of Appeals. The case at bar is wholly unlike The Chicago Junction Case, 264 U.S. 258, 269, 44 S.Ct. 317, 68 L.Ed. 667, where a prayer to set aside the illegal purchase of stock and the lease already made was held proper as ancillary to setting aside the order of the Commission authorizing the same. There, the joinder was permitted in order to carry out the purpose of Congress to make the judicial review effective. Here, such joinder is unnecessary for that purpose. Moreover, grounds for general equitable relief, obviously, cannot give the Pittsburgh a standing in this Court on direct appeal under the Urgent Deficiencies Act, when it had no right to bring suit under that act.

While there was no occasion for the District Court to consider the merits, the bill was properly dismissed. The decree is affirmed without prejudice to the right, if any, of the Pittsburgh to enjoin in a proper proceeding action by the Wheeling.

Affirmed.[b]

[b] Footnotes of the court have been omitted.

CLAIBORNE-ANNAPOLIS FERRY CO. v. UNITED STATES

Supreme Court of the United States.
285 U S. 382, 52 S.Ct. 440, 76 L.Ed. 808 (1932).

Mr. Justice McREYNOLDS delivered the opinion of the court.

The Chesapeake Beach Railway Company, incorporated under Maryland laws and carrier by railroad subject to the Interstate Commerce Act, operates a line twenty-nine miles long which commences in the District of Columbia and passes southeastward through Maryland to Chesapeake Beach, twenty miles south of Annapolis. Connections are made and freight interchanged with the Baltimore & Ohio and Pennsylvania Railroad. The charter empowers it to build and operate a railroad, etc., to construct docks, piers, bridges, and retaining walls along the bay shore and to "own and employ steamboats or other vessels to connect the said railroad or railroads with other points by water communication."

December 26, 1929, proceeding under section 1, pars. 18, 19, 20, Interstate Commerce Act, as amended by Transportation Act 1920, § 402, 49 U.S.C. § 1(18–20) (49 U.S.C.A. § 1(18–20), the railway company petitioned the Interstate Commerce Commission to grant a certificate declaring "that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation," of the proposed addition or extension to its line. It stated the purpose "to establish and operate, either directly or through a wholly owned subsidiary, a ferry for the transportation of passengers and property between the terminus of its said line at Chesapeake Beach, across Chesapeake Bay [16 miles], and a point on Trippe's Bay in Dorchester County, Maryland." And it averred that "the present and future public convenience and necessity require the establishment of the proposed ferry so as to afford a direct route by rail and water between the City of Washington and surrounding territory and the eastern shore of Maryland and also to provide a direct route for the transportation of automobiles and other vehicles between such points."

Notice was given to the Governor of Maryland; publication followed; all as required by the statute.

The Claiborne-Annapolis Ferry Company (appellant), Maryland corporation, which operates a ferry from Annapolis across Chesapeake Bay, intervened and opposed the railway's application "for the reason that the ferry service proposed to be operated by the applicant from Chesapeake Beach, Calvert County, Maryland, to a point on Trippe's Bay in Dorchester County, Maryland, will interfere with and hamper the efforts of your petitioner to give adequate service on its present route"—twenty miles further north. It denied that present and future public convenience and necessity requires establishment of the proposed ferry. No other party asked to intervene or offered objection to the requested certificate.

The commission took evidence, heard the parties, made a report, and, August 1, 1930, certified "that the present and future public convenience and necessity require the establishment by the Chesapeake Beach Railway Company of ferry service across Chesapeake Bay, in Calvert and Dorchester Counties, Md., as set forth in the application and said report."

The ferry company asked modification of the report, order, and certificate "in such manner as the Commission may deem best to remove any doubt that the permission granted the applicant is only for an extension of railroad and not for the establishment of a general ferry service." Among other things, the petition therefor stated: "Your petitioner does not question the authority or the wisdom of this Honorable Commission in granting to the applicant a Certificate of Public Convenience and Necessity if the Commission construes the application of the Chesapeake Beach Railway Company in this case to be an application for a certificate authorizing an extension of its railroad. That, although the jurisdiction of this Honorable Commission in this case is limited in law to the grant of authority to the applicant to extend its line of railroad across the Chesapeake Bay by means of vessels, the Report, Order and Certificate filed in this case on their face would seem to indicate that the Commission has attempted to grant to the applicant authority to operate a general ferry across the Chesapeake Bay between the points known as Chesapeake Beach, Calvert County, Maryland, and Trippe's Bay, Dorchester County, Maryland. While your petitioner does not suggest that this Honorable Commission has granted or attempted to grant to the applicant such a certificate, which could be granted only by the State of Maryland, yet the use of the language by the Commission as follows: 'It is hereby certified, That the present and future public convenience and necessity require the establishment by the Chesapeake Beach Railway Company of ferry service across Chesapeake Bay, in Calvert and Dorchester Counties, Md., as set forth in the application and said report' is, we most respectfully submit, misleading and confusing." The request was denied October 13, 1930.

December 24, 1930, appellant here, as sole complainant, filed an original bill in the Supreme Court, District of Columbia, against the Chesapeake Beach Railway Company and all members of the Interstate Commerce Commission, individually and as members thereof. Subsequently, the United States were made parties defendant. No others asked to come in or were added. After stating complainant's business, and that the Interstate Commerce Commission had granted the above-described certificate of public convenience and necessity, the bill alleged that the order and certificate were null and without effect because the evidence before the commission showed the carrier lacked corporate power to operate the ferry and had no actual use therefor in connection with its road; also, that no present or future public necessity and convenience required such operation. The prayer

asked an injunction prohibiting the proposed construction, maintenance, and operation, pursuant to the order of August 1, 1930, and "that it be adjudged, ordered and decreed that the said order of the Interstate Commerce Commission of August 1, 1930, be set aside and annulled and held for naught." Also, for general relief.

The proceedings before the Interstate Commerce Commission, the evidence presented there, and its action were presented to the court. The cause was heard at a special session held by one judge of the Court of Appeals and two judges of the Supreme Court. 38 Stat. 208, 220, U.S.C., title 28, § 47 (28 U.S.C.A. § 47), U.S.C. title 28, § 345 (28 U.S.C.A. § 345). A final decree dismissed the bill and the cause is here upon direct appeal.

Section 1, par. 3, Interstate Commerce Act, as amended by Transportation Act 1920, § 400, 49 U.S.C.A. § 1(3), provides that the term "railroad" as used in the Act, shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad. Paragraph 18 prohibits carriers from extending their lines, or constructing new ones, "unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation of such additional or extended line of railroad." Paragraph 19 prescribes the procedure in respect of applications for such certificates. Paragraph 20: "From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both." Chapter 91, 41 Stat. 474, 477, 478; U.S.C.A., title 49, § 1.

Paragraphs 18, 19, and 20 were added to the Act to Regulate Interstate Commerce by the Transportation Act 1920, § 402. They are restricted to carriers engaged in transporting persons or property in interstate and foreign commerce and were intended to affect intrastate commerce only as that may be incidental to the effective regulation of interstate commerce. Texas v. Eastern Texas R. R. Co., 258 U.S. 204, 213, 217, 42 S.Ct. 281, 66 L.Ed. 566.

Considering Texas v. Eastern R. R. Co., supra; Colorado v. United States, 271 U.S. 153, 46 S.Ct. 452, 70 L.Ed. 878; Western Pacific California R. R. Co. v. Southern Pacific Company, 284 U.S. 47, 52 S.Ct. 56, 76 L.Ed. 160, decided November 23, 1931; and Transit Commission of State of New York v. United States, 284 U.S. 360, 52 S.Ct. 157, 76 L.Ed. 342 (January 4, 1932), it must be held that appellant is a "party in interest" within the meaning of the statute capable of instituting the present proceeding. The bill disclosed that the proposed and permitted action might directly and adversely affect its welfare by changing the transportation situation. The cause is one of the class to be tried by a specially constituted district court, under the Urgent Deficiencies Act, Oct. 22, 1913, c. 32, 38 Stat. 208, 220 (U.S.C., title 28, § 47 [28 U.S.C.A. § 47]).

U. S. Code, title 28, § 46, 28 U.S.C.A. § 46 (Judicial Code, § 208), provides that suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the District Court against the United States, etc. Section 47 directs that they shall be heard before three judges, at least one of whom must be a circuit judge.

It has been suggested that the Supreme Court of the District of Columbia cannot be regarded as a District Court, and judges of the Court of Appeals of the District are not circuit judges within those provisions; consequently the District Supreme Court had no jurisdiction to hear the present cause. The point is without merit.

Section 43, title 18, District of Columbia Code 1929, provides that the Supreme Court "shall possess the same powers and exercise the same jurisdiction as the district courts of the United States, and shall be deemed a court of the United States." Federal Trade Commission v. Klesner, 274 U.S. 145, 156, 47 S.Ct. 557, 560, 71 L.Ed. 972, held that section 5 of the Federal Trade Commission Act, conferring jurisdiction on the Circuit Courts of Appeals to enforce, set aside, or modify orders of the commission, should be construed as conferring like jurisdiction upon the Court of Appeals of the District of Columbia. "The parallelism between the Supreme Court of the District and the Court of Appeals of the District, on the one hand, and the District Courts of the United States and the Circuit Courts of Appeals, on the other, in the consideration and disposition of cases involving what among the states would be regarded as within federal jurisdiction, is complete." And see Pitts v. Peak (App.D.C.) 50 F.2d 485.

Whether the railway company has corporate power to operate the proposed ferry is a question which cannot be considered in this proceeding. We think Congress never intended to impose upon the Interstate Commerce Commission the duty of determining matters of this nature before granting or withholding assent to the construction of an extension. Cleveland, etc., Ry. v. United States, 275 U.S. 404, 414, 48 S.Ct. 189, 72 L.Ed. 338.

The right of appellant ferry company to institute and maintain this proceeding rests wholly upon the permission granted by paragraph 20, § 1. "Any party in interest" may institute a suit to enjoin proposed construction, operation, or abandonment of a carrier's line unless it has obtained a certificate of public convenience and necessity from the Interstate Commerce Commission. In the absence of such certificate the doing of any of these things is declared to be unlawful —a crime subject to punishment by fine and imprisonment. And the permission is to apply to the court for an order to arrest the unlawful undertaking. The inhibition applies where there is no certificate in fact, or where the commission lacked power to grant the outstanding one because of insufficient evidence to support its findings or other reason. An invalid certificate would leave the situation as though none had issued. Chicago, R. I. & P. Ry. v. United States, 274 U.S. 29, 47 S.Ct. 486, 71 L.Ed. 911.

Here, undoubtedly, the commission had power to entertain and act upon the railway's petition, also to grant the certificate of public convenience and necessity upon sufficient evidence. If the record discloses such evidence, the certificate is not a nullity and the ferry company has no right now to demand decision of any other question.

We think there was enough evidence—material and conflicting we may not pass upon its weight—to support the commission's conclusion. A large district on the Eastern Shore of Chesapeake Bay lacks adequate railroad connection with Washington and points beyond. The possibilities of the proposed ferry, operated as a part of the railway's line, were disclosed and the commission's conclusion that material advantages to the public would result from the additional facilities for interstate transportation is not without support.

The decree below is affirmed.

Affirmed.[c]

FEDERAL COMMUNICATIONS COMMISSION v. SANDERS BROS. RADIO STATION

Supreme Court of the United States.
309 U.S. 470, 60 S.Ct. 693, 84 L.Ed. 869 (1940).

Mr. Justice ROBERTS delivered the opinion of the Court.

We took this case to resolve important issues of substance and procedure arising under the Communications Act of 1934, as amended.

January 20, 1936, the Telegraph Herald, a newspaper published in Dubuque, Iowa, filed with the petitioner an application for a construction permit to erect a broadcasting station in that city. May 14, 1936,

[c] *Cf.* L. Singer & Sons v. Union Pacific R. R., 311 U.S. 295, 61 S.Ct. 254, 85 L. Ed. 198 (1940), *supra* at p. 571.

the respondent, who had for some years held a broadcasting license for, and had operated, Station WKBB at East Dubuque, Illinois, directly across the Mississippi River from Dubuque, Iowa, applied for a permit to move its transmitter and studios to the last named city, and to instal its station there. August 18, 1936, respondent asked leave to intervene in the Telegraph Herald proceeding, alleging in its petition, *inter alia,* that there was an insufficiency of advertising revenue to support an additional station in Dubuque and insufficient talent to furnish programs for an additional station; that adequate service was being rendered to the community by Station WKBB and there was no need for any additional radio outlet in Dubuque and that the granting of the Telegraph Herald application would not serve the public interest, convenience, and necessity. Intervention was permitted and both applications were set for consolidated hearing.

The respondent and the Telegraph Herald offered evidence in support of their respective applications. The respondent's proof showed that its station had operated at a loss; that the area proposed to be served by the Telegraph Herald was substantially the same as that served by the respondent and that, of the advertisers relied on to support the Telegraph Herald station, more than half had used the respondent's station for advertising.

An examiner reported that the application of the Telegraph Herald should be denied and that of the respondent granted. On exceptions of the Telegraph Herald, and after oral argument, the broadcasting division of petitioner made an order granting both applications, reciting that "public interest, convenience, and necessity would be served" by such action. The division promulgated a statement of the facts and of the grounds of decision, reciting that both applicants were legally, technically, and financially qualified to undertake the proposed construction and operation; that there was need in Dubuque and the surrounding territory for the services of both stations, and that no question of electrical interference between the two stations was involved. A rehearing was denied and respondent appealed to the Court of Appeals for the District of Columbia. That court entertained the appeal and held that one of the issues which the Commission should have tried was that of alleged economic injury to the respondent's station by the establishment of an additional station and that the Commission had erred in failing to make findings on that issue. It decided that, in the absence of such findings, the Commission's action in granting the Telegraph Herald permit must be set aside as arbitrary and capricious.

The petitioner's contentions are that under the Communications Act economic injury to a competitor is not a ground for refusing a broadcasting license and that, since this is so, the respondent was not a person aggrieved or whose interests were adversely affected, by the Commission's action, within the meaning of Section 402 (b) of the Act,

47 U.S.C.A. § 402(b), which authorizes appeals from the Commission's orders.

The respondent asserts that the petitioner in argument below contented itself with the contention that the respondent had failed to produce evidence requiring a finding of probable economic injury to it. It is consequently insisted that the petitioner is not in a position here to defend its failure to make such findings on the ground that it is not required by the Act to consider any such issue. By its petition for rehearing in the court below, the Commission made clear its position as now advanced. The decision of the court below, and the challenge made in petition for rehearing and here by the Commission, raise a fundamental question as to the function and powers of the Commission and we think that, on the record, it is open here.

First. We hold that resulting economic injury to a rival station is not in and of itself, and apart from considerations of public convenience, interest, or necessity, an element the petitioner must weigh and as to which it must make findings in passing on an application for a broadcasting license.

Section 307(a) of the Communications Act, 47 U.S.C.A. § 307(a), directs that "the Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act [chapter], shall grant to any applicant therefor a station license provided for by this Act [chapter]." This mandate is given meaning and contour by the other provisions of the statute and the subject matter with which it deals. The Act contains no express command that in passing upon an application the Commission must consider the effect of competition with an existing station. Whether the Commission should consider the subject must depend upon the purpose of the Act and the specific provisions intended to effectuate that purpose.

The genesis of the Communications Act and the necessity for the adoption of some such regulatory measure is a matter of history. The number of available radio frequencies is limited. The attempt by a broadcaster to use a given frequency in disregard of its prior use by others, thus creating confusion and interference, deprives the public of the full benefit of radio audition. Unless Congress had exercised its power over interstate commerce to bring about allocation of available frequencies and to regulate the employment of transmission equipment the result would have been an impairment of the effective use of these facilities by anyone. The fundamental purpose of Congress in respect of broadcasting was the allocation and regulation of the use of radio frequencies by prohibiting such use except under license.

In contradistinction to communication by telephone and telegraph, which the Communications Act recognizes as a common carrier activity and regulates accordingly in analogy to the regulation of rail and other carriers by the Interstate Commerce Commission, the Act recognizes that broadcasters are not common carriers and are not to be

dealt with as such. Thus the Act recognizes that the field of broadcasting is one of free competition. The sections dealing with broadcasting demonstrate that Congress has not, in its regulatory scheme, abandoned the principle of free competition, as it has done in the case of railroads, in respect of which regulation involves the suppression of wasteful practices due to competition, the regulation of rates and charges, and other measures which are unnecessary if free competition is to be permitted.

An important element of public interest and convenience affecting the issue of a license is the ability of the licensee to render the best practicable service to the community reached by his broadcasts. That such ability may be assured the Act contemplates inquiry by the Commission, *inter alia*, into an applicant's financial qualifications to operate the proposed station.

But the Act does not essay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy. In short, the broadcasting field is open to anyone, provided there be an available frequency over which he can broadcast without interference to others, if he shows his competency, the adequacy of his equipment, and financial ability to make good use of the assigned channel.

The policy of the Act is clear that no person is to have anything in the nature of a property right as a result of the granting of a license. Licenses are limited to a maximum of three years' duration, may be revoked, and need not be renewed. Thus the channels presently occupied remain free for a new assignment to another licensee in the interest of the listening public.

Plainly it is not the purpose of the Act to protect a licensee against competition but to protect the public. Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee who was not interfering electrically with other broadcasters to survive or succumb according to his ability to make his programs attractive to the public.

This is not to say that the question of competition between a proposed station and one operating under an existing license is to be entirely disregarded by the Commission, and, indeed, the Commission's practice shows that it does not disregard that question. It may have a vital and important bearing upon the ability of the applicant adequately to serve his public; it may indicate that both stations,—the existing and the proposed—will go under, with the result that a portion of the listening public will be left without adequate service; it may indicate that, by a division of the field, both stations will be compelled to render inadequate service. These matters, however, are distinct from the consideration that, if a license be granted, competition between the licensee and any other existing station may cause economic loss to the latter. If such economic loss were a valid reason for refusing a license

this would mean that the Commission's function is to grant a monopoly in the field of broadcasting a result which the Act itself expressly negatives, which Congress would not have contemplated without granting the Commission powers of control over the rates, programs, and other activities of the business of broadcasting.

We conclude that economic injury to an existing station is not a separate and independent element to be taken into consideration by the Commission in determining whether it shall grant or withhold a license.

Second. It does not follow that, because the licensee of a station cannot resist the grant of a license to another, on the ground that the resulting competition may work economic injury to him, he has no standing to appeal from an order of the Commission granting the application.

Section 402(b) of the Act, 47 U.S.C.A. § 402(b), provides for an appeal to the Court of Appeals of the District of Columbia (1) by an applicant for a license or permit, or (2) "by any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application."

The petitioner insists that as economic injury to the respondent was not a proper issue before the Commission it is impossible that § 402(b) was intended to give the respondent standing to appeal, since absence of right implies absence of remedy. This view would deprive subsection (2) of any substantial effect.

Congress had some purpose in enacting section 402(b) (2). It may have been of opinion that one likely to be financially injured by the issue of a license would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission in granting the license. It is within the power of Congress to confer such standing to prosecute an appeal.

We hold, therefore, that the respondent had the requisite standing to appeal and to raise, in the court below, any relevant question of law in respect of the order of the Commission. * * *

The judgment of the Court of Appeals is reversed.[d]

STARK v. WICKARD

Supreme Court of the United States.
321 U.S. 288, 64 S.Ct. 559, 88 L.Ed. 733 (1944).

Mr. Justice REED delivered the opinion of the Court.

This class action was instituted in the United States District Court for the District of Columbia, to procure an injunction prohibiting the respondent Secretary of Agriculture from carrying out certain provi-

[d] Footnotes of the court have been omitted.

sions of his Order No. 4, effective August 1, 1941, dealing with the marketing of milk in the Greater Boston, Massachusetts, area. See Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, 7 U.S.C. § 601 et seq., and Order 4, United States Department of Agriculture, Surplus Marketing Administration, Title 7, Code of Federal Regulations, Part 904. The district court dismissed the suit for failure to state a claim upon which relief can be granted, and its judgment was affirmed by the Court of Appeals for the District of Columbia, 136 F.2d 786. The respondent War Food Administrator was joined in this court upon a showing that he had been given powers concurrent with those of the Secretary. See Executive Order No. 9334, 50 U.S.C.A. Appendix, § 601 note, filed April 23, 1943, 8 F.R. 5423, 5425. We granted certiorari because of the importance of the question to the administration of this Act. 320 U.S. 723, 64 S.Ct. 58.

The petitioners are producers of milk, who assert that by §§ 904.7(b)(5) and 904.9 of his Order, the Secretary is unlawfully diverting funds that belong to them. The courts below dismissed the action on the ground that the Act vests no legal cause of action in milk producers, and since the decision below and the argument here were limited to that point, we shall confine our consideration to it.

The district court for the District of Columbia has a general equity jurisdiction authorizing it to hear the suit; but in order to recover, the petitioners must go further and show that the act of the Secretary amounts to an interference with some legal right of theirs. If so, the familiar principle that executive officers may be restrained from threatened wrongs in the ordinary courts in the absence of some exclusive alternative remedy will enable the petitioners to maintain their suit; but if the complaint does not rest upon a claim of which courts take cognizance, then it was properly dismissed. The petitioners place their reliance upon such rights as may be expressly or impliedly created by the Agricultural Marketing Agreement Act of 1937 and the Order issued thereunder.

Although this Court has previously reviewed the provisions of that statute at length and upheld its constitutionality, some further reference to it is necessary to an understanding of the producer's interest in the funds dealt with by the Order.[4]

[4] The following clauses of the Act are necessary to a consideration of this case:

"Sec. 2. It is hereby declared to be the policy of Congress—

"(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this title, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period; and, in the case of all commodities for which the base period is the prewar period, August 1909 to July 1914, will also reflect current interest payments per acre on farm indebtedness secured by real estate and tax payments per acre on farm real estate, as contrasted with such interest payments and tax payments during the

The immediate object of the Act is to fix minimum prices for the sale of milk by producers to handlers. It does not forbid sales at prices above the minimum. It contains an appropriate declaration of policy,

base period. The base period in the case of all agricultural commodities except tobacco and potatoes shall be the prewar period, August 1909-July 1914. In the case of tobacco and potatoes, the base period shall be the postwar period, August 1919-July 1929.

"(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under this title which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section."

"Sec. 8a(5) Any person willfully exceeding any quota or allotment fixed for him under this title by the Secretary of Agriculture, and any other person knowingly participating, or aiding, in the exceeding of said quota or allotment, shall forfeit to the United States a sum equal to three times the current market value of such excess, which forfeiture shall be recoverable in a civil suit brought in the name of the United States.

"(6) The several district courts of the United States are hereby vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating any order, regulation, or agreement, heretofore or hereafter made or issued pursuant to this title, in any proceeding now pending or hereafter brought in said courts.

"(7) Upon the request of the Secretary of Agriculture, it shall be the duty of the several district attorneys of the United States, in their respective districts, under the directions of the Attorney General, to institute proceedings to enforce the remedies and to collect the forfeitures provided for in, or pursuant to, this title. Whenever the Secretary, or such officer or employee of the Department of Agriculture as he may designate for the purpose, has reason to believe that any handler has violated, or is violating, the provisions of any order or amendment thereto issued pursuant to this title, the Secretary shall have power to institute an investigation and, after due notice to such handler, to conduct a hearing in order to determine the facts for the purpose of referring the matter to the Attorney General for appropriate action.

"(8) The remedies provided for in this section shall be in addition to, and not exclusive of, any of the remedies or penalties provided for elsewhere in this title or now or hereafter existing at law or in equity.

"(9) The term 'person' as used in this title includes an individual, partnership, corporation, association, and any other business unit."

"Sec. 8c(3) Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this title with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

"(4) After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this title with respect to such commodity.

"(5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7)) no others:

"(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the

and it provides that the Secretary of Agriculture shall hold a hearing when he has reason to believe that a marketing order would tend to effectuate the purposes of the Act. If he finds that an order would be

time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

"(B) Providing:

"(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: Provided, That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

"(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time.

"(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection (5), providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) hereof."

Among the provisions of subsection (7), referred to in Section 8c(5), is authorization for terms described as follows:

"Sec. 8c(7) (D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5), (6), and (7) and necessary to effectuate the other provisions of such order."

Sections 8c(8) and 8c(9) provide, with exceptions not here relevant that a marketing order must have the approval of the handlers of at least 50% of the volume of the commodity subject to the order unless the Secretary, with the approval of the President, determines that the proposed order is necessary to effectuate the declared policy of the Act and "is the only practical means of advancing the interests of the producers of such commodity pursuant to the declared policy * * *." Section 8c(9) (B). Whether the handlers agree or not, an order must be found to be "approved or favored" either by two-thirds of the producers in number or by volume of the commodity produced. Section 8c(19) authorizes the Secretary to hold a referendum to determine whether producers approve.

"Sec. 8c(13) (B) No order issued under this title shall be applicable to any producer in his capacity as a producer."

"Sec. 8c(14) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order (other than a provision calling for payment of a pro rata share

in accordance with the declared policy, he must then issue it. Sections 8c(5) and 8c(7) enumerate the provisions that the order may contain. Section 8c(5) (A) authorizes the Secretary to classify milk in accordance with the form or purpose of its use, and to fix minimum prices for each classification. These minima are the use value of the milk. This method of fixing prices was adopted because the economic value of milk depends upon the particular use made of it. It is apparent that serious inequities as among producers might arise if the prices each received depended upon the use the handler might happen to make of his milk; accordingly, Section 8c(5) (B) authorizes provision to be made for the payment to producers of a uniform price for the milk delivered irrespective of the use to which the milk is put by the individual handler. Section 8c(5) (C) authorizes the Secretary to set up the necessary machinery to accomplish these purposes.

By Order No. 4, the Secretary of Agriculture did fix minimum prices for each class of milk and required each handler in the Boston area to pay not less than those minima to producers, 7 C.F.R.1941 Supp., §

of expenses) shall, on conviction, be fined not less than $50 or more than $500 for each such violation, and each day during which such violation continues shall be deemed a separate violation: Provided, That if the court finds that a petition pursuant to subsection (15) of this section was filed and prosecuted by the defendant in good faith and not for delay, no penalty shall be imposed under this subsection for such violations as occurred between the date upon which the defendant's petition was filed with the Secretary, and the date upon which notice of the Secretary's ruling thereon was given to the defendant in accordance with regulations prescribed pursuant to subsection (15)."

"Sec. 8c(15) (A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

"(B) The District Courts of the United States (including the Supreme Court of the District of Columbia) in any district in which such handler is an inhabitant, or has his principal place of business, are hereby vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 8a(6) of this title. Any proceedings brought pursuant to section 8a (6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15)) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15)."

904.4, less specified deductions. §§ 904.7(b), 904.8. In addition, the order exercised the authority granted by the statute to require the use of a weighted average in reaching the uniform price to be paid producers, as described in the preceding paragraph. §§ 904.7, 904.8.

Under the Order, the handler does not make final settlement with the producer until the blended price [11] has been set, although he must make a part payment on or before the tenth of each month. § 904.8. But within eight days after the end of each calendar month—the so-called "delivery period", § 904.1(9)—the handler must report his sales and deliveries, classified by use value, § 904.5, to a "market administrator." § 904.1(8). On the basis of these reports, the administrator computes the blended price and announces it on the twelfth day following the end of the delivery period. § 904.7(b). On the twenty-fifth day, the handlers are required to pay the balance due of the blended price so fixed to the producers. § 904.8(b).

Were no administrative deductions necessary, the blended price per hundredweight of milk could readily be determined by dividing the total value of the milk used in the marketing area at the minimum prices for each classification by the number of hundredweight of raw milk used in the area. However, the Order requires several adjustments for purposes admittedly authorized by statute, so that the determination of the blended price as actually made is drawn from the total use value less a sum which the administrator is directed to retain to meet various incidental adjustments. In practice, each handler discharges his obligation to the producers of whom he bought milk by making two payments: one payment, the blended price, is apportioned from the values at the minimum price for the respective classes less administrative deductions and is made to the producer himself; the other payment is equal to these deductions and is made, in the language of the Order, "to the producer, through the market administrator," in order to enable the administrator to cover the differentials and deductions in question. It is the contention of the petitioners that by § 904.7 (b)(6) of the Order the Secretary has directed the administrator to deduct a sum for the purpose of meeting payments to cooperatives as required by § 904.9, and that the Act does not authorize the Secretary to include in his order provision for payments of that kind or for deductions to meet them. Apparently, this deduction for payments to cooperatives is the only deduction that is an unrecoverable charge against the producers. The other items deducted under § 904.7(b) are for a revolving fund or to meet differentials in price because of location, seasonal delivery, et cetera.

These producer petitioners allege that they have delivered milk to handlers in the "Greater Boston," Massachusetts, marketing area under the provisions of the Order. They state that they are not mem-

[11] "Blended price" means the uniform price less administrative deductions.

bers of a cooperative association entitled under the Order to the contested payments and that, as producers, many of them voted against the challenged amendment on the producers' referendum under §§ 8c(9) and 8c(19) of the Act. These allegations are admitted by the defense upon which dismissal was based, namely, that the petition fails to state a claim upon which relief could be granted. From the preceding summary of the theory and plan of the statutory regulation of minimum prices for milk affecting interstate commerce, it is clear that these petitioners have exercised the right granted them by the statute and Order to deliver their milk to "Greater Boston" handlers at the guaranteed minimum prices fixed by the Secretary of Agriculture in the Order. Sec. 904.4. Upon accepting that delivery the handler was required by the Order to pay to these producers their minimum prices in the manner set forth in § 904.8. Simply stated, this section required the handler to pay directly to the producer the blended price as determined by the administrator and to pay to the producers through the administrator for use in meeting the deductions authorized by the order of the Secretary and approved by two-thirds of the producers, § 8c(9)(B), the difference between the blended price and the minimum price. The Order directed the administrator to deduct from the funds coming into his hands from the producers' sale price the payments to cooperatives. § 904.9.

It is this deduction which the producers challenge as beyond the Secretary's statutory power. The respondents answer that the petitioners have not such a legal interest in this expenditure or in the administrator's settlement fund as entitles them to challenge the action of the Secretary in directing the disbursement. The Government says that as the producers pay nothing into the settlement fund and receive nothing from it, they have no legally protected right which gives them standing to sue. There is, of course, no question but that the challenged deduction reduces pro tanto the amount actually received by the producers for their milk.

By the statute and Order, the Secretary has required all area handlers dealing in the milk of other producers to pay minimum prices as just described. §§ 904.1(6), 904.4; Act, § 8c(14). The producer is not compelled by the Order to deliver (Act § 8c(13)(B) but neither can he be required to market elsewhere and if he finds a dealer in the area who will buy his product, the producer by delivery of milk comes within the scope of the Act and the Order. The Order fixing the minimum price obviously affects by direct Governmental action the producer's business relations with handlers. Columbia Broadcasting System v. United States, 316 U.S. 407, 422, 62 S.Ct. 1194, 1202, 86 L.Ed. 1563. Cf. Chicago Junction Case, 264 U.S. 258, 267, 44 S.Ct. 317, 320, 68 L.Ed. 667. The fact that the producer may sell to the handler for any price above the minimum is not of moment in determining whether or not the statute and Order secure to him a minimum price. Should the producer sell his milk to a handler at prices in excess of the mini-

mum, the handler would nevertheless be compelled to pay into the fund the same amount. The challenged deduction is a burden on every area sale. §§ 904.7(a), 904.8(b). In substance petitioners' allegation is that in effect the Order directed without statutory authority a deduction of a sum to pay the United States a sales tax on milk sold. The statute and Order create a right in the producer to avail himself of the protection of a minimum price afforded by Governmental action. Such a right created by statute is mandatory in character and obviously capable of judicial enforcement.[17] For example the Order could not bar any qualified producers in the milk shed from selling to area handlers. Like the instances just cited from railway labor cases, supra, n. 17, the petitioners here voluntarily bring themselves within the coverage of the Act. It cannot be fairly said that because producers may choose not to sell in the area, those who do choose to sell there necessarily must sell, without a right of challenge, in accordance with unlawful requirements of administrators. Upon purchase of his milk by a handler, the statute endows the producer with other rights, e. g., the right to be paid a minimum price. Order, § 904.4.

The mere fact that Governmental action under legislation creates an opportunity to receive a minimum price does not settle the problem of whether or not the particular claim made here is enforceable by the District Court. The deduction for cooperatives may have detrimental effect on the price to producers and that detriment be damnum absque injuria. It is only when a complainant possesses something more than a general interest in the proper execution of the laws that he is in a position to secure judicial intervention. His interest must rise to the dignity of an interest personal to him and not possessed by the people generally. Such a claim is of that character which constitutionally permits adjudication by courts under their general powers.

We deem it clear that on the allegations of the complaint these producers have such a personal claim as justifies judicial consideration. It is much more definite and personal than the right of complainants to judicial consideration of their objections to regulations, which this Court upheld in Columbia Broadcasting System v. United States, 316 U.S. 407, 62 S.Ct. 1194, 86 L.Ed. 1563. In the present case a reexamination of the preceding statement of facts and summary of the statute and Order will show that delivering producers are assured minimum prices for their milk. § 904.4. The Order directs the handler to pay that minimum as follows:

[17] Texas & N. O. R. Co. v. Brotherhood of R. & S. S. Clerks, 281 U.S. 548, 568, 50 S.Ct. 427, 433, 74 L.Ed. 1034; Virginian Ry. v. System Federation, 300 U.S. 515, 545, 57 S.Ct. 592, 598, 81 L. Ed. 789. General Committee v. M.-K.-T. R. Co., 320 U.S. 323, 64 S.Ct. 146, and Switchmen's Union v. National Mediation Board, 320 U.S. 297, 64 S.Ct. 95, do not look in the contrary direction. Both assume claims created by statute in the petitioners and deny a judicial remedy to those claims on the ground that "Congress * * * has foreclosed resort to the courts for enforcement of the claims asserted by the parties." 320 U.S. 300 and 327, 64 S.Ct. 96 and 148.

A. By § 904.8(a) the handler is to make a preliminary part payment of the blended price and later, § 904.8(b) (1) the handler makes the final payment to the producer of the blended price computed as the Order directs. It is clear that the Order compels the handler to pay not only the blended price, which is always less than the uniform minimum price, but the entire minimum price, because § 904.8(b) directs the handler's payment of the entire minimum value as ascertained by § 904.7(a) (1) and (2). The blended price is reached by subtracting among other items the cooperative payment, here in question, from the minimum price. § 904.7(b) (5).

B. The balance of the minimum price, which the handler owes to the producer, he must pay "to the producer, through the market administrator" by payment into the settlement or equalization fund two days ahead of the final date for payment of the blended price. § 904.8 (b) (3). This balance of the minimum purchase price is then partly used by the administrator to pay the cooperatives. § 904.9(b). The handler is simply a conduit from the administrator who receives and distributes the minimum prices. The situation would be substantially the same if an administrator received as trustee for the producers the purchase price of their milk, paid expenses incurred in the operation, and paid the balance to the producers. Under such circumstances we think the producers have legal standing to object to illegal provisions of the Order.

However, even where a complainant possesses a claim to executive action beneficial to him, created by federal statute, it does not necessarily follow that actions of administrative officials, deemed by the owner of the right to place unlawful restrictions upon his claim, are cognizable in appropriate federal courts of first instance. When the claims created are against the United States, no remedy through the courts need be provided. United States v. Babcock, 250 U.S. 328, 331, 39 S.Ct. 464, 465, 63 L.Ed. 1011, and cases cited; Work v. United States ex rel. Rives, 267 U.S. 175, 181, 45 S.Ct. 252, 254, 69 L.Ed. 561; Butte, A. & P. Ry. v. United States, 290 U.S. 127, 142, 143, 54 S.Ct. 108, 112, 78 L.Ed. 222. To reach the dignity of a legal right in the strict sense, it must appear from the nature and character of the legislation that Congress intended to create a statutory privilege protected by judicial remedies. Under the unusual circumstances of the historical development of the Railway Labor Act, 45 U.S.C.A. § 151, this Court has recently held that an administrative agency's determination of a controversy between unions of employees as to which is the proper bargaining representative of certain employees is not justiciable in federal courts. General Committee v. M.-K.-T. R. Co., 320 U.S. 323, 64 S.Ct. 146, 88 L.Ed. 76. Under the same Act it was held on the same date that the determination by the National Mediation Board of the participants in an election for representatives for collective bargaining likewise was not subject to judicial review. Switchmen's Union v. Mediation Board, 320 U.S. 297, 64 S.Ct. 95, 88 L.Ed. 61. This result was

reached because of this Court's view that jurisdictional disputes between unions were left by Congress to mediation rather than adjudication. 320 U.S. 302 and 337, 64 S.Ct. 97 and 152. That is to say, no personal right of employees, enforcible in the courts, was created in the particular instances under consideration. 320 U.S. 337, 64 S.Ct. 152. But where rights of collective bargaining, created by the same Railway Labor Act, contained definite prohibitions of conduct or were mandatory in form, this Court enforced the rights judicially. 320 U.S. 330, 331, 64 S.Ct. 149, 150. Cf. Texas & N. O. R. Co. v. Brotherhood of R. & S. S. Clerks, 281 U.S. 548, 50 S.Ct. 427, 74 L.Ed. 1034; Virginian Ry. v. System Federation, 300 U.S. 515, 57 S.Ct. 592, 81 L.Ed. 789.

It was pointed out in the Switchmen's case that:

"If the absence of jurisdiction of the federal courts meant a sacrifice or obliteration of a right which Congress had created, the inference would be strong that Congress intended the statutory provisions governing the general jurisdiction of those courts to control." 320 U. S. at page 300, 64 S.Ct. at page 97.

The only opportunity these petitioners had to complain of the contested deduction was to appear at hearings and to vote for or against the proposed order. Act, § 8c(3), 8c(9) and 8c(19); Order, preamble. So long as the provisions of the Order are within the statutory authority of the Secretary such hearings and balloting furnish adequate opportunity for protest. Morgan v. United States, 298 U.S. 468, 480, 56 S.Ct. 906, 911, 80 L.Ed. 1288. But where as here the issue is statutory power to make the deduction required by Order, § 904.9, under the authority of § 8c(7) (D) of the Act, a mere hearing or opportunity to vote cannot protect minority producers against unlawful exactions which might be voted upon them by majorities. It can hardly be said that opportunity to be heard on matters within the Secretary's discretion would foreclose an attack on the inclusion in the Order of provisions entirely outside of the Secretary's delegated powers.

Without considering whether or not Congress could create such a definite personal statutory right in an individual against a fund handled by a Federal agency, as we have here, and yet limit its enforceability to administrative determination, despite the existence of federal courts of general jurisdiction established under Article III of the Constitution, the Congressional grant of jurisdiction of this proceeding appears plain. There is no direct judicial review granted by this statute for these proceedings. The authority for a judicial examination of the validity of the Secretary's action is found in the existence of courts and the intent of Congress as deduced from the statutes and precedents as hereinafter considered.

The Act bears on its face the intent to submit many questions arising under its administration to judicial review. §§ 8a(6), 8c(15) (A) and (B). It specifically states that the remedies specifically provided in § 8a are to be in addition to any remedies now existing at law or

equity. § 8a(8). This Court has heretofore construed the Act to grant handlers judicial relief in addition to the statutory review specifically provided by § 8c(15). On complaint by the United States, the handler was permitted by way of defense to raise issues of a want of statutory authority to impose provisions on handlers which directly affect such handlers. United States v. Rock Royal Co-op., 307 U.S. 533, 560, 561, 59 S.Ct. 993, 1006, 1007, 83 L.Ed. 1446. In the Rock Royal case the Government had contended that the handlers had no legal standing in the suit for enforcement to attack provisions of the order relating to handlers. While we upheld the contention of the Government as to the lack of standing of handlers to object to the operation of the producer settlement fund on the ground that the handlers had no "financial interest" in that fund, we recognized the standing of a proprietary handler to question the alleged discrimination shown in favor of the co-operative handlers. The producer settlement fund is created to meet allowable deductions by the payment of a part of the minimum price to producers through the market administrator. See note 15, supra. Rock Royal pointed out that handlers were without standing to question the use of the fund, because handlers had no financial interest in the fund or its use. It is because every dollar of deduction comes from the producer that he may challenge the use of the fund. The petitioners' complaint is not that their blended price is too low, but that the blended price has been reduced by a misapplication of money deducted from the producers' minimum price.

With this recognition by Congress of the applicability of judicial review in this field, it is not to be lightly assumed that the silence of the statute bars from the courts an otherwise justiciable issue, United States v. Griffin, 303 U.S. 226, 238, 58 S.Ct. 601, 607, 82 L.Ed. 764; Shields v. Utah Idaho R. Co., 305 U.S. 177, 182, 59 S.Ct. 160, 163, 83 L.Ed. 111; cf. American Federation of Labor v. Labor Board, 308 U. S. 401, 404, 412, 60 S.Ct. 300, 301, 305, 84 L.Ed. 347. The ruling in Texas & Pac. Ry. v. Abilene Cotton Oil Co., 204 U.S. 426, 27 S.Ct. 350, 51 L.Ed. 553, 9 Ann.Cas. 1075, is not authority to the contrary. It was there held that the statute placed the power in the Interstate Commerce Commission to hear the complaint stated, not in the state court where it was brought. The Commission award was then to be enforced in court. Page 438 of 204 U.S., page 354 of 27 S.Ct., 51 L.Ed. 553, 9 Ann.Cas. 1075. Here, there is no forum, other than the ordinary courts, to hear this complaint. When, as we have previously concluded in this opinion, definite personal rights are created by federal statute, similar in kind to those customarily treated in courts of law, the silence of Congress as to judicial review is, at any rate in the absence of an administrative remedy, not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts in the exercise of their general jurisdiction. When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed

by the authority granted. This permits the courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect justiciable individual rights against administrative action fairly beyond the granted powers. The responsibility of determining the limits of statutory grants of authority in such instances is a judicial function entrusted to the courts by Congress by the statutes establishing courts and marking their jurisdiction. Cf. United States v. Morgan, 307 U.S. 183, 190, 191, 59 S.Ct. 795, 799, 83 L.Ed. 1211. This is very far from assuming that the courts are charged more than administrators or legislators with the protection of the rights of the people. Congress and the Executive supervise the acts of administrative agents. The powers of departments, boards and administrative agencies are subject to expansion, contraction or abolition at the will of the legislative and executive branches of the government. These branches have the resources and personnel to examine into the working of the various establishments to determine the necessary changes of function or management. But under Article III, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons or by the exertion of unauthorized administrative power.

It is suggested that such a ruling puts the agency at the mercy of objectors, since any provisions of the Order may be attacked as unauthorized by each producer. To this objection there are adequate answers. The terms of the Order are largely matters of administrative discretion as to which there is no justiciable right or are clearly authorized by a valid act. United States v. Rock Royal Co-op., 307 U.S. 533, 59 S.Ct. 993, 83 L.Ed. 1446. Technical details of the milk business are left to the Secretary and his aides. The expenses of litigation deter frivolous contentions. If numerous parallel cases are filed, the courts have ample authority to stay useless litigation until the determination of a test case. Cf. Landis v. North American Co., 299 U.S. 248, 57 S.Ct. 163, 81 L.Ed. 153. Should some provisions of an order be held to exceed the statutory power of the Secretary, it is well within the power of a court of equity to so mold a decree as to preserve in the public interest the operation of the portion of the order which is not attacked pending amendment.

It hardly need be added that we have not considered the soundness of the allegations made by the petitioners in their complaint. The trial court is free to consider whether the statutory authority given the Secretary is a valid answer to the petitioners' contention. We merely determine the petitioners have shown a right to a judicial examination of their complaint.

Reversed.*

* Footnotes of the court, except footnotes 4, 11 and 17, have been omitted.

Mr. Justice BLACK is of the view that the judgment should be affirmed for the reasons given in the opinion of the United States Court of Appeals for the District of Columbia.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

Mr. Justice FRANKFURTER, dissenting.

The immediate issue before us is whether these plaintiffs, milk producers, can in the circumstances of this case go to court to complain of an order by the Secretary of Agriculture fixing rates for the distribution of milk within the Greater Boston marketing area. The solution of that question depends, however, upon a proper approach toward such a scheme of legislation as that formulated by Congress in the Agricultural Marketing Agreement Act of 1937.

Apart from legislation touching the revenue, the public domain, national banks and patents, not until the Interstate Commerce Act of 1887, 49 U.S.C.A. § 1 et seq., did Congress begin to place economic enterprise under systems of administrative control. These regulatory schemes have varied in the range of control exercised by government; they have varied no less in the procedures by which the control was exercised. More particularly, these regimes of national authority over private enterprise reveal great diversity in the allotment of power by Congress as between courts and administrative agencies. Congress has not made uniform provisions in defining who may go to court, for what grievance, and under what circumstances, in seeking relief from administrative determinations. Quite the contrary. In the successive enactments by which Congress has established administrative agencies as major instruments of regulation, there is the greatest contrariety in the extent to which, and the procedures by which, different measures of control afford judicial review of administrative action.

Except in those rare instances, as in a claim of citizenship in deportation proceedings, when a judicial trial becomes a constitutional requirement because of "The difference of security of judicial over administrative action," Ng Fung Ho v. White, 259 U.S. 276, 285, 42 S.Ct. 492, 495, 66 L.Ed. 938, whether judicial review is available at all and, if so, who may invoke it, under what circumstances, in what manner, and to what end, are questions that depend for their answer upon the particular enactment under which judicial review is claimed. Recognition of the claim turns on the provisions dealing with judicial review in a particular statute and on the setting of such provisions in that statute as part of a scheme for accomplishing the purposes expressed by that statute. Apart from the text and texture of a particular law in relation to which judicial review is sought "judicial review" is a mischievous abstraction. There is no such thing as a common law of judicial review in the federal courts. The procedural provisions in more than a score of these regulatory measures prove that the manner in which Congress has distributed responsibility for the enforcement

of its laws between courts and administrative agencies runs a gamut all the way from authorizing a judicial trial de novo of a claim determined by the administrative agency to denying all judicial review and making administrative action definitive.

Congress has not only devised different schemes of enforcement for different Acts. It has from time to time modified and restricted the scope of review under the same Act. Compare § 16 of the Act to Regulate Commerce, February 4, 1887, c. 104, 24 Stat. 379, 384, 385, with § 13 of the Commerce Court Act, June 18, 1910, c. 309, 36 Stat. 539, 554, 555, and 49 U.S.C. § 16(12), 49 U.S.C.A. § 16(12), and the latter with enforcement of reparation orders, 49 U.S.C. § 16(2), 49 U.S.C.A. § 16(2). Moreover the same statute, as is true of the Interstate Commerce Act, may make some orders not judicially reviewable for any purpose, see e. g., United States v. Los Angeles R. R., 273 U.S. 299, 47 S.Ct. 413, 71 L.Ed. 651, or reviewable by some who are adversely affected and not by others, e. g., Singer & Sons v. Union Pacific Co., 311 U.S. 295, 305–308, 61 S.Ct. 254, 258–260, 85 L.Ed. 198. The oldest scheme of administrative control—our customs revenue legislation—shows in its evolution all sorts of permutations and combinations in using available administrative and judicial remedies. See, for instance, Elliott v. Swartwout, 10 Pet. 137, 9 L.Ed. 373; Cary v. Curtis, 3 How. 236, 11 L.Ed. 576; Den ex dem. Murray's Lessee et al. v. Hoboken Land & Improvement Co., 18 How. 272, 15 L.Ed. 372; Hilton v. Merritt, 110 U.S. 97, 38 S.Ct. 548, 28 L.Ed. 83; for a general survey, see Freund, Administrative Powers over Persons and Property, §§ 260-62. And only the other day we found the implications of the Railway Labor Act, c. 347, 44 Stat. (part 2) 577, as amended, c. 691, 48 Stat. 1185, 45 U.S.C. § 151 et seq., 45 U.S.C.A. § 151 et seq. to be such that courts could not even exercise the function of keeping the National Mediation Board within its statutory authority. Switchmen's Union v. National Mediation Board, 320 U.S. 297, 64 S.Ct. 95. Were this list of illustrations extended and the various regulatory schemes thrown into a hotchpot, the result would be hopeless discord. And to do so would be to treat these legislative schemes as though they were part of a single body of law instead of each being a self-contained scheme.

The divers roles played by judicial review in the administration of regulatory measures other than the Agricultural Marketing Act cannot tell us when and for whom judicial review of administrative action can be had under that Act. * * *

An elaborate enactment like this, devised by those who know the needs of the industry and drafted by legislative specialists, is to be treated as an organism. Every part must be related to the scheme as a whole. The legislation is a self-contained code, and within it must be found whatever remedies Congress saw fit to afford. For the Act did not give new remedies for old rights. It created new rights and new duties, and precisely defined the remedies for the enforcement of duties and the vindication of rights. Of course the statute concerns the

interests of producers, handlers and consumers. But it does not define or create any legal interest for the consumer, and it specifically provides that "No order issued under this title shall be applicable to any producer in his capacity as a producer." § 8c(13) (B).

The statute as an entirety makes it clear that obligations are imposed on handlers alone. * * *

To create a judicial remedy for producers when the statute gave none is to dislocate the Congressional scheme of enforcement. * * *

By denying them access to the courts Congress has not left producers to the mercy of the Secretary of Agriculture. Congress merely has devised means other than judicial for the effective expression of producers' interests in the terms of an order. Before the Secretary may issue an order he is required to "give due notice of and an opportunity for a hearing upon a proposed order." § 8c(3). At such a hearing all interested persons may submit relevant evidence, and the procedure makes adequate provision for notice to those who may be affected by an order. See Administrative Procedure and Practice in the Department of Agriculture under the Agricultural Marketing Agreement Act of 1937 (U.S. Department of Agriculture, 1939) p. 11 et seq. Nor are these the only or the most effective means for safeguarding the producer's interest. While an order may be issued despite the objection of handlers of more than 50% of the volume of the commodity covered by the order, no order may issue when not approved by at least two-thirds—either numerically or according to volume of production—of the producers. § 8c(9).

The fact that Congress made specific provision for submission of some defined questions to judicial review would hardly appear to be an argument for inferring that judicial review even of broader scope is also open as to other questions for which Congress did not provide judicial review. * * *

The Court is thus adding to what Congress has written a provision for judicial relief of producers. And it sanctions such relief in a case in which petitioners have no standing to sue on any theory. The only effect of the deduction which is challenged by the producers is to fix a minimum price to which they are entitled perhaps lower than that which might otherwise have been determined. But the Act does not prevent their bargaining for a price higher than the minimum, and we are advised by the Government of what is not denied by petitioners, that such arrangements are by no means unusual. This Court has held that a consumer has no standing to challenge a minimum price order like the one before us. City of Atlanta v. Ickes, 308 U.S. 517, 60 S. Ct. 170, 84 L.Ed. 440; cf. Sprunt & Son v. United States, 281 U.S. 249, 50 S.Ct. 315, 74 L.Ed. 832. Surely a producer who may bargain for prices above the minimum is in no better legal position than a consumer who urges that too high a minimum has been improperly fixed. The Commonwealth of Massachusetts which purchased milk for its public

institutions valued at $105,232.97 in 1940, and $117,584.50 in 1941, has hardly a less substantial interest in the minimum price than that of the petitioners. And yet Massachusetts has no standing to object to the minimum fixed by an order. * * *

* * * If handlers may not attack payments to cooperatives, as this Court held in United States v. Rock Royal Co-op., supra, 307 U.S. at page 561, 59 S.Ct. at page 1007, 83 L.Ed. 1446, with all deference I am unable to see how producers can be in a better position to attack such payments. This suit was rightly dismissed.[f]

ADMINISTRATIVE PROCEDURE ACT § 10(a)

5 U.S.C.Supp. § 1009(a).

Sec. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

[f] *Cf.* City of Atlanta v. Ickes, 308 U.S. 517, 60 S.Ct. 170, 84 L.Ed. 440 (1939) (Mem.), affirming, on the ground of lack of standing to sue, the judgment in City of Atlanta v. National Bituminous Coal Commission, 26 F.Supp. 606 (Dist.Ct., D.C.1939).

PART IV. METHODS BY WHICH JUDICIAL REVIEW MAY BE INVOKED

SECTION 1. METHODS OF REVIEW OF ADMINISTRATIVE ORDERS

A. Special Statutory Procedures

(1) Suit in a Special Three-Judge Court—The Pattern of the Urgent Deficiencies Act of October 22, 1913

EXCERPT FROM
THE URGENT DEFICIENCIES ACT OF OCTOBER 22, 1913 [a]

28 U.S.C. §§ 41(28), 46, 47.

Section 41. (Judicial Code, section 24, amended.) Original jurisdiction. The district courts shall have original jurisdiction as follows:

* * *

(28) *Setting aside order of Interstate Commerce Commission.* Twenty-eighth. Of cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.

§ 46. (Judicial Code, section 208.) Suits to enjoin orders of Interstate Commerce Commission to be against United States

Suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the district court against the United States. The pendency of such suit shall not of itself stay or suspend the operation of the order of the Interstate Commerce Commission; but the court, in its discretion, may restrain or suspend, in whole or in part, the operation of the commission's order pending the final hearing and determination of the suit.

§ 47. Interlocutory injunctions as to orders of Interstate Commerce Commission; appeal to Supreme Court. No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof,

[a] Act of October 22, 1913, c. 32, 38 Stat. 208, 219–21.

or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Interstate Commerce Commission, to the Attorney General of the United States, and to such other persons as may be defendants in the suit. In cases where irreparable damage would otherwise ensue to the petitioner, a majority of said three judges concurring, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension, in whole or in part, of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of said judges pending the application for the order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judges making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The said judges may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until decision upon the application. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply.[b]

Similar procedures for review are provided in the Packers and Stockyards Act, 1921, 42 Stat. 159, 168, 7 U.S.C. § 217 (see Morgan v. United States, 298 U.S. 468, 56 S.Ct. 906, 80 L.Ed. 1288 (1936); Id., 304 U.S. 1, 58 S.Ct. 773, 82 L.Ed. 1129 (1938); United States v. Morgan, 313 U.S. 409, 61 S.Ct. 999, 85 L.Ed. 1429 (1941); all *supra* at

[b] See also 28 U.S.C.Supp. §§ 44, 45, 45a, 47a.

Cf. the procedure provided for suits to enjoin the enforcement of state or federal statutes on the ground of unconstitutionality. 28 U.S.C. § 380 (section 266 of the Judicial Code as amended); 28 U.S.C.Supp. §§ 380a, 349a (Act of August 24, 1937, c. 754, §§ 3, 2, 50 Stat. 752).

pp. 460ff.; the Communications Act of 1934, 48 Stat. 1064, 1093, 47 U.S.C. § 402(a) (see Rochester Telephone Corporation v. United States, 307 U.S. 125, 59 S.Ct. 754, 83 L.Ed. 1147 (1939), *supra* at p. 704); and the Merchant Marine Act, 1936, 49 Stat. 1985, 1987, 46 U.S.C. § 830, *cf.* 46 U.S.C. § 1114 (see United States v. American Union Transport, 327 U.S. 437, 66 S.Ct. 644, 90 L.Ed. —— (1946), *supra* at p. 107).

UNITED STATES v. GRIFFIN

Supreme Court of the United States.
303 U.S. 226, 58 S.Ct. 601, 82 L.Ed. 764 (1938).

Mr. Justice BRANDEIS delivered the opinion of the Court.

The sole question requiring decision in one of statutory construction: The Railway Mail Pay Act of July 28, 1916, c. 261, § 5, 39 Stat. 412, 425–430, 39 U.S.C.A. § 551, provides that the Interstate Commerce Commission "shall establish by order a fair, reasonable rate or compensation to be received" by railroads for carrying the mail;[1] and authorizes the Commission to modify the order upon a "re-examination." The Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219, 220, 28 U.S.C.A. § 41 (28) (amending Act of June 18, 1910, c. 309, 36 Stat. 539) declares that district courts shall have jurisdiction "of cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission." May suit be brought under the Urgent Deficiencies Act to set aside an order refusing, upon "re-examination," to increase the allowance for railway mail compensation theretofore made to this carrier?

The suit was brought, under the Urgent Deficiencies Act, in the federal court for Southern Georgia, by the receivers of the Georgia & Florida Railroad against the United States and the Interstate Commerce Commission, to set aside an order made May 10, 1933, under the Railway Mail Pay Act, Railway Mail Pay, Georgia & Florida R. R., 192 I.C.C. 779; and to grant a permanent injunction. By that order the Commission had denied upon a "re-examination" an application further to increase the compensation allowed by the order of July 10, 1928. Railway Mail Pay, 144 I.C.C. 675. The 1928 order had, upon a "re-examination," increased the compensation originally fixed by order of December 23, 1919. Railway-Mail Pay, 56 I.C.C. 1. As grounds

1 "The Postmaster General is authorized and directed to adjust the compensation to be paid to railroad companies for the transportation and handling of the mails and furnishing facilities and services in connection therewith upon the conditions and the rates hereinafter provided." 39 U.S.C. § 524, 39 U.S.C.A. § 524.

"All railway common carriers are hereby required to transport such mail matter as may be offered for transportation by the United States in the manner, under the conditions, and with the service prescribed by the Postmaster General and shall be entitled to receive fair and reasonable compensation for such transportation and for the service connected therewith." 39 U.S.C. § 541, 39 U.S.C.A § 541.

for setting aside the order of May 10, 1933, the receivers alleged, among other things, that the order was unlawful, because the finding that the existing rates were fair and reasonable was without evidence to support it and contrary to the evidence and that the order will violate the Fifth Amendment by taking property without just compensation.

The jurisdiction of the court was not challenged; and the case was heard by three judges on the merits. A decree was rendered setting aside as unlawful the order of May 10, 1933, and directing the Commission to take further action. Additional hearings were then had by the Commission; and on February 4, 1936, it again declined to order any increase over that which had been allowed July 10, 1928. Railway Mail Pay, Georgia & Florida R. R., 214 I.C.C. 66. The last order of the Commission was assailed by a supplemental bill on the same grounds as that assailed in the original bill. The jurisdiction of the court was not challenged; the case was again heard on the merits by three judges; and a decree was entered setting aside the order of February 4, 1936, and directing the Commission to take "such further action in the premises as the law requires in view of the annulment and setting aside of" the order.

From that decree the United States and the Interstate Commerce Commission have appealed to this Court. Here, although answering to the merits, they challenged the jurisdiction of the District Court. Since lack of jurisdiction of a federal court touching the subject matter of the litigation cannot be waived by the parties, we must upon this appeal examine the contention; and, if we conclude that the District Court lacked jurisdiction of the cause, direct that the bill be dismissed. United States v. Corrick, 298 U.S. 435, 440, 56 S.Ct. 829, 831, 80 L.Ed. 1263. We at first thought that the District Court had jurisdiction, and ordered a reargument of the case on the merits. But, upon further consideration of the jurisdictional question, we are of opinion that the remedy provided by the Urgent Deficiencies Act is not applicable to this order.

First. The Railway Mail Pay Act, terminated the system theretofore prevailing of service under voluntary contracts. As embodied in United States Code, title 39, §§ 523 to 568, 39 U.S.C.A. §§ 523–568, it provides in forty-six sections comprehensively for the character, means and methods of mail transportation; defines the authority of the Postmaster General; and describes the obligations of the railroads and their right to compensation, which is to be fixed by the Commission.

"The Interstate Commerce Commission is hereby empowered and directed to fix and determine from time to time the fair and reasonable rates and compensation for the transportation of such mail matter by railway common carriers and the service connected therewith, prescribing the method or methods by weight, or space, or both, or otherwise, for ascertaining such rate or compensation, and to publish the same, and orders so made and published shall continue in force until

changed by the commission after due notice and hearing." 39 U.S.C. § 542, 39 U.S.C.A. § 542.

"For the purpose of determining and fixing rates or compensation hereunder the commission is authorized to make such classification of carriers as may be just and reasonable and, where just and equitable, fix general rates applicable to all carriers in the same classification." 39 U.S.C. § 549, 39 U.S.C.A. § 549.

"At the conclusion of the hearing the commission shall establish by order a fair, reasonable rate or compensation to be received, at such stated times as may be named in the order, for the transportation of mail matter and the service connected therewith, and during the continuance of the order the Postmaster General shall pay the carrier from the appropriation for inland transportation by railroad routes such rate or compensation." 39 U.S.C. § 551, 39 U.S.C.A. § 551.

Eleven sections of the act deal with the procedure on hearings before the Commission.[3] No provision is made for a judicial review. But provision is made for administrative review by "re-examination" of an order.

"Either the Postmaster General or any such carrier may at any time after the lapse of six months from the entry of the order assailed apply for a re-examination and thereupon substantially similar proceedings shall be had with respect to the rate or rates for service covered by said application, provided said carrier or carriers have an interest therein." 39 U.S.C. § 553, 39 U.S.C.A. § 553.

There have been many administrative reviews by "re-examination." The case at bar appears to be the only instance in which an attempt has been made to set aside a mail order by suit under the Urgent Deficiencies Act.

Second. The Urgent Deficiencies Act provides a method of judicial review of orders of the Interstate Commerce Commission possessing the following extraordinary features: (1) The original hearing in the district court is not before a single judge, but before three, of whom one must be a circuit judge; (2) from the decree of the district court as so constituted a direct appeal to the Supreme Court is granted as of right, instead of a review by a circuit court of appeals; (3) upon both the trial court and the Supreme Court rests the obligation to give the case precedence over others. These features were first introduced by the Expediting Act of 1903, 32 Stat. 823, 15 U.S.C.A. §§ 28, 29 and notes for suits by the United States to enforce the antitrust and commerce laws. They were extended by the Hepburn Act of 1906, § 5, 34

[3] Section 544, 39 U.S.C.A. provides: "The procedure for the ascertainment of said rates and compensation shall be as provided in sections 545 to 554 of this title;" and section 554, 39 U.S.C.A. provides: "For the purposes of sections 524 to 568 of this title the Interstate Commerce Commission is hereby vested with all the powers which it is authorized by law to exercise in the investigation and ascertainment of the justness and reasonableness of freight, passenger, and express rates to be paid by private shippers."

Stat. 584, 590, 592, 49 U.S.C.A. § 16 and note, to suits to enforce or to set aside orders of the Interstate Commerce Commission. When that jurisdiction was vested in the Commerce Court provisions with like effect were provided for cases coming before it. 36 Stat. 539. To its jurisdiction the district court succeeded, with these features, under the Urgent Deficiencies Act.

In the opinion of Congress jurisdiction with the extraordinary features of the Urgent Deficiencies Act was justified by the character of the cases to which it applied—cases of public importance because of the widespread effect of the decisions thereof. In such cases Congress sought to guard against ill-considered action by a single judge and to avert the delays ordinarily incident to litigation. In construing the Act, this Court concluded that despite the broad language used in the Commerce Court Act, Congress could not have intended to include in this special jurisdiction suits to set aside every kind of order issued by the Commission. For substantially every decision, and every other kind of action by the Commission is expressed in, or is followed by, an order; and many of the orders are obviously not of such public importance and widespread effect as to justify, in cases affecting them, the extraordinary features of the Urgent Deficiencies Act.

The Commerce Court had (36 Stat. 539) jurisdiction "over all cases of the following kinds:

"First. All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money.

"Second. Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission."

This Court concluded that, as the intent of Congress was "to relieve parties in whole or in part from the duty of obedience to orders which are found to be illegal," there was jurisdiction to set aside only those kinds of orders which there was jurisdiction to enforce; that a distinction must be drawn between "affirmative" and "negative" orders; and that jurisdiction under the Commerce Court Act was applicable only to "affirmative" orders. Procter & Gamble Co. v. United States, 225 U.S. 282, 32 S.Ct. 761, 56 L.Ed. 1091; Hooker v. Knapp, 225 U.S. 302, 32 S.Ct. 769, 56 L.Ed. 1099. Since the abolition of the Commerce Court, that rule has been consistently followed in cases brought under the Urgent Deficiencies Act. Lehigh Valley R. Co. v. United States, 243 U.S. 412, 37 S.Ct. 397, 61 L.Ed. 819; Piedmont & Northern Ry. v. United States, 280 U.S. 469, 50 S.Ct. 192, 74 L.Ed. 551; Standard Oil Co. v. United States, 283 U.S. 235, 51 S.Ct. 429, 75 L.Ed. 999; United States v. Corrick, 298 U.S. 435, 56 S.Ct. 829, 80 L.Ed. 1263. Compare Delaware & Hudson Co. v. United States, 266 U.S. 438, 45 S.Ct. 153, 69 L.Ed. 369; United States v. Los Angeles & Salt Lake R. Co., 273 U.S. 299, 47 S.Ct. 413, 71 L.Ed. 651.

The order of February 4, 1936, here assailed, does not command either the Government or the Railroad to do anything. It is simply a refusal, upon a second "re-examination" of the order of July 11, 1928, further to increase the compensation thereby awarded upon a "re-examination" of the compensation originally awarded by the order made December 23, 1919. The order assailed, being a refusal to change the existing status, was a "negative" order. The District Court lacked jurisdiction to set it aside, and should have dismissed the bill.

Third. Congress cannot be assumed to have made the extraordinary remedy of the Urgent Deficiencies Act applicable for the determination of the validity of railway mail pay orders, even if "affirmative." The issue here is whether the existing mail revenue of $35,728 should be increased for the year by $31,227. There is no wide public interest in its speedy determination. There is no danger of temporarily interrupting the mail service through the improvident issue of an injunction by a single judge. Only the method or amount of payments currently to be made would be affected. Such orders are in character unlike those under the Boiler Inspection Act, 36 Stat. 913, as amended, 38 Stat. 1192, 43 Stat. 659, 45 U.S.C.A. § 22 et seq. and the Inland Waterways Corporation Act, 43 Stat. 361, as amended, 45 Stat. 978, 48 Stat. 968, 49 U.S.C.A. § 153, of which jurisdiction was taken although the statutes contained no provision for judicial review.

In Great Northern Ry. Co. v. United States, 277 U.S. 172, 48 S.Ct. 466, 72 L.Ed. 838, we held that there was not jurisdiction under the Urgent Deficiencies Act of a suit to set aside an order of the Interstate Commerce Commission made under title 2 of the Transportation Act of 1920, 41 Stat. 457, determining the amount due a railroad on the Government's guaranty of income for the period following relinquishment of federal control. And in United States v. Los Angeles & Salt Lake R. Co., 273 U.S. 299, 47 S.Ct. 413, 71 L.Ed. 651, we held that there was not jurisdiction under the Urgent Deficiencies Act, 28 U.S.C.A. § 43–48, 214, of a suit to set aside a final order under the Valuation Act, even though that statute was enacted as an amendment to the Interstate Commerce Act itself. 37 Stat. 701, as amended, 41 Stat. 456, 474, 493, 42 Stat. 624, 49 U.S.C.A. § 1 et seq.

In recent years the field of administrative determination has been widely extended; and the duty of making many of these determinations has been imposed upon the Interstate Commerce Commission. Some of the statutes contain specific provision making applicable jurisdiction under the Urgent Deficiencies Act. This is true of the Emergency Railroad Transportation Act of 1933, 48 Stat. 211, 216, as amended, 49 Stat. 376, 49 U.S.C.A. §§ 264a, 267a, and of the Motor Carrier Act of 1935, 49 Stat. 543, 550, 49 U.S.C.A. § 305(h). Compare Transportation of Explosives Act (Criminal Code, § 233), 35 Stat. 554, 555, as amended, 35 Stat. 1088, 1135, 41 Stat. 1445, 18 U.S.C.A. § 383. It is true likewise of several statutes under which the

determinations are to be made by other administrative tribunals. Shipping Act of 1916, 39 Stat. 728, 738, superseded by 49 Stat. 1985, 46 U.S.C.A. § 1101 et seq. (United States Shipping Board); Packers & Stockyards Act of 1921, 42 Stat. 159, 168, 7 U.S.C.A. § 221 et seq. (Secretary of Agriculture); Perishable Agricultural Commodities Act of 1930, 46 Stat. 531, 535, 46 U.S.C.A. § 499g et seq. (Secretary of Agriculture); Emergency Railroad Transportation Act of 1933, supra (Federal Coordinator of Transportation); Communications Act of 1934, 48 Stat. 1064, 1093, as amended, 50 Stat. 189, 47 U.S.C.A. § 151 (Federal Communications Commission.)[8] The orders for which review is provided by each of these statutes are like the orders under the Interstate Commerce Act fixing rates payable by shippers. Improper injunctive relief of such orders or delay in final determination of their validity may seriously affect the public interest by preventing or obstructing action under those statues.

While the compensation fixed in a railway mail pay order is ordinarily measured by a rate, the ultimate question determined by the Commission is, as in the Great Northern Case, the proper compensation to be paid by the Government to the railroad for services and the use of its property—the quantum meruit for carrying the mail. There is nothing in the history of the Railway Mail Pay Act which requires that the Urgent Deficiencies Act be made applicable to the determination of the validity of such orders.

Fourth. The absence in the Railway Mail Pay Act of a provision for judicial review and the denial of jurisdiction under the Urgent Deficiencies Act do not preclude every character of judicial review. If the Commission makes the appropriate finding of reasonable compensation but fails, because of an alleged error of law, to order payment of the full amount which the railroad believes is payable under the finding, the Court of Claims has jurisdiction of an action for the balance, as the claim asserted is one founded upon a law of Congress. Missouri Pacific R. Co. v. United States, 271 U.S. 603, 46 S.Ct. 598, 70 L.Ed. 1109. Compare United States v. New York Central R. Co., 279 U.S. 73, 49 S.Ct. 260, 73 L.Ed. 619, affirming 65 Ct.Cl. 115, 121. And since railway mail service is compulsory, the Court of Claims would, under the general provisions of the Tucker Act, 24 Stat. 505, have jurisdiction also of an action for additional compensation if an order is confiscatory. United States v. Great Falls Mfg. Co., 112 U.S. 645, 5 S.Ct. 306, 28 L.Ed. 846; North American Transportation & Trading Co. v. United States, 253 U.S. 330, 333, 40 S.Ct. 518, 64 L.Ed. 935; Jacobs v. United States, 290 U.S. 13, 16, 54 S.Ct. 26, 78 L.Ed. 142, 96 A.L.R. 1. Moreover, as district courts have jurisdiction of

[8] Compare Merchant Marine Act of 1936, 49 Stat. 1985, 1987, 46 U.S.C.A. § 1114 (United States Maritime Commission). A similar procedure has also been provided for certain suits to enjoin the enforcement or operation of state and federal statutes on the ground that they are unconstitutional. Judicial Code, § 266, 36 Stat. 557, 1162, as amended, 37 Stat. 1013, 43 Stat. 938, 28 U.S.C.A. § 380; Judiciary Act of 1937, 50 Stat. 751, 752, 28 U.S.C.A. §§ 349a, 380a.

every suit at law or in equity "arising under the postal laws," 28 U.S.C. § 41(6), 28 U.S.C.A. § 41(6) suit would lie under their general jurisdiction if the Commission is alleged to have acted in excess of its authority, or otherwise illegally. Compare Powell v. United States, 300 U.S. 276, 288, 289, 57 S.Ct. 470, 81 L.Ed. 643. But a suit under the Urgent Deficiencies Act to set aside an order concerning mail pay is not primarily one against the Commission. Primarily, it is a suit against the United States. And the United States can be sued only when authority so to do has been specifically conferred. The Railway Mail Pay Act does not confer that authority.

Decree reversed, with direction to the District Court to dismiss the bill without costs to either party.[e]

SHANNAHAN v. UNITED STATES

Supreme Court of the United States.
303 U.S. 596, 58 S.Ct. 732, 82 L.Ed. 1039 (1938).

Mr. Justice BRANDEIS delivered the opinion of the court.

The sole question for decision is whether the District Court had jurisdiction of this controversy under the Urgent Deficiencies Act of October 22, 1913.

The Chicago South Shore & South Bend Railroad is an interstate electric railway subject to the Interstate Commerce Act, 49 U.S.C.A. § 1 et seq. On August 9, 1934, the National Mediation Board requested the Commission to determine whether that carrier fell within the exemption from the scope of the Railway Labor Act, as amended June 21, 1934, 48 Stat. 1185, c. 691, § 1, 45 U.S.C. § 151, 45 U.S.C.A. § 151. That act confers upon the National Mediation Board certain duties in respect to carriers by railroad subject to the Interstate Commerce Act, with the following exception: "Provided, however, That the term 'carrier' shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Mediation Board, or upon complaint of any party interested to determine after hearing whether any line operated by electric power falls within the terms of this proviso."

[e] Footnotes of the court, except footnotes 1, 3 and 8, have been omitted.

For examples of cases in which orders of the Interstate Commerce Commission were reviewed by a statutory three-judge court under the Urgent Deficiencies Act, see The New England Divisions Case, *supra* at p. 383; United States and Interstate Commerce Commission v. Abilene and Southern Ry. Co., *supra* at p. 508; The Chicago Junction Case, *supra* at p. 696.

After due hearing had, at which the South Shore introduced evidence and filed its brief, the matter was argued orally before the Commission, which, on February 14, 1936, made its report and the following determination (Chicago South Shore & South Bend Railroad, 214 I.C.C. 167, 173): "We find that the line of the Chicago South Shore and South Bend Railroad is not a street, interurban, or suburban electric railway within the meaning of the exemption proviso in the first paragraph of section 1 of the Railway Labor Act, as amended June 21, 1934, and it is therefore subject to the provisions of that act."

No order was entered thereon by the Commission.

Shannahan and Jackson, who had been appointed trustees of the South Shore by the federal court of Northern Indiana, and had filed their appearance in the proceeding, applied for a rehearing. An order was entered denying the same. Thereupon, the trustees filed this suit against the United States, invoking the jurisdiction of the court under the Urgent Deficiencies Act of October 22, 1913, to set aside the alleged order. They do not deny that the South Shore is an interstate carrier subject to the jurisdiction of the Commission; and that the act is constitutional. Their contention is that: "A correct application of the law to the undisputed facts leads to the conclusion that the lines of the railroad of appellants are an electric interurban railway under the exemption proviso of the first division of Section 1 of the Railway Labor Act and that there is no substantial evidence to support the conclusion and determination of the Commission."

The Commission intervened. Its answer, and that of the United States, challenged the jurisdiction of the court on the ground that the determination of the Commission was not an "order" within the meaning of the Urgent Deficiencies Act. The case was heard before three judges on the pleadings and evidence; and a decree was entered dismissing the bill for want of jurisdiction, one judge dissenting. D.C., 20 F.Supp. 1002. The Trustees appealed.

First. The function of the Commission is limited to the determination of a fact. Its decision is not even in form an order. It "had no characteristic of an order, affirmative or negative." United States v. Illinois Cent. R. Co., 244 U.S. 82, 89, 37 S.Ct. 584, 587, 61 L.Ed. 1007; United States v. Atlanta, B. & C. R. Co., 282 U.S. 522, 527, 528, 51 S.Ct. 237, 238, 239, 75 L.Ed. 513. Compare Lehigh Valley R. Co. v. United States, 243 U.S. 412, 414, 37 S.Ct. 397, 61 L.Ed. 819. But even if this difficulty is overlooked, others are insuperable. The decision neither commands nor directs anything to be done. "It was merely preparation for possible action in some proceeding which may be instituted in the future." United States v. Los Angeles & S. L. R. Co., 273 U.S. 299, 310, 47 S.Ct. 413, 414, 71 L.Ed. 651. The determination is thus not enforceable by the Commission; the only action which could ever be taken on it would be by some other body. It is as clearly "negative" as orders by which the Commission re-

fuses to take requested action. United States v. Griffin, 303 U.S. 226, 58 S.Ct. 601, 82 L.Ed. 764. As such, it is not reviewable under the Urgent Deficiencies Act.

Second. Moreover, the determination of the Commission is not even a decision which the Mediation Board, by whom it was sought, is empowered to enforce. The act confers upon the Board no power over any carrier. It merely imposes upon the Board possible duties in respect to interstate carriers by railroad not exempted by the proviso. The Board's duties, in case of dispute between carrier and employees, require it:

(1) To "promptly put itself in communication with the parties to [the] controversy, and * * * use its best efforts, by mediation, to bring them to agreement." Section 5, subd. 1, as amended, 45 U.S.C.A. § 155, subd. 1. When a dispute is settled through these efforts a mediation agreement is signed, and should any question arise subsequently regarding the meaning or application of such an agreement, the Board is required upon request of either party "and after a hearing of both sides [to] give its interpretation within thirty days." Section 5, subd. 2, as amended, 45 U.S.C.A. § 155, subd. 2.

(2) If the mediating efforts prove unsuccessful, it is the Board's duty to "at once endeavor as its final required action * * * to induce the parties to submit their controversy to arbitration, in accordance with the provisions of" the act. Section 5, subd. 1, as amended, 45 U.S.C.A. § 155, subd. 1. If arbitration is agreed upon it may become the Board's duty to name a third arbitrator if the two named by the parties fail to select him.

(3) If arbitration is refused and the dispute threatens "substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service," then the Board is required to notify the President. Section 10, as amended, 45 U.S.C.A. § 160.

(4) If, in selecting representatives to deal with the carriers, disputes arise among employees as to what organization they desire to represent them, it is the duty of the Board, on request of either party, to investigate and to certify in writing to the parties and to the carrier the names of the individuals or organizations that have been designated and authorized to represent the employees.

(5) If the National Railroad Adjustment Board undertakes arbitration, and it fails to select a referee, the Mediation Board has the duty of doing so.

In order not to fail in the performance of these duties the Mediation Board had to satisfy itself whether the South Shore was a railroad within the exemption proviso. To that end, it applied to the Commission for its determination. If it had omitted to do so, the application might have been made "upon complaint of any party interested." The determination, whether applied for by the Board, by a

carrier, or by employees, is clearly not an order enforceable within the meaning of the cases construing and applying the Urgent Deficiencies Act. It is a decision on a controverted matter, comparable to that considered in United States v. Los Angeles & Salt Lake R. R. Co., 273 U.S. 299, 47 S.Ct. 413, 71 L.Ed. 651, in Great Northern Ry. Co. v. United States, 277 U.S. 172, 48 S.Ct. 466, 72 L.Ed. 838, in United States v. Atlanta B. & C. Ry. Co., 282 U.S. 522, 51 S.Ct. 237, 75 L.Ed. 513, and in United States v. Griffin, 303 U.S. 226, 58 S.Ct. 601, 82 L. Ed. 764, which were held not to be subject to review under the Urgent Deficiencies Act.

Third. The trustees argue that the determination of the Commission is an affirmative "order, because it fixed for the first time, by the only body authorized by law to do so, the status of the carrier"; that by fixing the status, the obligations of the Railway Labor Act are fixed upon the carrier; and that willful failure or refusal of any carrier to comply with certain of the obligations is made a misdemeanor.

Lehigh Valley R. R. Co. v. United States, supra, shows that the determination of a status or similar matter is not action subject to review under the Urgent Deficiencies Act even if disregard of the determination may subject the carrier to criminal prosecution. The Panama Canal Act, 37 Stat. 560, 566, § 11, as amended, 49 U.S.C.A. § 5(10–12), prohibited, after July 1, 1914, any ownership by a railroad in any common carrier by water where the railroad might compete with the water carrier; prescribed a heavy penalty for any violation of the prohibition; and conferred upon the Commission jurisdiction: "to determine questions of fact as to the competition or possibility of competition, after full hearing, on the application of any railroad company or other carrier. Such application may be filed for the purpose of determining whether any existing service is in violation * * * of this section and pray for an order permitting the continuance of any vessel or vessels already in operation."

Thereupon in January, 1914, the Lehigh Valley filed with the Commission a petition for a hearing on the question whether the services of a steamboat line owned by it would be in violation of the above section and for an extension of time. The Commission held that, by virtue of the arrangements found to exist, the railroad did or might compete with its boat line; and dismissed the petition. This Court held that the risk to which the railroad was left subject did not come from the order, but from the statute which contained the prohibition and provided a penalty; that, therefore, it was not an affirmative order; and that the District Court was without jurisdiction under the Urgent Deficiencies Act. Compare also Piedmont & No. R. Co. v. United States, 280 U.S. 469, 476. 477, 50 S.Ct. 192, 193, 74 L.Ed. 551.

Fourth. Whether the determination of the Commission is reviewable in a district court by some judicial procedure other than that of the Urgent Deficiencies Act we have no occasion to consider. Com-

pare United States v. Griffin, supra, and Lehigh Valley R. Co. v. United States, supra.[5]

Affirmed.

Mr. Justice CARDOZO took no part in the consideration or decision of this case.[d]

(2) Review by Circuit Courts of Appeals—Pattern of the Federal Trade Commission Act

FEDERAL TRADE COMMISSION ACT § 5(c)

15 U.S.C. § 45(c).

Sec. 5. * * * (c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the circuit court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days[1] from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith served upon the Commission, and thereupon the Commission forthwith shall certify and file

[5] In Utah-Idaho Cent. Ry. v. Shields (unreported), D.Utah, Oct. 15, 1936, and in Hudson & Manhattan Ry. Co. v. Hardy, D.C., S.D.N.Y., Feb. 21, 1938, 22 F.Supp. 105 (where jurisdiction under the Urgent Deficiencies Act was specifically denied), the electric railways involved were declared in proceedings before single judges to be within the proviso excluding them from the application of the act, and final injunctions against prosecution for penalties were granted, although the Interstate Commerce Commission, in Utah-Idaho Central Railroad Co., 214 I.C.C. 707 and Hudson & Manhattan R. Co., 216 I.C.C. 745, respectively, had reached the opposite conclusion. In Texas Electric Ry. v. Eastus (unreported), N.D.Tex., June 4, 1936, a preliminary injunction was likewise granted in spite of the Commission's decision in Texas Electric Ry., 208 I.C.C. 193. From informal sources it has been learned that similar proceedings have been instituted in other cases. Chicago Warehouse & Term. Co. v. Igoe, N.D.Ill. [No opinion for publication], and Chicago Tunnel Co. v. Igoe, N.D.Ill. [No opinion for publication], to review 214 I.C.C. 81; Hudson & Manhattan Ry. v. Quinn, D.N.J. [No opinion for publication], to review 216 I.C.C. 745; New York, W. & B. R. R. Co. v. Hardy, S.D.N.Y. [No opinion for publication], to review 218 I.C.C. 253.

[d] Footnotes of the court, except footnote 5, have been omitted.

Cf. Shields v. Utah-Idaho Central Railroad Co., 305 U.S. 177, 59 S.Ct. 160, 83 L.Ed. 111 (1938), *infra* at p. 1005.

[1] Section 5 (a) of the amending Act of 1938 provides:

Sec. 5. (a) In case of an order by the Federal Trade Commission to cease and desist, served on or before the date of the enactment of this Act, the sixty-day period referred to in section 5 (c) of the Federal Trade Commission Act, as amended by this Act, shall begin on the date of the enactment of this Act.

in the court a transcript of the entire record in the proceeding, including all the evidence taken and the report and order of the Commission. Upon such filing of the petition and transcript the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, evidence, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed, and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 240 of the Judicial Code.

Similar procedures for review are provided by the Securities Act of 1933, § 9(a), 15 U.S.C. § 77i(a), *supra* at p. 771; the Securities Exchange Act of 1934, § 25, 15 U.S.C. 78y; the Public Utilities Holding Company Act of 1935, § 24, 15 U.S.C. 79x; the National Labor Relations Act, § 10(f), 29 U.S.C. § 160(f); the Federal Power Act, § 313, 16 U.S.C. § 825*l*; the Civil Aeronautics Act of 1938, § 1006, 49 U.S.C. Supp. § 646. See, for example, Federal Trade Commission v. Algoma Lumber Company, 291 U.S. 67, 54 S.Ct. 315, 78 L.Ed. 655 (1934), *supra* at p. 758; Morgan, Stanley & Co. v. Securities and Exchange Commission, 126 F.2d 325 (C.C.A. 2nd, 1942), *supra* at p. 828; National Labor Relations Board v. Fansteel Metallurgical Corporation, 306 U.S. 240, 59 S.Ct. 490, 83 L.Ed. 627, 123 A.L.R. 599 (1939), *supra* at p. 933; Federal Power Commission v. Pacific Power & Light Company, 307 U. S. 156, 59 S.Ct. 766, 83 L.Ed. 1180 (1939), *supra* at p. 717; and O'Carroll v. Civil Aeronautics Board, 144 F.2d 993, 79 App.D.C. 233 (1944), *supra* at p. 502.

(3) Review by a Specialist Court Created Exclusively for Such Review

EMERGENCY PRICE CONTROL ACT of 1942, §§ 203, 204

50 U.S.C.App. §§ 923, 924.

§ 203. Procedure

(a) At any time after the issuance of any regulation or order under section 2, or in the case of a price schedule, at any time after the effective date thereof specified in section 206, any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections. * * * Within a reasonable time after the filing of any protest under this subsection, but in no event more than thirty days after such filing, the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice. * * *

(c) Any proceedings under this section may be limited by the Administrator to the filing of affidavits, or other written evidence, and the filing of briefs: * * *

§ 204. Review

(a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: *Provided,* That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. No objection to such regulation, order, or price schedule, and no evidence in support of any objection thereto, shall be considered by the court, unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in

the transcript. If application is made to the court by either party for leave to introduce additional evidence which was either offered to the Administrator and not admitted, or which could not reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same, and such other evidence as he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof and any modification made in the regulation, order, or price schedule as a result thereof; except that on request by the Administrator, any such evidence shall be presented directly to the court.

(b) No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious. * * *

(c) There is hereby created a court of the United States to be known as the Emergency Court of Appeals, which shall consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. The Chief Justice of the United States shall designate one of such judges as chief judge of the Emergency Court of Appeals, and may, from time to time, designate additional judges for such court and revoke previous designations. * * * The court shall have the powers of a district court with respect to the jurisdiction conferred on it by this Act; except that the court shall not have power to issue any temporary restraining order or interlocutory decree staying or restraining, in whole or in part, the effectiveness of any regulation or order issued under section 2 or any price schedule effective in accordance with the provisions of section 206. * * *

(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U.S.C., 1934 edition, Title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, re-

strain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

(e) (1) Within thirty days after arraignment, or such additional time as the court may allow for good cause shown, in any criminal proceeding, and within five days after judgment in any civil or criminal proceeding, brought pursuant to section 205 involving alleged violation of any provision of any regulation or order issued under section 2 or of any price schedule effective in accordance with the provisions of section 206, the defendant may apply to the court in which the proceeding is pending for leave to file in the Emergency Court of Appeals a complaint against the Administrator setting forth objections to the validity of any provision which the defendant is alleged to have violated. The court in which the proceeding is pending shall grant such leave with respect to any objection which it finds is made in good faith and with respect to which it finds there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with section 203 of this Act. * * *

B. Ordinary Suits in Equity

SHIELDS v. UTAH IDAHO CENTRAL RAILROAD CO.

Supreme Court of the United States.
305 U.S. 177, 59 S.Ct. 160, 83 L.Ed. 111 (1938).

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

This case presents the questions of the effect of a determination by the Interstate Commerce Commission, for the purposes of the Railway Labor Act, 45 U.S.C.A. § 151 et seq., that the respondent is not an interurban electric railway, and of the scope of judicial review of that determination.

The Railway Labor Act, which applies to railroads engaged in interstate commerce, excepts any "interurban" electric railway unless it is operating as a part of a general steam-railroad system of transportation. The Interstate Commerce Commission is "authorized and di-

* See Yakus v. United States, 321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834 (1944), *infra* at p. 1066; Lockerty v. Phillips, 319 U.S. 182, 63 S.Ct. 1019, 87 L.Ed. 1339 (1943), *infra* at p. 1062.

Cf. the Commerce Court, created by the Mann-Elkins Act (Act of June 18, 1910, §§ 1–5, 36 Stat. 539 et seq., and abolished by the Urgent Deficiencies Act of 1913 (Act of Oct. 22, 1913, c. 32, 38 Stat. 208, 219). See the discussion of federal courts of specialized jurisdiction in Frankfurter and Landis, The Business of the Supreme Court (1928) 146-86.

rected upon request of the Mediation Board or upon complaint of any party interested to determine after hearing whether any line operated by electric power" falls within the exception. At the request of the Mediation Board, the Interstate Commerce Commission after hearing determined that the lines of respondent, the Utah Idaho Central Railroad Company, do not constitute an interurban electric railway. 214 I. C. C. 707. The Mediation Board ordered respondent to post the formal notice prescribed by Section 2, Eighth, of the Railway Labor Act. Respondent did not comply. Failure to publish the notice subjects "the carrier, officer, or agent offending" to criminal penalties. Respondent, insisting that its line is an interurban electric railway and thus excepted from the Railway Labor Act, and alleging the invalidity of the Act, brought this suit against the United States Attorney for the District of Utah to restrain him from prosecuting any proceeding based upon an alleged violation of the Act.

The District Court took jurisdiction, permitted respondent to try the question de novo, decided that respondent was an interurban electric railway, and granted a permanent injunction. The Circuit Court of Appeals affirmed. 10 Cir., 95 F.2d 911. We granted certiorari, 304 U.S. 556, 58 S.Ct. 1055, 82 L.Ed. 1524. May 31, 1938.

As respondent, however characterized, is engaged in interstate transportation, the question whether it should be subjected to the requirements of the Railway Labor Act, relating to the adjustment of labor disputes, was one for the decision of Congress. These requirements were prescribed in the exercise by Congress of its constitutional control over interstate commerce. Texas & New Orleans R. R. Co. v. Railway Clerks, 281 U.S. 548, 50 S.Ct. 427, 74 L.Ed. 1034; Virginian Railway Co. v. System Federation No. 40, 300 U.S. 515, 57 S.Ct. 592, 81 L.Ed. 789. As Congress was free to establish the categories which should be excepted, Congress could bring to its aid an administrative agency to determine the question of fact whether a particular railroad fell within the exception, and Congress could make that factual determination, after hearing and upon evidence, conclusive. St. Joseph Stock Yards Co. v. United States, 298 U.S. 38, 51, 56 S.Ct. 720, 725, 80 L.Ed. 1033. For that purpose Congress could create a new administrative agency or use one already existing. And as the questions of fact involved would relate to methods of railroad transportation, and thus to a field in which the Interstate Commerce Commission had peculiar expertness, Congress could fittingly commit the determination to that body.

Congress did not define the term "interurban". Despite the desirability of such a definition and the difficulties occasioned by its absence, the term is not so destitute of meaning that it can be denied effect as a valid description. Respondent, standing upon the exception, necessarily treats it as valid and hence as susceptible of application. That view presupposes that the term "interurban" denotes distinguishing factual characteristics which on appropriate inquiry may be as-

certained. We have so treated the term in other relations. Piedmont & Northern Rwy. Co. v. Interstate Commerce Commission, 286 U.S. 299, 52 S.Ct. 541, 76 L.Ed. 1115; United States v. Chicago North Shore & Milwaukee R. R. Co., 288 U.S. 1, 53 S.Ct. 245, 77 L.Ed. 583. The conferring of authority upon the Interstate Commerce Commission to determine whether a particular electric railway is an interurban one cannot be regarded as an unconstitutional delegation of power. See United States v. Chicago North Shore & Milwaukee R. R. Co., supra, at pages 13, 14, 53 S.Ct. at pages 248, 249.

In the instant case, the Interstate Commerce Commission has made the determination contemplated by the statute and we are not concerned with the questions which might arise in its absence. The Commission's determination was one of fact. Shannahan v. United States, 303 U.S. 596, 599, 58 S.Ct. 732, 733, 734, 82 L.Ed. 1039. What effect shall be ascribed to it? The argument is pressed that the determination is at best persuasive and not in any wise binding upon the courts. It is urged that the Commission was restricted to determining whether respondent was operated as a part of a general steam-railroad system of transportation, which concededly it was not; that the determination of the Commission was not an "order"; that Congress has not manifested an intention that the determination should be binding in judicial proceedings and that in the nature of things it could not be made binding in criminal prosecutions.

We are unable to agree with the view expressed in the court below that the Commission was confined to determining whether respondent was operated as a part of a general steam-railroad system of transportation. Before reaching that point—as to which there was no question—the Commission had to determine whether respondent was an "interurban" line. That has been the administrative construction of the statutory provision and we see no reason to doubt its correctness.

In considering the effect of the Commission's determination, the fundamental question is the intent of Congress. The language of the provision points to definitive action. The Commission is to *"determine"*. The Commission must determine *"after hearing"*. The requirement of a "hearing" has obvious reference "to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts". The "hearing" is "the hearing of evidence and argument". Morgan v. United States, 298 U.S. 468, 480, 56 S.Ct. 906, 911, 80 L.Ed. 1288. And the manifest purpose in requiring a hearing is to comply with the requirements of due process upon which the parties affected by the determination of an administrative body are entitled to insist. Interstate Commerce Commission v. Louisville & Nashville R. R. Co., 227 U.S. 88, 91, 33 S.Ct. 185, 186, 57 L.Ed. 431. The Commission is not only authorized but "directed" to give the hearing and make the determination when requested. We cannot think that a determination so prescribed and safeguarded was intended to have no legal effect. On the contrary, in view of the nature and purpose of the proceeding, we must regard the determination as binding on both the

carrier and the Mediation Board. The latter having obtained the determination could not ignore it; neither could the carrier.

We have held that the determination of the Commission is not an *"order"* reviewable under the Urgent Deficiencies Act of October 22, 1913. Shannahan v. United States, supra. But we have not held that the determination of the Commission was not subject to judicial review by other procedure, a question which, as we said in the Shannahan Case, we had no occasion there to consider. Id., at page 603, 58 S.Ct. 735. The nature of the determination points to the propriety of judicial review. For, while the determination is made by the Interstate Commerce Commission for the purposes of the Railway Labor Act and not for further proceedings by the Commission itself, it is none the less a part of a regulatory scheme. It has the effect, if validly made, of subjecting the respondent to the requirements of the Railway Labor Act which was enacted to regulate the activities of transportation companies engaged in interstate commerce. The Mediation Board has ordered the posting of the prescribed notice that disputes between the carrier and its employees will be handled under the Railway Labor Act. Disobedience is immediately punishable and it is made the duty of the United States Attorney to institute proceedings against violators. Respondent has invoked the equity jurisdiction to restrain such prosecution and the Government does not challenge the propriety of that procedure. Equity jurisdiction may be invoked when it is essential to the protection of the rights asserted, even though the complainant seeks to enjoin the bringing of criminal actions. Philadelphia Company v. Stimson, 223 U.S. 605, 621, 622, 32 S.Ct. 340, 345, 56 L. Ed. 570. Truax v. Raich, 239 U.S. 33, 37, 38, 36 S.Ct. 7, 8, 9, 60 L.Ed. 131, L.R.A.1916D, 545, Ann.Cas.1917B, 283. Terrace v. Thompson, 263 U.S. 197, 214, 44 S.Ct. 15, 17, 68 L.Ed. 255. To support its contention that equitable relief is appropriate, respondent points to the peculiar difficulties which confront it under the congressional legislation. Congress has enacted two sets of statutes which involve the application of the same criterion. If respondent is subject to the Railway Labor Act, it is excluded from the application of the National Labor Relations Act; otherwise not. The Railroad Retirement Act of 1937 has a like proviso excepting interurban electric railways and authorizing the Interstate Commerce Commission to determine whether a particular electric railway falls within the exception. A similar provision is found in the Carriers Taxing Act of 1937 and in the Railroad Unemployment Insurance Act of 1938. In these circumstances we think respondent was entitled to resort to equity in order to obtain a judicial review of the questions of the validity and effect of the Commission's determination purporting to fix its status.

What is the scope of the judicial review to which respondent is entitled? As Congress had constitutional authority to enact the requirements of the Railway Labor Act looking to the settlement of industrial disputes between carriers engaged in interstate commerce and their employees, and could include or except interurban carriers as it saw

fit, no constitutional question is presented calling for the application of our decisions with respect to a trial de novo so far as the character of the respondent is concerned. With respect to that question, unlike the case presented in United States v. Idaho, 298 U.S. 105, 56 S.Ct. 690, 80 L.Ed. 1070, where the Interstate Commerce Commission was denied the authority to determine the character of the trackage in question (Id., page 107, 56 S.Ct. page 691), the Commission in this instance was expressly directed to make the determination. As this authority was validly conferred upon the Commission, the question on judicial review would be simply whether the Commission had acted within its authority. Interstate Commerce Commission v. Union Pacific R. R. Co., 222 U.S. 541, 547, 32 S.Ct. 108, 110, 56 L.Ed. 308; Interstate Commerce Commission v. Louisville & Nashville R. R. Co., 227 U.S. 88, 91, 33 S.Ct. 185, 186, 57 L.Ed. 431; Virginian Railway Co. v. United States, 272 U.S. 658, 663, 47 S.Ct. 222, 224, 71 L.Ed. 463; Tagg Bros. & Moorhead v. United States, 280 U.S. 420, 444, 50 S.Ct. 220, 226, 74 L.Ed. 524; Florida v. United States, 292 U.S. 1, 12, 54 S.Ct. 603, 608; 78 L. Ed. 1077; St. Joseph Stock Yards Co. v. United States, supra.

The condition which Congress imposed was that the Commission should make its determination after hearing. There is no question that the Commission did give a hearing. Respondent appeared and the evidence which it offered was received and considered. The sole remaining question would be whether the Commission in arriving at its determination departed from the applicable rules of law and whether its finding had a basis in substantial evidence or was arbitrary and capricious. Id. That question must be determined upon the evidence produced before the Commission.

Taking that position, petitioners unsuccessfully objected in the District Court to the admission of new evidence. But that evidence was substantially the same as that produced before the Commission, which was also received. The facts carefully analyzed by the Commission (214 I. C. C. pages 709–711) are virtually undisputed. Respondent's railway extends from Ogden, Utah, north to Preston, Idaho, a distance of 94.63 miles and has two branch lines of about 7 and 14 miles respectively. About 81.8 per cent. of the line is located on privately owned right-of-way and the remaining 18.2 per cent. on public streets or highways, these being chiefly in fifteen cities and towns. The Government concedes the point stressed by respondent that its line has many of the physical characteristics of an interurban railroad. Thus its tracks on the whole are of lighter weight, its grades slightly steeper, its curves sharper, its stations and sidetracks more frequent, its motive power of less capacity, its sidetracks shorter than is customary on trunk lines, and its passenger business is conducted in the same manner as that of any interurban electric railway. The passenger business, however, yields but a minor part (about 18.1 per cent.) of the total revenues. During the five years from 1930 to 1934, inclusive, the freight revenues amounted to $2,021,724.57 and the revenues from

passengers, mail and express were $448,941.62. The railway is predominantly a carrier of freight. The freight traffic consists to a large extent of raw products such as sugar beets, milk, tomatoes and peas moving to factories, canneries or processing plants, and of the manufactured products moving outbound from the plants to connecting railroads. A considerable part of the movement of the raw products requires special service with one-car or two-car trains. A daily package-merchandise train is maintained with facilities for refrigeration in summer and heating in winter and with pick-up and delivery service at all available points. In 1934 the freight trains averaged 6.2 cars each. In the last half of that year the carrier handled 6,354 carloads of freight of which 2,226 were local and 4,017 were interchanged with other carriers. The traffic originating on its line moved to points in 31 States and that delivered by it was from points in 26 States. Respondent is a party to practically all the tariffs publishing through rates to or from this territory and its interchange traffic generally moves on joint rates. It does not perform intermediate service between other lines. Practically all the interchange traffic is handled in standard equipment furnished by connecting railroads.

It cannot be said upon this evidence, and the related facts summarized in the Commission's report, that the Commission's determination lacked support or was arbitrary or capricious. Nor is there ground for holding that the Commission in reaching its determination departed from applicable principles of law. There is no principle of law which required such a carrier to be classified as an interurban railway. Failing in its effort to obtain a clarifying definition from Congress, the Commission performed its duty in weighing the evidence and reaching its conclusion in the light of the dominant characteristics of respondent's operations which were fairly comparable to those of standard steam railroads. Compare Piedmont & Northern Railway Co. v. Interstate Commerce Commission, supra, pages 308–310, 52 S.Ct. page 544; United States v. Chicago North Shore & Milwaukee R. R. Co., supra, page 10, 53 S.Ct. page 247.

We conclude that the District Court erred in permitting a trial de novo of that issue and that the determination of the Commission was within its authority validly exercised. The decree of the Circuit Court of Appeals is reversed and the cause is remanded to the District Court with direction to dismiss the bill of complaint.

It is so ordered.

Reversed and remanded with directions.[f]

[f] Footnotes of the court have been omitted.

Cf. Shannahan v. United States, 303 U.S. 596, 58 S.Ct. 732, 82 L.Ed. 1039 (1938), *supra* at p. 997. Compare, also, American Federation of Labor v. National Labor Relations Board, 308 U.S. 401, 60 S.Ct. 300, 84 L.Ed. 347 (1940), *supra* at p. 720, with Inland Empire District Council, Lumber and Sawmill Workers Union, etc. v. Mills, 325 U.S. 697, 65 S.Ct. 1316, 89 L.Ed. 1877 (1945), *supra* at p. 744.

In STARK v. WICKARD, 321 U.S. 288, 64 S.Ct. 559, 88 L.Ed. 733 (1944), *supra* at p. 973, the court, at 321 U.S. 290 (64 S.Ct. 560–1), said:

"The district court for the District of Columbia has a general equity jurisdiction authorizing it to hear the suit; but in order to recover, the petitioners must go further and show that the act of the Secretary amounts to an interference with some legal right of theirs. If so, the familiar principle that executive officers may be restrained from threatened wrongs in the ordinary courts in the absence of some exclusive alternative remedy will enable the petitioners to maintain their suit; * * *"

C. Proceedings for a Declaratory Judgment

THE FEDERAL DECLARATORY JUDGMENT ACT[a]

28 U.S.C.Supp. § 400.

§ 400. Declaratory judgments authorized; procedure

(1) In cases of actual controversy (except with respect to Federal taxes) the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

(2) Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated by the declaration, to show cause why further relief should not be granted forthwith.

(3) When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not.

[a] Judicial Code § 274d, as added by the Act of June 14, 1934, c. 512, 48 Stat. 955, and amended Aug. 30, 1935, c. 829, § 405, 49 Stat. 1027.

AETNA LIFE INSURANCE CO. OF HARTFORD, CONN. v. HAWORTH

Supreme Court of the United States.
300 U.S. 227, 236, 239–41, 57 S.Ct. 461, 462, 463–4, 81 L.Ed. 617, 108 A.L.R. 1000 (1937).

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

The question presented is whether the District Court had jurisdiction of this suit under the Federal Declaratory Judgment Act. Act of June 14, 1934, 48 Stat. 955, Jud.Code § 274d, 28 U.S.C. § 400 (28 U.S.C.A. § 400 and note).[1]

The question arises upon the plaintiff's complaint which was dismissed by the District Court upon the ground that it did not set forth a "controversy" in the constitutional sense and hence did not come within the legitimate scope of the statute. 11 F.Supp. 1016. The decree of dismissal was affirmed by the Circuit Court of Appeals. 84 F. 2d 695. We granted certiorari. * * *

First.—The Constitution (article 3, § 2) limits the exercise of the judicial power to "cases" and "controversies." "The term 'controversies,' if distinguishable at all from 'cases,' is so in that it is less comprehensive than the latter, and includes only suits of a civil nature." Per Mr. Justice Field in Re Pacific Railway Commission (C.C.) 32 F. 241, 255, citing Chisholm v. Georgia, 2 Dall. 419, 431, 432, 1 L.Ed. 440. See Muskrat v. United States, 219 U.S. 346, 356, 357, 31 S.Ct. 250, 55 L.Ed. 246; Old Colony Trust Co. v. Commissioner, 279 U.S. 716, 723, 724, 49 S.Ct. 499, 501, 502, 73 L.Ed. 918. The Declaratory Judgment Act of 1934, in its limitation to "cases of actual controversy," manifestly has regard to the constitutional provision and is operative only in respect to controversies which are such in the constitutional sense. The word "actual" is one of emphasis rather than of definition. Thus the operation of the Declaratory Judgment Act is procedural only. In providing remedies and defining procedure in relation to cases and controversies in the constitutional sense the Congress is acting within its delegated power over the jurisdiction of the federal courts which the Congress is authorized to establish. Turner v. Bank of North America, 4 Dall. 8, 10, 1 L.Ed. 718; Stevenson v. Fain, 195 U.S. 165, 167, 25 S.Ct. 6, 49 L.Ed. 142; Kline v. Burke Construction Co., 260 U.S. 226, 234, 43 S.Ct. 79, 82, 67 L.Ed. 226, 24 A.L.R. 1077. Exercising this control of practice and procedure the Congress is not confined to traditional forms or traditional remedies. The judiciary clause of the Constitution "did not crystallize into changeless form the procedure of 1789 as the only possible means for presenting a case or controversy otherwise cognizable by the federal courts." Nashville, Chattanooga & St. Louis R. Co. v. Wallace, 288 U.S. 249, 264, 53 S.Ct. 345, 348, 77 L.Ed. 730, 87 A.L.R. 1191. In dealing with methods within its sphere of remedial action the Congress may create and improve as well as abolish or re-

[1] [Footnote omitted.—Ed.]

strict. The Declaratory Judgment Act must be deemed to fall within this ambit of congressional power, so far as it authorizes relief which is consonant with the exercise of the judicial function in the determination of controversies to which under the Constitution the judicial power extends.

A "controversy" in this sense must be one that is appropriate for judicial determination. Osborn v. Bank of United States, 9 Wheat. 738, 819, 6 L.Ed. 204. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. United States v. Alaska S. S. Co., 253 U.S. 113, 116, 40 S.Ct. 448, 449, 64 L.Ed. 808. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. South Spring Gold Co. v. Amador Gold Co., 145 U.S. 300, 301, 12 S.Ct. 921, 36 L.Ed. 712; Fairchild v. Hughes, 258 U.S. 126, 129, 42 S.Ct. 274, 275, 66 L.Ed. 499; Massachusetts v. Mellon, 262 U.S. 447, 487, 488, 43 S.Ct. 597, 601, 67 L.Ed. 1078. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. See Muskrat v. United States, supra; Texas v. Interstate Commerce Commission, 258 U.S. 158, 162, 42 S.Ct. 261, 262, 66 L.Ed. 531; New Jersey v. Sargent, 269 U.S. 328, 339, 340, 46 S.Ct. 122, 125, 70 L. Ed. 289; Liberty Warehouse Co. v. Grannis, 273 U.S. 70, 47 S.Ct. 282, 71 L.Ed. 541; New York v. Illinois, 274 U.S. 488, 490, 47 S.Ct. 661, 71 L.Ed. 1164; Willing v. Chicago Auditorium Association, 277 U.S. 274, 289, 290, 48 S.Ct. 507, 509, 72 L.Ed. 880; Arizona v. California, 283 U. S. 423, 463, 464, 51 S.Ct. 522, 529, 75 L.Ed. 1154; Alabama v. Arizona, 291 U.S. 286, 291, 54 S.Ct. 399, 401, 78 L.Ed. 798; United States v. West Virginia, 295 U.S. 463, 474, 475, 55 S.Ct. 789, 793, 79 L.Ed. 1546; Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 324, 56 S.Ct. 466, 472, 80 L.Ed. 688. Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages. Nashville, Chattanooga & St. Louis R. Co. v. Wallace, supra, 288 U.S. 249, at page 263, 53 S.Ct. 345, 348, 77 L.Ed. 730, 87 A.L.R. 1191; Tutun v. United States, 270 U.S. 568, 576, 577, 46 S.Ct. 425, 426, 70 L.Ed. 738; Fidelity National Bank & Trust Co. v. Swope, 274 U.S. 123, 132, 47 S.Ct. 511, 514, 71 L.Ed. 959; Old Colony Trust Company v. Commissioner, supra, 279 U.S. 716, at page 725, 49 S.Ct. 499, 502, 73 L.Ed. 918. And as it is not essential to the exercise of the judicial power that an injunction be sought, allegations that irreparable injury is threatened are not required. Nashville, Chattanooga & St. Louis R. Co. v. Wallace, supra, 288 U.S. 249, at page 264, 53 S.Ct. 345, 348, 77 L.Ed. 730, 87 A.L.R. 1191.

With these principles governing the application of the Declaratory Judgment Act, we turn to the nature of the controversy, the relation and interests of the parties, and the relief sought in the instant case. * * *

PERKINS v. ELG

United States Court of Appeals of the District of Columbia.
99 F 2d 408, 69 App D C. 175 (1938)

GRONER, C. J. The main question in this case is whether appellee, a natural born citizen of the United States, has lost her citizenship involuntarily and by operation of law, by reason of her removal from the United States by her parents in her infancy and her residence in a foreign country until she was 21 years of age.

A secondary question is whether the suit is properly brought under the Declaratory Judgment Act, 28 U.S.C.A. 400.

The facts are these: Marie Elizabeth Elg was born October 2, 1907, in the city and state of New York, and at the time of bringing this suit was and now is a resident of Mt. Kisco, Westchester County, New York. Some years prior to her birth her parents emigrated from Sweden to the United States, and in September 1906 her father was naturalized in New York. In 1911, when four years of age, Miss Elg was taken by her mother to Sweden, where she resided until she was 21 years of age. Her father remained in the United States until 1922, at which time he too returned to Sweden, where he has lived ever since. Shortly before she attained her majority Miss Elg inquired of an American consul in Sweden what steps she should take when she reached legal age to return to the United States as an American citizen. As the result of this inquiry the Secretary of State of the United States issued instructions to the consul at Göteborg in Sweden to furnish Miss Elg an American citizen's passport, and in 1929 when 21 years of age, Miss Elg returned to the United States and was admitted at the port of New York as a natural born citizen of the United States. In April 1934,—because investigation of her father's status by American consular officials developed the fact that he had no intention of returning to the United States and was willing to surrender his naturalization certificate,—Miss Elg was examined by the immigration service in New York; and in April 1935 she was notified that she was an alien illegally in the United States, and was ordered to leave the country and threatened with deportation if she did not. As the result of her protest, the Secretary of Labor and the Commissioner of Immigration, as a matter of grace, suspended action temporarily, but all the while insisting upon the validity of the holding that she was an alien illegally in the United States and all the while threatening to have her deported. In July 1936 Miss Elg applied to the Secretary of State for an American passport, which the Secretary refused on the ground that, because of the residence of her father in Sweden since

1922 without the intention of returning to the United States, the Department considered that he had renounced his American citizenship and reacquired Swedish nationality, and that because of her residence with her father she too had lost the one and acquired the other.

In January 1937 Miss Elg brought her suit in the United States District Court in the District of Columbia against the Secretary of Labor, the Commissioner of Immigration, and the Secretary of State. She prayed for a judgment declaring that she is a natural born citizen of the United States and entitled to all the rights and privileges of a citizen; and she prayed further that the Secretary of Labor and the Commissioner of Immigration be enjoined from carrying out the threat to deport her from the United States or from interfering with her residence therein; that the Secretary of State be enjoined from officially holding her not to be a citizen of the United States and refusing to issue her a passport; and for general relief. A show cause order was issued, and the case was heard on the return thereto and on a motion to dismiss the bill. The court held that plaintiff had not lost her American citizenship by her residence abroad during her minority; that when she elected to return and did return to the United States immediately after her emancipation she was entitled to be treated as a citizen of the United States; and that the deportation proceedings begun against her and suspended only by her suit, presented an actual controversy entitling her to a declaratory judgment. The court dismissed the bill as to the Secretary of State on the ground that the issuance of a passport involved discretion, but refused to dismiss as to the Secretary of Labor and the Commissioner of Immigration. All parties elected to stand on their pleadings, and the present cross appeals were duly effected.

We think the decision of the lower court is in all respects correct. * * *

And this brings us to the final question in the case, namely, whether the Declaratory Judgment Act, 28 U.S.C.A. § 400, is applicable.

The trial court, as we have seen, concluded that the case was properly brought within the declaratory judgment statute. We are of the same opinion.

There can be no doubt that the lower court had jurisdiction of the several defendants and that it has jurisdiction of the subject matter of the suit. There is no other proceeding at law by which appellee could obtain an adjudication that she is a United States citizen,—certainly none by which she can obtain that adjudication without being subject to arrest and confinement until her case may be heard on a petition of habeas corpus. Appellants, Secretary of Labor and Commissioner of Immigration, are required by law to deport aliens illegally in this country and in accordance with law they have threatened her with arrest and deportation. The threat remains unretracted and is in abeyance only by agreement of counsel pending the decision of the case. She

has not yet been arrested, and therefore she cannot now test by habeas corpus the question raised here; but she is entitled to a declaration of her political status, for her rights as a citizen are valuable rights,—certainly no less valuable than property rights,—and an actual and vital controversy exists between her and the government in relation to them. The right to be immune from threats of deportation and from the declarations of public officials that she is an alien and subject to arrest is, we think, a right within the declaratory judgment act entitling Miss Elg to prosecute this suit. If she is deported as an alien, her return at all to the United States will be possible only under very difficult conditions. And if the Secretary and Commissioner decide for purposes of their own to postpone her deportation indefinitely, she would, as a publicly declared alien, be subject to entirely different conditions of residence in the United States and to curtailment of the rights and privileges which she might enjoy as a citizen of the United States, such as traveling about freely, demanding and receiving protection from her government, voting, serving as a juror, and holding public office.

We think the facts we have outlined present a case fairly within the intent and purpose of the act whereby appellee may test the validity of the threat and have, as she is entitled to have, a declaratory judgment of her American citizenship. For we certainly have a case "admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged," and in these circumstances the Supreme Court has said the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages. Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617, 108 A.L.R. 1000.

The decree of the District Court declaring appellee to be a natural born citizen of the United States is in all respects affirmed.

Affirmed.[h]

EXCERPT FROM PERKINS v. ELG

Supreme Court of the United States.
307 U.S. 325, 349-50, 59 S.Ct. 884, 896, 83 L.Ed. 1320 (1939).

Fifth.—The cross petition of Miss Elg, upon which certiorari was granted in No. 455, is addressed to the part of the decree below which dismissed the bill of complaint as against the Secretary of State. The dismissal was upon the ground that the court would not undertake by mandamus to compel the issuance of a passport or control by means of

[h] *Cf.* Macauley v. Waterman S. S. Corporation, 327 U.S. 540, 66 S.Ct. 712, 90 L.Ed. — (1946).

a declaratory judgment the discretion of the Secretary of State. But the Secretary of State, according to the allegation of the bill of complaint, had refused to issue a passport to Miss Elg "solely on the ground that she had lost her native born American citizenship". The court below, properly recognizing the existence of an actual controversy with the defendants (Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 57 S.Ct. 461, 81 L.Ed. 617, 108 A.L.R. 1000), declared Miss Elg "to be a natural born citizen of the United States" [99 F.2d 414] and we think that the decree should include the Secretary of State as well as the other defendants. The decree in that sense would in no way interfere with the exercise of the Secretary's discretion with respect to the issue of a passport but would simply preclude the denial of a passport on the sole ground that Miss Elg had lost her American citizenship.

The decree will be modified accordingly so as to strike out that portion which dismisses the bill of complaint as to the Secretary of State, and so as to include him in the declaratory provision of the decree, and as so modified the decree is affirmed. It is so ordered.

Decree modified and, as modified, affirmed.

BATA SHOE COMPANY, INC. v. PERKINS

District Court of the United States for the District of Columbia.
33 F.Supp. 508 (1940).

MORRIS, Justice. On June 12, 1939, the defendant, James L. Houghteling, as Commissioner of Immigration and Naturalization Service of the Labor Department of the United States, by his assistant, upon the application and representations of the plaintiff, Bata Shoe Company, Inc., a corporation organized under the laws of the State of New York, with its principal office at Belcamp, Aberdeen, Maryland, advised that company that the Department of Labor tentatively authorized the importation for one year, pursuant to the provisions of Section 136(h), Title 8, Chapter 6, U.S.C.A. (4th proviso of Sec. 3 of the Immigration Act of 1917, 39 Stat. 874), of not more than one hundred citizens of Czechoslovakia, for the purpose of teaching American workers in methods of shoe manufacture employed by the Bata Shoe Company. This statute permits the entry into the United States of certain skilled laborers, if otherwise admissible, and if labor of like kind unemployed cannot be found in this country; the question of the necessity of importing such skilled labor in any particular instance may be determined by the Secretary of Labor upon the application of any person interested, such application to be made before such importation, and such determination by the Secretary of Labor to be reached after a full hearing and an investigation into the facts of the case. Any contract laborers not coming within the proviso here referred to are excluded from admission into the United States and if admitted, are subject to deportation. Any person or corporation assisting or soliciting

the importation of any contract laborer, unless exempted by the provision referred to, is guilty of an offense against the United States and punishable as provided in Section 139, Chapter 6, Title 8, U.S.C.A. (Ch. 29, Sec. 5, Immigration Act of 1917, 39 Stat. 879).

Pursuant to this tentative authorization, names of individual aliens were furnished by the Bata Shoe Company to the Immigration and Naturalization Service, and entry permits were issued to seventy-eight of such aliens. On December 28, 1939, the Bata Shoe Company was advised by the Commissioner of Immigration and Naturalization Service to the effect that investigation had indicated that there "are very few processes employed at the Bata plant which are not known to skilled American workers and which might justify the importation of Czechoslovakian workers on the assumption that unemployed skilled American labor of the type required to perform these processes is not available." The Commissioner thereupon stated that, after January 10, 1940, that company would be permitted to employ only ten of the alien visitors whose entry had been approved, and previous permission granted for the entry of the others was withdrawn. This communication was modified by subsequent ones with the net result that the retention of twenty-five of the aliens so admitted were considered properly employed by the Bata Shoe Company, and directions given that all others so admitted "discontinue their employment with the Bata Shoe Company, failing which, action will be taken looking to the institution of deportation proceedings." The forty-five plaintiffs herein, other than the Bata Shoe Company, are aliens who have been admitted as above stated, and against whom deportation proceedings will be instituted, unless such proceedings are enjoined as prayed for in the complaint herein. The relief herein sought is an injunction for this purpose and a declaratory judgment that defendants are without authority of law to revoke or modify the action of the Department of Labor set forth in its communication of June 9, 1939, by the subsequent communications relating thereto. It is urged by the Bata Shoe Company, a domestic corporation, that it has acquired certain rights under the original action of the Department of Labor, of which it may not be deprived by the deportation of the alien plaintiffs, or any modification of such original action.

It is insisted on behalf of the defendants that, while the communications of the Commissioner of Immigration and Naturalization Service subsequent to June 9, 1939, contain rather curious directions, for which there is no statutory authority, concerning the employment of the alien plaintiffs by the plaintiff, Bata Shoe Company, the only legal effect of such communications is to give notice that deportation proceedings will be instituted to test the very questions which are sought to be adjudicated in these proceedings.

There are two statutory methods by which alien contract laborers who have entered, and those interested in their importation, may be dealt with. One is by deportation proceedings in which the critical

facts can be examined and the questions of law determined. If the party sought to be deported is not afforded a full, adequate hearing, in which the findings are supported by substantial evidence; or, if the law is mistakenly applied in such proceedings, judicial relief can be had by the writ of habeas corpus. If the importation of an alien contract laborer, not exempted by the proviso under which the Secretary of Labor may permit such entry, has been assisted or solicited by some person or corporation, proceedings may be instituted against such person or corporation to enforce the criminal penalty. In such proceedings, clearly the power of the Secretary of Labor to modify a permit of entry could be challenged. This is not that kind of action. However, in deportation proceedings, it can be determined whether the alien plaintiffs may remain in this country under the original authority to enter, or whether that authority may be revoked, either because it was given under misrepresentation, or the alien is not employed to perform the skilled labor for which employment his entry was authorized. Clearly the question as to whether or not the Secretary of Labor has any legal authority to revoke a permit of entry under the section of the statute here applicable may be considered in such deportation proceedings and, if erroneously decided therein, may then become the subject of judicial action in habeas corpus proceedings.

It would seem arbitrary, and not in accord with that principle of fair play which should characterize all administrative procedure, to revoke with finality a permit for the importation of alien contract labor, which has been issued by the Secretary of Labor to a domestic corporation, without giving that corporation a full, fair opportunity to be heard, regardless of whether or not its interests have the status of property rights. If the action here complained of had that conclusive effect, there would be clearer occasion for the invocation of the judicial power, but that is not the case. Neither the Bata Shoe Company nor the alien plaintiffs may properly complain at the institution of administrative proceedings to determine their rights, if such proceedings afford full and fair opportunity for them to be heard; and if these proceedings do not afford such opportunity, judicial relief may then be sought. Not before the result and conduct of those proceedings are known could there be any proper occasion for direction by the courts to the executive branch of the Government, to whom Congress has committed the task of determining the right of aliens to remain in the country. It is not enough to say that the Bata Shoe Company may not be allowed to intervene in the deportation proceedings. That company has not yet been denied such right, and it is not to be assumed that it will be.

The motion to dismiss the complaint is allowed.

MILES LABORATORIES, INC. v. FEDERAL TRADE COMMISSION

United States Court of Appeals for the District of Columbia.
140 F.2d 683, 78 App.D.C. 326 (1944).

GRONER, C. J. Appellant is an Indiana corporation and is engaged in the sale and distribution in interstate commerce of certain medical preparations described as "Dr. Miles' Nervine," "Dr. Miles' Nervine Tablets," and "Dr. Miles' Anti-Pain Pills." The sales of these products amount to around a million dollars annually.

Stated in general terms, the present controversy grows out of the fact that some two or three years ago the Federal Trade Commission, after an investigation, reached the tentative conclusion that appellant's advertising material failed fully to reveal that these preparations, if used by individuals in excess of the dosage recommended, might result in harm to the users. In consequence the Commission addressed a communication to appellant, notifying it of this finding, and suggesting the disposition of the matter by stipulation. This contemplated an agreement on the part of appellant to revise its advertising matter to include a warning to the public in line with the conclusions of the Commission; or, stated in the language of the Commission, so as to reveal to purchasers that its preparations, if used in excess of the dosage recommended on its labels, would be dangerous to health and cause mental derangement, skin eruptions or collapse or dependence upon the drug. The Commission offered as an alternative, that if the directions for the use of the preparations appearing on the labels were changed to contain warnings, in similar language to that just used, of dangers of excessive use, the advertisements need contain only the cautionary statement "Caution, Use Only As Directed."

Appellant declined the Commission's offer to stipulate and brought this suit in the District Court under the Federal Declaratory Judgment Act, 28 U.S.C.A. § 400, seeking a declaration as to the limits of the Commission's authority to dictate and control the contents of appellant's labeling and advertising. The suit was dismissed on the Commission's motion upon the ground that the court was without jurisdiction of the subject matter. An appeal to this court followed.

The Federal Trade Commission Act, 15 U.S.C.A. § 41 et seq., defines unlawful advertising as that which is misleading in a material respect, or which induces the purchase of drugs injurious to health under the conditions prescribed in the advertisement or under such conditions as are customary or usual, and which fails to reveal material facts with respect to the consequences which may result from the use under the conditions advertised. Appellant says that nothing appears in any of its advertising or labeling contrary to these provisions; that all of its labels, as well as its advertisements, contain accurate statements of the active ingredients in its medicines, the purposes for which they are to be used, as well as the safe and proper doses to be taken; and

all of this is admitted on the motion to dismiss. Appellant, therefore, insists that the action of the Commission in demanding that it include in its advertisements, or at its option on its labels, a statement to the effect that the excessive use of any of the medicines may result in mental derangement or cause collapse or dependence upon the drug, is wholly beyond the power of the Commission. But appellant admits, as of course it must, that the Act does give the Commission power, after notice and hearing, to prohibit false advertising of drugs, as that term is defined in the Act; and that is the provision on which the Commission based its right to request a stipulation that appellant conform its advertising to the Commission's construction of the statute, as an alternative to a proceeding by the Commission to seek to accomplish the same end through the issuance of a "complaint." We see no objection to this procedure. Certainly, there can be no contention that the Commission is without statutory authority to issue a complaint when it "has reason to believe" that someone is using misleading matter in the advertising and sale of its medicinal products—for the Act specifically so provides. Whether, having issued a complaint and held a hearing, its decision on the facts or on the law is correct is a question which cannot be challenged in a District Court, either before or after the event, for in such case an appeal to an appropriate court of appeals is made the exclusive remedy. Here, as we have seen, appellant's contention is that its advertisements are lawful and hence do not offend the Act, and that its labels are matters not within the scope of the Act, as the result of which the Commission has no lawful right to issue its complaint in the one case or the other, and that accordingly it ought to be saved the expense and embarrassment of a long and useless Commission proceeding. The Commission denies, and we think correctly, that it is attempting to regulate appellant's labels. All that it said on that subject was to offer that means of correction as a choice which appellant could take or leave as it pleased. However desirable it may be thought that appellant, when challenged as to its methods of business, should have recourse to a court of equity to construe the extent of the Commission's power in a case in which it is made to appear that a public hearing will result in irreparable injury, nevertheless, it has been held so often as not to require citation of authority, that for a Federal Court to assume the right to suspend the Commission's investigation, while it determines controversial questions of law or fact, would be a clear assumption of power it does not possess. The administrative remedy which Congress has provided must be first exhausted. To hold otherwise, the Supreme Court has recently and explicitly said,

"* * * would * * * in effect substitute the District Court for the Board as the tribunal to hear and determine what Congress declared the Board exclusively should hear and determine in the first instance." That the Supreme Court will change or modify its views in this respect is an "iridescent dream," for the trend is decidedly the oth-

er way. On no subject is the opinion of that Court, as I view it, more definitely fixed than it is on the lack of power of the courts to inject themselves or be injected into proceedings which Congress has committed to the primary jurisdiction of administrative agencies. Indeed, it has been held in some cases that even a right of review, if not provided in the statute, may not be supplied by the courts; and this doctrine was recently extended to a case in which the claim was that the action of the Board was arbitrary and unreasonable. See Per Curiam, December 6, 1943, In re Brotherhood of Ry. & S. Clerks v. United T. S. E. of America, 64 S.Ct. 260.

In the present case and on the present record—if the question were open—it might very well be argued that appellant's advertising is neither false nor misleading, when considered in the light of the statutory provision requiring no more than a revelation of all material consequences which may result from the use of the product in the customary way or under the conditions prescribed in the advertisement. But since the matter is not open, we have no occasion to examine or weigh questions of fact or law, since they are in the first instance within the exclusive jurisdiction of the Commission and its decision when made is subject to challenge only as provided in the Act; nor is there anything in the Declaratory Judgment Act which changes this result or creates new rights or increases or extends the jurisdiction of the courts. Doehler Metal Furniture Co. v. Warren, 76 U.S.App.D.C. 60, 129 F.2d 43, 45.

We are, therefore, of opinion that the District Court was in all respects correct in holding that it lacked jurisdiction of the subject matter of the complaint.

Affirmed.[1]

EXCERPT FROM
COLEGROVE v. GREEN

Supreme Court of the United States.
328 U.S. 633, 66 S.Ct. 1198, 1198–9, — L.Ed. — (1946).

Mr. Justice FRANKFURTER announced the judgment of the court and an opinion in which Mr. Justice REED and Mr. Justice BURTON concur.

This case is appropriately here, under § 266 of the Judicial Code, 28 U.S.C. § 380, 28 U.S.C.A. § 380, on direct review of a judgment of the District Court of the Northern District of Illinois, composed of three judges, dismissing the complaint of these appellants. Petitioners are three qualified voters in an Illinois district which has a much larger population than other Illinois Congressional districts. They brought this suit against the Governor, the Secretary of State, and the Auditor

[1] Footnotes of the court have been omitted.

of the State of Illinois, as members ex officio of the Illinois Primary Certifying Board, to restrain them, in effect, from taking proceedings for an election in November 1946, under the provisions of Illinois law governing Congressional districts. Illinois Laws of 1901, p. 3. Formally, the appellees asked for a decree, with its incidental relief, § 274d Judicial Code, 28 U.S.C. § 400, 28 U.S.C.A. § 400, declaring these provisions to be invalid because they violated various provisions of the United States Constitution and § 3 of the Reapportionment Act of August 8, 1911, 37 Stat. 13, 2 U.S.C.A. § 3, as amended, 2 U.S.C. § 2a, 2 U.S.C.A. § 2a, in that by reason of subsequent changes in population the Congressional districts for the election of Representatives in the Congress created by the Illinois Laws of 1901, Ill.Rev.Stat.Ch. 46, 1945, §§ 154–156, lacked compactness of territory and approximate equality of population. The District Court, feeling bound by this Court's opinion in Wood v. Broom, 287 U.S. 1, 53 S.Ct. 1, 77 L.Ed. 131, dismissed the bill. 64 F.Supp. 632.

The District Court was clearly right in deeming itself bound by Wood v. Broom, supra, and we could also dispose of this case on the authority of Wood v. Broom. The legal merits of this controversy were settled in that case. * * *

But we also agree with the four Justices (Brandeis, Stone, Roberts, and Cardozo, JJ.) who were of opinion that the bill in Wood v. Broom, supra, should be "dismissed for want of equity." To be sure, the present complaint, unlike the bill in Wood v. Broom, was brought under the Federal Declaratory Judgment Act which, not having been enacted until 1934, was not available at the time of Wood v. Broom. But that Act merely gave the federal courts competence to make a declaration of rights even though no decree of enforcement be immediately asked. It merely permitted a freer movement of the federal courts within the recognized confines of the scope of equity. The Declaratory Judgment Act "only provided a new form of procedure for the adjudication of rights in conformity" with "established equitable principles." Great Lakes Dredge & Dock Co. v. Huffman, 319 U. S. 293, 300, 63 S.Ct. 1070, 1074, 87 L.Ed. 1407. And so, the test for determining whether a federal court has authority to make a declaration such as is here asked, is whether the controversy "would be justiciable in this Court if presented in a suit for injunction." Nashville C. & St. L. Ry. v. Wallace, 288 U.S. 249, 262, 53 S.Ct. 345, 348, 77 L.Ed. 730, 87 A.L.R. 1191. * * *]

]But see the concurring opinion of Mr. Justice Rutledge in Cook v. Fortson, — U.S. —, 67 S.Ct. 21, — L.Ed. — (1946), in which Mr. Justice Rutledge said, in n. 6 to his opinion:

"This Court has not yet determined that declaratory relief cannot be given beyond the boundaries fixed by the pre-existing jurisdiction in equity, * * * although three members of the Court announced their view apparently to that effect in Colegrove v. Green."

D. Habeas Corpus

ESTEP v. UNITED STATES

Supreme Court of the United States.
327 U.S. 114, 66 S.Ct. 423, 90 L.Ed. — (1946).

Mr. Justice DOUGLAS delivered the opinion of the Court.

In Falbo v. United States, 320 U.S. 549, 64 S.Ct. 346, 88 L.Ed. 305, we held that in a criminal prosecution under § 11 of the Selective Training and Service Act of 1940, 54 Stat. 894, 50 U.S.C.App. § 311, 50 U.S.C.A.Appendix, § 311, a registrant could not defend on the ground that he was wrongfully classified and was entitled to a statutory exemption, where the offense was a failure to report for induction into the armed forces or for work of national importance. We found no provision for judicial review of a registrant's classification prior to the time when he had taken all the steps in the selective process and had been finally accepted by the armed services. The question in these cases is whether there may be judicial review of his classification in a prosecution under § 11 where he reported for induction, was finally accepted, but refused to submit to induction.

Estep's local board classified him as I-A, i.e., as available for military service. Sec. 5(d) of the Act exempts from training and service (but not from registration) "regular or duly ordained ministers of religion." Under the regulations those in that category are classified as IV-D. Estep, a member of Jehovah's Witnesses, claimed that he was entitled to that classification. The local board ruled against him. He took his case to the appeal board which classified him as I-A. He then asked the State and National Directors of Selective Service to appeal to the President for him. His request was refused. The local board thereupon ordered him to report for induction. He reported at the time and place indicated. He was accepted by the Navy. But he refused to be inducted, claiming that he was exempt from service because he was an ordained minister of the gospel.

He was indicted under § 11 of the Act for wilfully failing and refusing to submit to induction. He sought to defend on the ground that as a Jehovah's Witness he was a minister of religion and that he had been improperly denied exemption from service, because the classifying agencies acted arbitrarily and capriciously in refusing to classify him as IV-D. He also claimed that his right to an effective appeal had been denied because the local board unlawfully withheld certain relevant documents from the appeal board and included improper material in the record on appeal. The District Court rejected these defenses and did not permit the introduction of evidence to sustain Estep's contention. The jury found him guilty and he was sentenced to imprisonment for a term of five years. On appeal the Circuit Court of Appeals affirmed, on a divided vote. 3 Cir., 150 F.2d 768.

Smith, like Estep, is a member of Jehovah's Witnesses. He claimed exemption from all service on the ground that he was a minister of religion. His local board placed him in Class I-A, as available for military service. His classification was affirmed by the appeal board. On appeal to the President his classification was again affirmed. The local board then ordered him to report for induction. He reported to the induction station, was accepted by the military, but refused to be inducted, claiming he was exempt from service because he was a minister. He was inducted against his will and later was held for trial by a general court-martial for disobedience of military orders. He filed a petition for a writ of habeas corpus which was denied. Smith v. Richart, D.C., 53 F.Supp. 582. While his appeal was pending, we decided Billings v. Truesdell, 321 U.S. 542, 64 S.Ct. 737, 88 L.Ed. 917. He was thereupon released from military custody and indicted for violation of § 11 of the Act. At the trial he sought to attack the classification given him by his local board, claiming, among other things, that it acted without any foundation of fact, discriminated against him because he was a Jehovah's Witness, and denied him the right to make full proof of his claim that he was a minister of religion. The court ruled that no such defense could be tendered. Smith was found guilty by the jury and a sentence of three and one-half years was imposed. The judgment of conviction was affirmed on appeal. Smith v. United States, 4 Cir., 148 F.2d 288.

The cases are here on petitions for writs of certiorari which we granted because of the importance of the question presented.

Congress entrusted the administration of the Selective Service System to civilian agencies, not to the military. It authorized the President to create and establish a Selective Service System and to establish civilian local boards and appeal boards to administer it. § 10(a) (2). The Selective Service System was designed to "provide for the classification of registrants and of persons who volunteer for induction under this Act on the basis of availability for training and service." Id. Congress specified certain restricted classes for deferment or exemption from service, including in the latter, as we have said, "regular or duly ordained ministers of religion." § 5. The President was authorized to provide for the deferment of other classes by rules and regulations. § 5(e). And the local boards "under rules and regulations prescribed by the President" were granted the "power within their respective jurisdictions to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this Act of all individuals within the jurisdiction of such local boards." § 10(a) (2). The Act makes no provision in terms for judicial review of the actions of the local boards or the appeal boards. For § 10(a) (2) states that the "decisions of such local boards shall be final except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe."

By the terms of the Act Congress enlisted the aid of the federal courts only for enforcement purposes. Sec. 11 makes criminal a wilful failure to perform any duty required of a registrant by the Act or the rules or regulations made under it. An order to report for induction is such a duty; and it includes the duty to submit to induction. Billings v. Truesdell, supra, 321 U.S. at page 557, 64 S.Ct. at page 746, 88 L.Ed. 917. Sec. 11 confers jurisdiction on the district courts to try one charged with such offense. But § 11 is silent when it comes to the defenses, if any, which may be interposed.

Thus we start with a statute which makes no provision for judicial review of the actions of the local boards or the appeal agencies. That alone, of course, is not decisive. For the silence of Congress as to judicial review is not necessarily to be construed as a denial of the power of the federal courts to grant relief in the exercise of the general jurisdiction which Congress has conferred upon them. American School of Magnetic Healing v. McAnnulty, 187 U.S. 94, 23 S.Ct. 33, 47 L.Ed. 90; Gegiow v. Uhl, 239 U.S. 3, 36 S.Ct. 2, 60 L.Ed. 114; Stark v. Wickard, 321 U.S. 288, 64 S.Ct. 559, 88 L.Ed. 733. Judicial review may indeed be required by the Constitution. Ng Fung Ho v. White, 259 U.S. 276, 42 S.Ct. 492, 66 L.Ed. 938. Apart from constitutional requirements, the question whether judicial review will be provided where Congress is silent depends on the whole setting of the particular statute and the scheme of regulation which is adopted. Switchmen's Union v. National Mediation Board, 320 U.S. 297, 301, 64 S.Ct. 95, 97, 88 L.Ed. 61. And except when the Constitution requires it, judicial review of administrative action may be granted or withheld as Congress chooses.

The authority of the local boards whose orders are the basis of these criminal prosecutions is circumscribed both by the Act and by the regulations. Their authority to hear and determine all questions of deferment or exemption is, as stated in § 10(a) (2), limited to action "within their respective jurisdictions." It is only orders "within their respective jurisdictions" that are made final. It would seem, therefore, that if a Pennsylvania board ordered a citizen and resident of Oregon to report for induction, the defense that it acted beyond its jurisdiction could be interposed in a prosecution under § 11. That case could be comparable to Tung v. United States, 1 Cir., 142 F.2d 919, where the local board ordered a registrant to report for induction without allowing him the appeal to which he was entitled under the regulations. Since § 10(a) (2) makes the decisions of the local boards final "except where an appeal is authorized" under the regulations, the defense was allowed in the criminal trial.

Any other case where a local board acts so contrary to its granted authority as to exceed its jurisdiction does not stand on a different footing. By § 10(a) (2) the local boards in hearing and determining claims for deferment or exemption must act "under rules and regulations prescribed by the President." Those rules limit, as well as de-

fine, their jurisdiction. One of those regulations forbids the local boards from basing their classification of a registrant on a discrimination "for or against him because of his race, creed, or color, or because of his membership or activity in any labor, political, religious, or other organization." 623.1. Another provides, in accordance with the mandate contained in § 5(c) (1) of the Act, for the deferment of governors of States and members of Congress while they hold their offices. 622.42. Another provides that the local board "shall reopen and consider anew the classification of a registrant" on the written request of the State Director or the Director and upon receipt of the request "shall immediately cancel" any order to report for induction or for work of national importance. 626.2-1. If a local board ordered a member of Congress to report for induction, or if it classified a registrant as available for military service, because he was a Jew, or a German, or a Negro, it would act in defiance of the law. If a local board refused to reopen on the written request of the State Director a registrant's classification and refused to cancel its order to report for induction, it would be acting in the teeth of the regulations. In all such cases its action would be lawless and beyond its jurisdiction.

We cannot read § 11 as requiring the courts to inflict punishment on registrants for violating whatever orders the local boards might issue. We cannot believe that Congress intended that criminal sanctions were to be applied to orders issued by local boards no matter how flagrantly they violated the rules and regulations which define their jurisdiction. We are dealing here with a question of personal liberty. A registrant who violates the Act commits a felony. A felon customarily suffers the loss of substantial rights. Sec. 11, being silent on the matter, leaves the question of available defenses in doubt. But we are loathe to resolve those doubts against the accused. We cannot readily infer that Congress departed so far from the traditional concepts of a fair trial when it made the actions of the local boards "final" as to provide that a citizen of this country should go to jail for not obeying an unlawful order of an administrative agency. We are loathe to believe that Congress reduced criminal trials under the Act to proceedings so barren of the customary safeguards which the law has designed for the protection of the accused. The provision making the decisions of the local boards "final" means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant. See Goff v. United States, 4 Cir., 135 F.2d 610, 612.

Falbo v. United States, supra, does not preclude such a defense in the present cases. In the Falbo case the defendant challenged the order of his local board before he had exhausted his administrative remedies. Here these registrants had pursued their administrative remedies to the end. All had been done which could be done. Submission to induction would be satisfaction of the orders of the local boards, not a further step to obtain relief from them.

If § 11 were not construed to permit the accused to defend on the ground that his local board acted beyond its jurisdiction, a curious result would follow. The remedy of habeas corpus extends to a case where a person "is in custody in violation of the Constitution or of a law * * * of the United States." R.S. § 753, 28 U.S.C. § 453, 28 U.S.C.A. § 453. It has been assumed that habeas corpus is available only after a registrant has been inducted into the armed services. But if we now hold that a registrant could not defend at his trial on the ground that the local board had no jurisdiction in the premises, it would seem that the way would then be open to him to challenge the jurisdiction of the local board after conviction by habeas corpus. The court would then be sending men to jail today when it was apparent that they would have to be released tomorrow.

We do not suggest that because Congress has provided one judicial remedy another should be implied. We may assume that where only one judicial remedy is provided, it normally would be deemed exclusive. But the fact that habeas corpus after conviction is available in these cases gives added support to our reading of § 11. It supports a rejection of a construction of the Act that requires the courts to march up the hill when it is apparent from the beginning that they will have to march down again.

We express no opinion on the merits of the defenses which were tendered. Since the petitioners were denied the opportunity to show that their local boards exceeded their jurisdiction, a new trial must be had in each case.

Reversed.

Mr. Justice FRANKFURTER, concurring in result. Although Congress, in 1940, and by reenactment since, provided that when a draft board determines whether a registrant is entitled to exemption or deferment the board's decision is "final," the Court now concludes that such a decision is not final but may be reviewed when the registrant is tried before a jury for wilful disobedience of a board's order. Not only is such a result opposed to the expressed will of Congress. It runs counter to the achievement of the great object avowed by Congress in enacting this legislation; it contradicts the settled practice under the Selective Service Act throughout the war years, recognized as such by authoritative Congressional opinion; it reverses all the circuit courts of appeals before whom the matter has come, constituting an impressive body of decisions and expressing the views of more than forty judges. * * *

Did Congress place within the Selective Service System the authority for determining who shall and who shall not serve in the armed services, who shall and who shall not enjoy the exemptions and deferments by which Congress has qualified the duty of all to serve? Or, did it leave such determination for reconsideration in trials before juries of persons charged with wilful disobedience of duties defined by the Act? This is the crucial issue in the case and touches the very nerve-center of the Selective Service Act.

One would suppose that Congress expressed its will with the utmost clarity, precluding the need of labored argumentation as to its purpose. Section 10(a) (2) gives the answer.

"Such local boards, under rules and regulations prescribed by the President, shall have power within their respective jurisdictions to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this Act of all individuals within the jurisdiction of such local boards. The decisions of such local boards shall be final except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe." 54 Stat. 885, 893; 50 U.S.C.App. § 310(a) (2), 50 U.S.C.A.Appendix § 310(a) (2).

These words can only mean what they appear to mean if they are read as ordinary words should be read. Ordinary words should be read with their common, everyday meaning when they serve as directions for ordinary people. If legislation was ever designed to define the rights and duties of the vast body of ordinary people, it is the Selective Service Act. One need not italicize "final" to make final mean final, when nowhere in the Act is there any derogation of this Congressional command of finality to "the decisions of such local boards," subject only to reviewability within the Selective Service System.

But if one goes beyond the meaning that the text spontaneously yields, all other relevant considerations only confirm what the text expresses. To allow judicial review of a board's decision on classification is not to respect the context of purpose into which a specific provision of a law is properly placed. To do so disregards that purpose. And Congress did not rely on the public understanding of the purpose that moved it in passing the Selective Service Act, as well it might have considering that the Act was passed in September, 1940. It was explicit: "The Congress hereby declares that it is imperative to increase and train the personnel of the armed forces of the United States." § 1(a). 54 Stat. 885, 50 U.S.C.App. § 301(a), 50 U.S.C.A. Appendix § 301 (a).

There cannot have been many instances in our national life when Congress stamped its legislation as "imperative." And history has amply underscored the desperate urgency. Congress deemed it imperative to secure a vast citizen army with the utmost expedition. It

did so with due regard for the individual interests by giving ample opportunities, within the elaborate system which it established, for supervision of the decisions of the multitudinous draft boards on the selection of individuals for service. As to such legislation, even were the language not explicit, every provision of the Act should be construed to promote fulfilment of the imperative need which inspired it. Surely it would hamper the aim of Congress to subject the decisions of the selective process in determining who is amenable to service to reconsideration by the cumbersome process of trial by jury, admirably suited as that is for the familiar controversies when the nation's life is not at stake. To avoid such a palpable inroad upon Congressional purpose, we need not draw on implications. We must merely resist unwarranted implications to sterilize what Congress has expressly required.

In construing the Act, this Court has heretofore applied the reasons which led Congress to rely wholly on the Selective Service System in determining the rights of individuals. This is what we said two years ago:

"To meet the need which it felt for mobilizing national manpower in the shortest practicable period, Congress established a machinery which it deemed efficient for inducting great numbers of men into the armed forces. Careful provision was made for fair administration of the Act's policies within the framework of the selective service process."

We so ruled in Falbo v. United States, 320 U.S. 549, 554, 64 S.Ct. 346, 349, 88 L.Ed. 305. That was a case in which we held that a challenge to a local board's classification cannot be raised upon a trial like the present for violation of the Court's order, where the registrant disobeys the order before he is accepted for national service. But the Congress made the decisions of the board "final" without regard to the stage at which the registrant disobeys it. The command of Congress makes the decision of the board no less final after the registrant has submitted to the pre-induction examination than before such submission. The finality of the board is neither diminished, nor the authority of the courts to review such decision enlarged, because a registrant flouts the Selective Service process at an early or at a late stage. The language of the statute is unqualified and all-inclusive: "The decisions of such local boards shall be final except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe."

Such has been the construction of more than forty judges in the circuit courts of appeals. The question raised by the facts of this case has come before the Circuit Courts of Appeals for the First, the Second, the Third, the Fourth, the Fifth, the Sixth, the Seventh and the Eighth Circuits. All, eight of them, have ruled that judicial review of a draft board classification is not available, in a criminal prosecution, even though the registrant has submitted to the pre-induction physi-

cal examination. Sirski v. United States, 1 Cir., 1944, 145 F.2d 749; United States v. Flakowicz, 2 Cir., 1945, 146 F.2d 874; United States v. Estep, 3 Cir., 1945, 150 F.2d 768; Smith v. United States, 4 Cir., 1945, 148 F.2d 288; Koch v. United States, 4 Cir., 1945, 150 F.2d 762; Fletcher v. United States, 5 Cir., 1942, 129 F.2d 262; Klopp v. United States, 6 Cir., 1945, 148 F.2d 659; United States v. Rinko, 7 Cir., 1945, 147 F.2d 1; Gibson v. United States, 8 Cir., 1945, 149 F.2d 751. Such was the impact of this Court's reasoning in the Falbo case that it greatly influenced the ruling of the Circuit Courts of Appeals as to the finality of local board orders and practically silenced whatever doubts may theretofore have been held by a few of the judges.

That it was during the crucial war years that the Act was thus interpreted and enforced, whereby the raising of the armed forces was saved from obstruction by not subjecting the Selective Process to judicial review when Congress forbade it, is of course no reason for misconstruing it now and relaxing the mode of administration which Congress deemed necessary for its effectiveness.

Congress not only so willed but those especially entrusted with formulating this legislation were fully aware of the judicial consequences of what it prescribed. This is shown by an authoritative report of the House Committee on Military Affairs when that Committee, the originator of the Act, was considering amendments on renewal of the Act. In its report in January, 1945, more than four years after the Act had been in operation, the Committee thus stated with accuracy and acquiescence the unanimity of judicial decisions in support of the respect by the judiciary of finality of the decisions of the draft board:

"Under the Act as it is now written, registrants who are ordered to submit to induction into the armed forces may not refuse and defend such refusal in a criminal prosecution on the ground that their classifications were not given fair consideration by their boards. In order to obtain a judicial determination of such issues such registrants must first submit to induction and raise the issue by habeas corpus." H. R. Rep. No. 36, 79th Cong., 1st Sess., (1945) 4-5.

Congress wanted men to get into the army, not to litigate about getting in. And so it legislated on the assumption that its carefully devised scheme for determining within the Selective Service System, who was under duty to serve in the army would go awry too seldom to justify allowance of review by the courts. If challenges to such determination by the Selective Service System were found baseless, as they were so found as a matter of experience in all but a negligible number of instances, the men having submitted to induction would be in the army, available as such, and not in prison for disobedience. Accordingly, Congress legislated to discourage obstruction and delay through dilatory court proceedings that would have been inevitable if judicial review of classification had been afforded during the war years.

The Court finds support for its reading that "final" does not mean final in the fact that not even at a time of our greatest national emer-

gency was the writ of habeas corpus withdrawn as the ultimate safeguard of personal liberty. See U. S. Constitution, Art. I, § 9, cl. 2; 1 Stat. 81, as amended, 28 U.S.C. § 451, 28 U.S.C.A. §§ 451. But this general right to question the entire want of a legal foundation for a restraint is no measure of the issues that Congress left open for determination in a jury trial for disobedience of orders of the local draft boards made "final" by § 10(a) (2). Still less can it justify nullification of an explicit direction by Congress that such orders shall finally be determined within the framework of the Selective Service System. The issues in a habeas corpus proceeding are quickly joined, strictly limited and swiftly disposed of by a single judge. See 14 Stat. 385; 28 U.S.C. § 465, 28 U.S.C.A. § 465. Habeas corpus proceedings are freed from the cumbersomeness which is a proper price to pay for the countervailing advantages of jury trials in appropriate situations. Habeas corpus "comes in from the outside," after regular proceedings formally defined by law have ended, "not in subordination to the proceedings, and although every form may have been preserved, opens the inquiry whether they have been more than an empty shell." Holmes, J., dissenting in Frank v. Mangum, 237 U.S. 309, 346, 35 S.Ct. 582, 595, 59 L.Ed. 969. Habeas corpus, after conviction, could not, of course, serve as a revisory process of the determination of classification which Congress lodged with finality in the draft boards. It could only be used in those hardly conceivable situations in which the proceedings before the draft board were a mere sham, "nothing but an empty form." Ibid. The availability in such a remote contingency of habeas corpus even after conviction is certainly no reason for deflecting and confusing a trial for the simple issue defined by § 11, namely, whether there was a wilful disregard of an order made by the Selective Service System, a system ranging from the local board to the President. It is one thing for the writ of habeas corpus to be available even though an administrative action may otherwise be "final." See e.g, Ng Fung Ho v. White, 259 U.S. 276, 42 S.Ct. 492, 66 L.Ed. 938. It is quite another to interpolate judicial review and thereby to disrupt a whole scheme of legislation under which millions of orders need promptly to be made and promptly to be respected and were therefore endowed with finality when sanctions for disobedience are sought.

Another ground for denying the evident purpose of Congress and disregarding the terms in which it expressed that purpose, is the suggestion that the validity of a classification goes to the "jurisdiction of the board" to issue an order to report for induction. But Congress did not say that "the decision of such local boards *when properly acting under their authority* shall be final." It said simply and unqualifiedly "the decisions of such local boards shall be final." To be sure local boards are given power to act "within their respective jurisdictions." But all agencies upon which Congress confers authority have such authority impliedly only "within their respective jurisdictions." If that inherent limitation opened the door to review of their action in

every enforcement proceeding despite provisions for finality, a provision of finality is meaningless.

This argument revives, if indeed it does not multiply, all the casuistic difficulties spawned by the doctrine of "jurisdictional fact." In view of the criticism which that doctrine, as sponsored by Crowell v. Benson, 285 U.S. 22, 52 S.Ct. 285, 76 L.Ed. 598, brought forth and of the attritions of that case through later decisions, one had supposed that the doctrine had earned a deserved repose. In withholding judicial review in the situations with which we are concerned, Congress was acting upon the conviction that it was dealing with matters which were more fittingly lodged in the exclusive discretion of the Selective Service System. Even in cases of far less exigency, Congress has chosen to act on such a view. See, e. g., Gray v. Powell, 314 U.S. 402, 62 S.Ct. 326, 86 L.Ed. 301; Final Report of the Attorney General's Committee on Administrative Procedure (1941) 86. But the short answer to any claim of reviewability drawn from the confinement of the local boards to action "within their respective jurisdictions" is that Congress was concerned with geography and not with law. Throughout this Act, the term "jurisdiction" has this geographic connotation. Is it reasonable to believe that Congress, bent on creating a vast armed force as quickly as possible, would in effect authorize every order of the Selective Service System to be reconsidered upon trials for disregard of such orders? The Act does not differentiate between the power of the board to allow exemptions and its power to grant deferments. The boards were invested with final authority to determine such matters subject only to such review as the Act authorizes. When Congress talked about a board acting within its jurisdiction it meant that a registrant had submitted his papers to a board either because he resided within its area or for some other relevant reason had registered with it.

For five years the circuit courts of appeals have construed § 10(a)(2) to mean that Congress establish a system for organizing a vast citizen's army, the selection of which shall be in civilian boards with such control over them as the President may formulate. Designed obstruction of this means of meeting the great emergency was made an offense. That the Congress had the Constitutional power to do so needs no argument at this late date. See Selective Draft Law Cases (Arver v. United States), 245 U.S. 366, 38 S.Ct. 159, 62 L.Ed. 349, L.R.A.1918C, 361, Ann.Cas.1918B, 856; Kiyoshi Hirabayashi v. United States, 320 U.S. 81, 93, 63 S.Ct. 1375, 1382, 87 L.Ed. 1774. And yet the Court today holds that eight circuit courts of appeals were wrong in reading the language of Congress as Congress wrote it, even though in doing so these courts were respectful of the considerations that moved Congress to write the Act as it did in order to raise that army. If this be so, not only were they wrong, but probably hundreds of convictions for disobedience of local board orders based on such regard for what Congress had written, were invalid. * * *

Another issue is presented by the petitioner in No. 66. The indictment alleges a failure to report for induction. While the petitioner did not report at the local board as he was ordered to do, he was forcibly taken to the induction center and went through the pre-induction physical examination but subsequently refused to submit to induction. An order to report for induction, as we said in Billings v. Truesdell, "includes a command to submit to induction." 321 U.S., at page 557, 64 S.Ct. at page 745, 88 L.Ed. 917; United States v. Collura, 2 Cir., 1943, 139 F.2d 345. There is, however, basis for the petitioner's contention that the case was tried and submitted to the jury on the theory that he failed to show up at his local board. He substantially complied with that request by being at the induction center for examination. The trial court's charge is at best ambiguous. The court more than once apparently charged not that he did not submit to induction, but that he failed to appear voluntarily at the induction points. "A conviction ought not to rest on an equivocal direction to the jury on a basic issue." Bollenbach v. United States, 326 U.S. 607, 66 S.Ct. 402, 90 L.Ed. ——. On this ground the conviction is properly reversed.

Mr. Justice BURTON, with whom Mr. Chief Justice STONE concurs, dissenting.

The CHIEF JUSTICE and I think that the judgment of conviction in these cases should be affirmed, for reasons stated in Part I of Mr. Justice FRANKFURTER'S opinion.

We think that under § 10(a) (2) of the Selective Service Act, rightly construed, the registrant is required, on pain of criminal penalties, to obey the Local Board's order to report for induction into the armed forces, even though the Board's order or the action of the Appeal Board on which it is based, is erroneous. "In order to obtain a judicial determination of such issues such registrants must first submit to induction and raise the issues by habeas corpus." H.Rep. No. 36, 79th Cong., 1st Sess. (1945) 4. It follows that if the registrant is indicted for disobedience of the Board's order he cannot defend on the ground that the draft procedure has not been complied with or, if convicted, secure his release on that ground by resort to habeas corpus. The result is that such relief is open to him only if he obeys the order and submits to induction, when he is free to seek habeas corpus.

We do not find in the record of either case sufficient basis for reversal thereof on the grounds suggested in Part II of Mr. Justice FRANKFURTER'S opinion.[k]

[k] The footnotes of the court, the dissenting opinion of Mr. Justice Murphy and the concurring opinion of Mr. Justice Rutledge, have been omitted.

BRIDGES v. WIXON

Supreme Court of the United States.
326 U.S. 135, 65 S.Ct. 1443, 89 L.Ed. 2103 (1945).

See *supra* at p. 320.

NG FUNG HO v. WHITE

Supreme Court of the United States.
259 U.S. 276, 42 S.Ct. 492, 66 L.Ed. 938 (1922).

See *supra* at p. 781.

MAHLER v. EBY

Supreme Court of the United States.
264 U.S. 32, 44 S.Ct. 283, 68 L.Ed. 549 (1924).

See *supra* at p. 905.

E. MANDAMUS

JUDICIAL CODE § 262

28 U.S.C. § 377.

§ 377. Power to issue writs. The Supreme Court and the district courts shall have power to issue writs of scire facias. The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.[1]

[1] In M'Intire v. Wood, 7 Cranch (U. S.) 504, 3 L.Ed. 420 (1813), and M'Clung v. Silliman, 6 Wheat. (U.S.) 598, 5 L. Ed. 340 (1821), it was held that the 14th section of the Judiciary Act of 1789, from which Judicial Code § 262 was ultimately derived, did not vest in the circuit courts a general jurisdiction to issue writs of mandamus to officers in the executive departments of the United States to compel the performance of ministerial duties. The writ could be issued only where necessary to the exercise of the jurisdiction of the issuing court—*e. g.*, in order to make effective a recognized jurisdiction to review. See also Kendall v. The United States, 12 Pet. (U.S.) 524, 620-1, 9 L.Ed. 1181 (1838). In Kendall v. The United States, the court held that the organic act of the District of Columbia, Act of Feb. 27, 1801, did vest a general jurisdiction to issue the writ of mandamus as at common law in the circuit court of the District of Columbia. *Cf.* also Marbury v. Madison, 1 Cranch (U.S.) 137, 2 L.Ed. 60 (1803).

RULE 81(b) OF FEDERAL RULES OF CIVIL PROCEDURE (1938)

(b) SCIRE FACIAS AND MANDAMUS. The writs of scire facias and mandamus are abolished. Relief heretofore available by mandamus or scire facias may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules.

SAFEWAY STORES, INC. v. BROWN

United States Emergency Court of Appeals.
138 F.2d 278 (1943).

PER CURIAM. Safeway Stores, Incorporated, the complainant, has filed three complaints in this court. In each complaint it avers that within the statutory period of sixty days it filed a protest against a specified maximum price regulation, that the Price Administrator did not within the period of thirty days after the filing of the protest or the period of ninety days after the issuance of the regulation either grant or deny its protest in whole or in part, notice such protest for hearing or provide the complainant an opportunity to present further evidence in connection therewith. Each complaint thereupon states that "the failure and refusal of the respondent to act upon complainant's protest are not in accordance with law, are arbitrary and capricious and constitute, in fact, a denial of the protest." The Price Administrator has moved to dismiss each complaint for want of jurisdiction upon the ground, inter alia, that it appears from the face of the complaints that the complainant is not a person aggrieved by the denial or partial denial of his protest and is, therefore, not entitled to file a complaint in this court under the Emergency Price Control Act.

Section 203(a) of the Act, 50 U.S.C.A.Appendix § 923(a), provides: "Within a reasonable time after the filing of any protest under this subsection, but in no event more than thirty days after such filing or ninety days after the issuance of the regulation or order * * * in respect of which the protest is filed, whichever occurs later, the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith."

Section 204(a), 50 U.S.C.A.Appendix § 924(a), provides: "Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part."

The complainant contends that since the statute made it the duty of the Price Administrator to take some action upon its protests within thirty days after their filing or within ninety days after the issuance

of the regulations, whichever occurs later, the failure of the Administrator to take any action within those periods must be treated as amounting to such a denial of the protest as would afford it the right to file the complaints. We are satisfied that this contention cannot be sustained.

The language of Section 204(a) which we have quoted makes it clear that the jurisdiction of this court may only be invoked by a complainant when his protest has been denied by the Price Administrator in whole or in part. We think that this means that the protest must have been actually denied by an overt act of the Administrator. It must be remembered that the statute does not require the Administrator to take final action upon a protest within the periods mentioned. He may instead notice it for hearing or otherwise afford the protestant an opportunity to present further evidence in connection with it, in which event its final disposition will necessarily be deferred beyond the periods specified. Furthermore, it is obvious that in many cases it would be wholly impracticable for the Administrator to take considered final action on a protest within the periods specified in the statute. The fact that the act does not require such final action within those periods removes the basis for the complainant's theory that failure of the Administrator to take final affirmative action within the periods necessarily amounts to a rejection. Then also the act requires the Administrator, when denying a protest, to inform the protestant of the grounds of his decision. We think that it was the intention of Congress that not only the protestant but this court as well should have the benefit of such a statement of the reasons for the Administrator's action. Obviously it will not be available if he has not acted.

To adopt the view contended for by the complainant would in effect be to amend the statute so as to give this court jurisdiction not only in case of the denial or partial denial of a protest but also in case of failure of the Administrator within the periods of time specified in Section 203(a) to take either the final or procedural action with respect thereto which Section 203(a) authorizes him to take. It is of course within the power of Congress to confer such additional jurisdiction upon this court but we may not assume to exercise it without statutory authority. Compare United States v. Bell, 4 Cir., 1935, 80 F.2d 516.

It does not follow, however, that a protestant is wholly without remedy in case the Price Administrator improperly delays action upon his protest. Section 203(a), as we have seen, requires some action, not necessarily final, to be taken within a time which it specifies. If procedural action is taken within that time the statute is silent as to a further time limit upon final action thereafter. But we think that by clearest implication the act requires such action within a reasonable time. If the Administrator should unreasonably delay final action it would seem clear that this court, upon a proper showing,

may under the authority of Section 262 of the Judicial Code, 28 U.S.C.A. § 377, in aid of its jurisdiction issue an order in the nature of a writ of mandamus directing the Price Administrator to take action upon a pending protest. Knickerbocker Ins. Co. v. Comstock, 1872, 83 U.S. 258, 270, 16 Wall. 258, 270, 21 L.Ed. 493; McClellan v. Carland, 1910, 217 U.S. 268, 280, 30 S.Ct. 501, 54 L.Ed. 762; Roche et al. v. Evaporated Milk Ass'n et al., 1943, 319 U.S. 21, 63 S.Ct. 938, 87 L.Ed. 1185. Under such circumstances mandamus will lie where an inferior tribunal or agency refuses to act even though the act required involves the exercise of judgment and discretion. Ex parte Newman, 1871, 81 U.S. 152, 169, 14 Wall. 152, 169, 20 L.Ed. 877; Interstate Com. Comm. v. United States ex rel. Humboldt Steamship Co., 1912, 224 U.S. 474, 485, 32 S.Ct. 556, 56 L.Ed. 849. Of course, in such a case the decree of the court would merely require the Administrator to exercise his discretionary power with respect to the protest without any direction as to the manner in which his discretion should be exercised.

The complaints are dismissed.[m]

INTERSTATE COMMERCE COMMISSION v. UNITED STATES EX REL. HUMBOLDT STEAMSHIP COMPANY

Supreme Court of the United States.
224 U.S. 474, 32 S.Ct. 556, 56 L.Ed. 849 (1912).

See *supra* at p. 581.

WORK, SECRETARY OF THE INTERIOR v. UNITED STATES EX REL. RIVES

Supreme Court of the United States.
267 U.S. 175, 45 S.Ct. 252, 69 L.Ed. 561 (1925).

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

This is an appeal under section 250 of the Judicial Code, par. 6 (Comp.St. § 1227), from a judgment of the Supreme Court of the District of Columbia, affirmed by the Court of Appeals, granting a mandamus compelling the Secretary of the Interior to consider and allow a claim for net losses suffered by Logan Rives, the relator, in producing and preparing to produce manganese at the instance of the government for war purposes, under section 5 of the Dent Act (March 2, 1919, ch. 94, 40 Stat. 1272, being Comp.St.Ann.Supp. 1923, § 3115¼½e).

Relator's petition shows that he incurred losses aggregating $55,204.15, but that the Secretary awarded him only $23,047.36, refusing to allow him, among other items, $9,600 which he had to expend in ob-

[m] Footnotes of the court have been omitted.

taining a release from a contract to buy land containing manganese, after the land had lost most of its value because of the Armistice. The mandamus asked is to compel consideration and allowance of the claim for this particular item.

The Secretary's answer avers that the relator received and accepted the $23,047.36 awarded March, 1920, but refused to waive any right to further award under any subsequent legislation which might provide for further payment. The answer further denies that the Secretary refused to consider the claim, but avers that he did so fully and rejected it. The relator demurred to the answer and on that demurrer judgment followed and the writ issued.

Mandamus issues to compel an officer to perform a purely ministerial duty. It cannot be used to compel or control a duty in the discharge of which by law he is given discretion. The duty may be discretionary within limits. He cannot transgress those limits, and if he does so, he may be controlled by injunction or mandamus to keep within them. The power of the court to intervene, if at all, thus depends upon what statutory discretion he has. Under some statutes, the discretion extends to a final construction by the officer of the statute he is executing. No court in such a case can control by mandamus his interpretation, even if it may think it erroneous. The cases range, therefore, from such wide discretion as that just described to cases where the duty is purely ministerial, where the officer can do only one thing which on refusal he may be compelled to do. They begin on one side with Kendall v. United States, 12 Pet. 524, 9 L.Ed. 1181, in which Congress directed the Postmaster General to make some credit entries in an account found to be just by the Solicitor of the Treasury. This court held that the duty was ministerial with no discretion and required the Postmaster General to make the entries. On the other side is Decatur v. Paulding, Secretary of the Navy, 14 Pet. 497, 599, 10 L. Ed. 559, 609. Congress there provided for general naval pensions by general act, and by resolution of the same day granted a special pension for the widow of Commodore Decatur. She received the pension under the general law and then applied for the special pension, which was refused by the Secretary of the Navy, on the ground that she was given an election of one of two funds and she had elected. She sought by mandamus to compel the Secretary, who under the law administered the Naval Pension fund, to allow the special pension. This court held that Congress intended the Secretary to construe the statutes and to allow the pensions accordingly, and that although the court might, as a matter of legal construction, differ from his conclusion, it could not by mandamus or injunction constrain him in his exercise of his discretion. Between these two early and leading authorities illustrating the extremes are decisions, in which the discretion is greater than in the Kendall Case and less than in the Decatur Case, and its extent and the scope of judicial action in limiting it depend upon

a proper interpretation of the particular statute and the congressional purpose.

The Dent Act was passed by Congress in an effort to do justice and equity to the many persons who could not obtain from the government compensation for supplies or services furnished or losses incurred in helping the government during the war, because of a lack of enforceable contracts or equities. As to supplies and services furnished, there was to be a settlement made by the Secretary of War, and if this did not satisfy the claimant, he was given a right under section 2 to sue in the Court of Claims to recover greater compensation. Section 3 gave the Secretary power to settle fairly and equitably claims of foreign governments and their nationals for supplies and services rendered to the American Expeditionary Forces whether by contract entered into in accordance with applicable statutory provisions or not. By section 4, the Secretary was given power to protect subcontractors in his awards.

By section 5, provision was made, not to pay for supplies or services rendered directly to the government, but to relieve a class of persons who were invited by the government to invest money in the production and preparing for the production of certain metals or materials difficult to obtain, and needed for the war, and who had thereupon incurred expense therein and had suffered losses because of the coming of the Armistice and the consequent destruction of the market for such metals.

The said Secretary was to make adjustments and payments in each case as he should determine to be just and equitable; and the decision of the Secretary was to be "conclusive and final." There were five provisos: The first imposed a limit of total expenditure under the act. The second limited claims to those filed within three months after the passage of the act.

The third proviso declared:

"That no claim shall be allowed * * * by said Secretary unless it shall appear to the satisfaction of the said Secretary that the expenditures so made or obligations so incurred by the claimant were made in good faith for or upon property which contained * * * manganese * * * in sufficient quantities to be of commercial importance."

The fourth proviso was:

"That no claims shall be paid unless it shall appear to the satisfaction of said Secretary that moneys were invested or obligations were incurred subsequent to April 6, 1917, and prior to November 12, 1918, in a legitimate attempt to produce * * * manganese * * * for the prosecution of the war, and that no profits of any kind shall be included in the allowance of any of said claims, and that no investment for merely speculative purposes shall be recognized in any manner by said Secretary."

The fifth proviso declared that the settlement of any claim under the section should not bar the government through any authorized agency or any congressional committee thereafter duly appointed from the review of such settlement, nor the right to recover any money paid by the government to any party under the section if the government had been defrauded.

The last paragraph of the section declared "that nothing in this section shall be construed to confer jurisdiction upon any court to entertain a suit against the United States," and closed with a proviso that in determining the net losses of any claimant, the Secretary should take into consideration and charge to him the then market value of any ores or minerals on hand belonging to him, and the salvage or usable value of his machinery or other appliances claimed to have been purchased to comply with the request of the government.

On November 23, 1921, after the first award in this case, section 5 was amended (chapter 137, 42 Stat. 322) by adding another proviso that all claimants who in response to the request of any government agency mentioned in the act expended money "in producing or preparing to produce" manganese, and had mailed their claims in time "if the proof in support of said claims clearly shows them to be based upon action taken in response to such request * * * shall be reimbursed such net losses as they may have incurred and are in justice and equity entitled to from the appropriation in said act. If in claims passed upon under said act awards have been denied or made on rulings contrary to the provisions of this amendment, or through miscalculation, the Secretary of the Interior may award proper amounts or additional amounts."

This amendment was brought about on the recommendation of the Secretary of the Interior, because he had felt obliged, under section 5 as it was, to reject some 600 claims for failure within the time limit to show a direct personal request or demand upon the claimant by the government authorities named in the act and a response thereto by the claimant and because the Comptroller had refused to pay any changed award of the Secretary made after a rehearing or to correct miscalculation.

It is urged that the refusal of the Secretary to allow the loss of $9,600 on the real estate contract is in the teeth of the third proviso, which requires him to allow for expenditures made or obligations incurred "for and upon property" containing manganese in sufficient quantities to be of commercial importance. The Interior Department had held from the beginning that this proviso did not embrace money spent for real estate or mining rights. The ruling was based in part at least on the legislative history of the bill, which showed that it originally contained an express provision for expenditures for real estate as a proper element in calculating the net losses to be reimbursed, and that this provision was objected to as involving too speculative a subject-matter and it was stricken out. The Department's view was that

expenditures "for and upon" property containing manganese and other metals did not include cost of real estate or mining rights because too speculative under the limitations of the fourth proviso and were intended to be confined to expenditures for construction, equipment and machinery in development of such property.

We are asked to reject this interpretation as wholly at variance with the natural and necessary meaning of the words and to confirm the courts below in enforcing a view more liberal to the claimant.

The above summary of section 5 clearly shows that Congress was seeking to save the beneficiaries from losses which it would have been under no legal obligation to make good if a private person. It was a gratuity based on equitable and moral considerations. United States v. Realty Co., 163 U.S. 427, 439, 16 S.Ct. 1120, 41 L.Ed. 215; Allen v. Smith, 173 U.S. 389, 402, 19 S.Ct. 446, 43 L.Ed. 741. Congress did not wish to create a legal claim. It was not dealing with vested rights. It did not, as it did with the claims for supplies and services directly furnished the government under the first and second sections of the act, make the losses recoverable in a court, but expressly provided otherwise. It dealt with the subject with the utmost caution. It hedged the granting of the equitable gratuity with limitations to prevent the use of the statute for the recovery of doubtful or fraudulent claims or merely speculative losses. It vested the Secretary with power to reject all losses except as he was satisfied that they were just and equitable and it made his decision conclusive and final. Final against whom? Against the claimant. He could not resort to court to review the Secretary's decision. This was expressly forbidden. By the fifth proviso, however, the government was permitted through any of its agencies or even by a committee of Congress duly authorized, to review the settlement by the Secretary and by necessary implication to reverse it. If the government was defrauded, it was authorized to sue to recover any money paid under the award.

Congress was occupying toward the proposed beneficiaries of section 5 the attitude rather of a benefactor, than of a debtor at law. Congress intended the Secretary to act for it, and to construe the meaning of the words used to describe the elements of the net losses to be ascertained and to give effect to his interpretation without the intervention of the courts. This statute presents a case of as wide discretion as was held to have been vested in the Secretary of the Navy in the Decatur Case.

Nor does the amendment of 1921 change the effect of the act in this regard. His counsel insist that it was adopted in order to relieve claimants from previous narrow rulings of the Secretary. There is nothing in the amendment that indicates the congressional purpose to do more than it purports to do, i. e., to enable the Secretary to entertain claims for losses incurred at the instance of any government agencies whether direct and personal or by public invitation, and to enable the Secretary to grant rehearings, correct miscalculation and award

additional amounts. The amendments still left all claims to his sense of justice and equity.

Two cases upon which the relator relies do not aid him. They depend on the construction of the particular statute. In Work v. Mosier, 261 U.S. 352, 43 S.Ct. 389, 67 L.Ed. 693, we held that the statutory direction that certain income due minors of the Osage Indians be paid was clear and positive and it was not left to the Secretary of the Interior to vary it, i. e., he was not given discretion finally to construe it. In Work v. McAlester, 262 U.S. 200, 43 S.Ct. 580, 67 L.Ed. 949, it was held that by virtue of the statute a lessee had a vested right to buy the land at an original appraisement and that the Secretary had no authority to affect that right by ordering another appraisement.

Ness v. Fisher, 223 U.S. 683, 32 S.Ct. 356, 56 L.Ed. 610, Riverside Oil Co. v. Hitchcock, 190 U.S. 316, 23 S.Ct. 698, 47 L.Ed. 1074, Alaska Smokeless Co. v. Lane, 250 U.S. 549, 40 S.Ct. 33, 63 L.Ed. 1135, and Hall v. Payne, 254 U.S. 343, 41 S.Ct. 131, 65 L.Ed. 295, were all cases in which it was sought to control and reverse rulings of the Secretary of the Interior, on the ground that he had in the administration of the land laws made a ruling contrary to law against an applicant for action by him. In each case it was held that as the statute intended to vest in the Secretary the discretion to construe the land laws and make such rulings no court could reverse or control them by mandamus in the absence of anything to show that they were capricious or arbitrary. It was pointed out that a mandamus could not be made to serve the function of a writ of error, and the mere fact that the court might deem the ruling erroneous in law gave it no power to intervene. These cases are supported by earlier authorities to the same effect. United States ex rel. Tucker v. Seaman, 17 How. 225, 15 L.Ed. 226; Gaines v. Thompson, 7 Wall. 347, 19 L.Ed. 62; Litchfield v. The Register and Receiver, 9 Wall. 575, 19 L.Ed. 681; United States ex rel. Dunlap v. Black, 128 U.S. 40, 9 S.Ct. 12, 32 L.Ed. 354. All rest upon the Decatur Case. Compare United States v. Babcock, 250 U.S. 328, 331, 39 S.Ct. 464, 63 L.Ed. 1011. There is nothing in the award by the Secretary in the case at bar which would justify characterizing it as arbitrary or capricious or fraudulent or an abuse of discretion. The Secretary's view that it was not just or equitable to include loss by a land purchase within the gratuity of the government as defined by the statute must therefore prevail against mandamus.

Lane v. Hoglund, 244 U.S. 174, 37 S.Ct. 558, 61 L.Ed. 1066; Ballinger v. Frost, 216 U.S. 240, 30 S.Ct. 338, 54 L.Ed. 464; Garfield v. Goldsby, 211 U.S. 249, 29 S.Ct. 62, 53 L.Ed. 168; Roberts v. United States, 176 U.S. 221, 20 S.Ct. 376, 44 L.Ed. 443; Butterworth v. Hoe, 112 U.S. 50, 5 S.Ct. 25, 28 L.Ed. 656; United States v. Schurz, 102 U.S. 378, 26 L.Ed. 167, were all cases in which the court found that all the conditions had been fulfilled upon which the relator in the mandamus was entitled to call upon the officer to do an act beneficial to the relator and that the act was thus a ministerial duty as in the Kendall Case.

There is a class of cases in which a relator in mandamus has successfully sought to compel action by an officer who has discretion concededly conferred on him by law. The relator in such cases does not ask for a decision any particular way but only that it be made one way or the other. Such are Louisville Cement Co. v. Interstate Commerce Commission, 246 U.S. 638, 38 S.Ct. 408, 62 L.Ed. 914, and Interstate Commerce Commission v. Humboldt S. S. Co., 224 U.S. 474, 32 S.Ct. 556, 56 L.Ed. 849. They follow the decision in Commissioner of Patents v. Whiteley, 4 Wall. 522, 18 L.Ed. 335. They are analogous to Hohorst, Petitioner, 150 U.S. 653, 14 S.Ct. 221, 37 L.Ed. 1211; Parker, Petitioner, 131 U.S. 221, 9 S.Ct. 708, 33 L.Ed. 123; Ex parte Parker, 120 U.S. 737, 7 S.Ct. 767, 30 L.Ed. 818, and others which hold that mandamus may issue to an inferior judicial tribunal if it refuses to take jurisdiction when by law it ought to do so, or where, having obtained jurisdiction, it refuses to proceed in its exercise. It is sought to bring the present case within this class by the averment in the petition that the Secretary of the Interior has refused to take jurisdiction of the claim for the loss of $9,600 through the real estate contract. This averment is met by a denial in the answer and the affirmative allegation that the Secretary did consider the claim and disallowed it for cause deemed by him to be good. This mandamus was granted by the courts below on demurrer to the answer. Its allegations must be taken as admitted. Moreover, it is clearly shown by the exhibits to the pleadings that the Secretary decided that on its merits the claim was not for the kind of loss which Congress intended the Secretary to reimburse.

Our conclusion makes it unnecessary for us to consider the contention of the government that the relator here is estopped to urge the present claim by his acceptance of the award already made.

Reversed.[n]

ROBERTS, TREASURER v. UNITED STATES

Supreme Court of the United States.
176 U.S. 221, 20 S.Ct. 376, 44 L.Ed. 443 (1900).

Mr. Justice PECKHAM delivered the opinion of the Court.

A writ of certiorari was issued in this case to the court of appeals of the District of Columbia, for the purpose of reviewing a judgment of that court affirming a judgment of the supreme court of the District, which awarded to the relator, Marie A. Valentine, a writ of mandamus to compel the petitioner, who is the Treasurer of the United States, to pay her, as assignee, a residue of 2.35 per centum interest upon certain certificates issued by the board of audit of the District of Columbia pursuant to the provisions of § 6 of the act approved June 20, 1874,

[n] *Cf.* State of Louisiana v. McAdoo, 234 U.S. 627, 34 S.Ct. 938, 58 L.Ed. 1506 (1914).

entitled "An Act for the Government of the District of Columbia, and for Other Purposes." 18 Stat. at L. 116, 118, chap. 337.

The facts upon which the controversy arises are uncontradicted, and are as follows: One Charles E. Evans, who, previous to 1874, had done a large amount of work for the District in laying concrete and brick pavements in the city of Washington, duly presented his claims on that account to the board of audit constituted under the act above mentioned, which board, after an examination of such claims, executed on the 1st of August, 1874, the two certificates which form the basis of the claim of the relator, each certificate being dated on that day, one of which acknowledged an indebtedness to him on the part of the District of Columbia of $19,616.25 and the other $909.40. They were not, however, delivered to Evans, because at the time they were made a claim had been set up by the authorities of the District that Evans was liable for the expense of repairs which were needed on pavements laid by him (which claim, however, as it afterwards appeared, was not well founded), and the board of audit, instead of delivering the certificates to Evans, withheld them from him, and at or about their date delivered them to the commissioners of the District, who held them as collateral security for the payment of any liability of Evans for the repairs mentioned. They remained from August, 1874, until June 9, 1890, in a tin box in the office of the Treasurer of the United States, who held it and its contents subject to the control of the commissioners of the District.

By reason of this refusal to deliver the certificates and their retention in the hands of the Treasurer, Evans was unable to avail himself of the right given by the act of 1874 to exchange such certificates for the 3.65 bonds mentioned in that act, and for the same reason he was unable to avail himself of the provisions of § 9 of the act approved June 16, 1880 (21 Stat. at L. 284, chap. 243), providing for the redemption of the certificates created by the act of 1874. An action was therefore commenced in December, 1880, in the court of claims by the assignee of Evans to recover judgment against the District of Columbia upon those certificates, under the provisions of § 1 of the above act of 1880. In this action, in addition to the claims upon the certificates already mentioned, Fisher, the assignee, included a large amount of other claims against the District, which had also been assigned to him by Evans.

In 1884, Congress passed an act, approved July 5, 1884 (23 Stat. at L. 123, 131, chap. 227), providing that no payment should be made of any certificate issued under the act of 1874 that should not be presented for payment within one year from the date of the approval of the act of 1884.

After its commencement (the certificates still remaining in the custody of the Treasurer) the action above mentioned continued pending until some time during the December term, 1889, of the court of claims, when the executors of the will of Fisher, the assignee, were substituted

as parties plaintiff in the action upon the suggestion of the death of Fisher having been duly made upon the record, and the action was revived in the names of the executors of Fisher's will.

In June, 1890, a settlement of that action was agreed upon, by the terms of which the two certificates were to be delivered to the plaintiffs, and the other matters in dispute therein were to be withdrawn from the court by the discontinuance of the action. Pursuant to that settlement and on June 9, 1890, under the advice of the Assistant Attorney General in charge of the case, the certificates were delivered to the plaintiff's attorney, who thereupon presented them to the Treasurer and requested him, in his capacity as *ex officio* commissioner of the sinking fund of the District of Columbia, to issue in exchange for them the 3.65 bonds authorized by the act of Congress of 1874. The Treasurer refused to redeem the certificates or to issue bonds for the payment thereof, or in any way to pay the same, until the parties had obtained a judgment in the court of claims in the action already mentioned, which should provide for their payment. Accordingly the plaintiffs in that action asked and obtained leave to amend their petition by striking out all reference to any other causes of action than those upon these two certificates. The amendment was consented to by the Assistant Attorney General, and on June 12, 1890, a judgment was duly obtained in favor of plaintiffs and against the District of Columbia for the recovery, "in the manner provided by the act of June 16, 1880, chapter 243," of the sums mentioned in the certificates. The judgment roll in the case contained the petition in which these particular certificates were set out in full, and it showed that the judgment entered by the court of claims was recovered on those certificates and on them alone. There was thus evidence on record which showed the cause of action on which the judgment was based. On September 12, 1890, the Treasurer paid these certificates with interest from their date, August 1, 1874, to September 11, 1890, at 3.65 per centum, by paying the judgment entered by the court of claims. Subsequently to that time the executors of Fisher, the assignee of Evans, assigned to one Robinson all interest in the claims and demands against the District, and Robinson subsequently assigned the same to the relator. Thus, some sixteen years after the certificates had been duly made under the authority of the act of 1874 they were finally redeemed, the delay having been caused by their retention as above stated and by the refusal of the Treasurer to deliver them to their owner.

On August 13, 1894, Congress passed an act (28 Stat. at L. 277, chap. 279), the first section of which reads as follows:

"That the Treasurer of the United States is hereby directed to pay to the owners, holders, or assignees of all board of audit certificates redeemed by him under the act approved June 16, 1880, the residue of two and thirty-five hundredths per centum per annum of unpaid legal rate interest due upon said certificates from their date up to the date of approval of said act providing for their redemption."

The relator as assignee, by her attorney, made demand upon the Treasurer for the payment of the balance of the interest as provided for in the above act, and on November 3, 1897, the Treasurer refused such demand, and wrote the following letter to the attorney:

Sir: Your letter of the 27th ultimo, inclosing a petition for the payment of interest on certain board of audit certificates, under the act of Congress approved August 13, 1894, is received.

You will note that the act referred to provides for additional interest to be paid only upon board of audit certificates redeemed by the Treasurer under the act of June 16, 1880. Neither of the certificates recited in your petition was redeemed by the Treasurer, and they are not in his possession.

You state that certain judgments of the court of claims were issued in lieu of these certificates. These judgments were paid by this office in the manner prescribed by law, but neither of them states that they were issued in lieu of or upon debts of the District of Columbia represented by board of audit certificates.

The Treasurer has therefore no authority to pay the additional interest you demand.

The foregoing facts were set forth in the petition of the relator to the supreme court of the District of Columbia asking for a mandamus to compel the Treasurer to make the payment demanded.

In answer to the petition the Treasurer alleged "that the certain board of audit certificates, so called, in the said petition mentioned, namely, the certificates numbered 8879 and 19,429, were not redeemed by him or any person holding the office of Treasurer of the United States at any time, and that the only moneys paid by any Treasurer of the United States on account of any of the matters or things in the said petition mentioned as having relation to the said certificates, or either of them, were paid upon certain judgments of the court of claims of the United States, as appears by the transcript from the records of the Treasury Department of the United States, hereto annexed and made part hereof and that the defendant has no official knowledge, nor has he any official record in his office, showing or tending to show upon what claim or claims either of the said judgments was based."

Nothing but a transcript of the decree contained in the judgment roll was annexed to the return. The relator demurred to the return, and upon these pleadings the cause came on for hearing before the supreme court, which ordered a writ of mandamus to issue as prayed for. Upon appeal to the court of appeals that court affirmed the judgment, and the Treasurer applied for and obtained a writ of certiorari for the purpose of procuring a review of the judgment by this court.

Upon reading the return made by the Treasurer to the petition for the writ it will be seen that the facts upon which he bases his defense

are that he did not redeem the certificates in question, and that the only moneys paid by any Treasurer of the United States were paid on this judgment of the court of claims already mentioned, and that it did not appear in any official record in his office upon what claim or claims the judgment of the court of claims was based. * * *

The remaining and most important objection is that this is not a case in which the writ of mandamus can properly be issued to one of the executive officers of the government.

The law relating to mandamus against a public officer is well settled in the abstract, the only doubt which arises being whether the facts regarding any particular case bring it within the law which permits the writ to issue where a mere ministerial duty is imposed upon an executive officer, which duty he is bound to perform without any further question. If he refuse under such circumstances, mandamus will lie to compel him to perform his duty. This is the principle upheld by this court in United States ex rel. Dunlap v. Black, 128 U.S. 40, 32 L.Ed. 354, 9 Sup.Ct.Rep. 12, and upon the authority of that case the defendant claims that no mandamus can be issued against him.

The writ was refused in the Black Case, because, as the court held, the decision which was demanded from the Commissioner of Pensions required of him, in the performance of his regular duties as commissioner, the examination of several acts of Congress, their construction, and the effect which the later acts had upon the former, all of which required the exercise of judgment to such an extent as to take his decision out of the category of a mere ministerial act. A decision upon such facts, the court said, would not be controlled by mandamus The circumstances under which a party has the right to the writ are examined in the course of the opinion, which was delivered by Mr Justice Bradley, and many cases upon the subject are therein cited, and the result of the examination was as just stated.

In this case the facts are quite different. There is but one act of Congress to be examined, and it is specially directed to the Treasurer. We think its construction is quite plain and unmistakable. It directs the Treasurer to pay the interest on the certificates which had been redeemed by him, and the only question for him to determine was whether these certificates had been redeemed within the meaning of that act. That they were, we have already attempted to show, and the duty of the Treasurer seems to us to be at once plain, imperative, and entirely ministerial, and he should have paid the interest as directed in the statute.

This case comes within the exception stated in the Black Case, that where a special statute imposes a mere ministerial duty upon an executive officer, which he neglects or refuses to perform, then mandamus lies to compel its performance; but the court will not interfere with the executive officers of the government in the exercise of their ordinary official duties, even when those duties require an interpreta-

tion of the law, the court having no appellate power for that purpose. On this last ground the court denied the writ.

Unless the writ of mandamus is to become practically valueless, and is to be refused even where a public officer is commanded to do a particular act by virtue of a particular statute, this writ should be granted. Every statute to some extent requires construction by the public officer whose duties may be defined therein. Such officer must read the law, and he must therefore, in a certain sense, construe it, in order to form a judgment from its language what duty he is directed by the statute to perform. But that does not necessarily and in all cases make the duty of the officer anything other than a purely ministerial one. If the law direct him to perform an act in regard to which no discretion is committed to him, and which, upon the facts existing, he is bound to perform, then that act is ministerial, although depending upon a statute which requires, in some degree, a construction of its language by the officer. Unless this be so, the value of this writ is very greatly impaired. Every executive officer whose duty is plainly devolved upon him by statute might refuse to perform it, and when his refusal is brought before the court he might successfully plead that the performance of the duty involved the construction of a statute by him, and therefore it was not ministerial, and the court would on that account be powerless to give relief. Such a limitation of the powers of the court, we think, would be most unfortunate, as it would relieve from judicial supervision all executive officers in the performance of their duties, whenever they should plead that the duty required of them arose upon the construction of a statute, no matter how plain its language, nor how plainly they violated their duty in refusing to perform the act required.

In this case we think the proper construction of the statute was clear, and the duty of the Treasurer to pay the money to the relator was ministerial in its nature, and should have been performed by him upon demand.

The judgment of the Court of Appeals must be affirmed.

In UNITED STATES EX REL. GREATHOUSE v. DERN, SECRETARY OF WAR, 289 U.S. 352, 53 S.Ct. 614, 77 L.Ed. 1250 (1933), the court, at 289 U. S. 359, 360, 53 S.Ct. 614, 617, said:

Although the remedy by mandamus is at law, its allowance is controlled by equitable principles. * * * and it may be refused for reasons comparable to those which would lead a court of equity, in the exercise of a sound discretion, to withhold its protection of an undoubted legal right. * * * The Court, in its discretion, may refuse mandamus to compel the doing of an idle act, * * * or to give a remedy which would work a public injury or embarrassment * * * just as, in its sound discretion, a court of equity may refuse to enforce or protect legal rights, the exercise of which may be prejudicial to the public interest.

So-called "writs of mandamus", in the nature of mandatory injunctions, quite distinct in character from the common-law writ, are sometimes provided for by the express terms of a particular statute. See, for example, section 21(f) of the Securities Exchange Act of 1934, 15 U.S.C. § 78u(f), *supra* at p. 525; section 20(9) of the Interstate Commerce Act, 49 U.S.C. § 20(9); the fourth paragraph of section 9 of the Federal Trade Commission Act, 15 U.S.C. § 49, *supra* at p. 216.

F. Certiorari

DEGGE v. HITCHCOCK

Supreme Court of the United States.
229 U.S. 162, 33 S.Ct. 639, 57 L.Ed. 1135 (1913).

Mr. Justice LAMAR, after making the foregoing statement, delivered the opinion of the court:

This case is the first instance, so far as we can find, in which a Federal court has been asked to issue a writ of certiorari to review a ruling by an executive officer of the United States government. That at once suggests that the failure to make such application has been due to the conceded want of power to issue the writ to such officers. For, since the adoption of the Constitution, there have been countless rulings by heads of Departments that directly affected personal and property rights, and where the writ of certiorari, if available, would have furnished an effective method by which to test the validity of quasi judicial orders under attack. The modern decisions cited to sustain the power of the court to act in the present case are based on state procedure and statutes that authorize the writ to issue not only to inferior tribunals, boards, assessors, and administrative officers, but even to the chief executive of a state in proceedings where a quasi judicial order has been made. But none of these decisions are in point in a Federal jurisdiction where no statute has been passed to enlarge the scope of the writ at common law.

In ancient times it was used to compel the production of a record for use as evidence; more often to supplement a defective record in an appellate court, and later, to remove, before judgment,—Harris v. Barber, 129 U.S. 369, 32 L.Ed. 699, 9 Sup.Ct.Rep. 314,—a record from a court without jurisdiction, and with a view of preventing error rather than of correcting it. When, later still, its scope was enlarged so as to make it serve the office of a writ of error, certiorari was granted only in those instances in which the inferior tribunal had acted without jurisdiction, or in disregard of statutory provisions. But in those cases the writ ran to boards (Reaves v. Ainsworth, 219 U.S. 297, 55 L.Ed. 226, 31 Sup.Ct.Rep. 230), officers, tribunals, and inferior judicatures, whose findings and decisions, even though er-

roneous, had the quality of a final judgment, and there being no right of appeal or other method of review, the extraordinary writ of certiorari was resorted to from necessity to afford a remedy where there would otherwise have been a denial of justice. But in all those cases it ran from court to court,—including boards, officers, or tribunals having a limited statutory jurisdiction, but whose judgments would be conclusive unless set aside.

The plaintiffs in error insist that under these common-law principles the writ should issue here because, having to act "upon evidence satisfactory to him" (Rev.Stat. § 3929), and notice and a hearing having been given, the Postmaster General acted in a judicial capacity in making the order, which was therefore subject to review on certiorari because he exceeded his jurisdiction, and, without any proof of fraud in the use of the mails, deprived plaintiffs in error of the valuable right to receive letters and money through the postoffice.

It is true that the Postmaster General gave notice and a hearing to the persons specially to be affected by the order, and that in making his ruling he may be said to have acted in a quasi judicial capacity. But the statute was passed primarily for the benefit of the public at large, and the order was for them and their protection. That fact gave an administrative quality to the hearing and to the order, and was sufficient to prevent it from being subject to review by writ of certiorari. The Postmaster General could not exercise judicial functions, and in making the decision he was not an officer presiding over a tribunal where his ruling was final unless reversed. Not being a judgment, it was not subject to appeal, writ of error, or certiorari. Not being a judgment, in the sense of a final adjudication, the plaintiffs in error were not concluded by his decision, for had there been an arbitrary exercise of statutory power, or a ruling in excess of the jurisdiction conferred, they had the right to apply for and obtain appropriate relief in a court of equity. American School v. McAnnulty, 187 U.S. 94, 47 L.Ed. 90, 23 Sup.Ct.Rep. 33; Philadelphia Co. v. Stimson, 223 U.S. 620, 56 L.Ed. 576, 32 Sup.Ct.Rep. 340.

The fact that there was this remedy is itself sufficient to take the case out of the principle on which, at common law, right to the writ was founded. For there it issued to officers and tribunals only because there was no other method of preventing injustice. Besides, if the common-law writ, with all of its incidents, could be construed to apply to administrative and quasi judicial rulings, it could, with a greater show of authority, issue to remove a record before decision, and so prevent a ruling in any case where it was claimed there was no jurisdiction to act. This would overturn the principle that, as long as the proceedings are in fieri, the courts will not interfere with the hearing and disposition of matters before the Departments. Plested v. Abbey, 228 U.S. 42, 51, 57 L.Ed. 724, 33 Sup.Ct.Rep. 503. To hold that the writ could issue either before or after an administrative ruling would make the despatch of business in the Departments wait on

the decisions of the courts, and not only lead to consequences of the most manifest inconvenience, but would be an invasion of the executive by the judicial branch of the government.

The writ of certiorari is one of the extraordinary remedies, and being such it is impossible to anticipate what exceptional facts may arise to call for its use; but the present case is not of that character, but rather an instance of an attempt to use the writ for the purpose of reviewing an administrative order. Public Clearing House v. Coyne, 194 U.S. 497, 48 L.Ed. 1092, 24 Sup.Ct.Rep. 789. This cannot be done.

Affirmed.

In HARTRANFT v. MULLOWNY, 247 U.S. 295, 38 S.Ct. 518, 62 L.Ed. 1123 (1918), the court, at 247 U.S. 298-300, 38 S.Ct. 520, said:

Whether it was a separate and independent proceeding must be determined by a consideration of the nature and office of the writ of certiorari, as employed in this case, and its relation to the criminal proceeding.

The only provision of the District of Columbia Code respecting this form of writ is in section 68 (Act March 3, 1901, c. 854, 31 Stat. 1189, 1200), which provides:

"The said Supreme Court may, in its appropriate special terms, issue writs of quo warranto, mandamus, prohibition, scire facias, certiorari, injunction, prohibitory and mandatory, ne exeat, and all other writs known in common law and equity practice that may be necessary to the effective exercise of its jurisdiction." Act March 3, 1901, c. 854, 31 Stat. 1189, 1200.

Certiorari always has been recognized in the District as an appropriate process for reviewing the proceedings of a subordinate tribunal when it has proceeded, or is proceeding, to judgment without lawful jurisdiction. Kennedy v. Gorman, 4 Cranch, C.C. 347, Fed.Cas. No.7702; Bates v. District of Columbia, 1 MacArthur (D.C.) 433, 449. And the power to employ the writ inheres in the Supreme Court of the District as possessing a general common-law jurisdiction and supervisory control over inferior tribunals, analogous to that of the King's Bench. United States v. West, 34 App.D.C. 12, 17. The Court of Appeals, in a recent case, declared:

"There is no statute prescribing the function of, or regulating the procedure by, certiorari in the District of Columbia, hence we must look therefor to the common law. The writ lies to inferior courts and to special tribunals exercising judicial or quasi judicial functions, to bring their proceedings into the superior court, where they may be reviewed and quashed if it be made plainly to appear that such inferior court or special tribunal had no jurisdiction of the subject-matter, or had exceeded its jurisdiction, or had deprived a party of a

right or imposed a burden upon him or his property, without due process of law." Degge v. Hitchcock, 35 App.D.C. 218, 226, affirmed 229 U.S. 162, 170, 33 S.Ct. 639, 57 L.Ed. 1135.

At the common law certiorari was one of the prerogative or discretionary writs by which the Court of King's Bench exercised its supervisory authority over inferior tribunals, and it was employed in three classes of cases, among others, viz.: (1) To bring up an indictment or presentment before trial in order to pass upon its validity, to take cognizance of special matters, bearing upon it, or to assure an impartial trial; if the accused was in custody, it was usual to employ a habeas corpus as a companion writ; (2) as a quasi writ of error to review judgments of inferior courts of civil or of criminal jurisdiction, especially those proceeding otherwise than according to the course of the common law and therefore not subject to review by the ordinary writ of error; and (3) as an auxiliary writ, in aid of a writ of error, to bring up outbranches of the record or other matters omitted from the return.

REAL PROPERTIES, INC. v. BOARD OF APPEAL OF BOSTON

Supreme Judicial Court of Massachusetts.
319 Mass. 180, 65 N.E.2d 199 (1946).

WILKINS, Justice. These are three petitions for writs of certiorari brought in the Supreme Judicial Court to quash the proceedings of the respondent board in rendering a decision varying the application of the zoning law of the city of Boston. St.1924, c. 488, § 19, as amended. See now St.1941, c. 373, § 18. Following rescript (see 311 Mass. 430, 42 N.E.2d 499) the cases came on for hearing on the merits before a single justice, who reported the cases without decision upon the petitions and returns. See G.L.(Ter.Ed.) c. 211, § 6; c. 231, § 111; Campbell v. Justices of the Superior Court, 187 Mass. 509, 510, 73 N.E. 659, 69 L.R.A. 311, 2 Ann.Cas. 462. The single justice stated in his report that he would not deny the petitions in the exercise of his discretion.

The question is whether there is substantial error of law apparent upon the face of the returns of the respondent board. Tileston v. Street Commissioner of Boston, 182 Mass. 325, 327, 65 N.E. 380; Newcomb v. Aldermen of Holyoke, 271 Mass. 565, 567, 171 N.E. 826; Worcester Gas Light Co. v. Commissioners of Woodland Water District in Town of Auburn, 314 Mass. 60, 63, 49 N.E.2d 447.

The returns disclose the following. F. I. Sher Co. is the owner of a vacant lot at 77-91 Washington Street in the Brighton district of Boston containing twenty-one thousand three hundred ten square feet in an area zoned for general residence uses. St.1924, c. 488, § 4, as amended. The owner applied to the building commissioner for a permit for the erection of a group of one-story stores, covering an area of eleven thousand seven hundred twenty square feet, with necessary in-

cidental signs, and set on a line with existing stores on the abutting property. On January 27 1939, the application was denied on the ground, as stated by the building commission, that there would be a violation of St.1924, c. 488, "to wit: Section 4. Business (stores with necessary signs) prohibited in a general residence district. Section 13, Set-back less than the average set-back between two streets." The owner appealed to the board of appeal. After due notice and public hearing, the board rendered a decision which we summarize. On the lot originally was a large, old-fashioned, single family dwelling house, which at an unstated time, due to change in the locality, was torn down for lack of demand. The premises are on a main highway and within about one hundred feet of Commonwealth Avenue, another main thoroughfare. Alongside the premises runs the boundary of a local business zone permitting business such as the owner seeks, and on the abutting premises is a group of one-story stores such as the owner asks permission to erect. Due to its proximity to the business zone, the owner has been unable to develop the premises for the purposes for which it is zoned. The only type of development which would yield an adequate return on the investment is a building such as the owner seeks to erect. Such a development would not open up a new shopping center but would complete the development of what is already a shopping center, and is necessitated by the growing development of this section since the passage of the zoning act. The board stated "that the exceptional circumstances peculiar to this specific case justify a relaxation of the restrictions imposed by the statute"; "that the varying of the application of the zoning act (sections 4 and 13) in this specific case as set forth in this decision will not conflict with the spirit of the act"; and "that this is a specific case wherein strict enforcement of the act involves practical difficulty and unnecessary hardship, and wherein desirable relief may be granted without substantially derogating from the intent and purpose of said zoning act." Acting under its discretionary power, the board varied the application of the zoning act, sections 4 and 13, annulled the refusal of the building commissioner to grant a permit, and ordered him to grant the permit applied for with certain limitations as to signs not now material.

"The board of appeal may vary the application of this act in specific cases wherein its enforcement would involve practical difficulty or unnecessary hardship and wherein desirable relief may be granted without substantially derogating from the intent and purpose of this act, but not otherwise." St.1924, c. 488, § 19. The power of the board of appeal of the city of Boston to authorize a variance is substantially the same as that conferred upon the board of appeals in other municipalities under G.L.(Ter.Ed.) c. 40, § 30, inserted by St.1933, c. 269, § 1, as amended. Brackett v. Board of Appeal of Boston, 311 Mass. 52, 54, 39 N.E.2d 956.

The facts found do not warrant the action of the board. Mere repetition of the general language of the statute adds nothing. Prusik v.

Board of Appeal of Boston, 262 Mass. 451, 457, 458, 160 N.E. 312. Brackett v. Board of Appeal of Boston, 311 Mass. 52, 54, 39 N.E.2d 956. The unhappy financial position of one single owner, although a factor, is not of itself enough. Norcross v. Board of Appeal of Boston, 255 Mass. 177, 185, 150 N.E. 887. Prusik v. Board of Appeal of Boston, 262 Mass. 451, 457, 160 N.E. 312. Coleman v. Board of Appeal of Boston, 281 Mass. 112, 116, 183 N.E. 166. Amero v. Board of Appeal of Gloucester, 283 Mass. 45, 52, 186 N.E. 61. Phillips v. Board of Appeals of Springfield, 286 Mass. 469, 472, 190 N.E. 601. Economic distress is unavailing in a case of this kind where, for all that appears, it may be a burden commonly shared by other owners in the district. See Matter of Young Women's Hebrew Association v. Board of Standards and Appeals of New York, 266 N.Y. 270, 275, 276, 194 N.E. 751; Matter of Levy v. Board of Standards and Appeals of New York, 267 N.Y. 347, 352–354, 196 N.E. 284; Matter of Otto v. Steinhilber, 282 N.Y. 71, 72, 24 N.E.2d 851. That the premises are contiguous to an area zoned for business is of slight weight when such contiguity existed at the passage of the zoning act, which vests in the board of zoning adjustment in narrow limits the power to change zone district boundaries. St. 1924, c. 488, § 20, as amended. Norcross v. Board of Appeal of Boston, 255 Mass. 177, 185, 150 N.E. 887. Brackett v. Board of Appeal of Boston, 311 Mass. 52, 58, 39 N.E.2d 956. See Bradley v. Zoning Adjustment Board of Boston, 255 Mass. 160, 150 N.E. 892. A district has to end somewhere. Care should be taken lest the boundaries of a residence district be pared down in successive proceedings granting variances to owners who from time to time through such proceedings find their respective properties abutting upon premises newly devoted to business purposes.

The petitioners contend that the finding that the variance "would complete the development" of an existing shopping center and that it "is necessitated by the growing development of this section * * * since the passage of the zoning act" is wanting in the detail required by section 19 of the act.[1] Prusik v. Board of Appeal of Boston, 262 Mass. 451, 457, 458, 160 N.E. 312. Brackett v. Board of Appeal of Boston, 311 Mass. 52, 54, 39 N.E.2d 956. We need not consider this question, however, as we are of opinion that, giving due weight to this general finding, the facts do not show that the board had authority to grant the variance. The board relies upon Hammond v. Board of Appeal of Springfield, 257 Mass. 446, 154 N.E. 82, which was decided "with hesitation." See Prusik v. Board of Appeal of Boston, 262 Mass. 451, 458, 160 N.E. 312; Coleman v. Board of Appeal of Boston, 281 Mass. 112, 117, 183 N.E. 166. The Hammond case [257 Mass. 446, 154 N.E. 83] rested in part upon a finding, which is lacking here, that the property in question was "in close proximity to nonconforming business premises" which were within the residence zone in question when

[1] "The board shall cause to be made a detailed record of all its proceedings, which record shall set forth the reasons for its decisions."

it was established, and as was said at page 448 of 257 Mass., at page 83 of 154 N.E., "The factor that the neighborhood, when the zoning law went into effect, was not exclusively residential, was of some consequence." See Amero v. Board of Appeal of Gloucester, 283 Mass. 45, 52, 186 N.E. 61; Brackett v. Board of Appeal of Boston, 311 Mass. 52, 59, 39 N.E.2d 956.

The "power of variation is to be sparingly exercised and only in rare instances and under exceptional circumstances peculiar in their nature, and with due regard to the main purpose of a zoning ordinance to preserve the property rights of others." Hammond v. Board of Appeal of Springfield, 257 Mass. 446, 448, 154 N.E. 82, 83. See Real Properties, Inc. v. Board of Appeal of Boston, 311 Mass. 430, 440, 42 N.E.2d 499. We think that the action of the board was really an unauthorized change of a zone district boundary. See Coleman v. Board of Appeal of Boston, 281 Mass. 112, 183 N.E. 166; State ex rel. Nigro v. Kansas City, 325 Mo. 95, 101, 27 S.W.2d 1030.

Judgment is to be entered quashing the decision of the board of appeal granting a permit varying the application of the provisions of St. 1924, c. 488.

So ordered.

G. Prohibition

HATHAWAY BAKERIES, INC. v. LABOR RELATIONS COMMISSION

Supreme Judicial Court of Massachusetts.
316 Mass. 136, 55 N.E.2d 254 (1944).

RONAN, Justice. This is a petition for a writ of prohibition against the respondents, who are all the members of the labor relations commission, to prevent them from hearing and determining a petition filed by a labor union seeking an investigation and certification by the commission, pursuant to G.L.(Ter.Ed.) c. 150A, § 5(c), inserted by St. 1938, c. 345, § 2, that the union is the collective bargaining agency of a group of the petitioner's employees who are known as district managers and are engaged in a supervisory capacity. The case was reserved and reported to this court by a single justice, without decision, upon the pleadings and statement of agreed facts.

The petitioner, hereinafter called the company, is a corporation having its principal place of business in Cambridge, in this Commonwealth, and is engaged in the manufacture, distribution and sale of bread and pastry. It operates establishments in seven States. The company maintains a manufacturing plant at Cambridge and another at Waltham. It conducts two stations, one at Salem and the other at Allston, where goods manufactured at the Cambridge and Waltham plants are distributed and sold.

The company for a long time has had a closed shop agreement with the union which covers all the driver-salesmen working out of the plants and stations mentioned, and also the transport drivers who transfer goods to and from these plants and stations. None of these driver-salesmen delivers or sells goods outside the Commonwealth, but the transport drivers regularly convey goods beyond the boundaries of this State. Other local unions, belonging to the same national body as does the union in question, have closed shop agreements with the company covering driver-salesmen operating from other establishments of the company located in other parts of the Commonwealth.

All the sales supervisors or district managers of the company connected with the Waltham, Salem and Allston establishments of the company, which are the only establishments mentioned in the petition for certification, became members of the union on May 1, 1943. The company refused to enter into any contract with the union with reference to them. The union filed a petition with the commission for certification of the union as the bargaining agent of these employees. At the hearing upon this petition the company filed a motion to dismiss on the ground that the commission had no jurisdiction to hear and decide the petition because the controversy affects the interstate commerce of the company and therefore is within the exclusive jurisdiction of the National Labor Relations Board.

Besides the facts already mentioned, it also appeared from the agreed facts that a little over two thirds of the materials used by the company in its Cambridge and Waltham plants is purchased outside the Commonwealth and is shipped here. One tenth of the production of the Cambridge plant and thirty-six per cent of the production of the Waltham plant are sold outside the Commonwealth. The purchase of flour for all of the company's bakeries, including those located in other States, is effected at the company's central offices in Cambridge. None of the district managers at the three establishments mentioned in the union's petition works outside the State or supervises the work of any driver-salesmen having routes outside the State. The commission denied the motion to dismiss and continued the hearing to await the result of this petition for prohibition.

A writ of prohibition lies to restrain a court or quasi judicial body from acting outside its jurisdiction against one who has not submitted thereto and where there is no other adequate remedy. The writ does not lie to correct errors committed by a tribunal having jurisdiction over a subject matter and the parties, but its function is to prevent the court from proceeding to a decision when the court has no power to make any decision at all. If the tribunal possesses jurisdiction, then the writ cannot be invoked by one who has been harmed by a decision, whether that decision was right or wrong. The commission in performing the duties of the character and nature imposed upon it by law was acting in a quasi judicial capacity, Prusik v. Board of Appeal

of Boston, 262 Mass. 451, 160 N.E. 312; Jaffarian v. Murphy, 280 Mass. 402, 183 N.E. 110, 85 A.L.R. 293; Dube v. Mayor of Fall River, 308 Mass. 12, 30 N.E.2d 817; Anderson v. Labor Relations Commission, 310 Mass. 590, 38 N.E.2d 929; Boott Mills v. Board of Conciliation & Arbitration, 311 Mass. 223, 40 N.E.2d 870; National Labor Relations Board v. J. S. Popper, Inc., 3 Cir., 113 F.2d 602, 603; Thompson Products, Inc., v. National Labor Relations Board, 6 Cir., 133 F.2d 637, 639, and a writ of prohibition is the appropriate remedy if the commission contemplates taking such action as would amount to a clear transgression of its jurisdiction. Tehan v. Justices of the Municipal Court of Boston, 191 Mass. 92, 77 N.E. 313; Ashley v. Three Justices of the Superior Court, 228 Mass. 63, 116 N.E. 961, 8 A.L.R. 1463; Kevorkian v. Superior Court, 295 Mass. 355, 3 N.E.2d 742.

The company cannot be held to have submitted to the jurisdiction by filing a motion to dismiss for the sole purpose of challenging the jurisdiction of the commission. The point was raised at the outset of the hearing and thereafter was always insisted upon by the company. It was apparently the only matter heard by the commission, which continued the hearing upon the union's petition after it denied the company's motion. It was the duty of the commission in the first instance to decide whether it possessed the power to entertain the union's petition for certification and, if it found it lacked the power, to dismiss the petition. Gray v. Dean, 136 Mass. 128, 129; Corbett v. Boston & Maine Railroad, 219 Mass. 351, 356, 107 N.E. 60, 12 A.L.R. 683; Carroll v. Berger, 255 Mass. 132, 134, 150 N.E. 870; Henry L. Sawyer Co. v. Boyajian, 303 Mass. 311, 313, 21 N.E.2d 536; Donnelly v. Montague, 305 Mass. 14, 18, 24 N.E.2d 864; Newport News Shipbuilding & Dry Dock Co. v. Schauffler, 303 U.S. 54, 57, 58 S.Ct. 466, 82 L.Ed. 646; Thompson Products, Inc. v. National Labor Relations Board, 6 Cir., 133 F.2d 637, 640.

It is hardly possible that the commission would find that the union did not represent a majority of the district managers and so would dismiss the petition, since all of those employees of the company had become members of the union and were evidently such at the time the commission began hearings on the petition. It is contended, however, that the company could not be harmed by any decision that the commission might make upon the petition for certification and that it was only when the company has been found guilty of having committed an unfair labor practice under § 6 and ordered by the commission to take certain action that it could for the first time obtain a judicial review of the entire proceedings, including not only the validity of the order with reference to the unfair labor practice but also the correctness of the order made upon the petition for certification. Jordan Marsh Co. v. Labor Relations Commission, 312 Mass. 597, 45 N.E.2d 925; Pittsburgh Plate Glass Co. v. National Labor Relations Board, 313 U.S. 146, 61 S.Ct. 908, 85 L.Ed. 1251.

The principal contention of the petitioner in the Jordan Marsh Co. case was that there was an abuse of discretion by the commission in refusing to grant a continuance of the hearing. No question of jurisdiction was raised. Moreover, that opinion does not lay down as an invariable rule that in no instance can a judicial review of certification proceedings be obtained before the commission has made a final order under § 6, for the opinion, at page 602 of 312 Mass., at page 928 of 45 N.E.2d states that "It is not necessary now to determine that no case could ever exist where the effect of a mere certification might be so immediately and completely disastrous to the legally protected interests of the employer that the Legislature must be presumed to have intended to leave open some avenue of escape other than the review provided for in the statute." The question here is not whether the commission had conducted certification proceedings in a manner not warranted by law but whether the commission had any power at all to act, and, if found to be lacking in power, whether the contemplated action of the commission to complete the hearings and adjudicate the petition for certification may be prohibited before any final order is made under § 6.

The commission is a statutory board having only the powers, duties and obligations expressly conferred upon it by the statute that created it or such as are reasonably necessary for the proper functioning of the board in carrying out and accomplishing the purpose for which it was established. Vose v. Deane, 7 Mass. 280; Adams v. County of Essex, 205 Mass. 189, 91 N.E. 557; Safford v. Lowell, 255 Mass. 220, 151 N.E. 111; Eastern Massachusetts Street Railway v. Mayor of Fall River, 308 Mass. 232, 31 N.E.2d 543; Federal Trade Commission v. Raladam Co., 283 U.S. 643, 51 S.Ct. 587, 75 L.Ed. 1324, 79 A.L.R. 1191; Hotel Casey Co. v. Ross, 343 Pa. 573, 23 A.2d 737.

The State labor relations law provides in § 10(b) that "This chapter shall not be deemed applicable to any unfair labor practice subject to the National Labor Relations Act." It appears from the agreed facts that the practice of the commission has been to construe this subsection as not preventing it from exercising jurisdiction to investigate questions relative to representation, to designate those found to be bargaining representatives of the employees, and to issue a certificate stating that it has determined that the persons named therein are the exclusive representatives of the employees for the purposes of collective bargaining with respect to rates of pay, hours of work and other conditions of employment. If the commission lacks power to issue an order against the company arising out of an unfair labor practice alleged to have been committed by it, then we do not think that in these circumstances that the company was bound to wait for any order that the commission might subsequently make upon proceedings in reference to any unfair labor practice by the company if the alleged practice affected interstate commerce. It was said in Connecticut River Railroad v. County Commissioners of Franklin, 127 Mass. 50, 59, 34 Am.

Rep. 338: "But the fact that the remedy by petition for writ of certiorari will be open to the landowner after final judgment affords no reason why the court should now refuse a writ of prohibition, and thereby put the petitioner to the trouble, expense and delay of a trial before a tribunal which has no jurisdiction of the case, and to whose jurisdiction the petitioner has objected at the outset of the proceedings." To the same effect see Ex parte Simons, 247 U.S. 231, 237, 38 S.Ct. 497, 62 L.Ed. 1094; Hall v. Superior Court, 198 Cal. 373, 245 P. 814; Curtis v. Cornish, 109 Me. 384, 84 A. 799.

We see nothing in the contention that § 10(b) only makes the State labor relations law inapplicable to an unfair labor practice subject to the National Labor Relations Act and does not prevent the commission from determining a petition for certification. Certification is a preliminary step in a legislative plan designed to avert labor controversies. If the commission is powerless to issue such an order relative to an unfair labor practice subject to the national act, it would seem to follow that proceedings for certification in cases subject to that act would be equally beyond the power of the commission. It could hardly be thought that the Legislature intended that the commission should have the power to certify where the certification alone without subsequent coercive action by the commission would be ineffectual to accomplish the purpose of the State labor relations law. A certification in such circumstances may be of some practical value, as urged by the commission, between parties who voluntarily recognize the order, but such an advantage will not support an order if shown to have been beyond the power of the commission when its validity is challenged by one whose rights have been thereby impaired. Legal rights can be regulated only in accordance with the law. Commonwealth v. Coughlin, 182 Mass. 558, 66 N.E. 207; Commonwealth v. Boston Advertising Co., 188 Mass. 348, 74 N.E. 601, 69 L.R.A. 817, 108 Am.St.Rep. 494; American Employers' Ins. Co. v. Commissioner of Insurance, 298 Mass. 161, 10 N.E.2d 76; Boott Mills v. Board of Conciliation & Arbitration, 311 Mass. 223, 40 N.E.2d 870. The commission has no authority to act with reference to an unfair labor practice subject to the national act, and it cannot be supposed that the Legislature intended that the commission should have the power to certify the bargaining representatives of employees for the enforcement of the rights given to them under the Federal act when the commission cannot enforce these rights. As to such employees certification by the commission would seem to be an idle ceremony, incapable of establishing their rights. It can hardly be assumed that the Legislature intended to confer the power of certification upon a board in those instances where the board is expressly prohibited from making any orders which can be enforced against the employer. Flood v. Hodges, 231 Mass. 252, 257, 120 N.E. 689; Central Trust Co. v. Howard, 275 Mass. 153, 157, 175 N.E. 461; Cullen v. Mayor of Newton, 308 Mass. 578, 583, 32 N.E.2d 201; Burnham v. Mayor & Aldermen of Beverly, 309 Mass. 388, 393, 35 N.E.2d 242, 135 A.L.R. 750.

Counsel for the commission conceded at the argument that in cases like the present the commission goes no farther than the ascertainment of a bargaining agency and the certification of such agency. If the commission intends to take no steps after the petition for certification has been decided, then the company could not be said to have any remedy for a review upon the issuance of a final order by the commission, for no such order would ever be made.

The National Labor Relations Act provides, U.S.C. (1940 Ed.) Title 29, § 160(a), 29 U.S.C.A. § 160(a), that the national labor relations board is empowered "to prevent any person from engaging in any unfair labor practice (listed in section 158) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise." We need not inquire whether Congress has so fully and completely covered the field of labor controversies that affect interstate commerce that the power of the States with respect to such controversies has been superseded or whether Congress has not manifested an intention to exclude the States from exercising their police powers with reference to this subject matter provided the regulations made by the States are consistent with the Federal legislation, South Carolina State Highway Department v. Barnwell Brothers, Inc., 303 U.S. 177, 625, 58 S.Ct. 510, 82 L.Ed. 734; Kelly v. Washington, 302 U.S. 1, 58 S.Ct. 87, 82 L.Ed. 3, for our own act, § 10(b), expressly prohibits the commission from dealing with any unfair labor practice subject to the national act. That must mean any unfair labor practice that affects interstate commerce. There is, therefore, a line of demarcation established between the field covered by the act of Congress and that covered by our own statute. The commission had no authority to go beyond that line, whether the national board took any action or not, if the subject matter was in fact one affecting interstate commerce. * * *

Writ to issue.

SECTION 2. METHODS OF REVIEW OF RULES AND REGULATIONS

A. Special Statutory Procedures

COLUMBIA BROADCASTING SYSTEM, INC. v. UNITED STATES

Supreme Court of the United States.
316 U.S. 407, 62 S.Ct. 1194, 86 L.Ed. 1563 (1942).

See *supra* at p. 673.[a]

LOCKERTY v. PHILLIPS

Supreme Court of the United States.
319 U.S. 182, 63 S.Ct. 1019, 87 L.Ed. 1339 (1943).

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

The question for our decision is whether the jurisdiction of the district court below to enjoin the enforcement of price regulations prescribed by the Administrator under the Emergency Price Control Act of 1942, 56 Stat. 23, was validly withdrawn by § 204(d) of the Act, 50 U.S.C.A.Appendix § 924(d). Appellants brought this suit in the district court for the District of New Jersey for an injunction restraining appellee, the United States Attorney for that district, from the prosecution of pending and prospective criminal proceedings against appellants for violation of §§ 4(a) and 205(b) of the Act, 50 U.S.C.A.Appendix §§ 904(a), 925(b), and of Maximum Price Regulation No. 169. In view of the provisions of § 204(d) of the Act, the district court of three judges, 28 U.S.C. § 380a, 28 U.S.C.A. § 380a dismissed the suit for want of jurisdiction to entertain it.

The amended bill of complaint alleges that appellants are established merchants owning valuable wholesale meat businesses, in the course of which they purchase meat from packers and sell it at wholesale to retail dealers; that Maximum Price Regulation No. 169, promulgated by the Price Administrator under the purported authority of § 2(a) of the Act, 50 U.S.C.A.Appendix § 902(a), as originally issued and as revised, fixed maximum wholesale prices for specified cuts of beef; that in fixing such prices the Administrator had failed to give due consideration to the various factors affecting the cost of production and

[a] See, also, American Telephone & Telegraph Co. v. United States, 299 U.S. 232, 57 S.Ct. 170, 81 L.Ed. 142 (1936), *supra* at p. 336; Assigned Car Cases, 274 U.S. 564, 47 S.Ct. 727, 71 L.Ed. 1204 (1927) *supra* at p. 297. *Cf.* Gemsco, Inc. v. Walling, 324 U.S. 244, 65 S.Ct. 605, 89 L.Ed. 921 (1945) (review of general order prohibiting homework by Circuit Court of Appeals, under section 10 of the Fair Labor Standards Act, 29 U.S.C. § 210).

distribution of meat in the industry as a whole; that the Administrator had failed to fix or regulate the price of livestock; that the conditions in the industry—including the quantity of meat available to packers for distribution to wholesalers, the packers' expectation of profit, and the effect of these conditions upon the prices of meat sold by packers to wholesalers—are such that appellants are and will be unable to obtain a supply of meat from packers which they can resell to retail dealers within the prices fixed by Regulation No. 169; that enforcement of the Regulation will preclude appellants' continuance in business as meat wholesalers; that the Act as thus applied to appellants is a denial of due process in violation of the Fifth Amendment of the Constitution, and involves an unconstitutional delegation of legislative power to the Administrator; that appellee threatens to prosecute appellants for each sale of meat at a price greater than that fixed by the Regulation, and to subject them to the fine and imprisonment prescribed by §§ 4 and 205(b) of the Act for violations of the Act or of price regulations prescribed by the Administrator under the Act; and that such enforcement by repeated prosecutions of appellants will irreparably injure them in their business and property.

Section 203(a), 50 U.S.C.A.Appendix § 923(a), sets up a procedure whereby any person subject to any provision of any regulation, order or price schedule promulgated under the Act may within sixty days "file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections". He may also protest later on grounds arising after the expiration of the original sixty days. The subsection directs that within a specified time "the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice."

By § 204(a), "Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part." Subsection (b) provides that no regulation, order, or price schedule, shall be enjoined "unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious". Under subsections (b) and (d), decisions of the Emergency Court may, by writ of certiorari, be brought for review to the Supreme Court, which is required to advance the cause on its docket and to expedite the disposition of it.

Although by following the procedure prescribed by these provisions of the Act appellants could have raised and obtained review of the questions presented by their bill of complaint, they did not protest the price regulation which they challenge and they took no proceedings for review of it by the Emergency Court. Appellants are thus seeking the aid of the district court to restrain the enforcement of an administrative order without pursuing the administrative remedy provided by the statute (cf. Illinois Commerce Commission v. Thomson, 318 U.S. 675, 63 S.Ct. 834, 839, 87 L.Ed. 1075, decided April 12, 1943), and without recourse to the judicial review by the Emergency Court of Appeals and by this Court which the statute affords.

Moreover the statute vests jurisdiction to grant equitable relief exclusively in the Emergency Court and in this Court. Section 204(d) declares: "The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision."

By this statute Congress has seen fit to confer on the Emergency Court (and on the Supreme Court upon review of decisions of the Emergency Court) equity jurisdiction to restrain the enforcement of price orders under the Emergency Price Control Act. At the same time it has withdrawn that jurisdiction from every other federal and state court. There is nothing in the Constitution which requires Congress to confer equity jurisdiction on any particular inferior federal court. All federal courts, other than the Supreme Court, derive their jurisdiction wholly from the exercise of the authority to "ordain and establish" inferior courts, conferred on Congress by Article III, § 1, of the Constitution. Article III left Congress free to establish inferior federal courts or not as it thought appropriate. It could have declined to create any such courts, leaving suitors to the remedies afforded by state courts, with such appellate review by this Court as Congress might prescribe. Kline v. Burke Construction Co., 260 U.S. 226, 234, 43 S.Ct. 79, 82, 67 L.Ed. 226, 24 A.L.R. 1077, and cases cited; McIntire v. Wood, 7 Cranch 504, 506, 3 L.Ed. 420. The Congressional power to ordain and establish inferior courts includes the power "of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good". Cary

v. Curtis, 3 How. 236, 245, 11 L.Ed. 576; Lauf v. E. G. Shinner & Co., 303 U.S. 323, 330, 58 S.Ct. 578, 582, 82 L.Ed. 872; Hallowell v. Commons, 239 U.S. 506, 509, 36 S.Ct. 202, 203, 60 L.Ed. 409; Smallwood v. Gallardo, 275 U.S. 56, 48 S.Ct. 23, 72 L.Ed. 152; Toucey v. New York Life Ins. Co., 314 U.S. 118, 129, 62 S.Ct. 139, 141, 86 L.Ed. 100, 137 A.L.R. 967. See, also, United States v. Hudson and Goodwin, 7 Cranch 32, 33, 3 L.Ed. 259; Mayor v. Cooper, 6 Wall. 247, 252, 18 L.Ed. 851; Stevenson v. Fain, 195 U.S. 165, 167, 25 S.Ct. 6, 7, 49 L.Ed. 142; Commonwealth of Kentucky v. Powers, 201 U.S. 1, 24, 26 S.Ct. 387, 393, 50 L.Ed. 633, 5 Ann.Cas. 692; Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 376, 60 S.Ct. 317, 319, 84 L.Ed. 329. In the light of the explicit language of the Constitution and our decisions, it is plain that Congress has power to provide that the equity jurisdiction to restrain enforcement of the Act, or of regulations promulgated under it, be restricted to the Emergency Court, and, upon review of its decisions, to this Court. Nor can we doubt the authority of Congress to require that a plaintiff seeking such equitable relief resort to the Emergency Court only after pursuing the prescribed administrative procedure.

Appellants argue that the command of § 204(d) that "no court, Federal, State, or Territorial, shall have jurisdiction or power to * * * restrain, enjoin, or set aside * * * any provision of this Act" extends beyond the mere denial of equitable relief by way of injunction, and withholds from all courts authority to pass upon the constitutionality of any provision of the Act or of any order or regulation under it. They insist that the phrase "set aside" is to be read broadly, as meaning that no court can declare unconstitutional any such provision, and that consequently the effect of the statute is to deny to those aggrieved, by statute or regulation, their day in court to challenge its constitutionality. But the statute expressly excepts from this command those remedies afforded by § 204, including that of subsection (b), which gives to complainants a right to an injunction whenever they establish to the satisfaction of the Emergency Court that the regulation, order, or price schedule is "not in accordance with law, or is arbitrary or capricious". A construction of the statute which would deny all opportunity for judicial determination of an asserted constitutional right is not to be favored. The present Act has at least saved to the Emergency Court, and, upon review of its decisions, to this Court, authority to determine whether any regulation, order, or price schedule promulgated under the Act is "not in accordance with law, or is arbitrary or capricious". We think it plain that orders and regulations involving an unconstitutional application of the statute are "not in accordance with law" within the meaning of this clause, and that the constitutional validity of the Act, and of orders and regulations under it, may be determined upon the prescribed review in the Emergency Court.

Appellants also contend that the review in the Emergency Court is inadequate to protect their constitutional rights, and that § 204 is therefore unconstitutional, because § 204(c) prohibits all interlocutory relief by that court. We need not pass upon the constitutionality of this restriction. For in any event, the separability clause of § 303 of the Act, 50 U.S.C.A.Appendix § 943, would require us to give effect to the other provisions of § 204, including that withholding from the district courts authority to enjoin enforcement of the Act—a provision which as we have seen is subject to no unconstitutional infirmity.

Since appellants seek only an injunction which the district court is without authority to give, their bill of complaint was rightly dismissed. We have no occasion to determine now whether, or to what extent, appellants may challenge the constitutionality of the Act or the Regulation in courts other than the Emergency Court, either by way of defense to a criminal prosecution or in a civil suit brought for some other purpose than to restrain enforcement of the Act or regulations issued under it.

Affirmed.

YAKUS v. UNITED STATES [b]

Supreme Court of the United States.
321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834 (1944).

* * *

II.

We consider next the question whether the procedure which Congress has established for determining the validity of the Administrator's regulations is exclusive so as to preclude the defense of invalidity of the Regulation in this criminal prosecution for its violation under §§ 4(a) and 205(b). Section 203(a) sets up a procedure by which "any person subject to any provision of [a] regulation [or] order" may within 60 days after it is issued "file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections." He may similarly protest later, on grounds arising after the expiration of the original sixty days. The subsection directs that within a reasonable time and in no event more than thirty days after the filing of a protest or ninety days after the issue of the regulation protested, whichever is later, "the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of

[b] For the initial part of this opinion, see p. 257, *supra*.

any economic data and other facts of which the Administrator has taken official notice."

Section 204(c) creates a court to be known as the Emergency Court of Appeals consisting of United States district or circuit judges designated by the Chief Justice of the United States. Section 204(a) authorizes any person aggrieved by the denial or partial denial of his protest to file a complaint with the Emergency Court of Appeals within thirty days after the denial, praying that the regulation, order or price schedule protested be enjoined or set aside in whole or in part. The court may issue such an injunction only if it finds that the regulation, order or price schedule "is not in accordance with law, or is arbitrary or capricious." Subsection (b). It is denied power to issue a temporary restraining order or interlocutory decree. Subsection (c). The effectiveness of any permanent injunction it may issue is postponed for thirty days, and if review by this Court is sought upon writ of certiorari, as authorized by subsection (d), its effectiveness is further postponed until final disposition of the case by this Court by denial of certiorari or decision upon the merits. Subsection (b).

Section 204(d) declares:

"The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, * * * of any price schedule effective in accordance with the provisions of section 206, * * * and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision."

In Lockerty v. Phillips, supra, we held that these provisions conferred on the Emergency Court of Appeals, subject to review by this Court, exclusive equity jurisdiction to restrain enforcement of price regulations of the Administrator and that they withdrew such jurisdiction from all other courts. This was accomplished by the exercise of the constitutional power of Congress to prescribe the jurisdiction of inferior federal courts, and the jurisdiction of all state courts to determine federal questions, and to vest that jurisdiction in a single court, the Emergency Court of Appeals.

The considerations which led us to that conclusion with respect to the equity jurisdiction of the district court, lead to the like conclusion as to its power to consider the validity of a price regulation as a defense to a criminal prosecution for its violation. The provisions of § 204(d), conferring upon the Emergency Court of Appeals and this

Court "exclusive jurisdiction to determine the validity of any regulation or order", coupled with the provision that "no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation", are broad enough in terms to deprive the district court of power to consider the validity of the Administrator's regulation or order as a defense to a criminal prosecution for its violation.

That such was the intention of Congress appears from the report of the Senate Committee on Banking and Currency, recommending the adoption of the bill which contained the provisions of § 204(d). After pointing out that the bill provided for exclusive jurisdiction of the Emergency Court and the Supreme Court to determine the validity of regulations or orders issued under section 2, the Committee said: "The courts in which criminal or civil enforcement proceedings are brought have jurisdiction, concurrently with the Emergency Court, to determine the constitutional validity of the statute itself." Sen.Rep. 931, 77th Cong., 2d Sess., p. 25. That the Committee, in making this statement, intended to distinguish between the validity of the statute and that of a regulation, and to permit consideration only of the former in defense to a criminal prosecution, is further borne out by the fact that the bill as introduced in the House had provided that the Emergency Court of Appeals should have exclusive jurisdiction to determine the validity of the provisions of the Act authorizing price regulations, as well as of the regulations themselves. H.R. 5479, 77th Cong., 1st Sess., printed in Hearings before Committee on Banking and Currency, House of Representatives, 77th Cong., 2d Sess., on H.R. 5479, pp. 4, 7, 8.

Congress, in thus authorizing consideration by the district court of the validity of the Act alone, gave clear indication that the validity of the Administrator's regulations or orders should not be subject to attack in criminal prosecutions for their violation, at least before their invalidity had been adjudicated by recourse to the protest procedure prescribed by the statute. Such we conclude is the correct construction of the Act.

III.

We come to the question whether the provisions of the Act, so construed as to deprive petitioners of opportunity to attack the Regulation in a prosecution for its violation, deprive them of the due process of law guaranteed by the Fifth Amendment. At the trial, petitioners offered to prove that the Regulation would compel them to sell beef at such prices as would render it impossible for wholesalers such as they are, no matter how efficient, to conduct their business other than at a loss. Section 4(d) declares that "Nothing in this Act shall be construed to require any person to sell any commodity * * *." Petitioners were therefore not required by the Act, nor so far as appears by any other rule of law, to continue selling meat at wholesale if they could not do so without loss. But they argue that to impose on them

the choice either of refraining from sales of beef at wholesale or of running the risk of numerous criminal prosecutions and suits for treble damages authorized by Sec. 205(e), without the benefit of any temporary injunction or stay pending determination by the prescribed statutory procedure of the Regulation's validity, is so harsh in its application to them as to deny them due process of law. In addition they urge the inadequacy of the administrative procedure and particularly of the sixty days period afforded by the Act within which to prepare and lodge a protest with the Administrator.

In considering these asserted hardships, it is appropriate to take into account the purposes of the Act and the circumstances attending its enactment and application as a war-time emergency measure. The Act was adopted January 30, 1942, shortly after our declaration of war against Germany and Japan, when it was common knowledge, as is emphasized by the legislative history of the Act that there was grave danger of war-time inflation and the disorganization of our economy from excessive price rises. Congress was under pressing necessity of meeting this danger by a practicable and expeditious means which would operate with such promptness, regularity and consistency as would minimize the sudden development of commodity price disparities, accentuated by commodity shortages occasioned by the war.

Inflation is accelerated and its consequences aggravated by price disparities not based on geographic or other relevant differentials. The harm resulting from delayed or unequal price control is beyond repair. And one of the problems involved in the prevention of inflation by establishment of a nation-wide system of price control is the disorganization which would result if enforcement of price orders were delayed or sporadic or were unequal or conflicting in different parts of the country. These evils might well arise if regulations with respect to which there was full opportunity for administrative revision were to be made ineffective by injunction or stay of their enforcement in advance of such revision or of final determination of their validity.

Congress, in enacting the Emergency Price Control Act, was familiar with the consistent history of delay in utility rate cases. It had in mind the dangers to price control as a preventive of inflation if the validity and effectiveness of prescribed maximum prices were to be subject to the exigencies and delays of litigation originating in eighty-five district courts and continued by separate appeals through eleven separate courts of appeals to this Court, to say nothing of litigation conducted in state courts. See Sen.Rep.No. 931, 77th Cong., 2d Sess., pp. 23-5.

Congress sought to avoid or minimize these difficulties by the establishment of a single procedure for review of the Administrator's regulations, beginning with an appeal to the Administrator's specialized knowledge and experience gained in the administration of the Act, and affording to him an opportunity to modify the regulations and orders

complained of before resort to judicial determination of their validity. The organization of such an exclusive procedure especially adapted to the exigencies and requirements of a nation-wide scheme of price regulation is, as we have seen, within the constitutional power of Congree to create inferior federal courts and prescribe their jurisdiction. The considerations which led to its creation are similar to, and certainly no weaker than, those which led this Court in Texas & P. R. v. Abilene Cotton Oil Co., 204 U.S. 426, 27 S.Ct. 350, 51 L.Ed. 553, 9 Ann.Cas. 1075, and the long line of cases following it, to require resort to the Interstate Commerce Commission and the special statutory method provided for review of its decisions in certain types of cases involving railway rates. As with the present statute, it was thought desirable to preface all judicial action by resort to expert administrative knowledge and experience, and thus minimize the confusion that would result from inconsistent decisions of district and circuit courts rendered without the aid of an administrative interpretation. In addition the present Act seeks further to avoid that confusion by restricting judicial review of the administrative determination to a single court. Such a procedure, so long as it affords to those affected a reasonable opportunity to be heard and present evidence, does not offend against due process. Bradley v. City of Richmond, 227 U.S. 477, 33 S.Ct. 318, 57 L.Ed. 603; First Nat. Bank v. Board of Com'rs Weld County, 264 U.S. 450, 44 S.Ct. 385, 68 L.Ed. 784; Anniston Mfg. Co. v. Davis, 301 U.S. 337, 57 S.Ct. 816, 81 L.Ed 1143.

Petitioners assert that they have been denied that opportunity because the sixty days period allowed for filing a protest is insufficient for that purpose;[c] because the procedure before the Administrator is inadequate to ensure due process; because the statute precludes any interlocutory injunction staying enforcement of a price regulation before final adjudication of its validity; because the trial of the issue of validity of a regulation is excluded from the criminal trial for its violation; and because in any case there is nothing in the statute to prevent their conviction for violation of a regulation before they could secure a ruling on its validity. A sufficient answer to all these contentions is that petitioners have failed to seek the administrative remedy and the statutory review which were open to them and that they have not shown that had they done so any of the consequences which they apprehend would have ensued to any extent whatever, or if they should, that the statute withholds judicial remedies adequate to protect petitioners' rights.

For the purposes of this case, in passing upon the sufficiency of the procedure on protest to the Administrator and complaint to the Emergency Court, it is irrelevant to suggest that the Administrator or the Court has in the past or may in the future deny due process. Action

[c] This sixty-day limitation was eliminated by the amendment of June 30, 1944 to § 203(a) of the Emergency Price Control Act of 1942, 50 U.S.C.App. § 923(a), *supra* at p. 1003.

taken by them is reviewable in this Court and if contrary to due process will be corrected here. Hence we have no occasion to pass upon determinations of the Administrator or the Emergency Court, said to violate due process, which have never been brought here for review, and obviously, we cannot pass upon action which might have been taken on a protest by petitioners, who have never made a protest or in any way sought the remedy Congress has provided. In the absence of any proceeding before the Administrator we cannot assume that he would fail in the performance of any duty imposed on him by the Constitution and laws of the United States, or that he would deny due process to petitioners by "loading the record against them" or denying such hearing as the Constitution prescribes. Plymouth Coal Co. v. Commonwealth of Pennsylvania, 232 U.S. 531, 545, 34 S.Ct. 359, 363, 58 L.Ed. 713; Hall v. Geiger-Jones Co., 242 U.S. 539, 554, 37 S.Ct. 217, 222, 61 L.Ed. 480, L.R.A.1917F, 514, Ann.Cas.1917C, 643; State of Minnesota v. Probate Court, 309 U.S. 270, 277, 60 S.Ct. 523, 527, 84 L. Ed. 744, 126 A.L.R. 530, and cases cited. Only if we could say in advance of resort to the statutory procedure that it is incapable of affording due process to petitioners could we conclude that they have shown any legal excuse for their failure to resort to it or that their constitutional rights have been or will be infringed. Natural Gas Co. v. Slattery, 302 U.S. 300, 309, 58 S.Ct. 199, 203, 82 L.Ed. 276; Anniston Mfg. Co. v. Davis, supra, 301 U.S. at pages 356, 357, 57 S.Ct. at page 825, 81 L.Ed. 1143; State of Minnesota v. Probate Court, supra, 309 U.S. at pages 275, 277, 60 S.Ct. at pages 526, 527, 84 L.Ed. 744, 126 A. L.R. 530. But upon a full examination of the provisions of the statute it is evident that the authorized procedure is not incapable of affording the protection to petitioners' rights required by due process.

The regulations, which are given the force of law, are published in the Federal Register, and constructive notice of their contents is thus given all persons affected by them. 44 U.S.C. § 307, 44 U.S.C.A. § 307. The penal provisions of the statute are applicable only to violations of a regulation which are willful. Petitioners have not contended that they were unaware of the Regulation and the jury found that they knowingly violated it within eight days after its issue.

The sixty days period allowed for protest of the Administrator's regulations cannot be said to be unreasonably short in view of the urgency and exigencies of war-time price regulation. Here the Administrator is required to act initially upon the protest within thirty days after it is filed or ninety days after promulgation of the challenged regulation, by allowing the protest wholly or in part, or denying it or setting it down for hearing. (Section 203(a). But we cannot say that the Administrator would not have allowed ample time for the presentation of evidence. And under § 204(a) petitioners could have applied to the Emergency Court of Appeals for leave to introduce any additional evidence "which could not reasonably" have been offered to the Administrator or included in the proceedings before him, and could

have applied to the Administrator to modify or change his decision in the light of that evidence.

Nor can we say that the administrative hearing provided by the statute will prove inadequate. We hold in Bowles v. Willingham, 321 U.S. 64, 64 S.Ct. 641, 88 L.Ed. 892, that in the circumstances to which this Act was intended to apply, the failure to afford a hearing prior to the issue of a price regulation does not offend against due process. While the hearing on a protest may be restricted to the presentation of documentary evidence, affidavits and briefs, the Act contemplates, and the Administrator's regulations provide for, a full oral hearing upon a showing that written evidence and briefs "will not permit the fair and expeditious disposition of the protest". § 203(a); Revised Procedural Regulation No. 1, § 1300.39, 7 Fed.Reg. 8961. In advance of application to the Administrator for such a hearing we cannot well say whether its denial in any particular case would be a denial of due process. The Act requires the Administrator to inform the protestant of the grounds for his decision denying a protest, including all matters of which he has taken official notice. § 203(a). In view of the provisions for the introduction of further evidence both before and after the Administrator has announced his determination, we cannot say that if petitioners had filed a protest adequate opportunity would not have been afforded them to meet any arguments and evidence put forward by the Administrator, or that if such opportunity had been denied the denial would not have been corrected by the Emergency Court.

The Emergency Court has power to review all questions of law, including the question whether the Administrator's determination is supported by evidence, and any question of the denial of due process or any procedural error appropriately raised in the course of the proceedings. No reason is advanced why petitioners could not, throughout the statutory proceeding, raise and preserve any due process objection to the statute, the regulations, or the procedure, and secure its full judicial review by the Emergency Court of Appeals and this Court. Compare White v. Johnson, 282 U.S. 367, 374, 51 S.Ct. 115, 118, 75 L. Ed. 388.

In the circumstances of this case we find no denial of due process in the statutory prohibition of a temporary stay or injunction. The present statute is not open to the objection that petitioners are compelled to serve the public as in the case of a public utility, or that the only method by which they can test the validity of the regulations promulgated under it is by violating the statute and thus subjecting themselves to the possible imposition of severe and cumulative penalties. See Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714, 13 L.R. A.,N.S., 932, 14 Ann.Cas. 764; Wilcox v. Consolidated Gas Co., 212 U. S. 19, 53, 54, 29 S.Ct. 192, 200, 53 L.Ed. 382, 48 L.R.A.,N.S., 1134, 15 Ann.Cas. 1034; Missouri Pac. R. Co. v. Tucker, 230 U.S. 340, 33 S.Ct. 961, 57 L.Ed. 1507; Oklahoma Operating Co. v. Love, 252 U.S. 331, 40 S.Ct. 338, 64 L.Ed. 596. For as we have seen, § 4(d) specifically pro-

vides that no one shall be compelled to sell any commodity, and the statute itself provides an expeditious means of testing the validity of any price regulation, without necessarily incurring any of the penalties of the Act. Compare Wadley Southern R. Co. v. State of Georgia, 235 U.S. 651, 667–669, 35 S.Ct. 214, 220, 221, 59 L.Ed. 405.

The petitioners are not confronted with the choice of abandoning their businesses or subjecting themselves to the penalties of the Act before they have sought and secured a determination of the Regulation's validity. It is true that if the Administrator denies a protest no stay or injunction may become effective before the final decision of the Emergency Court or of this Court if review here is sought. It is also true that the process of reaching a final decision may be time-consuming. But while courts have no power to suspend or ameliorate the operation of a regulation during the pendency of proceedings to determine its validity, we cannot say that the Administrator has no such power or assume that he would not exercise it in an appropriate case.

The Administrator, who is the author of the regulations, is given wide discretion as to the time and conditions of their issue and continued effect. Section 2(a) authorizes him to issue such regulations as will effectuate the purposes of the Act, whenever, in his judgment, such action is necessary. Section 201(d) similarly authorizes him "from time to time" to issue regulations when necessary and proper to effectuate the purposes of the Act. One of the objects of the protest provisions is to enable the Administrator more fully to inform himself as to the wisdom of a regulation through evidence of its effect on particular cases. In the light of that information he is authorized by § 203(a) to grant or deny a protest "in whole or in part." And § 204(a) authorizes the Administrator to modify or rescind a regulation "at any time." Moreover § 2(a) further authorizes the issue, in the Administrator's judgment, of temporary regulations, effective for sixty days, "establishing as a maximum * * * the price * * * prevailing with respect to any commodity * * * within five days prior to the date of issuance of such temporary regulations. * * *"

Under these sections the Administrator may not only alter or set aside the regulation, but he has wide scope for the exercise of his discretionary power to modify or suspend a regulation pending its administrative and judicial review. Hence we cannot assume that petitioners, had they applied to the Administrator, would not have secured all the relief to which they were entitled. The denial of a right to a restraining order of interlocutory injunction to one who has failed to apply for available administrative relief, not shown to be inadequate, is not a denial of due process. Natural Gas Co. v. Slattery, supra, 302 U.S. at page 310, 58 S.Ct. at page 204, 82 L.Ed. 276.

In any event, we are unable to say that the denial of interlocutory relief pending a judicial determination of the validity of the regulation

would in the special circumstances of this case, involve a denial of constitutional right. If the alternatives, as Congress could have concluded, were war-time inflation or the imposition on individuals of the burden of complying with a price regulation while its validity is being determined, Congress could constitutionally make the choice in favor of the protection of the public interest from the dangers of inflation. Compare Miller v. Schoene, 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568, in which we held that the Fourteenth Amendment did not preclude a state from compelling the uncompensated destruction of private property in order to preserve important public interests from destruction.

The award of an interlocutory injunction by courts of equity has never been regarded as strictly a matter of right, even though irreparable injury may otherwise result to the plaintiff. Compare Scripps-Howard Radio, Inc., v. Federal Communications Comm., 316 U.S. 4, 10, 62 S.Ct. 875, 880, 86 L.Ed. 1229, and cases cited. Even in suits in which only private interests are involved the award is a matter of sound judicial discretion, in the exercise of which the court balances the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding of the injunction. Meccano, Ltd., v. John Wanamaker, 253 U.S. 136, 141, 40 S.Ct. 463, 465, 64 L.Ed. 822; Rice & Adams Corp. v. Lathrop, 278 U.S. 509, 514, 49 S.Ct. 220, 222, 73 L.Ed. 480. And it will avoid such inconvenience and injury so far as may be, by attaching conditions to the award, such as the requirement of an injunction bond conditioned upon payment of any damage caused by the injunction if the plaintiff's contentions are not sustained. Prendergast v. New York Tel. Co., 262 U.S. 43, 51, 43 S.Ct. 466, 469, 67 L.Ed. 853; Ohio Oil Co. v. Conway, 279 U.S. 813, 815, 49 S.Ct. 256, 257, 73 L.Ed. 972.

But where an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond can not compensate, the court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff. Virginian R. Co. v. United States, 272 U.S. 658, 672, 673, 47 S.Ct. 222, 228, 71 L.Ed. 463; Petroleum Exploration v. Public Service Commission, 304 U.S. 209, 222, 223, 58 S.Ct. 834, 841, 842, 82 L.Ed. 1294; Dryfoos v. Edwards, D.C., 284 F. 596, 603, affirmed 251 U.S. 146, 40 S.Ct. 106, 64 L.Ed. 194; see Beaumont, S. L. & W. R. Co. v. United States, 282 U.S. 74, 91, 92, 51 S.Ct. 1, 7, 8, 75 L.Ed. 221. Compare State of Wisconsin v. State of Illinois, 278 U.S. 367, 418-421, 49 S.Ct. 163, 171–173, 73 L.Ed. 426. This is but another application of the principle, declared in Virginian R. Co. v. System Federation, 300 U.S. 515, 552, 57 S.Ct. 592, 601, 81 L.Ed. 789, that "Courts of equity may, and frequently do, go much further both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved."

Here, in the exercise of the power to protect the national economy from the disruptive influences of inflation in time of war Congress has seen fit to postpone injunctions restraining the operations of price regulations until their lawfulness could be ascertained by an appropriate and expeditious procedure. In so doing it has done only what a court of equity could have done, in the exercise of its discretion to protect the public interest. What the courts could do Congress can do as the guardian of the public interest of the nation in time of war. The legislative formulation of what would otherwise be a rule of judicial discretion is not a denial of due process or a usurpation of judicial functions. Cf. Demorest v. City Bank Farmers Trust Co., 321 U.S. 36, 64 S.Ct. 384, 88 L.Ed. 526.

Our decisions leave no doubt that when justified by compelling public interest the legislature may authorize summary action subject to later judicial review of its validity. It may insist on the immediate collection of taxes. Phillips v. Commissioner, 283 U.S. 589, 595–597, 51 S.Ct. 608, 611, 75 L.Ed. 1289, and cases cited. It may take possession of property presumptively abandoned by its owner, prior to determination of its actual abandonment, Anderson Nat. Bank v. Luckett, 321 U.S. 233, 64 S.Ct. 599, 88 L.Ed. 692, 151 A.L.R. 824. For the protection of public health it may order the summary destruction of property without prior notice or hearing. North American Cold Storage Co. v. City of Chicago, 211 U.S. 306, 29 S.Ct. 101, 53 L.Ed. 195, 15 Ann.Cas. 276; Adams v. City of Milwaukee, 228 U.S. 572, 584, 33 S.Ct. 610, 613, 57 L.Ed. 971. It may summarily requisition property immediately needed for the prosecution of the war. Compare United States v. Pfitsch, 256 U.S. 547, 41 S.Ct. 569, 65 L.Ed. 1084. As a measure of public protection the property of alien enemies may be seized, and property believed to be owned by enemies taken without prior determination of its true ownership. Central Union Trust Co. v. Garvan, 254 U.S. 554, 556, 41 S.Ct. 214, 65 L.Ed. 403; Stoehr v. Wallace, 255 U.S. 239, 245, 41 S.Ct. 293, 296, 65 L.Ed. 604. Similarly public necessity in time of war may justify allowing tenants to remain in possession against the will of the landlord, Block v. Hirsh, 256 U.S. 135, 41 S.Ct. 458, 65 L.Ed. 865, 16 A.L.R. 165; Marcus Brown Holding Co. v. Feldman, 256 U.S. 170, 41 S.Ct. 465, 65 L.Ed. 877. Even the personal liberty of the citizen may be temporarily restrained as a measure of public safety. Kiyoshi Hirabayashi v. United States, supra; cf. Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11, 25 S.Ct. 358, 49 L.Ed. 643, 3 Ann.Cas. 765. Measured by these standards we find no denial of due process under the circumstances in which this Act was adopted and must be applied, in its denial of any judicial stay pending determination of a regulation's validity.

IV.

As we have seen Congress, through its power to define the jurisdiction of inferior federal courts and to create such courts for the exercise of the judicial power, could, subject to other constitutional

limitations, create the Emergency Court of Appeals, give to it exclusive equity jurisdiction to determine the validity of price regulations prescribed by the Administrator, and foreclose any further or other consideration of the validity of a regulation as a defense to a prosecution for its violation.

Unlike most penal statutes and regulations whose validity can be determined only by running the risk of violation, see Douglas v. City of Jeanette, 319 U.S. 157, 163, 63 S.Ct. 877, 881, 882, 87 L.Ed. 1324, the present statute provides a mode of testing the validity of a regulation by an independent administrative proceeding. There is no constitutional requirement that that test be made in one tribunal rather than in another, so long as there is an opportunity to be heard and for judicial review which satisfies the demands of due process, as is the case here. This was recognized in Bradley v. City of Richmond, supra, and in Wadley Southern R. Co. v. State of Georgia, supra, 235 U.S. at pages 667, 669, 35 S.Ct. at pages 220, 221, 59 L.Ed. 405, and has never been doubted by this Court. And we are pointed to no principle of law or provision of the Constitution which precludes Congress from making criminal the violation of an administrative regulation, by one who has failed to avail himself of an adequate separate procedure for the adjudication of its validity, or which precludes the practice, in many ways desirable, of splitting the trial for violations of an administrative regulation by committing the determination of the issue of its validity to the agency which created it, and the issue of violation to a court which is given jurisdiction to punish violations. Such a requirement presents no novel constitutional issue.

No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. O'Neil v. State of Vermont, 144 U.S. 323, 331, 12 S.Ct. 693, 696, 36 L.Ed. 450; Barbour v. State of Georgia, 249 U.S. 454, 460, 39 S.Ct. 316, 317, 63 L.Ed. 704; Whitney v. People of State of California, 274 U.S. 357, 360, 362, 380, 47 S.Ct. 641, 642, 643, 650, 71 L.Ed. 1095. Courts may for that reason refuse to consider a constitutional objection even though a like objection had previously been sustained in a case in which it was properly taken. Seaboard Air Line R. Co. v. Watson, 287 U.S. 86, 53 S.Ct. 32, 77 L.Ed. 180, 86 A.L.R. 174. While this Court in its discretion sometimes departs from this rule in cases from lower federal courts, it invariably adheres to it in cases from state courts, see Brandeis J. concurring in Whitney v. People of State of California, supra, 274 U.S. at page 380, 47 S.Ct. at page 650, 71 L.Ed. 1095, and it could hardly be maintained that it is beyond legislative power to make the rule inflexible in all cases. Compare Woolsey v. Best, 299 U.S. 1, 57 S.Ct. 2, 81 L.Ed. 3, with Ex parte Siebold, 100 U.S. 371, 25 L.Ed. 717.

For more than fifty years it has been a penal offense for shippers and interstate rail carriers to fail to observe the duly filed tariffs fix-

ing freight rates—including, since 1906, rates prescribed by the Commission—even though the validity of those rates is open to attack only in a separate administrative proceeding before the Interstate Commerce Commission. 49 U.S.C. §§ 6(7), 10(1), 49 U.S.C.A. §§ 6(7), 10(1); Armour Packing Co. v. United States, 209 U.S. 56, 81, 28 S.Ct. 428, 435, 52 L.Ed. 681; United States v. Adams Express Co., 229 U.S. 381, 388, 33 S.Ct. 878, 57 L.Ed. 1237. It is no defense to a prosecution for departure from a rate fixed by the filed tariffs that the rate is unreasonable or otherwise unlawful, where its infirmity has not first been established by an independent proceeding before the Interstate Commerce Commission, and the denial of the defense in such a case does not violate any provision of the Constitution. United States v. Vacuum Oil Co., D.C., 158 F. 536, 539–541; Lehigh Valley R. Co. v. United States, 3 Cir., 188 F. 879, 887, 888. See also United States v. Standard Oil Co., D.C., 155 F. 305, 309, 310, reversed on other grounds, 7 Cir., 164 F. 376. Compare Pennsylvania R. Co. v. International Coal Min. Co., 230 U.S. 184, 196, 197, 33 S.Ct. 893, 895, 896, 57 L.Ed. 1446; Arizona Grocery Co. v. Atchison, T. & S. F. R. Co., 284 U.S. 370, 384, 52 S.Ct. 183, 184, 76 L.Ed. 348. Similarly it has been held that one who has failed to avail himself of the statutory method of review of orders of the Secretary of Agriculture under the Packers and Stockyards Act of 1921, or of the Federal Radio Commission under the Radio Act of 1927, cannot enjoin threatened prosecutions for violation of those orders, United States v. Corrick, 298 U.S. 435, 440, 56 S.Ct. 829, 831, 80 L.Ed. 1263; White v. Johnson, supra, 282 U.S. at pages 373, 374, 51 S.Ct. at page 118, 75 L.Ed. 388. See also Natural Gas Co. v. Slattery, supra, 302 U.S. at pages 309, 310, 58 S.Ct. at pages 203, 204, 82 L.Ed. 276.

The analogy of such a procedure to the present, by which violation of a price regulation is made penal, unless the offender has established its unlawfulness by an independent statutory proceeding, is complete and obvious. As we have pointed out such a requirement is objectionable only if by statutory command or in operation it will deny, to those charged with violations, an adequate opportunity to be heard on the question of validity. And, as we have seen, petitioners fail to show that such is the necessary effect of the present statute, or that if so applied as to deprive them of an adequate opportunity to establish the invalidity of a regulation there would not be adequate means of securing appropriate judicial relief in the course either of the statuory proceeding or of the criminal trial. During the present term of court we have held that one charged with criminal violations of an order of his draft board may not challenge the validity of the order if he has failed to pursue to completion the exclusive administrative remedies provided by the Selective Training and Service Act of 1940. Falbo v. United States, 320 U.S. 549, 64 S.Ct. 346; and see Bowles v. United States, 319 U.S. 33, 63 S.Ct. 912, 87 L.Ed. 1194. We perceive no tenable ground for distinguishing that case from this.

We have no occasion to decide whether one charged with criminal violation of a duly promulgated price regulation may defend on the ground that the regulation is unconstitutional on its face. Nor do we consider whether one who is forced to trial and convicted of violation of a regulation, while diligently seeking determination of its validity by the statutory procedure may thus be deprived of the defense that the regulation is invalid. There is no contention that the present regulation is void on its face, petitioners have taken no step to challenge its validity by the procedure which was open to them and it does not appear that they have been deprived of the opportunity to do so. Even though the statute should be deemed to require it, any ruling at the criminal trial which would preclude the accused from showing that he had had no opportunity to establish the invalidity of the regulation by resort to the statutory procedure, would be reviewable on appeal on constitutional grounds. It will be time enough to decide questions not involved in this case when they are brought to us for decision, as they may be, whether they arise in the Emergency Court of Appeals or in the district court upon a criminal trial.

In the exercise of the equity jurisdiction of the Emergency Court of Appeals to test the validity of a price regulation, a jury trial is not mandatory under the Seventh Amendment. Cf. Block v. Hirsh, supra, 256 U.S. at page 158, 41 S.Ct. at page 460, 65 L.Ed. 865, 16 A. L.R. 165. Nor has there been any denial in the present criminal proceeding of the right, guaranteed by the Sixth Amendment, to a trial by a jury of the state and district where the crime was committed. Subject to the requirements of due process, which are here satisfied, Congress could make criminal the violation of a price regulation. The indictment charged a violation of the regulation in the district of trial, and the question whether petitioners had committed the crime thus charged in the indictment and defined by Congress, namely, whether they had violated the statute by willful disobedience of a price regulation promulgated by the Administrator, was properly submitted to the jury. Cf. Falbo v. United States, supra.

Affirmed.[d]

B. Ordinary Suits in Equity

HOUSTON v. ST. LOUIS INDEPENDENT PACKING CO.

Supreme Court of the United States.
249 U.S. 479, 39 S.Ct. 332, 63 L.Ed. 717 (1919).

See *supra* at p. 864.

[d] The footnotes of the court, and the dissenting opinions of Mr. Justice Roberts and Mr. Justice Rutledge, have been omitted.

PANAMA REFINING COMPANY v. RYAN

Supreme Court of the United States.
293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446 (1935).

See *supra* at p. 232.

C. Review of Regulation in Criminal Prosecution Thereunder

M. KRAUS & BROS. v. UNITED STATES

Supreme Court of the United States.
327 U.S. 614, 66 S.Ct. 705, 90 L.Ed. — (1946).

See *supra* at p. 312.[e]

SECTION 3. METHODS OF REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT

ADMINISTRATIVE PROCEDURE ACT § 10(b)

5 U.S.C.Supp. § 1009(b).

Sec. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

* * *

(b) FORM AND VENUE OF ACTION.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

[e] *Cf.* Schechter Poultry Corp. v. United States, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570, 97 A.L.R. 947 (1935), *supra* at p. 244. But *cf.* Yakus v. United States, 321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834 (1944), *supra* at p. 1066, and § 204(d) (e) of the Emergency Price Control Act of 1942, 50 U.S.C.App. § 924(d) (e), *supra* at pp. 1004-5.

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Administrative Procedure Act

(5 U S.C.A. §§ 1001–1011)

Official Text of Act

CHAPTER 324—PUBLIC LAW 404

[S. 7]

An Act to improve the administration of justice by prescribing fair administrative procedure.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:

TITLE

Section 1. This Act may be cited as the "Administrative Procedure Act".

DEFINITIONS

Sec. 2. As used in this Act—

(a) Agency.—"Agency" means each authority (whether or not within or subject to review by another agency) of the Government of the United States other than Congress, the courts, or the governments of the possessions, Territories, or the District of Columbia. Nothing in this Act shall be construed to repeal delegations of authority as provided by law. Except as to the requirements of section 3, there shall be excluded from the operation of this Act (1) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them, (2) courts martial and military commissions, (3) military or naval authority exercised in the field in time of war or in occupied territory, or (4) functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947, and the functions conferred by the following statutes: Selective Training and Service Act of 1940;[1] Contract Settlement Act of

[1] 50 U.S.C.A.Appendix, §§ 301–318.

1944;[2] Surplus Property Act of 1944;[3] and the Veterans' Emergency Housing Act of 1946.[3a].

(b) Person and party.—"Person" includes individuals, partnerships, corporations, associations, or public or private organizations of any character other than agencies. "Party" includes any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding; but nothing herein shall be construed to prevent an agency from admitting any person or agency as a party for limited purposes.

(c) Rule and rule making.—"Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

(d) Order and adjudication.—"Order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. "Adjudication" means agency process for the formulation of an order.

(e) License and licensing.—"License" includes the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission. "Licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation amendment, modification, or conditioning of a license.

(f) Sanction and relief.—"Sanction" includes the whole or part of any agency (1) prohibition, requirement, limitation, or other condition affecting the freedom of any person; (2) with-

[2] 41 U.S.C.A. § 101 et seq.

[3] 50 U.S.C.A.Appendix, §§ 1611–1646.

[3a] The functions conferred by the "Veterans' Emergency Housing Act of 1946", 50 U.S.C.A.Appendix §§ 1821–1833, were excluded from the operation of the Administrative Procedure Act by the Act of Aug. 8, 1946, c. 870, Title III, § 302, and by the Act of Aug. 10, 1946, c. 951, Title VI, § 601.

holding of relief; (3) imposition of any form of penalty or fine; (4) destruction, taking, seizure, or withholding of property; (5) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees; (6) requirement, revocation, or suspension of a license; or (7) taking of other compulsory or restrictive action. "Relief" includes the whole or part of any agency (1) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy; (2) recognition of any claim, right, immunity, privilege, exemption, or exception; or (3) taking of any other action upon the application or petition of, and beneficial to, any person.

(g) Agency proceeding and action.—"Agency proceeding" means any agency process as defined in subsections (c), (d), and (e) of this section. "Agency action" includes the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.

PUBLIC INFORMATION

Sec. 3. Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest or (2) any matter relating solely to the internal management of an agency—

(a) Rules.—Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

(b) Opinions and orders.—Every agency shall publish or, in accordance with published rule, make available to public inspection all final opinions or orders in the adjudication of cases (except those required for good cause to be held confidential and not cited as precedents) and all rules.

(c) Public records.—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.

RULE MAKING

Sec. 4. Except to the extent that there is involved (1) any military, naval, or foreign affairs function of the United States or (2) any matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts—

(a) Notice.—General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(b) Procedures.—After notice required by this section, the agency shall afford interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity to present the same orally in any manner; and, after consideration of all relevant matter presented, the agency shall incorporate in any rules adopted a concise general statement of their basis and purpose. Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply in place of the provisions of this subsection.

(c) Effective dates.—The required publication or service of any substantive rule (other than one granting or recognizing exemption or relieving restriction or interpretative rules and statements of policy) shall be made not less than thirty days prior to the effective date thereof except as otherwise provided by the agency upon good cause found and published with the rule.

(d) Petitions.—Every agency shall accord any interested person the right to petition for the issuance, amendment, or repeal of a rule.

ADJUDICATION

Sec. 5. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 11; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives—

(a) Notice.—Persons entitled to notice of an agency hearing shall be timely informed of (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(b) Procedure.—The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 7 and 8.

(c) Separation of functions.—The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investi-

gative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 8 except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency.

(d) Declaratory orders.—The agency is authorized in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty.

ANCILLARY MATTERS

Sec. 6. Except as otherwise provided in this Act—

(a) Appearance.—Any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. Every party shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any agency proceeding. So far as the orderly conduct of public business permits, any interested person may appear before any agency or its responsible officers or employees for the presentation, adjustment, or determination of any issue, request, or controversy in any proceeding (interlocutory, summary, or otherwise) or in connection with any agency function. Every agency shall proceed with reasonable dispatch to conclude any matter presented to it except that due regard shall be had for the convenience and necessity of the parties or their representatives. Nothing herein shall be construed either to grant or to deny to any person who is not a lawyer the right to appear for or represent others before any agency or in any agency proceeding.

(b) Investigations.—No process, requirement of a report, inspection, or other investigative act or demand shall be issued, made, or enforced in any manner or for any purpose except as authorized by law. Every person compelled to submit data or evidence shall be entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for

good cause be limited to inspection of the official transcript of his testimony.

(c) **Subpenas.**—Agency subpenas authorized by law shall be issued to any party upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought. Upon contest the court shall sustain any such subpena or similar process or demand to the extent that it is found to be in accordance with law and, in any proceeding for enforcement, shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

(d) **Denials.**—Prompt notice shall be given of the denial in whole or in part of any written application, petition, or other request of any interested person made in connection with any agency proceeding. Except in affirming a prior denial or where the denial is self-explanatory, such notice shall be accompanied by a simple statement of procedural or other grounds.

HEARINGS

SEC. 7. In hearings which section 4 or 5 requires to be conducted pursuant to this section—

(a) **Presiding officers.**—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case.

(b) **Hearing powers.**—Officers presiding at hearings shall have authority, subject to the published rules of the agency and within its powers, to (1) administer oaths and affirmations, (2) issue subpenas authorized by law, (3) rule upon offers of proof and receive relevant evidence, (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the set-

tlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (8) make decisions or recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act.

(c) Evidence.—Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(d) Record.—The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

DECISIONS

Sec. 8. In cases in which a hearing is required to be conducted in conformity with section 7—

(a) Action by subordinates.—In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 5, any other officer or officers qualified to preside at hearings pursuant to section 7) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or revew upon motion of the agency within time pro-

vided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision except that in rule making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires.

(b) Submittals and decisions.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

SANCTIONS AND POWERS

Sec. 9. In the exercise of any power or authority—

(a) In general.—No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the agency and as authorized by law.

(b) Licenses.—In any case in which application is made for a license required by law the agency, with due regard to the rights or privileges of all the interested parties or adversely affected persons and with reasonable dispatch, shall set and complete any proceedings required to be conducted pursuant to sections 7 and 8 of this Act or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which pub-

lic health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful unless, prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements. In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no license with reference to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency.

JUDICIAL REVIEW

Sec. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) Right of review.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) Form and venue of action.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) Reviewable acts.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the ac-

tion meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) **Interim relief.**—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) **Scope of review.**—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

EXAMINERS

Sec. 11. Subject to the civil-service and other laws to the extent not inconsistent with this Act, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 7 and 8, who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission (here-

inafter called the Commission) after opportunity for hearing and upon the record thereof. Examiners shall receive compensation prescribed by the Commission independently of agency recommendations or ratings and in accordance with the Classification Act of 1923, as amended,[4] except that the provisions of paragraphs (2) and (3) of subsection (b) of section 7 of said Act, as amended,[5] and the provisions of section 9 of said Act, as amended,[6] shall not be applicable. Agencies occasionally or temporarily insufficiently staffed may utilize examiners selected by the Commission from and with the consent of other agencies. For the purposes of this section, the Commission is authorized to make investigations, require reports by agencies, issue reports, including an annual report to the Congress, promulgate rules, appoint such advisory committees as may be deemed necessary, recommend legislation, subpena witnesses or records, and pay witness fees as established for the United States courts.

CONSTRUCTION AND EFFECT

Sec. 12. Nothing in this Act shall be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons. If any provision of this Act or the application thereof is held invalid, the remainder of this Act or other applications of such provision shall not be affected. Every agency is granted all authority necessary to comply with the requirements of this Act through the issuance of rules or otherwise. No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly. This Act shall take effect three months after its approval except that sections 7 and 8 shall take effect six months after such approval, the requirement of the selection of examiners pursuant to section 11 shall not become effective until one year after such approval, and no procedural requirement shall be mandatory as to any agency proceeding initiated prior to the effective date of such requirement.

Approved June 11, 1946.

[4] 5 U.S.C.A §§ 661–674.
[5] 5 U.S.C.A. § 667.
[6] 5 U S C.A. § 669.