CENSORSHIP AND THE CONSTITUTIONAL CONCEPT OF MORALITY

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"The foundation of a republic is the virtue of its citizens." So wrote Mr. Justice Swayne for a unanimous Supreme Court in *Trist v. Child.* Nevertheless, in three recent cases, the same Court has held states powerless to censor motion pictures on the grounds that they are sacrilegious, immoral or an incentive to immorality and crime. These decisions are all the more significant in the light of a long line of earlier holdings sustaining many different types of state statutes on the ground of legitimate protection of public morals. What limits, then, do the freedoms of speech, press and religion impose on state power to protect civic virtue? Specifically, is censorship a forbidden weapon in the defense of public morality?

The concept of public morals has been an important factor in constitutional controversies involving the regulation of gambling, prostitution, activities on Sunday, intoxicating beverages, motion pictures, books and newspapers, amusements, working conditions of women, marriage, fraud and deception in the conduct of business, and entry by indigents into a state. The constitutional provisions brought into play in the adjudication of these cases have ranged from the contents of Article I to the Twenty-first Amendment. On the other hand, in the last thirty years,

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1 21 Wall. 441, 450 (U.S. 1874).
5 One of the more curious intrusions of the concept of morality into the field of constitutional law occurs in the construction of "criminal prosecutions" as that phrase is used in the Sixth Amendment guarantee of the right to jury trial. "Petty offenses" are not "crimes" within the meaning of this amendment, and in the determination of whether an offense is "petty" or "serious," the moral nature of the act prohibited and the severity of the penalty imposed are conclusive. *District of Columbia v. Clawans*, 300 U.S. 617 (1937); *District of Columbia v. Colts*, 282 U.S. 63 (1930); *Callan v. Wilson*, 127 U.S. 540 (1888).
the Supreme Court has decided more than a hundred cases directly involving or touching on the nature and extent of freedom of speech, press and religion.

The paradox is that such a wealth of material should prove so poor in resources for the solution of the current conflict between the opponents of censorship and the champions of public morality. Although the Supreme Court has spoken often on the subjects of public morals and freedom of speech, it has never formulated a comprehensive definition of either, with the result that the constitutional line of division between these fields today is marked by a picket fence of \textit{ad hoc} decisions rather than a solid wall of systematic theory. Partisans on both sides have made extravagant claims, and both have attempted to bolster their positions with scores of citations to these decisions; but the amount of measured discussion of the manifold legal and factual issues which lie submerged beneath the surface of the controversy has been discouragingly small.\footnote{6 Some of the more thoughtful writing in the field may be found in Chafee, \textit{Free Speech in the United States} (1941); Kadin, \textit{Administrative Censorship}, 19 B.U.L. Rev. 533 (1939); Kupferman and O'Brien, \textit{Motion Picture Censorship—The Memphis Blues}, 36 Cornell L.Q. 273 (1951); Comment, 42 Calif. L. Rev. 122 (1954); Note, 68 Harv. L. Rev. 489 (1955); Note, 60 Yale L.J. 696 (1951); Note, 49 Yale L.J. 87 (1939).}

Part of the confusion which characterizes much of the recent literature in this field may be traced to a failure accurately to distinguish between two completely different questions. Whether it is constitutional to censor motion pictures involves issues altogether distinct from those connected with whether it is wise to do so. The constitutionality of legislation depends on the authority and the reasonableness of the legislature; the wisdom of legislation depends on choosing the best among reasonable alternatives. And in measuring the authority of the legislature, it must not be forgotten that the meaning of the terms in which power has been delegated by the people is a question for the courts, not for the jury. The argument that no two members of the community would agree on a definition of "public morals" is no more telling against the power of the state to legislate in the interest of public morals than the contention that because the man in the street does not know the technical definition of a bill of attainder or \textit{ex post facto} law, the constitutional inhibition on these classes of legislation is meaningless.

It is, therefore, essential to have an accurate understanding of the constitutional role of government as guardian of public morality before any attempt is made to solve the more complex issue of the constitutionality of the weapon of censorship. This is all the more true, because
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it is no longer merely the constitutionality of censorship which is in issue, but the very existence of the power of the government to regulate the morals of the people. What are these "public morals" which scores of Supreme Court cases hold it to be within the "police power" of the states to protect? Is there any interior unity and stability to the concept, or is it a mere label tagged to a collection of essentially diverse and shifting ideas? What is the basis of the power of the states to protect, prohibit and punish in the interest of public morals? And what are the general limits of this power under the Constitution of the United States?

As the first part of this article will show, there is a very definite constitutional concept of morality, which provides a solid basis for the exercise of state power in many different fields of human activity. What is immoral within the meaning of this concept may be prohibited precisely because it is immoral; indeed—what is more—the stimuli and occasions of public immorality may be stifled and suppressed. No one has a constitutional right to be free to corrupt the public morals; and the constitutional rights which are guaranteed stop far short of such license.

But even though there can be no doubt of the life and strength of the police power in the field of public morals, the question of the constitutionality of censorship remains. The freedoms of speech and press are so precious, and the weapon of censorship so dangerous, that the Supreme Court has been careful to circumscribe its use with the most stringent precautions for the protection of constitutional liberties. Nevertheless, the thesis of the present article is that certain forms of censorship are constitutional, when justified by necessity for the preservation of public morals and safeguarded by a method which interferes as little as possible with the proper exercise of the basic freedoms of speech, press, assembly and religion. As the second part of this article will show, the decisions of the Supreme Court in litigation involving these fundamental liberties establish beyond dispute that not one of them includes freedom to corrupt the morals of the community. The constitutionality of censorship, therefore, depends on its necessity and its method. In support of this proposition, the following study is submitted of the power of the states to protect public morals, and of the limitations im-

7 Typical of one extreme is the testimony of Herbert Cartwright Jr., former mayor of Galveston, before a state crime committee in Texas. One of his contentions, it seems, was that freedom of religion prohibits laws about morals. Time, May 23, 1955, p. 26. The traditional position on harmony between law and public morals was recently reiterated by Mr. Justice Frankfurter in his opinion for the Court in National City Bank of New York v. Republic of China, 75 Sup. Ct. 423 (1955).
posed on that power by those personal freedoms which are "implicit in the concept of ordered liberty."

PUBLIC MORALS AND THE POLICE POWER OF THE STATES

By 1925, when the Supreme Court decided *Gitlow v. New York*, the power of the states to legislate in the interest of public morals was well established. Owing to the fact that conflict between state censorship and freedom of speech, press and religion did not mature until after the *Gitlow* recognition of the incorporation of these freedoms in the due process clause of the Fourteenth Amendment, it will serve the purposes both of history and clarity to treat the doctrine of public morals as it had developed prior to 1925 before studying the impact of the Fourteenth Amendment on the police power of the states.

The most prominent targets during the nineteenth century of state power to suppress public immorality were gambling and liquor. In *Stone v. Mississippi*, the Supreme Court sustained a judgment against a society chartered and authorized by the provisional government of Mississippi in 1867 to conduct lotteries. The Mississippi Constitution of 1869 outlawed all lotteries, and one year later the state legislature made their conduct a crime. In answer to the contention that this action by the state violated the obligations of the contract clause, Chief Justice Waite wrote for a unanimous Court: "No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants." It is true that lotteries are only *mala prohibita*, not *mala in se*; but their evil influence renders them continually subject to regulations established for the common welfare, and those who violate these regulations may be punished "as violators of the rules of social morality."

The same doctrine was reiterated in *New Orleans v. Houston* and

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8 268 U.S. 652 (1925).
9 101 U.S. 814 (1879).
10 Id. at 819.
11 Id. at 821. The distinction between malum prohibitum and malum in se played an important part in *Ewell v. Daggs*, 108 U.S. 143 (1883), and *Spring v. Knowlton*, 103 U.S. 49 (1880). Later in the same decade Chief Justice Fuller wrote for a unanimous Court that the distinction "has long since been exploded . . . ." *Gibbs v. Baltimore Gas Co.*, 130 U.S. 396 (1889). The explosion, however, proved a bust. See *District of Columbia v. Colts*, 282 U.S. 63, 73 (1930) (prohibited acts which are *mala in se* are "crimes" within the meaning of the Sixth Amendment).
13 119 U.S. 265 (1886). In this case, however, the state legislature was held powerless
Douglas v. Kentucky. No lottery franchise is a contract within the meaning of the Constitution of the United States; no matter what its terms, it is a mere license, revocable at any time by the state "under its police powers, and for the protection of the public morals." Under any other doctrine, the Court declared:

... the legislature, by giving or bartering away the power to guard and protect the public morals, could "convert the State into dens of bawdy houses, gambling shops and other places of vice and demoralization, provided the grantees paid for the privilege, and thus deprived the State of its power to repeal the grants and all control of the subjects as far as the grantees are concerned, and the trust duty of protecting and fostering the honesty, health, morals and good order of the State would be cast to the winds, and vice and crime would triumph in their stead. Now, it seems to us that the essential principles of self-preservation forbid that the Commonwealth should possess a power so revolting, because destructive of the main pillars of government. Douglas v. Kentucky was the last Supreme Court opinion to deal fully with state power to suppress lotteries. Two cases, decided just after the turn of the twentieth century, raised the issue of the validity of state laws prohibiting certain types of options and contracts which were frequently employed as gambling devices. In Booth v. Illinois, the Supreme Court sustained a statute forbidding contracts for options to buy grain at a future time. In response to the argument that the statute directly forbade a citizen to pursue a calling which in itself involved no element of immorality, and therefore invaded his constitutional liberty, the Court declared that callings not intrinsically immoral might be prohibited, if the tendency of what was generally or ordinarily or often done in that calling was "towards that which is admittedly immoral and pernicious." If the state thinks that prohibition of the activity is the only cure for the attendant evil, the Supreme Court cannot interfere, unless it can say "that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law."

One year after this decision was handed down, there was a challenge to terminate the lottery grant, because the state constitution expressly protected it. Id. at 275-76.

14 168 U.S. 488 (1897).
16 Id. at 505. The quote within this passage is from the opinion of the Court of Appeals of Kentucky in this case.
17 184 U.S. 425 (1902).
18 Id. at 429.
19 Ibid.
to the validity of the section of the California constitution which nullified all contracts for the sales of shares of the capital stock of any corporation or association, on margin, or to be delivered at a future day.20 As this provision was construed by the highest court of California, it might extend even to bona fide transactions. Mr. Justice Holmes wrote the majority opinion for the Supreme Court, which upheld the prohibition.21 "No court would declare a usury law unconstitutional," he declared, "even if every member of it believed that Jeremy Bentham had said the last word on that subject, and had shown for all time that such laws did more harm than good."22 Courts must exercise a judgment of their own; but it does not follow that laws based upon moral concepts with which they may disagree are void.23 Unless prohibition of a particular type of business activity clearly and unmistakably infringes rights secured by the fundamental law, it is a constitutional weapon against admitted evils associated with the conduct proscribed.24

Although the Booth and Otis decisions upheld somewhat extreme anti-gambling measures, no case better illustrates the extent to which a state may go than Marvin v. Trout.25 An Ohio statute provided that if A lost money to B by gambling, and paid B, then A could sue B to recover the money within six months after payment was made; and that if A did not do so, any person could sue B. Furthermore, the judgment rendered against B was made a lien against the building in which the gambling was carried on, provided that the owner of the building knowingly permitted it to be used for gaming purposes. A gambler’s wife brought a successful suit under the statute, and followed it with an action to enforce the judgment lien against the owner of the building in which the gambling had occurred. The Supreme Court unanimously affirmed the state judgment in the plaintiff’s favor. After advertting to the fact that the country generally regarded gambling "as a vice to be prevented and suppressed in the interest of the public morals and the public welfare,"26 the Court declared:

21 The vote was 7-2, with Peckham and Brewer, JJ., dissenting without opinion.
22 187 U.S. at 609.
23 Id. at 608.
24 Id. at 609.
25 199 U.S. 212 (1905). Ah Sin v. Wittman, 198 U.S. 500, decided the same year, sustained a badly-drafted San Francisco ordinance which prohibited the keeping of gambling equipment in barricaded rooms so that it was exposed to public view, when three or more persons were present.
26 199 U.S. at 224.
The plain object of this legislation is to discourage, and, if possible, prevent gambling. The liability of the owner of the building, to make good the loss sustained, under the circumstances set forth in the statute, was clearly part of the means resorted to by the legislature for the purpose of suppressing the evil in the interest of public morals and welfare. We are aware of no provision in the Federal constitution which prevents this kind of legislation in a State for such a purpose.27

The last important set of decisions to deal with state legislation against gambling was the group known as the Trading Stamp Cases.28 Three different statutes were involved, but all shared the feature of regulating and taxing the use of profit-sharing coupons and trading stamps. The argument was made that these commercial devices were mere advertising, "not detrimental in any way to the public health and morals, nor obstructive of the public welfare."29 The Supreme Court admitted that they did not amount exactly to gambling or lotteries, but held that state legislatures could reasonably consider them as having the same seduction and evil.30 There is no fundamental right to carry on business through the use of these devices; a reasonable legislative judgment that their employment is contrary to the public welfare is conclusive.31

The breadth of this power of the states to suppress gambling in the interest of public morals is matched by an equally sweeping authority over traffic in intoxicating beverages. The License Cases32 first sustained the right of the states to require a license for retail sale, by others than direct importers, of wine, brandy, rum and other spirituous liquors. Although there was much division of opinion among the members of the Court on the questions of the exclusiveness of Congressional power over interstate and foreign commerce, the extent of constitutional protection of imports, and the category (commercial or police regulation) to which the license statutes should be assigned, a majority explicitly agreed that in the absence of federal legislation in the field of retail sales of intoxicating liquors, the states were free to regulate and even wholly prohibit such traffic in the interest of public health and public morals.33

27 Id. at 225.
30 Id. at 365.
31 Id. at 366-68.
32 5 How. 504 (U.S. 1847).
33 Id. at 577 (Taney, C.J.), 588-89, 591-93 (McLean, J.), 621, 626-29 (Woodbury, J.), 632 (Grier, J.). There was no opinion for the Court in this case; almost every Justice wrote a separate one for himself. The vote in favor of the constitutionality of the statutes was unanimous.
Only the sale of alcoholic beverages was in issue in the License Cases. In *Bartemeyer v. Iowa*,\(^\text{34}\) however, the Court sustained a statute which completely prohibited the manufacture of intoxicating liquors for ordinary consumption. The opinion in this case is devoted chiefly to a determination that such manufacture is not a privilege of national citizenship, but in *Beer Co. v. Massachusetts*,\(^\text{35}\) decided four years later, the Court expressly declared that its decision in the *Bartemeyer* case was based on the police power of the states to preserve public morals.\(^\text{36}\) *Beer Co. v. Massachusetts*, like *Stone v. Mississippi* and *Douglas v. Kentucky*, involved the obligation of contracts clause. The company claimed that its charter of incorporation gave it the right to sell liquors, and that the subsequent prohibition legislation in Massachusetts impaired its contract under the charter. As in the lottery franchise cases, however, the state was declared powerless to bargain away its police power, and the later statute was sustained.\(^\text{37}\)

Ten years later, in *Mugler v. Kansas*,\(^\text{38}\) the argument was made that a state may not prohibit the manufacture of liquor for the personal consumption of the producer, because that is a matter affecting him alone and in no way related to public morals. This contention was completely rejected by the Supreme Court. The general use of intoxicating drinks endangers the public health, the public morals and the public safety; idleness, disorder, pauperism and crime are its fruits. If a state determines that absolute prohibition of manufacture within its limits is essential for the peace and security of society, it is free to legislate even to that extent.\(^\text{39}\)

The states, however, were not left completely without restraint. *Leisy v. Hardin*,\(^\text{40}\) decided within a few years of *Mugler v. Kansas*, held that the states could not forbid shipments into their borders from other states, or the sale of the liquor so shipped in its original package. The power of a state to protect public morals is limited by the constitutional prohibition against state regulation of matters requiring a single, uniform rule for the nation.\(^\text{41}\)

Later that same term, the Supreme Court decided *Crowley v. Chris-
A retail liquor dealer had been convicted of a violation of the San Francisco licensing ordinance. He contended that what a man ate or drank was his private affair; moreover, that any injury consequent upon the use of alcohol was voluntarily inflicted by the user, and consequently that the seller should be free from regulation. As in Mugler v. Kansas, however, the Supreme Court held that private consumption was intimately connected with public morality. The manner and extent of the regulation of local consumption of intoxicating beverages is wholly in the hands of the state government.

In Crane v. Campbell, the argument based on the private character of personal possession and consumption was urged once again. A statute making it a crime to possess any alcoholic beverage for personal consumption was upheld as an appropriate means to enforce complete local prohibition. The power of a state absolutely to forbid local production, transportation, gift or sale of intoxicating liquors was well settled; to hold that possession for personal use is a privilege of national citizenship would conflict with the established rules of law. The "well-known noxious qualities" of intoxicating liquors and the "extraordinary evils" commonly consequent upon their use put them outside the protection of the Fourteenth Amendment.

The line of decisions from the License Cases to Crane v. Campbell has so firmly established the doctrine that states may regulate alcoholic beverages in the interest of public health and public morals that recent cases take the rule for granted. The Eighteenth Amendment only slightly increased the power of the states; its repeal has left their former power

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42 137 U.S. 86 (1890).
43 Id. at 90.
44 Id. at 90-91.
45 Id. at 91.
46 245 U.S. 304 (1917).
47 Id. at 307-08.
48 Id. at 307. In Samuels v. McCurdy, 267 U.S. 188 (1925), the Supreme Court sustained a Georgia statute which authorized the forfeiture and destruction of intoxicating liquors, including even those lawfully acquired for private consumption before the statute was enacted. For other examples of the extremes to which a state may go in the regulation of the liquor traffic, see Van Oster v. Kansas, 272 U.S. 465 (1926) (forfeiture of automobile used by borrower in violation of liquor laws, even though owner is wholly innocent); Eiger v. Garrity, 246 U.S. 97 (1918) (Illinois statute giving wife right of action against any person who injured her means of support by selling intoxicating liquor to her husband, and making a judgment for damages so recovered a lien upon the premises where the liquor was sold); Purity Extract Co. v. Lynch, 226 U.S. 192 (1912) (prohibition of "Poinsetta," a beverage with a low malt content).
unimpaired, and, in fact, augmented with the right to exclude even inter-state shipments intended for sale or consumption within their borders.

In addition to the many cases dealing with the regulation and suppression of gambling and the liquor traffic, there are a number of isolated decisions prior to 1925 sustaining state power to protect public morals in a wide variety of fields. In City of New York v. Miln,\textsuperscript{40} the Supreme Court sustained a statute requiring the master of every ship arriving at the port of New York City from any port not located in New York State to make a written report to the mayor of the city, containing the name, place of birth, last legal residence, age and occupation of every person brought on the voyage to New York City and permitted to land there. The legislation was held to be a valid precautionary measure against "the moral pestilence of paupers, vagabonds, and possibly convicts."\textsuperscript{50} And in Hennington v. Georgia,\textsuperscript{51} a majority of the Court upheld a statute which prohibited the running of any (including interstate) freight trains on any railroad in the state on Sunday, on the ground that the state's interest in the physical and moral well-being of its citizens justified such legislation, regardless of its effect on interstate commerce.

In Maynard v. Hill,\textsuperscript{52} a legislative divorce granted by the territorial assembly of Oregon was held to be a valid exercise of the police power. Marriage, the Court declared, had always been subject to the control of the legislature, because it had more to do with the morals and civilization of a people than any other institution.\textsuperscript{53} This doctrine was repeated in Andrews v. Andrews,\textsuperscript{54} which upheld a Massachusetts statute which had the effect of prohibiting the domiciliaries of that state from securing a binding divorce in other states on grounds which arose within Massachusetts.

\textsuperscript{40} 11 Pet. 102 (U.S. 1837).

\textsuperscript{50} Id. at 142. This case, however, was later overruled insofar as it was inconsistent with the decision in Edwards v. California, 314 U.S. 160 (1941). "Poverty," said the Court, "and immorality are not synonymous." Id. at 177.

\textsuperscript{51} 163 U.S. 299 (1896). The authority of this decision would seem doubtful in view of the later holding in Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945). Petit v. Minnesota, 177 U.S. 164 (1900), however, was decided squarely on the basis of Hennington v. Georgia, and is not affected by the interstate commerce problem common to the Hennington and Southern Pacific cases.

\textsuperscript{52} 125 U.S. 190 (1888).

\textsuperscript{53} Id. at 205.

\textsuperscript{54} 188 U.S. 14, 30 (1903). The authority of this case, so far as the validity of the particular statute involved is concerned, is extremely dubious in the light of the later decision in Sherrerr v. Sherrerr, 334 U.S. 343, 353 (1948). There is no indication, however, of any change in the fundamental doctrine of state power over marriage.
In 1900, the Supreme Court sustained an ordinance which created a ghetto for prostitutes.\textsuperscript{55} Property owners in adjacent areas complained that the ordinance deprived them of their property without due process of law. The Supreme Court, however, unanimously upheld the ordinance as a valid exercise of the police power. Mr. Justice Brewer wrote:

\ldots we premise by saying that one of the difficult social problems of the day is what shall be done in respect to those vocations which minister to and feed upon human weaknesses, appetites and passions. The management of those vocations comes directly within the scope of what is known as the police power. They affect directly the public health and morals. Their management becomes a matter of growing importance, especially in our larger cities, where from the very density of population the things which minister to vice tend to increase and multiply. It has been often said that the police power was not by the Federal Constitution transferred to the nation, but was reserved to the States, and that upon them rests the duty of so exercising it as to protect the public morals.\textsuperscript{56}

Courts have nothing to do with the wisdom or folly of police regulations; they cannot inquire into the reasonableness or propriety of territorial limits like those involved in this case.\textsuperscript{57} Finally, states are under no obligation to make compensation for pecuniary injuries suffered as a result of legislation of a police character.\textsuperscript{58}

In the field of amusements, the Supreme Court has given strong support to state regulations in the interest of public morality. In \textit{Murphy v. California},\textsuperscript{59} an ordinance was sustained which prohibited the maintenance of any billiard hall or pool room except by the proprietor of a hotel, and then only for the use of his regular guests. In line with its holding in \textit{Booth v. Illinois},\textsuperscript{60} the Court declared that callings not in themselves immoral might be prohibited if the state found their suppression necessary for the preservation of public morals.\textsuperscript{61} In the \textit{Mutual Film} cases,\textsuperscript{62} the Supreme Court rejected the contention that motion pictures were entitled to the protection accorded to speech and the

\textsuperscript{55} L'Hote v. New Orleans, 177 U.S. 587 (1900).
\textsuperscript{56} Id. at 596.
\textsuperscript{57} Id. at 597.
\textsuperscript{58} Id. at 598.
\textsuperscript{59} 225 U.S. 623 (1912).
\textsuperscript{60} 184 U.S. 425 (1902).
\textsuperscript{61} Murphy v. California, 225 U.S. 623, 628-30 (1912).
\textsuperscript{62} Mutual Film Corp. v. Ohio Indus'l Comm., 236 U.S. 230; Mutual Film Co. v. Ohio Indus'l Comm., 236 U.S. 247; Mutual Film Corp. v. Kansas, 236 U.S. 248 (1915). All three cases were decided on the same day; the decision of the first controlled the second and third.
press, and held that they were subject to regulation in the interest of public morals. The Ohio censorship statute was an appropriate method of such regulation. Its terms, which forbade the issuance of a license for the exhibition of any films which were not of a "moral, educational or amusing and harmless character," were sufficiently clear and definite. The general words drew "precision from the sense and experience of men."  

One of the very rare instances in which the Supreme Court has refused to sustain a statute regulating occupations occurred in 1917. In Adams v. Tanner, the Court invalidated a Washington statute which forbade employment agents to receive fees from persons for whom they found jobs. There was nothing inherently immoral or dangerous to the public welfare in such an occupation; on the contrary, it was useful, commendable and in great demand. Abuses, in the form of fraud and extortion, were not an adequate reason for complete suppression. The state would have to be content with regulation.

This survey of the most important cases decided before 1925 and dealing with the power of the states to legislate in the interest of public morality establishes, at the very least, a catalog of constitutionally virtuous, vicious and indifferent activities. Nevertheless, these cases are merely applications of the general concept of public morals, and it is important for an accurate understanding of the doctrine that the concept itself be analyzed. What is the common bond between gambling, liquor, prostitution, fraud and deception and certain forms of amusements which brings them all within the category of public morality?

There is no easy answer to this question. The Supreme Court has never given a comprehensive definition of "public morals." In fact, an examination of the cases in which the legal morality of an act, thing or person was in issue indicates at first glance that the primary test of

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63 On the ground that the exhibition of motion pictures is a "business pure and simple, originated and conducted for profit." Mutual Film Corp. v. Ohio Indus'l Comm., 236 U.S. 230, 244 (1915).
64 Mutual Film Corp. v. Ohio Indus'l Comm., 236 U.S. 230, 246 (1915).
65 244 U.S. 590 (1917).
66 Id. at 593.
67 Id. at 594. In the same term in which this case was decided, the Court upheld the Blue Sky Laws of three different states, on the ground that "the prevention of deception is within the competency of government." Hall v. Geiger-Jones Co., 242 U.S. 539, 551; Caldwell v. Sioux Falls Stock Yards Co., 242 U.S. 559; Merrick v. Halsey & Co., 242 U.S. 568 (1917). These cases are typical of the many decisions in favor of the constitutionality of state statutes designed to protect citizens against fraudulent and deceptive business practices.
public morals is somewhat nominalistic.68 If the "entire civilized world" recognizes a particular rule of conduct, such as cessation from labor one day a week, as "essential to the physical and moral well-being of society," the rule is essential.69 The consensus, however, need not be ecumenical. If the nation as a whole,70 or even the people of a particular state,71 judge that a particular activity is immoral, it is immoral. Still further, widespread legislation prohibiting or curbing certain activities on the ground that they are against public morals is convincing evidence that the activities are in fact pernicious or dangerous.72 Finally, a thing may be immoral because it was considered so at common law.73

This appeal, however, to the test of extrinsic denomination is only a constitutional short-cut. Adams v. Tanner clearly demonstrates that a legislative judgment cannot conclude the Supreme Court on the issue of the morality of an occupation.74 There is, therefore, a genuine interior significance to the concept, a content much more profound than the mere fact that many or most people agree in applying the word to a particular person, place or thing.

Once again, however, we are forced to construct the nucleus of meaning from widely scattered fragments of indication. Prostitution is immoral because it feeds "upon human weaknesses, appetites and passions,"75 and because the lives and example of prostitutes are in hostility to the traditional ideal of marriage and the family.76 Gambling is not per se immoral, but becomes so when it leads to a "population of speculators . . .

68 In the discussion which follows, cases will be used which do not deal directly with the police power of the states in the field of public morals. The legal concept of morality is important in many other fields of constitutional law; and the cases which develop the concept in these other areas are used here for the light they shed on the basic idea of public morals. Nothing indicates that the test of morality used by the Supreme Court varies with the particular provision of the Constitution which it happens to be expounding.

71 Otis v. Parker, 187 U.S. 606, 608-09 (1903).
74 244 U.S. 590 (1917). The Court said at 593: "We think it plain that there is nothing inherently immoral or dangerous to public welfare in acting as paid representative of another to find a position in which he can earn an honest living."
75 L'Hote v. New Orleans, 177 U.S. 587, 596 (1900).
living on the expectation of what, 'by the casting of lots, or by lot, chance, or otherwise,' might be 'awarded' to them from the accumulations of others.\textsuperscript{77} The excessive use of intoxicating liquors is immoral, because it results in drunkenness, idleness, wastefulness, pauperism and crime.\textsuperscript{78} Bribery is immoral because it corrupts the government;\textsuperscript{79} lobbying contracts are immoral, because they impede the "truth, frankness, and integrity" which a citizen is bound to exhibit in his intercourse with public officials touching the performance of their functions.\textsuperscript{80}

This survey makes it possible to draw a rough sketch of the Supreme Court's virtuous citizen. He is hard-working, honest, law-abiding and self-controlled. Religion, apparently, does not enter into the picture; sex, alcohol and gambling do. Virtue consists primarily in industry, integrity, obedience and temperance. Of course, in fairness it must be remembered that the Supreme Court has never claimed or even attempted completeness in any of its discussions of the elements of morality. Its predilection for a case-by-case elaboration of constitutional concepts necessarily results in leaving the structure of its doctrine incomplete.

As disinclined, however, as the Court has been to fashion a general definition of morality (preferring, rather, to rest on the external test of what the community or the nation says is immoral), it has indicated with reasonable clarity the point at which private immorality assumes public significance. Basically, there are three criteria: how widespread the immoral practice is,\textsuperscript{81} how bad the social effect,\textsuperscript{82} and whether government action is involved.\textsuperscript{83} When private immorality becomes prevalent, or results in serious social evils, or corrupts the government, there is an injury to "public morals" which it is within the power of the state to redress.\textsuperscript{84} These three tests make it clear that private immorality becomes of public importance only when it affects society at large; and

\textsuperscript{77} Stone v. Mississippi, 101 U.S. 814, 820 (1879).
\textsuperscript{78} Crowley v. Christensen, 137 U.S. 86, 90-91 (1890); Mugler v. Kansas, 123 U.S. 623, 662 (1887).
\textsuperscript{79} Bartle v. Coleman, 4 Pet. 184, 188 (U.S. 1830).
\textsuperscript{80} Trist v. Child, 21 Wall. 441, 450 (U.S. 1874).
\textsuperscript{81} Otis v. Parker, 187 U.S. 606, 610 (1903); Stone v. Mississippi, 101 U.S. 814, 818 (1879).
\textsuperscript{83} Trist v. Child, 21 Wall. 441, 450-52 (1874).
\textsuperscript{84} Murphy v. California, 225 U.S. 623, 628 (1912); Crowley v. Christensen, 137 U.S. 86, 90-91 (1890); Stone v. Mississippi, 101 U.S. 814, 818-19 (1879); Trist v. Child, 21 Wall. 441, 450 (U.S. 1874).
since society has two basic claims against the individual, not to be endangered in its existence nor impeded in its progress, it follows that public morals are that class of moral precepts without the common observance of which society can neither survive nor prosper.

And it is precisely this dependence of the existence and well-being of society on community adherence to the commonly accepted standards of right and wrong which provides the foundation of the state's power—and what is more, of the state's duty—to protect and preserve the public morals. Their preservation is one of the purposes for which government is organized; and the duty to preserve them is a "trust" which cannot be bargained or given away. The suppression of any and all practices tending to corrupt the public morals is legislation for the public welfare, because "reverent morality . . . is the source of all beneficent progress in social and political improvement." To those who would object that the morality of an act is irrelevant to the existence of state power to regulate or suppress it, Mr. Justice Swayne, speaking for a unanimous Court, has given a forceful and eloquent answer:

The foundation of a republic is the virtue of its citizens. They are at once sovereigns and subjects. As the foundation is undermined, the structure is weakened. When it is destroyed, the fabric must fall. Such is the voice of universal history. The theory of our government is, that all public stations are trusts, and that those clothed with them are to be animated in the discharge of their duties solely by considerations of right, justice, and public good. They are never to descend to a lower plane. But there is a correlative duty resting upon the citizen. In his intercourse with those in authority, whether executive or legislative, touching the performance of their functions, he is bound to exhibit truth, frankness, and integrity. Any departure from the line of rectitude in such cases, is not only bad in morals, but involves a public wrong.

The Supreme Court did not have to wait until recent times to hear the objection that "moral" is too vague and shifting a term to qualify as a constitutional standard of power. In Northwestern Life Ins. Co. v. McCue, the issue was whether the beneficiary of a life insurance policy could recover the proceeds when the assured had been hanged for the murder of his wife. In Ritter v. Mutual Life Insurance Co. and Burt

89 223 U.S. 234 (1912).
90 169 U.S. 139 (1898).
v. Union Central Life Insurance Co., the Supreme Court had already held that insurance contracts could not cover death at the hands of justice or intentional suicide while of sound mind, because such coverage would be subversive of good morals and contrary to sound public policy. In the Northwestern case, counsel for the beneficiary argued that the notions entertained of this policy were "indefinite and variable . . . according to times and places and the temperaments of courts" and that it was dangerous to permit "its uncertain conceptions to control or supersede the freedom of parties to make and to be bound by contracts deliberately made." The Court, however, passed by the "very interesting" argument of counsel, and reaffirmed the doctrine of the Burt and Ritter cases. Indeed, the Supreme Court had already expressly recognized the mutability of the moral judgments of the community, and held their variability in time and place no obstacle to the constitutionality of the law based upon them. It is the moral judgment of the community which the law governs which is important, not the ethical opinions of the nation or world at large. And it is the judge's knowledge of the community standards, not his own personal views on morality, which must guide his decision on the constitutionality of legislation in the interest of public morals.

Finally, the Supreme Court had met and answered more than once the specific objection that certain private practices, such as the possession and consumption of intoxicating liquors, had nothing to do with public morality. In Mugler v. Kansas, Mr. Justice Harlan expressed the unanimous opinion of the Court when he wrote:

But by whom, or by what authority, is it to be determined whether the manufacture of particular articles of drink, either for general use or for the personal use of the maker, will injuriously affect the public? Power to determine such questions, so as to bind all, must exist somewhere; else society will be at the mercy of the few, who, regarding only their own appetites or passions, may be willing to imperil the peace and security of the many, provided only they are permitted to do as they please. Under our system that power is lodged with the legislative branch of the government. It belongs to that department to exert

92 223 U.S. 234, 246 (1912).
93 Ibid.
96 Id. at 609.
97 Ibid.
what are known as the police powers of the State, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety.99

In summary, therefore, it is clear that "public morals" means the class of moral precepts which must be observed if society is to endure and prosper; that the validity of these precepts, from the constitutional point of view, derives from their general acceptance by the community which professes itself bound to observe them; that one of the purposes for which government is organized is to secure at least external compliance with these standards; and that the practical application and implementation of these precepts is primarily the work of the legislature.

Legislation in the interest of public morals must, of course, like all other legislation, conform to constitutional standards of state action. No label can guarantee constitutionality; no declaration of necessity can secure complete immunity from judicial review. Nevertheless, in the public morals cases decided before 1925, the Supreme Court demonstrated a marked reluctance to interfere with legislative judgments that certain places or activities were contrary to public morals, or that certain methods were necessary or appropriate to protect and enforce them. Over and over again, the Court declared that a statute purporting to have been enacted to protect the public morals would not be invalidated, unless it was indisputable that it had no real or substantial relation to those objects, or palpably invaded rights secured by the fundamental law.100 As a result, the legislature was at once the voice of the community conscience and the guardian of public behavior. No one had a constitutional right to corrupt public morals;101 and as long as reasonable men might differ, a legislative judgment that X was immoral or that Y led to X was conclusive.102

The Freedoms of Speech, Press, Assembly and Religion

Such was the state of the doctrine of public morals when Gitlow v. New York103 was decided in 1925. The significance of this case for the

102 See, for example, Murphy v. California, 225 U.S. 623, 629 (1912); Crowley v. Christiansen, 137 U.S. 86, 91 (1890); Mugler v. Kansas, 123 U.S. 623, 662 (1887); Hennington v. Georgia, 163 U.S. 299, 303-04 (1896).
103 268 U.S. 652 (1925).
The present discussion lies solely in its "assumption"\textsuperscript{104} that the Fourteenth Amendment prohibits the states from abridging freedom of speech, with the result that this decision set the stage for the later conflict between public morals and liberty of discussion. Subsequent decisions definitively included the freedoms of speech,\textsuperscript{105} press,\textsuperscript{106} assembly\textsuperscript{107} and religion\textsuperscript{108} within the class of rights "implicit in the concept of ordered liberty" and consequently protected by the due process clause of the Fourteenth Amendment.\textsuperscript{109} Once it was established that these rights were guaranteed against state interference, the opponents of legislation in the field of public morals were armed with an invaluable weapon. The constitutional right to engage in any lawful business had proved too tenuous to support claims of a "palpable invasion of rights secured by the fundamental law";\textsuperscript{110} but as events were to show, the Supreme Court was to demonstrate far greater jealousy of the rights of freedom of speech, press, assembly and religion.

The significance of this preferential treatment can be appreciated only against the background of the pre-\textit{Gitlow} cases in these fields. Prior to 1925, only the Federal Government, of course, was held to be inhibited by these rights;\textsuperscript{111} but they had proved no impediment to the exercise of national power in the interest of national morals. Indeed, the Tenth Amendment had been urged much more strongly than the First in opposition to federal police legislation; but the Supreme Court consistently answered that no valid objection to the exercise of federal power over interstate commerce or other legitimate subjects of congressional regulation could be based "upon the fact that such exercise may be attended by the same incidents which attend the exercise by a State of its police

\textsuperscript{104} Id. at 666.

\textsuperscript{105} The first case in which the Supreme Court invalidated a state statute unmistakably on the ground that it was an unconstitutional interference with freedom of speech was \textit{Stromberg v. California}, 283 U.S. 359 (1931). \textit{Fiske v. Kansas}, 274 U.S. 380 (1927), was not decided on the basis of freedom of speech, but on the due process requirement of at least some evidence to support a finding of guilt.

\textsuperscript{106} \textit{Near v. Minnesota}, 283 U.S. 697 (1931).


Moreover, the Supreme Court had expressly held that the power to regulate interstate commerce was conferred upon Congress for the promotion of the general welfare, material and moral; and that power must exist in Congress to regulate matters of public morality which were national in scope, because the states were powerless to do so.113

So it was that in Ex parte Jackson the Supreme Court sustained a statute prohibiting the use of the mails for lottery circulars, on the ground that whatever the scope of the freedom of the press or of other constitutional rights, Congress had the right to refuse the use of postal facilities for the distribution of matter deemed injurious to the public morals.114 And when the validity of a statute denying the franchise and any public office in the Territory of Idaho to any person who was a bigamist or polygamist, or who taught, advised, counseled or encouraged any person to become a bigamist or polygamist was challenged on the grounds of freedom of religion and freedom of speech, the Court held that these liberties could not be invoked to avoid punishment for practices or advocacy of practices which the moral judgment of the community denounced as crimes.115 The contempt116 and Espionage Act117 cases of the second and third decade of this century only emphasize that the freedoms of speech, press and religion have never meant the right to say whatever you please whenever you please however you please and wherever you please. Coercion, corruption and conspiracy cannot escape detection and punishment by disguising themselves with the cloak of constitutional liberty.

Even the "clear and present danger" test of Mr. Justice Holmes had but little effect at first. After serving as the test for three cases decided within one week of each other, it was abandoned in two cases decided

112 Hamilton v. Kentucky Distilleries Co., 251 U.S. 146, 156 (1919). For other cases dealing with the federal police power, see Caminetti v. United States, 242 U.S. 470, 491 (1917); Hoke v. United States, 227 U.S. 309, 322 (1913); United States v. Bitty, 208 U.S. 393, 401-02 (1908); Champion v. Ames, 188 U.S. 321, 355-58 (1903); Ex parte Jackson, 96 U.S. 727, 737 (1877).


114 96 U.S. 727, 736 (1877).


117 Pierce v. United States, 252 U.S. 239 (1920); Shaef er v. United States, 251 U.S. 466 (1920); Abrams v. United States, 250 U.S. 616 (1919); Debs v. United States, 249 U.S. 211 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Schenck v. United States, 249 U.S. 47 (1919).
later that same year (over the dissents of Justices Holmes and Brandeis), and its applicability was expressly rejected even in *Gitlow v. New York*.

During the pre-*Gitlow* period, there were numerous challenges to state action on the ground that it interfered with freedom of speech. In some of these cases, the Court said flatly that there was no constitutional restriction on such interference; but in two very important cases, it based its decision on the ground that even if the Fourteenth Amendment did protect freedom of speech against abridgment by the states, it did not prohibit the particular statutes in question. In *Fox v. Washington*, the Court unanimously affirmed a conviction for publishing matter tending to encourage and incite persistence in violations of the state law against indecent exposure. No one has a right, wrote Mr. Justice Holmes, to incite others to commit crimes; and it does not matter that speech or the press is the method chosen for stimulation. Such language, of course, was too broad, as the cases dealing with state Criminal Syndicalism statutes were soon to make clear; but the case is apparently still good authority for the punishment of speech urging activities which the state has power to prohibit.

The *Mutual Film* cases were decided on the same day as *Fox v. Washington*. Perhaps the most famous passage in the first of these opinions is the part which excludes motion pictures from the protection of freedom of speech on the ground that they are commercial entertainment:

...It cannot be put out of view that the exhibition of moving pictures is a business pure and simple, originated and conducted for profit, like other spectacles, not to be regarded, nor intended to be regarded by the Ohio constitution, we think, as part of the press of the country or as organs of public opinion. They are mere representations of events, of ideas and sentiments published and known, vivid, useful and entertaining no doubt, but, as we have said, capable of evil, having power for it, the greater because of their attractiveness and manner of exhibition. ...

This passage has often been criticized for the obvious reasons that the publication of books and newspapers is also a commercial enterprise, and that opinions are often most tellingly expressed in an entertaining form. Juvenal, after all, was not trying merely to amuse the Romans

119 See, for example, Prudential Ins. Co. v. Cheek, 259 U.S. 530, 543 (1922).
120 236 U.S. 273 (1915).
121 Mutual Film Corp. v. Ohio Indus'l Comm., 236 U.S. 230; Mutual Film Co. v. Ohio Indus'l Comm., 236 U.S. 247; Mutual Film Corp. v. Kansas, 236 U.S. 248 (1915).
122 Mutual Film Corp. v. Ohio Indus'l Comm., 236 U.S. 230, 244 (1915).
of his day. Nevertheless, the distinguished Court which unanimously decided the Mutual Film cases does not merit the censure which it has sometimes received. As a later Court expressly recognized, speech in the ordinary sense did not become a vital part of motion picture production until some eleven years after the Mutual Film decisions, and besides, it is submitted that the Justices were basically right. Freedom of speech, press, assembly and religion, as the following analysis of the relevant cases during the last thirty years will attempt to show, was never meant to protect public indulgence in harmful or immoral entertainment. Public officials may be criticized, but they may not be made the butt of obscene jokes; changes in the law may zealously be advocated, but traditional ideals of modesty and marriage may not be subjected to ridicule by alluring presentations of indecent or lewd and lascivious spectacles. When an idea wears an immodest gown, it may be forced to dress decently before it appears in public.

The major constitutional issues in the area of free speech during the last thirty years have been fought in the fields of subversive activities, labor-management relations and religious propaganda. It is not surprising, therefore, to find that most of the relevant cases do not deal simply with freedom of speech or of the press, but also contain discussions of the freedoms of assembly and religion. However, in spite of the complexity of these constitutional problems and of the formidable variety of factual situations in which they have been set, certain definite principles have been elaborated by the Supreme Court to govern the basic disposition of any case within this class of litigation.

The first and most important of these principles is that none of the rights guaranteed by the First and Fourteenth Amendments are absolute in the sense that their exercise may be pushed even to the destruction of orderly society. This is true, not simply because the government has a right of self-preservation, but more fundamentally because the exercise of these rights necessarily presupposes the existence of a stable society in which all the members are free to think, speak and worship

123 The members of the Supreme Court at this time were White, C.J., and Justices McKenna, Holmes, Day, Hughes, Van Devanter, Lamar, Pitney and McReynolds. Mr. Justice McKenna wrote the Mutual Film opinion.
126 Id. at 509: "Overthrow of the Government by force and violence is certainly a substantial enough interest for the Government to limit speech. Indeed, this is the ultimate value of any society, for if a society cannot protect its very structure from armed internal attack, it must follow that no subordinate value can be protected."
according to their own lights. These basic personal liberties are the liberties of all as well as of each; and, although it is true that the state may not interfere with their proper exercise, it is not true that the state may not prevent their destruction.

The second of these principles is that none of the objects of these four basic freedoms includes every word or act which falls generically within the generally protected class. Neither "speech" nor "press" immunizes libel from punishment or civil liability;\(^{127}\) "religion" does not safeguard polygamy,\(^{128}\) nor "assembly" a riot.\(^{129}\) If the mere fact of utterance, publication, religious belief or meeting in common could bar the activity of the state in promoting the common welfare or providing for the common defense, the government would be completely powerless. The test for deciding what type of speech, publication, religious activity or assembly is protected, and what type of governmental interference is prohibited, is largely historical.\(^{130}\) Although capable of meaning many different things on its face, the Bill of Rights assumes definite shape and substance in the light of the abuses against which it was aimed.

The third principle is that in determining the constitutionality of governmental interference with words or activities which appear to be within the protection of the freedoms of speech, press, assembly and religion, the social interest sought to be protected or achieved by the state must be weighed against the individual interest in liberty.\(^{131}\) The ultimate arbiter is, of course, the Supreme Court; but this does not mean that the legislative judgment may lightly be disregarded.\(^{132}\) The principal difference between state regulation of commercial affairs and state activities which impinge upon the basic personal freedoms is that in the former there is a "presumption" of constitutionality,\(^{133}\) while in the latter there would appear to be none.\(^{134}\) Although eminent legal authorities differ on whether these freedoms enjoy a "preferred" status, the constitutional history of the last thirty years clearly demonstrates that the Supreme


\(^{128}\) Cleveland v. United States, 329 U.S. 14 (1946).


\(^{130}\) Burstyn v. Wilson, 343 U.S. 495, 501-02 (1952); Dennis v. United States, 341 U.S. 494, 509 (1951); Maynard v. Hill, 125 U.S. 190, 205 (1888).


\(^{133}\) This presumption takes the form that if any set of facts can reasonably be conceived to exist which would warrant the legislation in question, the legislation is valid. Goesaert v. Cleary, 335 U.S. 464, 466-67 (1948).

\(^{134}\) Burstyn v. Wilson, 343 U.S. 495, 504 (1952).
Court approaches legislation affecting these liberties in a spirit greatly different from that with which it examines governmental regulation of business and industry.135

In the application of this third principle, the Supreme Court has sometimes used the "clear and present danger" test to determine the permissible limits of state interference with freedom of speech. Hailed by Professor Chafee in 1941 as a "test of great value,"136 and denounced ten years later by Professor Meiklejohn as "both unintelligible in practice and baseless in theory,"137 its unpredictable comings and goings in free speech cases have been the subject of much speculation and criticism.138 After dying a sudden death in the very year in which it was formulated,139 it was resurrected some twenty years later to play a decisive role in three significant cases,140 and flourished for slightly more than a decade, only to be shrouded in uncertainty by the opinions in American Communications Association v. Douds141 and Dennis v. United States.142 In 1952, Mr. Justice Frankfurter, speaking for a closely divided Court, shed some light on the problem when he wrote that the "clear and present danger" test does not apply at all to the prohibition of utterances not within the area of constitutionally protected speech. "Certainly," he continued, "no one would contend that obscene speech, for example, may be punished only upon a showing of such circumstances. Libel, as we have seen, is in the same class."

As elusive, however, as it has been in the application of Mr. Justice

135 For the history of the "preferred position" doctrine, see Constitution of the United States: Analysis and Interpretation 789-91 (Corwin ed. 1952).
136 Chafee, Free Speech in the United States 81 (1941).
137 Meiklejohn, The First Amendment and Evils That Congress Has a Right to Prevent, 26 Ind. L.J. 477 (1951).
138 See, for example, Corwin, Bowing Out "Clear and Present Danger," 27 Notre Dame L. 325 (1952); Meiklejohn, The First Amendment and Evils That Congress Has a Right to Prevent, 26 Ind. L.J. 477 (1951); Mendelson, Clear and Present Danger Test—A Reply to Mr. Meiklejohn, 5 Vand. L. Rev. 792 (1952); Mendelson, Clear and Present Danger Test—From Schenck to Dennis, 52 Colum. L. Rev. 313 (1952); Schmandt, Clear and Present Danger Doctrine: A Reappraisal in the Light of Dennis v. United States, 1 St. Louis U.L.J. 265 (1951); Note, 40 Georgetown L.J. 304 (1952).
142 341 U.S. 494 (1951).
Holmes' famous formula, the Supreme Court has been remarkably and even disconcertingly consistent in recent years in its rejection of all forms of state censorship of motion pictures. This is all the more extraordinary in view of its repeated declarations that obscene and immoral speech is not protected by the First Amendment from punishment.144 Perhaps the clearest statement of this doctrine is contained in the following passage from Mr. Justice Murphy's opinion for a unanimous Court in Chaplinsky v. New Hampshire:

... There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.145

Nevertheless, the first two censorship decisions are readily intelligible in the light of fundamental doctrines of constitutional law. The incurable error in the statute invalidated in Burstyn v. Wilson was that it attempted to protect religious groups from the expression of "distasteful views," a matter in which the state clearly has no interest, much less a sufficient interest to impose the burden of prior restraint.146 If freedom of speech and freedom of religion mean anything, they mean the right peaceably to express considered opinions, however heretical or blasphemous they may sound to some elements in the community. The statute in question in Burstyn permitted New York to prevent the expression of religious views which its citizens had a constitutional right to utter, and for that reason it was null and void.147

Although the Supreme Court was at pains to expound the rationale of its decision in the Burstyn case, it decided Gelling v. Texas148 with a terse per curiam citation of Burstyn and Winters v. New York.149 It seems clear that what the Court meant to say is that motion pictures are within the protection of freedom of speech, and that the censorship

146 343 U.S. 495, 505 (1952).
149 333 U.S. 507 (1948).
ordinance in question was too vague and indefinite to give the exhibitor fair warning of what was prohibited. Indefiniteness in this sense was the primary basis of the holding in the *Winters* case that a statute was un-constitutional which made it a crime to sell a magazine in which stories of criminal lust and bloodshed were massed in such a way as to incite crime.\(^{150}\) While recognizing the necessity of minimizing all incentives to crime, “particularly in the field of sanguinary and salacious publications,” the *Winters* majority insisted that the preservation of public morals could not be an excuse for vague boundaries in statutes penalizing distribution of periodicals.\(^{151}\) The ordinance invalidated in *Gelling v. Texas* gave the local censors power to prohibit the exhibition of any picture which they deemed to be “of such character as to be prejudicial to the best interests of the people of said City.”\(^{152}\) That such a standard is unconstitutionally vague needs no argument.

The rationale of the most recent censorship cases, however, is far from clear.\(^{153}\) Both of the statutes in question required a license for the public exhibition of any film. In the Ohio case, a license had been denied on the ground that the motion picture was “harmful,” because it was an incentive to immorality and crime. The New York censors had refused a license to “La Ronde” on the grounds that it was “immoral” and would “tend to corrupt morals”; specifically, they considered it a portrayal and stimulus of sexual immorality. The Supreme Court reversed both convictions, again in a per curiam opinion, but this time cited only *Burstyn*. Since freedom of religion was in no way involved in either case, and the state clearly has a constitutional interest in the suppression of crime and public immorality, the only meaning of the reference to *Burstyn* can be that the Court considered the statutes too vague or the prior restraint excessive.

Of these two possibilities, the more likely seems to be excessive prior restraint. Ever since *Near v. Minnesota*\(^{154}\) and *Grosjean v. American Press Co.*,\(^{155}\) the Supreme Court has demonstrated a marked aversion to suppression of the offensive material as a remedy for ordinary abuses of freedom of speech or press. In the first of these cases, a statute was held


\(^{151}\) Id. at 510.

\(^{152}\) 343 U.S. 960 (1952).


\(^{154}\) 283 U.S. 697 (1931).

\(^{155}\) 297 U.S. 233 (1936).
unconstitutional which authorized injunctions against the publication of malicious, scandalous and defamatory newspapers, magazines and other periodicals. Since there can be no doubt that these classes of speech are not protected against punishment by the Fourteenth Amendment, the Near case is clear authority for the proposition that not everything which may be punished may be censored. Similarly, in the Grosjean case, the Supreme Court outlawed license taxes for the privilege of engaging in the business of publishing advertising in any newspaper, magazine or periodical, because such “taxes on knowledge” had proved an effective method in the past for the suppression of newspapers hostile to the incumbent government.

Even though freedom of speech does not protect a man who falsely shouts “Fire” in a crowded theater, it would seem that it does forbid the state to gag him when he enters just to make sure that he does not commit a crime.

Under the same principle, a number of statutes severely regulating the distribution of literature, canvassing of homes or addresses in public parks have been invalidated on the ground of excessive prior restraint. The dividing line between these cases and those which sustained other types of regulations seems to have a double edge. Normal channels of communication may never be completely closed; and, when partial regulation is attempted, the standard for denial of a license must not be the content of what is to be said or distributed, but some external, non-discriminatory test based on public necessity or legitimate public convenience.

Even so, the Supreme Court has not completely closed the door to every type of prior restraint based on content. Near v. Minnesota itself recognized the constitutionality of wartime censorship, and did not hesitate to add that “on similar grounds, the primary requirements of decency may be enforced against obscene publications.” In Lovell v. Griffin, the Court was careful to point out at the same time that it invalidated a standardless ordinance requiring a license for the distribution of literature that the ordinance was not limited to literature that

157 Chafee, Free Speech in the United States 381-84 (1941).
160 283 U.S. 697, 716 (1931).
161 303 U.S. 444 (1938).
was obscene or offensive to public morals or that advocated unlawful conduct. Similarly, *Chaplinsky v. New Hampshire* recognized in passing that the prevention of lewd and obscene speech has "never been thought to raise any Constitutional problem."\(^{162}\) On the other hand, the opinion in *Kovacs v. Cooper* is couched in terms broad enough to suggest the invalidity of any prior restraint based on content.\(^{163}\) This ambiguity of the earlier decisions was explicitly recognized by the Supreme Court in *Burstyn v. Wilson*.\(^{164}\) Since, however, the term "sacrilegious" was the only standard under attack in that case, it was unnecessary for them to decide whether a state might censor motion pictures "under a clearly drawn statute designed and applied to prevent the showing of obscene films."\(^{165}\)

It is clear, therefore, that the *Burstyn* case was not decided simply on the basis that any form of censorship of motion pictures is unconstitutional. Indeed, the key passage in the opinion would seem to be the sentence denying any legitimate interest in the state in the protection of any or all religions "from views distasteful to them which is sufficient to justify prior restraints upon the expression of those views."\(^{166}\) Nevertheless, it cannot be denied that there is language in the same opinion which suggests that the basis of decision was in part the broadness or the vagueness of "sacrilegious," as that standard was interpreted by the New York courts.\(^{167}\) The statute was specifically challenged on the ground of unconstitutional indefiniteness, and Mr. Justice Frankfurter's concurring opinion rests solely on that basis.\(^{168}\)

Those who interpret the latest censorship decisions as founded on a lack of sufficient definiteness in the standards employed by New York and Ohio find some support in the holding in *Musser v. Utah*\(^{169}\) and the dissent in *Jordan v. De George*.\(^{170}\) Although the words "moral" and "immoral" have been used countless times and in many different connections in state and federal statutes throughout the history of our country, and the Supreme Court itself has sustained several convictions for the importation or transportation in interstate commerce of women

\(^{162}\) 315 U.S. 568, 571-72 (1942).
\(^{163}\) 336 U.S. 77, 82 (1949).
\(^{164}\) 343 U.S. 495, 506 n. 20 (1952).
\(^{165}\) Id. at 506.
\(^{166}\) Id. at 505.
\(^{167}\) Id. at 504-05.
\(^{168}\) Id. at 499, 507.
\(^{169}\) 333 U.S. 95 (1948).
“for immoral purposes,” there is ample reason today to doubt whether the term “morals,” standing by itself, is sufficiently definite to satisfy the requirements of the Due Process Clause. The defendants in Musser v. Utah were convicted of conspiring to commit acts “injurious to public morals”; the specific act with which they were charged was a combination to counsel, advise and practice polygamous or plural marriage. In remanding the case to the Supreme Court of Utah for a construction of the statute, Mr. Justice Jackson wrote for the majority:

It is obvious that this is no narrowly drawn statute. . . . Standing by itself, it would seem to be warrant for conviction for agreement to do almost any act which a judge and jury might find at the moment contrary to his or its notions of what was good for . . . morals . . . . In some States the phrase “injurious to public morals” would be likely to punish acts which it would not punish in others because of the varying policies on such matters as use of cigarettes or liquor and the permissibility of gambling. . . . Legislation may run afoul of the Due Process Clause because it fails to give adequate guidance to those who would be law-abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused.

Three years later, when a majority of the Court dismissed a petition for habeas corpus challenging the validity of a deportation order based on the repeated commission of a crime “involving moral turpitude,” Mr. Justice Jackson strenuously objected that the statutory phrase has no “settled significance” or “intelligible definition.” Mr. Justice Black and Mr. Justice Frankfurter concurred in his dissent. The majority, however, sustained the definiteness of the term “moral turpitude” on the ground that it has “deep roots in the law,” and that in every deportation case involving fraud, the federal courts had held that the crime in issue involved moral turpitude. Subsequently, the Supreme Court also held that assault with a deadly weapon is a crime in the same class.

Whatever be the true ground of the latest censorship decisions, it is certain that they are no authority for the proposition that censorship of immoral movies is unconstitutional. The Burstyn case explicitly reserved the question whether censorship under a “narrowly drawn” statute would be constitutional, so it is clear that these latest cases, decided by the

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172 333 U.S. 95, 96-97 (1948).
174 Id. at 227.
majority simply and without elaboration on the basis of *Burstyn*, do not extend the doctrine of the controlling case. The system of censorship imposed by the New York and Ohio statutes must have been unconstitutional because it was excessive, not simply because it was a form of prior restraint. On the other hand, if the meaning of the *Burstyn* citation is that the Court thought "immoral" too broad or even too vague a term for statutory use, this is far from a holding that more specific standards based on the concept of public morals may not be employed. The vice of censorship on the basis of "immorality" is not lack of power, but lack of guidance and warning. If the entire criminal code were reduced to a simple prohibition of immoral activities, it would be doubtful whether the statute would satisfy the constitutional requirement of definiteness; but many activities may be made criminal precisely because they corrupt public morals.\(^{176}\) The problem of statutory standards, therefore, must not be confused with the validity of the more general concepts which measure the police power of the states. They may suppress what is offensive to public morals, but owing to popular ignorance and differences of understanding, they must specify the precise objects within the class which they intend to prohibit.

That the free speech cases are far from destroying the validity and vitality of the constitutional concept of public morals appears clearly from a study of the cases dealing with police regulations in non-free speech areas during the same period when this liberty was being so zealously defended by the Supreme Court. Indeed, with the change in the economic philosophy of the Court after 1937, the states were permitted to go much further in their efforts to protect public morals than ever before. One of the most striking illustrations is *West Coast Hotel Co. v. Parrish*,\(^{177}\) which finally sustained a minimum wage statute for women.

Prior to this decision, the Supreme Court, acting on the principle that "healthy mothers are essential to vigorous offspring," and therefore that "the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race,"\(^{178}\) had upheld statutes regulating the hours of labor of women,\(^{179}\) the length of


\(^{177}\) 300 U.S. 379 (1937).

\(^{178}\) Muller v. Oregon, 208 U.S. 412, 421 (1908).

\(^{179}\) Bosley v. McLaughlin, 236 U.S. 385 (1915); Miller v. Wilson, 236 U.S. 373 (1915); Muller v. Oregon, 208 U.S. 412 (1908).
their lunch period,180 the time181 and place182 of their employment. In Adkins v. Children's Hospital, however, the Supreme Court had held a statute unconstitutional which provided for the fixing of minimum wages by a board so that the amount paid would be sufficient to supply the necessary cost of living for women, to maintain them in good health, and to protect their morals.183 With reference to the public morals aspect of the legislation, the Court said:

... The relation between earnings and morals is not capable of standardization. It cannot be shown that well paid women safeguard their morals more carefully than those who are poorly paid. Morality rests upon other considerations than wages; and there is, certainly, no such prevalent connection between the two as to justify a broad attempt to adjust the latter with reference to the former. As a means of safeguarding morals the attempted classification, in our opinion, is without reasonable basis.184

A similar minimum wage law in New York, which, however, did not contain the objectionable provision relating to morals, was declared unconstitutional in 1936 on the other grounds relied upon in Adkins.185

The validity of such legislation was finally sustained in West Coast Hotel Co. v. Parrish.186 The statute in question had been enacted for the protection of women "from conditions of labor which have a pernicious effect on their health and morals."187 Nothing, said the Court, could be closer to the public interest "than the health of women and their protection from unscrupulous and overreaching employers."188 A minimum wage law was a clearly appropriate means for such protection; and as far as deprivation of liberty of contract was concerned, it must be remembered that "the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people."189

182 Bosley v. McLaughlin, 236 U.S. 385 (1915); Miller v. Wilson, 236 U.S. 373 (1915).
183 261 U.S. 525 (1923). The statute drawn in question in this case was enacted by Congress for the District of Columbia. Since, however, the Court followed this decision in striking down the state statute involved in Morehead v. N.Y. ex rel. Tipaldo, 298 U.S. 587 (1936), it is clear that the Court did not consider the federal character of the act a significant factor.
184 Adkins v. Children's Hospital, 261 U.S. 525, 556 (1923).
185 Morehead v. N.Y. ex rel. Tipaldo, 298 U.S. 587 (1936). Basically, these grounds were vagueness, arbitrariness, and deprivation of liberty of contract.
186 300 U.S. 379 (1937).
187 Id. at 386-87.
188 Id. at 398.
189 Id. at 391, 398.
Goesaert v. Cleary is one of the most recent and interesting cases dealing with state regulation of the working conditions of women in the interest of public morals. A Michigan statute prohibited any woman to act as a bartender unless she was the wife or daughter of the male owner of a licensed liquor establishment. In a 6-3 decision, the Supreme Court upheld the statute, against the objection of denial of equal protection of the laws. Mr. Justice Frankfurter said on behalf of the majority:

... Since bartending by women may, in the allowable legislative judgment, give rise to moral and social problems against which it may devise preventive measures, the legislature need not go to the full length of prohibition if it believes that as to a defined group of females other factors are operating which either eliminate or reduce the moral and social problems otherwise calling for prohibition. Michigan evidently believes that the oversight assured through ownership of a bar by a barmaid's husband or father minimizes hazards that may confront a barmaid without such protecting oversight. This Court is certainly not in a position to gainsay such belief by the Michigan legislature.

The Supreme Court has displayed an equal promptness to sustain police regulations for the preservation of public morals in many other fields. Only a year after Gitlow v. New York was decided, the Court upheld a statute providing for the forfeiture of automobiles used in violation of the state's prohibition laws, even though the owner was wholly innocent. All that had to be proved was that the owner entrusted the possession and use of the car to the wrongdoer. "Certain uses of property may be so undesirable," wrote the Court, "that the owner surrenders his control at his peril. The law thus builds a secondary defense against a forbidden use and precludes evasions by dispensing with the necessity of judicial inquiry as to collusion between the wrongdoer and the alleged innocent owner." In Marvin v. Trout, the owner at least had to know that his building was being used for gambling; in this case it was enough for due process that the owner had voluntarily surrendered his property to another, and that the borrower in fact used it for an illegal purpose.

Similarly, the Supreme Court has sustained a number of state statutes requiring persons engaged in or connected with interstate commerce to secure a license, in spite of an earlier decision to the contrary. The

190 335 U.S. 464 (1948).
191 Id. at 466.
193 Id. at 467-68.
194 199 U.S. 212 (1905).
prevention of fraudulent or unconscionable conduct on the part of transport
ation agents and the protection of the public “from fraud, mis-
representation, incompetence and sharp practice which falls short of
minimum standards of decency in the selling of insurance by personal
solicitation and salesmanship” are matters peculiarly of local concern
and necessarily subject to state regulation, in the absence of any pos-
sibility of effective congressional control.

Moreover, the Supreme Court has clearly indicated that the police
power of the states is not limited to the enforcement of the moral code
which applies to the entire community without distinction as to the oc-
cupation or state in life of each individual. An Oregon statute forbidding
certain kinds of advertising by dentists was upheld in Semler v. Dental
Examiners. The community is concerned with the maintenance of pro-
fessional standards not only because they ensure competency and prevent
deception, but because they safeguard “against practices which tend to
demoralize the profession by forcing its members into an unseemly rivalry
which would enlarge the opportunities of the least scrupulous.” The
“ethics” of a profession, defined the Court, “is but the consensus of ex-
pert opinion as to the necessity of such standards.”

Finally, the impact of public morals on governmental action has once
again been clearly recognized by the Court. In National City Bank of
New York v. Republic of China, the issue was whether a foreign
sovereign, by suing in a United States court, waives immunity on counter
claims based on independent transactions. After remarking that the
doctrine of sovereign immunity has not been favored by the test of time,
but found increasingly in conflict with the growing subjection of govern-
mental action to the moral judgment, Mr. Justice Frankfurter declared
for a majority of the Court:

The outlook and feeling thus reflected are not merely relevant to our problem.
They are important. The claims of dominant opinion rooted in sentiments of
justice and public morality are among the most powerful shaping-forces in law-
making by courts. Legislation and adjudication are interacting influences in the
development of law. A steady legislative trend, presumably manifesting a strong
social policy, properly makes demands on the judicial process. . .

198 California v. Thompson, 313 U.S. 109, 115 (1941).
200 Id. at 612.
201 Ibid.
203 Id. at 426-27.
As a result of the progressive narrowing of the doctrine of sovereign immunity in the United States and abroad, the Court held that the Republic of China had submitted itself to jurisdiction over the counterclaim by suing on its own cause of action in one of our courts.

Nevertheless, the Court has not permitted the police power of the states in the field of public morals to go altogether unchecked. When California convicted one of its residents for knowingly bringing an indigent nonresident into the state, the Supreme Court reversed on the ground that the statute in question was an unconstitutional burden on interstate commerce. A single uniform rule was necessary for the nation properly to cope with "the grave and perplexing social and economic dislocation" which this statute reflected. The Court refused to recognize any exception to this general doctrine, based on the alleged power of the states to protect themselves from the "moral pestilence" of paupers. Mr. Justice Byrnes voiced the judgment of a unanimous Court when he wrote that "poverty and immorality are not synonymous."

**Conclusion**

These decisions in the fields of emigration, international law, licensing, prohibition and the working conditions of women demonstrate beyond doubt that whatever may be said of the definiteness of "moral" as a statutory standard, the constitutional concept of "public morals" is still very much alive and operative. Nevertheless, it cannot be denied that its vitality and efficacy have been seriously impaired whenever it has encountered the constitutional guarantees of freedom of speech, press, religion and assembly. The states are permitted the widest discretion when it is a question of estimating the moral perils of working as a barmaid; but they have a heavy burden to sustain when it is a question of predicting the moral effect on the community of the exhibition of "La Ronde."

Since a constitutional right is involved in the solution of both these questions, it is difficult to understand the difference in Supreme Court treatment of these two classes of legislation, except in the light of a doctrine of "preferred freedoms." Normally, when a particular place or activity threatens public morals, the validity of the legislation regulating or suppressing it depends solely on the appropriateness and reason-

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205 Id. at 173.
206 City of New York v. Miln, 11 Pet. 102, 142 (U.S. 1837).
ableness of the statute. The Court refuses to substitute its judgment for that of the legislature, and if any state of facts may reasonably be conceived which would warrant the regulation, the Court will not inquire into the true nature of the situation with which the legislature dealt. But when legislation appears to impinge on the basic personal freedoms, the Court has indicated that much more than mere appropriateness and reasonableness must be shown. Just as it held in Adams v. Tanner that the occupation of employment agents could not be completely suppressed when regulation would be sufficient to remedy abuses, so it seems to be saying of legislation in the borderline areas of speech and press that it will not be sustained unless it is clear that it has not gone beyond the point of necessity. The constitutional principles of definiteness and narrowness are the chief instruments which the Court has employed so far in order to keep the channels of communication clear.

With this position of the Court, there is little room for disagreement. For even though it is true that certain forms of censorship, such as wartime security measures, are undoubtedly constitutional, and others are probably so, the difficulties and dangers inherent in this method of the suppression of public evils are so great that the burden of justifying its use may well be cast upon those who choose to employ it. It would be easy to conceive a situation in which the literature and drama of a people would be so corrupt as to threaten the very existence of the society for whose consumption they were produced; but such dissoluteness is surely a fact to be proved rather than supposed. And although few who have studied the problem deny that a significant fraction of the current publications, plays and films exhibited throughout our country present a substantial threat, at least when taken *en masse*, to the traditional morals of our society, even those who are most interested in the elimination of this threat have steadily opposed governmental censorship. Other means of eliminating or offsetting the danger are preferred, not from any false conception of the limits of free speech, but from a fear well-grounded in history that the power of censorship will convert the government from a referee in the arena of truth to a judge of orthodoxy in the fields of religious and political belief.

The cultural and religious pluralism of our country finds a necessary counterpart in the multitude of moral codes which govern the lives of our citizens. Some of these systems are relatively stable, but many shift, or at least seem to shift, with advances in science and philosophy. In the exercise of their undoubted power to preserve the public morals, the states must be mindful that the content of this concept is determined by
those standards which are generally and currently accepted throughout their communities. As long as publications of all types stop short of inciting violations of the existing laws which express the considered moral judgment of society, the public should be free to see, consider and decide on the wisdom and propriety of innovations for itself. If this liberty involves the risk of temptation, it is also the price of maturity in morals and progress in civic virtue.
ASPECTS OF SETTLING CLAIMS UNDER THE YUGOSLAV CLAIMS AGREEMENT OF 1948

HENRY J. CLAY*

INTRODUCTION

THIS article presents a summary of the activities of the International Claims Commission and of the Foreign Claims Settlement Commission in adjudicating claims of the United States and of its nationals pursuant to the Claims Agreement between the United States and Yugoslavia of July 19, 1948.1

The Yugoslav Claims Agreement provided for the settlement of certain claims against the Government of Yugoslavia arising from the widespread expropriation, by nationalization, confiscation or otherwise, of American-owned property in Yugoslavia between September 1, 1939 and the effective date of the Agreement.

The procedure adopted for the settlement of these claims represents a marked departure from that which had characterized earlier espousals by the United States Government of the claims of its nationals against foreign governments.

During the period between the Jay Treaty with Great Britain in 1794,2 and 1914, the United States had been a party to 33 arbitral tribunals and 30 mixed claims commissions which undertook to settle claims of the United States and of its nationals based upon a large variety of acts by foreign governments which had given rise to claims cognizable under international law. In addition to these specific programs, the United States Government has, by direct negotiation, espoused many individual claims of its nationals against foreign governments arising from isolated acts for which compensation was sought.

Except to a relatively small degree, earlier claims were not based on the expropriation of private property of United States nationals. Such expropriation as did occur was usually restricted to a few isolated properties; and since compensation was generally soon provided for by the foreign government involved, they did not become a matter of general concern.

It was not until World War I, and the consequential aftermath of economic disturbances, that the communist philosophy became evident

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2 Nov. 19, 1794, 8 Stat. 116.
and, as a result thereof, that the expropriation of private property of United States nationals abroad became a significant problem.

Expropriation of American-owned property appears to have first arisen in Mexico in 1915 as a result of the Mexican program of redistribution of farmlands and the nationalization of its oil industries. The Government of the United States intervened on behalf of its citizens and as a result thereof a General and a Special Claims Commission were established to handle these problems.

General expropriation of all kinds of foreign-owned property was introduced by Soviet Russia after the Revolution of 1917. In connection with and for some brief time after the recognition of Soviet Russia in 1933, discussions were undertaken by this Government with Russia with a view to the settlement of the many claims of United States nationals. These negotiations proved abortive for a variety of reasons and have long since been abandoned.

After World War II, American property owners in Eastern Europe were caught in a web of widespread economic reform as the countries of Poland, Czechoslovakia, Yugoslavia, Rumania, Hungary and Bulgaria shifted from capitalist to communist economies. Between 1944 and 1949, these governments enacted many laws, decrees, resolutions and ordinances which by nationalization, confiscation, or other taking, deprived American citizens and others of their property. To date, the demands by the United States for compensation for such expropriations have been ignored by Poland, Czechoslovakia, Rumania, Hungary and Bulgaria.

On July 19, 1948, an Agreement between the United States and the Federal People's Republic of Yugoslavia regarding such claims was entered into. This Agreement provided for the adjudication of certain claims by a domestic agency to be established by the United States Government. A fund of $17,000,000 was established by Yugoslavia in full settlement of all such claims. Since it was anticipated that similar claims agreements would or might be negotiated with the other countries, the Congress, pursuant to recommendation by the Secretary of State, enacted the International Claims Settlement Act of 1949.3 This Act established a Commission to determine the validity and amount of claims of the United States and of its nationals under the Yugoslav Claims Agreement and all similar en bloc settlements.

The establishment of the International Claims Commission represented a major development in the field of international claims. Heretofore, the

adjudication of such claims had usually been assigned to special mixed tribunals with limited jurisdiction to resolve claims of a specified category. The International Claims Commission was the first tribunal created as a purely domestic institution intended to be a permanent body having jurisdiction over claims of an international character. Unique in the history of international claims procedure was the provision that individual claimants could appear in person before the Commission, with the right to a formal hearing, for the presentation of evidence and legal argument in support of their claims.

Initially the Commission was placed for housekeeping purposes in the Department of State. The Act, however, specifically provided that "The action of the Commission in allowing or denying any claim under this Act shall be final and conclusive on all questions of law and fact and not subject to review by the Secretary of State or any other official, department, agency, or establishment of the United States or by any court by mandamus or otherwise." This provision followed the pattern of like commissions in foreign countries.

Since additional comprehensive international claims programs are now under consideration by the Congress, it is believed that a recitation of the varied problems encountered in the Yugoslav claims program, and the means of resolving these problems may be of interest.

**Yugoslav Claims Agreement of 1948**

The Federal People's Republic of Yugoslavia was established on November 29, 1945. Pursuant to its constitution, various laws and decrees were promulgated nationalizing and otherwise expropriating for the benefit of the state virtually all private property. These laws effected property owned by many nationals of the United States.

Very early in the affairs of this new Government, it appeared that under the local remedies provided by Yugoslavia, American nationals and corporations were not likely to secure prompt or adequate compensation for properties so taken. It became obvious that appropriate protection for such interests could be effectively obtained only through the intervention of this Government.

At the time of official intervention by the Department of State, the Federal Reserve Bank in New York held blocked assets in the name of the Government of Yugoslavia in the amount of $47,000,000. These assets included gold bullion valued at $42,000,000 which had been

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brought to the United States for safekeeping by the predecessor Government of Yugoslavia prior to the German invasion.

During the month of May, 1947, settlement discussions began in Washington between representatives of the Department of State and a special mission of the Federal People's Republic of Yugoslavia. The negotiations included consideration of various claims of the Government of the United States, settlement of Lend-Lease obligations, compensation for the nationalization or other taking of property of United States nationals, the unblocking of the Yugoslav assets in this country, and similar problems.

In January, 1948, before any formal agreement had been reached, the Yugoslav Government requested the Economic and Social Council of the United Nations to review the action of the President of the United States in his refusal to unblock the Yugoslav assets pursuant to powers assertedly granted him by the Trading with the Enemy Act.\(^5\) The Council, by its resolution of March 9, 1948, refused to entertain this petition on jurisdictional grounds. Shortly after this decision, settlement negotiations were resumed. Thereafter, on July 19, 1948, an Agreement between the United States and the Federal People's Republic of Yugoslavia was entered into.\(^6\)

Pursuant to this Agreement, the Secretary of the Treasury unblocked the Yugoslav assets in the United States and, as provided for, the Government of Yugoslavia on August 21, 1948, paid to the United States $17,000,000 in full settlement and discharge of all claims of the Government of the United States and of its nationals against the Government of Yugoslavia, on account of the nationalization, or other taking by Yugoslavia of property, and of rights and interests in and with respect to property, which had occurred between September 1, 1939 and July 19, 1948.

The Agreement expressly provided that the fund so created was to be distributed among eligible claimants in accordance with such methods as might be adopted by the United States. It was specifically agreed that any determination respecting the validity or amounts of claims which might be made by the agency to be established by the United States for the purpose of adjudicating the claims would be "final and binding".

It was contemplated that the Government of Yugoslavia would be given an opportunity to be heard in the determination of all claims.

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\(^6\) See note 1 supra.
Thus, it was provided that the Government of Yugoslavia was to be furnished copies of all claims submitted to the Commission and would be given an opportunity to file a brief amicus curiae with respect to any such claim. This procedure was adopted in view of the provision that the Government of Yugoslavia retained a potential reverter interest in the fund, since it was provided that the United States would return to Yugoslavia such portion of the $17,000,000 fund as was not required to pay all awards plus allowable interest and the expenses of administration.

The Government of Yugoslavia also undertook to assist in the adjudication of claims by furnishing "such information, including certified copies of books, records or other documents, as may be necessary or appropriate to support or refute, in whole or in part, any claim . . .".7

**Organization and Early History of the Commission**

In October, 1950, the Commission published in the Federal Register its Proposed Rules of Practice and Procedure8 and offered interested persons an opportunity to submit their views and recommendations thereon. Attorneys representing many claimants and the Committee on Relations with Administrative Agencies of the District of Columbia Bar Association attended the hearing and presented oral and written suggestions and comments. Thereafter certain revisions were adopted and the Rules were thereupon published in the Federal Register on December 7, 1950.9

As required by Section 4(b) of the Act, the Commission published notice of the time when, and the limit of time within which, claims were to be filed, and similar notices were mailed to the last known address of each person who had ever written to the Department of State concerning a property claim against the Government of Yugoslavia. The time limit for filing such claims was fixed at June 30, 1951. However, by its Rules, the Commission did retain the power to permit late filing of any claim upon the showing of good cause. Prospective claimants were furnished a copy of the Act and the Commission's Rules of Practice and Procedure. Claimants, as required by the Act, received special

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7 Claims Agreement, supra note 1, Article 9(a).
notice of the provisions relating to the determination and limitation of attorneys' fees.

While claims were being received and docketed, attention was given to recruiting a staff for the Commission's Washington office and for a branch office in Belgrade, and to developing internal procedures for processing claims. The Yugoslav Government designated a Special Representative to assist the field branch and to coordinate the work of local Yugoslav officials in the procurement and submission of land records, appraisals, and other evidences as requested by the Commission. In February of that year, upon the arrival of the first staff members, the field branch office was opened in the United States Embassy.

The primary purpose of the field branch was to make on-the-spot appraisals of all properties involved and to conduct investigations on all other aspects of the claims submitted.

In order to expedite the settlement of claims and to insure completion of the affairs of the Commission by the December 31, 1954 date, the Commission had to simplify and streamline the rules by eliminating formal prehearing conferences and by permitting decisions without hearing.10

One of the major administrative problems was the lack of qualified and adequate field staff personnel to make the required investigations. American personnel already in Belgrade on regular State Department assignments were recruited from the Embassy and transferred to the Commission. This resulted in a considerable saving of time and money.

Despite numerous difficulties and obstacles, including riots over the Trieste issue and heavy snows throughout the winter which isolated Belgrade from the remainder of Yugoslavia and the outside world for days at a time, the performance of the increased field staff, under the guidance of the Commission, and with the active and valuable co-operation of the United States Embassy in Belgrade, was most satisfactory.

The Commission also obtained and sent to Yugoslavia two financial analysts employed by the Securities and Exchange Commission for the purpose of investigating the large and complex claims based upon the taking of the many industrial properties. After considerable effort, the Commission, upon the recommendation of the United States Department of Commerce, obtained the services of an outstanding Denver engineering firm to appraise the physical plants of certain specified industrial properties.

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The complex appraisals which were needed were completed only because of the resourcefulness and initiative of the members of the field branch. Their investigations indicate that no set rules or pattern of activity are possible in face of the innumerable and unforeseen difficulties which will arise in the course of investigating claims within the Communist political orbit.

**Reorganization of the Commission and Completion of the Yugoslav Claims Program**

On April 29, 1954, President Eisenhower transmitted to the Congress "Reorganization Plan No. 1 of 1954 Relating to the Establishment of the Foreign Claims Settlement Commission." This plan became effective July 1, 1954. It provided for the abolishment of the International Claims Commission and the War Claims Commission and for the assignment of their respective remaining functions to a new and independent agency, the Foreign Claims Settlement Commission of the United States.

The Reorganization Plan was accomplished with no difficulty. A smooth transition was made in the processing and determination of the Yugoslav claims to the end that the Yugoslav claims program was completed on time, the last decision having been issued on December 30, 1954.

A total of 1557 claims were filed under the claims agreement for asserted amounts aggregating $149,344,249.70. The Commission denied 670 of these claims which sought compensation for a total of $62,109,281.29. Awards were made amounting to $18,817,904.89, exclusive of interest, on 876 claims which had claimed a total of $86,354,281.41. Eleven claims for a total of $880,683 had been withdrawn by the claimants.

In accordance with the appropriate provisions of the Act, all claimants awarded $1,000 or less received payment in full less the deduction provided by law as reimbursement for the expenses of the Commission. All claimants awarded more than $1,000 received a down payment of $1,000 less the deduction for expenses. Because the total awards of the Commission exceeded the amount available for payment, the claimants

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11 68 Stat. 1279.
12 This Commission was established by the International Claims Settlement Act, 64 Stat. 12 (1950), 22 U.S.C. §§ 1621-1627 (1952).
13 This Commission was established by the War Claims Act, 62 Stat. 1240 (1948), 50 U.S.C. § 2001 (1952).
will receive a pro rata share of the remaining amount available for distribution. They will thus receive at last 85% of the amount of their awards, which establishes a new mark for recovery under similar claims programs.

INVESTIGATION OF CLAIMS

Economic Background

The population of Yugoslavia is made up for the most part of three Slavic racial groups, the Serbs, Croats and Slovenes. Its economic composition and its legal codes, practices and customs have been influenced greatly by frequent foreign invasions and the domination from time to time of several different European powers. In its determination of legal problems, therefore, particularly those respecting the descent and distribution of property, the Commission frequently had to consider widely differing laws and legal procedures applicable in different areas of Yugoslavia. The many different languages and dialects used throughout Yugoslavia also contributed greatly to the problems of investigation.

The total area of Yugoslavia is approximately 96,000 square miles, slightly larger than the combined areas of Pennsylvania and New York. The people of Yugoslavia are predominantly farmers on small farms.

Prior to World War II, foreign capital played an important role in financing industrial, mining and forestry enterprises in Yugoslavia. As of 1937, total investment in Yugoslav corporations was estimated at 18.6 billion dinars (the Yugoslav currency). Approximately one-third of that amount was owned by foreign interests. United States citizens and corporations organized under the laws of the United States owned 4.25 billion dinars of the total investment.

War damages in Yugoslavia, calculated by reference to 1938 prices ($1 equal to 44 dinars), amounted to approximately 46½ billion United States dollars. The loss of the country's national wealth amounted to approximately 17% of the total loss of the eighteen countries participating in the Paris Reparation Conference in 1948.14

Yugoslav industry suffered extensive damage as a result of the war. It is quite obvious from the war reports available that the ravages of war had a tremendous effect on the economic affairs of this area.

Problems of Investigation

The great majority of claims, as filed, contained no evidence of claimants' alleged ownership of the property, its value or facts relating to its

nationalization or its taking by the Yugoslav Government. Many claim-
ants, when requested to submit such evidence, advised the Commission
that in view of post-war conditions in Yugoslavia, all attempts by them
to obtain evidence had been or would be fruitless. Mindful of existing
conditions in Yugoslavia, and sympathetic with the difficulties which
would be encountered by claimants in that regard, the Commission un-
dertook to assist the claimants where possible.

All investigations were undertaken pursuant to specific request from
the Washington office. However, prior to undertaking any investigation,
it was necessary for the field branch to submit a request for leave to
do so, in writing, to the Yugoslav Ministry of Foreign Affairs five days
prior to the desired commencement of the investigation, stating the name
of the claimant, docket number of the claim and location of the property.
On all investigations, a staff member of the Yugoslav Ministry of Foreign
Affairs, or some other State official, accompanied the Commission’s in-
vestigator.

Obtaining evidence regarding ownership of property was no easy task
as many claimants were unable to provide sufficient description of the
property. It was therefore necessary for the field investigators to search
the land records of the pertinent county courts, interview local public
officials and local residents. The task of obtaining evidence of owner-
ship was further complicated by the fact that land records, when found,
did not always truly reflect the actual ownership of the property. Since
great destruction of books, records and documents in Yugoslavia re-
sulted from World War II, documentary evidence as to ownership was
frequently not available. In such cases, secondary evidence of owner-
ship was sought, for the most part in the form of statements furnished
by old residents of the vicinity.

In those cases where the land registry records reflected the trans-
fer of ownership to the State, there were no problems with regard to
establishing the date or law under which the property involved had been
taken. However, where such land records were not available, it was
necessary to search for court decrees establishing a taking and to inter-
view the persons residing on the property. In many instances, informa-
tion was obtained by proof that although the Government of Yugoslavia
had not formally taken the property, there had been in fact an actual
taking or interference with rights of ownership.

The general rules followed by the field branch office in making their
appraisals and evaluations were established by the Commission in Wash-
ington. In determining the value of unimproved real property, the field
branch was instructed to consult soil classification maps and purchase prices stated in sales contracts. A difficult task was presented in appraisal of improved property, taking into consideration only the condition of the property at the time of taking. As many of the properties involved were damaged as a result of war operations, and since war damages were not compensable under the Agreement, it was necessary not only to determine the value of the entire property but also to ascertain the percentage of war damage. In addition, it was necessary to ascertain whether improvements had been made to the property subsequent to the time of the taking.

Many of the more important claims were for stockholdings in, or ownership of, corporate or other industrial enterprises nationalized or confiscated. These properties represented many important segments of the Yugoslav economy.

Before an inspection of any of the enterprises or of their records could be made, it was necessary to make arrangements several days in advance with the Office of the Minister of Foreign Affairs of Yugoslavia in order that appropriate arrangements could be made at lower governmental subdivisions. After such arrangements had been made, the Commission's appraisers were permitted to make their inspection only in conjunction with persons representing the Yugoslav Government, local authorities, various People's Committees, the directors of the enterprises inspected and occasionally other government officials. Obviously, making such arrangements was time-consuming and in some instances impossible. However, it can be said that the co-operation afforded by the authorities was usually good.

Frequently, books and records of the enterprises were not available. Many had been destroyed or removed during the occupation to Hungary, Germany or Italy. Those books which were available were usually incomplete and in some instances did not at all follow recognized accounting practices and procedures. Often, the records available expressed assets and liabilities in the currency of a pre-existing puppet state, or of one of the occupying powers (kunas, marks, lire, pengos) and were of little value because of varying degrees of inflation they reflected or failed to reflect. In some instances, the records were sketchy and inaccurate because of the failure to take into consideration depreciation, proper reserves and other factors. Accordingly, it was the usual case that the appraisers had to reconstruct many of the accounting items. Conversely, various reserves on the books were found to have been created to conceal assets or to understate earnings in order to avoid taxes.
The task was further complicated because neither the Yugoslav Government nor any professional agent had prescribed standards for maintaining books and records.

These many factors, plus consideration of such matters as extra depreciation caused by improper maintenance and the overwork of the machines by the occupying powers, the moving of machinery and equipment to other locations in Yugoslavia, the addition of new and more modern machines, the construction or additions to buildings by the occupiers, the consolidation of enterprises with the attendant moving of facilities to new locations, and the fact that the properties were being evaluated several years after being taken by the Government of Yugoslavia, posed problems which often made it extremely difficult to reconstruct the scene as it appeared when the enterprise was taken by the Government of Yugoslavia. And, in the last analysis, this was the only basis upon which the evaluation could properly be made.

Much of the machinery and equipment used in many of the enterprises was obsolete by American standards. Since the value of such equipment in Yugoslavia was much higher than in the United States due to tariff and other protections, it was necessary to make adjustments in evaluating this equipment.

Finally the difficulties encountered were greatly enhanced by the fact that the records of the enterprises and the interviews with the many people involved were in a variety of languages—Serbian, Croatian, Slovenian, French, Hungarian and German.

It is fair to say in this regard that, if the Commission had not undertaken to obtain necessary evidence on behalf of claimants but had adhered strictly to the position that the burden of submitting all evidence was upon the claimant, at least 85% of all claims would have had to be denied.

It would not be possible, within the limitations of this report, to discuss each decision issued by the Commission or even to touch upon each phase of its adjudicative activity. The following sections, however, indicate some of the more significant legal problems dealt with and some of the decisions issued in those areas.

**THE LEGAL ASPECTS**

**Nationality**

Article 2 of the Claims Agreement restricted compensation to persons who were nationals of the United States at the time their property was taken. Whether a claimant had been born or naturalized in the United
States was a relatively simple matter for determination. Many varied problems arose, however, with respect to claimants who had been born or naturalized in the United States but thereafter had returned to Yugoslavia. A number of such persons had resided in Yugoslavia throughout World War II and were still in that country at the time their property was taken after the war. Many had returned to the United States after the War. Some died in Yugoslavia after their property had been taken and prior to the date of the Agreement. Such problems had to be considered in determining whether the test of nationality at the time of taking had been satisfied. In resolving these problems, the various expatriation provisions of the several applicable nationality laws of the United States had to be given careful consideration.

Certain claims related to proper interpretation of Section 2 of the Act of March 2, 1907, as amended by Section 409 of the Nationality Act of 1940. In this category were cases involving claimants who had returned to Yugoslavia subsequent to their naturalization in the United States. Section 2 of the 1907 Act provides in part:

> When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state it shall be presumed that he had ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: Provided, however, That such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe: And provided also, That no American citizen shall be allowed to expatriate himself when this country is at war.

Section 409 of the 1940 Act provides:

> "... That a naturalized person who shall have become subject to the presumption that he has ceased to be an American citizen as provided for in the second paragraph of section 2 of the Act of March 2, 1907 ..., and who shall not have overcome it under the rules in effect immediately preceding the date of the approval of this Act, shall continue to be subject to such presumption for the period of six years following the date of the approval of this Act unless it is overcome during such period."

In one case before the Commission the claimants asserted their claim as successors in interest to a person who had died intestate in Yugoslavia on January 23, 1946, without having overcome the presumption created

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15 34 Stat. 1228 (1907).
17 See note 15 supra.
18 See note 16 supra.
by the Act of March 2, 1907. The decedent in that case had been naturalized in 1921. In 1926, he returned to Yugoslavia where he acquired extensive property interests. He never returned to the United States. After a hearing and submission of evidence by claimants, it was found that the decedent’s long absence from the United States was fairly attributable to illness which continued until his death, and that during his stay in Yugoslavia he had periodically indicated his intention of returning to the United States by paying the local non-resident tax and renewing his Yugoslav visa. The Commission concluded that the claimants had overcome the presumption of expatriation.\(^{19}\)

In another case, the claimant, born in New York in 1907, had gone to Yugoslavia in 1910 and there acquired permanent residence. She returned to the United States for a short time after World War I, but in 1925 again returned to Yugoslavia on a Yugoslav passport, taking up permanent residence at her father’s birthplace. She remained in Yugoslavia until the outbreak of World War II, when she established a residence in Austria where she has lived ever since. The Commission denied her claim on the basis that the failure to return constituted expatriation under § 401(a) of the Nationality Act of 1940.\(^{20}\)

Another matter involved a claim by a native of Yugoslavia who had become a citizen of the United States in 1920 through her husband’s naturalization. Subsequently, claimant returned to Yugoslavia where she resided until 1947 when she returned to the United States. The Commission likewise denied that claim in its finding.

In view of her continuous residence there and her inability to establish that her return to the United States was precluded by conditions beyond her control, [she] . . . lost her United States citizenship on October 14, 1946, pursuant to Sections 404 and 409 of the Nationality Act of 1940. . . .

“Section 404. A person who has become a national by naturalization shall lose his nationality by: . . . (b) residing continuously for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated . . . .”

“Section 409. Nationality shall not be lost under the provisions of Section 404 . . . until the expiration of six years following October 14, 1940.”\(^{21}\)

After World War II, a general election was held in Yugoslavia on November 11, 1945. Several claimants who resided in Yugoslavia at that

\(^{19}\) Claim of Sofia Kilz et al.—Docket No. Y-464, Decision No. 1353. This record and all records subsequently cited in this article are in typewritten volumes in the Office of the Foreign Claims Settlement Commission.


\(^{21}\) Claim of Christine Halwax—Docket No. Y-1709, Decision No. 1057.
time voted in the election. The Commission held, in accordance with Section 401(e) of the Nationality Act of 1940, that such claimants had by that act lost their United States nationality and thus were unable to qualify as claimants.

Another case in this category involved a person who had become a naturalized citizen of the United States on November 13, 1924. Thereafter, he returned to Yugoslavia and voted in the Yugoslav election of November 11, 1945. The Commission held, in its Proposed Decision, that the claimant had lost his nationality under the last-mentioned provisions of the Nationality Act of 1940. After a hearing and the taking of testimony, however, the Commission was satisfied, as the claimant then contended, that he had been coerced into voting and it held, accordingly, that his United States citizenship had not been lost.22

In still another case the Commission held that voting in a Yugoslav election prior to January, 1941, did not result in a loss of United States citizenship pursuant to the Nationality Act of 1940, because that Act did not take effect until January, 1941.23

In connection with a number of claims filed with the Commission, the Government of Yugoslavia informed the Commission that the claimants had "declared" for German citizenship at the beginning of the occupation and that such "declaration" was recorded in a "book of declarants." In determining whether this had resulted in a loss of United States citizenship pursuant to Section 401(b) of the Nationality Act of 1940, the Commission held:

For loss of nationality to result from taking such an oath of allegiance, the oath must be one which is prescribed by law or regulation having the force of law and must be taken before a competent official of the Government concerned. . . . The fact that claimant's name may be listed in a "book of declarants" does not appear to have significant relation to his nationality status. Nowhere in . . . the "book of declarants" . . . can any statement or reference be found which would indicate that the names of persons listed herein took an oath or made an affirmation or other formal declaration of allegiance to a foreign state.24

The Agreement was quite explicit as to the requirement of the existence of nationality as of the time of taking. However, it did not touch upon a variety of other collateral problems involving nationality. For example, was a person a qualified claimant if he had lost his citizenship after his property had been taken and prior to the date of the Yugoslav

Claims Agreement? Another problem related to persons who were nationals at the time their property had been taken and at the time of the Agreement but had expatriated themselves for a short period of time between those dates. The Agreement was also silent with regard to non-nationals of the United States who claimed as successors in interest to individuals who were nationals at the time of taking and who, if alive, would have been qualified claimants.

In the light of the history of the negotiations leading up to the Agreement, and pursuant to the provisions of Section 4(a) of the International Claims Settlement Act, the Commission resolved such problems by reference to established principles of international law when it stated:

We are satisfied that the negotiators of the Agreement of July 19, 1948, between the Governments of the United States and Yugoslavia, were aware of the policy of the United States Government and established principles of international law and had they desired to depart from them would have inserted appropriate provisions in the Agreement. Since they did not, we conclude that a claim to be within the jurisdiction of this Commission must be owned by American nationals from the date the claim arose to the date the Agreement was signed.\(^\text{25}\)

Thus, the Commission held that it was unnecessary to establish the claimant's continued nationality subsequent to the date of the Agreement.

We are of the view that since the decedents were citizens of the United States at the time their property was taken (February 6, 1945), and citizens and residents of the United States at the time the Agreement between the United States and Yugoslavia was signed (July 19, 1948), that their claim has met the nationality requirements of the Agreement. We are aware that there is international legal precedent to the effect that a claim must be national from the date of origin to the date of settlement. The Agreement with Yugoslavia provided for the settlement of claims involving many thousands of persons. More than six years have already elapsed since the Agreement was signed. In the interim several hundreds of claimants (including original claimants and their successors) have died. If a claim has once been completely documented, the Commission would not, in most instances, have knowledge of the deaths of persons who had an interest in the claim. If it had to reinvestigate this aspect of each claim and require proof of death, succession, and nationality, it would be faced with a continuing and ever increasing burden which would tend to defeat the primary purpose of the Agreement, i.e., the prompt payment of effective compensation for the taking of property. This added burden upon the Commission would increase the cost of determining claims and, since the expenses of the Commission are deducted from awards, the end result would be a diminution of all awards. As the Commission is not in a position to undertake this additional burden with respect to all claims, it would be inequitable to deny this

claim, and one or two like it, because it happens to have knowledge that some of the persons who share in the award are not citizens of the United States. This claim will, therefore, be allowed.26

The nationality of corporate claimants did not present too many serious problems. Here Article 2(B) of the Agreement specifically provided that, at the time of taking, the corporation must have been organized under the laws of the United States, or a state or other political entity thereof, and that 20% or more of any class of its outstanding securities must have been owned, directly or indirectly, by individual nationals of the United States. The major problems in this area of adjudication related to whether the Commission might properly look behind nominal or record stock ownership.

In one such claim, the corporation involved was organized under the laws of the State of Delaware with more than 80% of its registered shareholders being American citizens. However, all of the shares of stock, it appeared upon investigation, were beneficially owned by aliens at the time the corporate property was taken. The Commission had no difficulty in concluding that the corporate nationality test was satisfied only if the requisite stock interest had been beneficially owned by individual United States nationals at the time of the taking.27

Nationalization or Other Taking

The Agreement purported to settle claims for the nationalization or other taking of property by the Government of Yugoslavia between the dates of September 1, 1939 and July 19, 1948.

Three separate problems for determination were thus raised: (1) whether the property had been nationalized or otherwise taken, (2) whether the nationalization or taking had been done by the Yugoslav Government, and (3) whether the nationalization or taking had occurred between September 1, 1939, and July 19, 1948.

The Federal People's Republic of Yugoslavia enacted two nationalization laws and several other laws which had the effect of taking rights and interests with respect to property. A taking by "nationalization" was a relatively simple matter to determine. However, what constituted "other taking" had no such simple disposition. The general approach of the Commission in this regard was that:

Where property has actually been taken by the Government of Yugoslavia under claim of ownership, it would constitute a "taking" within the meaning of the

26 Estate of George Straub—Docket No. Y-990, Decision No. 1405.
Yugoslav Claims Agreement, even if this had been accomplished without legal proceedings of any kind or even without a statutory basis for it in Yugoslav law. The Yugoslav Claims Agreement expressly contemplated that claims there-under would be compensated if the property involved had been taken by any means other than nationalization or other legal process. . . .

As was stated in the report (No. 800) of the Senate Committee which approved the International Claims Settlement Act of 1949, "It is known that some property owners were effectively deprived of property rights by Yugoslav authorities without formal nationalization." Both the Agreement and the International Claims Settlement Act contemplated that the effective deprivation of ownership or other property rights by Yugoslav authorities, through any means, would be compensable. The same report also states: "Since the Yugoslav Agreement covers the period of September 1, 1939 to July 19, 1948, the intent was undoubtedly to encompass all actual deprivations of property." Many legitimate claimants would be deprived of their intended rights under this Agreement if the Commission were to hold that they had no claims for the deprivation of their property unless such deprivation could be regarded as a "legal" one . . . .

The Government of Yugoslavia enacted a large variety of laws which resulted, in the Commission's judgment, in a compensable "taking". There will be discussed here only a few of those laws which affected the great majority of claimants.

The first of these was the Enemy Property Law of November 21, 1944 (Official Gazette of Yugoslavia No. 2 of February 6, 1945), as amended by the Enemy Property Law of July 31, 1946 (Official Gazette of Yugoslavia No. 63 of August 6, 1946). It provided that all property of persons included in its several stated categories would "on the day when this decree becomes effective . . . pass into State ownership." It undertook to confiscate all property belonging to persons of ethnic-German origin, with certain stated exceptions. Many of the claimants were persons of ethnic-German origin who had owned agrarian property in the "Vojvodina" area. The Commission held that property of persons found to be within the purview of that law by Yugoslav authorities had been taken on February 6, 1945, the effective date of that law, regardless of procedure selected by Yugoslav authorities for such taking.

Several claimants contended that they or their ancestors were not persons of ethnic-German origin and therefore their property could not legally have been taken under this particular Enemy Property Law. The Commission never made an affirmative finding that any claimant was in fact a person of ethnic-German origin. It limited itself to determining

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whether the property involved had, in fact, been taken. The Commission in this regard stated:

To entertain the notion that governments take property only if they abide by the provisions of their internal law in so doing is to put a premium on illegal procedures and discourage legal procedures. It would follow from claimant’s argument that if the property of an American citizen were subjected to the Enemy Property Law, no claim would lie therefor, unless the action taken under the law was in conformity with its provisions.

We must and do reject so dangerous and fallacious a suggestion. The essence of an international claim is a denial of justice. A denial of justice, of course, would include the taking of property in a manner which does not conform to law... 30

The second law which related to the “taking” problem was the Law Regarding Criminal Offenses against the People and the State, of August 25, 1945 (Official Gazette No. 66 of September 1, 1945) and the Law Against Illicit Speculation and Economic Sabotage of April 23, 1945 (Official Gazette No. 26 of April 25, 1945). The procedure for the effectuation of the taking pursuant to those laws was established in the Confiscation Act of June 9, 1945 (Official Gazette No. 40 of June 12, 1945), as amended by the Confiscation Act of July 27, 1946 (Official Gazette No. 61 of July 30, 1946).

Inasmuch as many of the claimants were war refugees or other persons who had become United States citizens by naturalization on varying dates during the period of several years in which the nationalization of the Yugoslav economy was in progress, the precise fixing of the date of taking in relation to the date of naturalization became a determining factor in many cases which presented extremely difficult problems of interpretation.

The laws last-mentioned affected, for the most part, corporate properties and required, for their implementation, judicial action on the part of Yugoslav authorities. The date of taking under those laws, the Commission found, was to be considered as the date “when the sentence of confiscation became final,” in accordance with Article 10 of the Act of June 9, 1945. Where property had been confiscated by a sentence of the county court and the time for an appeal had expired, the Commission considered the expiration of the time for appeal as the date of taking. Where an appeal had been taken from the county court to the Supreme Court of the Republic, the date of taking was considered the date of the affirming decision of the Supreme Court. 31

Certain claimants who had not become naturalized citizens by those dates attacked the validity of the decisions of the Yugoslav court and urged the Commission to determine whether the decrees of confiscation had been based upon valid findings and legal conclusions. The Commission was again impelled to reject such arguments:

There is no question that this Commission, as all international tribunals, must inquire into the eligibility of the claimants before it. However, to inquire into the question of a possible denial of justice is another matter. In practice, governments have on occasion protested against the judgments of foreign courts which they considered grossly unjust when they affected their own nationals. In this instance, claimant was not a national of the United States at the time of the issuance of the decree complained of, so that inquiry into her alleged injury on the ground of denial of justice, would be contrary to precedent.

The Commission indeed finds it somewhat of a paradox to speak of a denial of justice in this case. The Yugoslav Claims Agreement itself was negotiated to provide compensation for injury to citizens of the United States. Claimant now asks the Commission to inquire into an alleged illegal taking before she was a citizen of the United States and to set it aside or disregard it so that she may be considered injured by a taking subsequent to the attainment of citizenship.

. . . If we were to adopt claimant's theory, we would be required to inquire into proceedings in which claimant was involved many years prior to becoming a citizen of the United States.32

The first nationalization law enacted by Yugoslavia was the Nationalization of Private Enterprises Act of December 5, 1946 (Official Gazette No. 98 of December 6, 1946). This law undertook to nationalize all business concerns within forty-two different categories of economic activity of general national and republican importance. The Commission held that pursuant to that law, economic enterprises found by Yugoslav authorities to be of general national and republican importance were taken by operation of law and had passed into State ownership on December 5, 1946, in accordance with Article 1 of that law.33

The Second Nationalization Law of April 28, 1948 (Official Gazette No. 35 of April 29, 1948), nationalized additional kinds of "economic enterprises" and certain real property including "all real property owned by foreign citizens" with certain stated exceptions. That law authorized the Ministry of Justice of Yugoslavia to "issue the necessary instructions for the transfer to the state of nationalized real property." Instructions issued on June 12, 1948, pursuant to such authority, included the following definition of "foreign citizens":

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32 See note 31 supra.
IX. Our emigrants who have acquired foreign citizenship but who have not obtained a release from our citizenship, and who neither have a decree from the Ministry of the Interior stating that they have lost their citizenship nor that their citizenship was revoked, are not considered foreign citizens. Therefore the real property of such persons is not nationalized, regardless of the class of property and regardless of whether they are farmers or not.\textsuperscript{34}

Many claimants, owners of agrarian property, were affected by this law. It should be noted that under the provisions of this law, the Government of Yugoslavia purported to determine whether a claimant was a "foreign citizen" and thus whether the property owned by him had been taken pursuant to the law. With regard to property so affected, the Commission found that the date of taking was April 28, 1948, by operation of law.

In those cases where the Government of Yugoslavia considered a claimant still a Yugoslav citizen, it so advised the Commission and urged a denial of the claim on the ground that the claimant's property was exempt from nationalization, or that no restrictive measures have been applied to it; and therefore he could sell or otherwise dispose of it in the same way as any other citizen of Yugoslavia. Some claimants objected to the Yugoslav determination that they were still citizens of Yugoslavia. They argued that, upon obtaining United States citizenship, they had lost their Yugoslav citizenship and should be considered "foreign citizens" and thus qualify as claimants with respect to property which had been nationalized under the Second Nationalization Law. The Commission rejected this argument:

\begin{quote}
\ldots admission to United States citizenship does not \textit{ipso facto} effect loss [of Yugoslav citizenship] unless knowledge of that fact, at least, is communicated to the appropriate authorities.) Hence, we are not in a position to refute the determination of the Yugoslav Government, that under its laws claimant is a citizen of Yugoslavia. Even if we did and proved to our satisfaction that claimant should not be considered to be a Yugoslav citizen, we could not compel Yugoslavia to change its position and take possession of claimant's property. We wish to emphasize, however, that we did not deny this claim on the ground that claimant is a citizen of Yugoslavia. We denied the claim on the grounds that the property involved had not been interfered with by Yugoslav authorities up to December 1953, the date of our investigation, or almost six years after the Nationalization Law of April 28, 1948 became effective, and the advice of the Yugoslav Government that claimant's property had not been taken because he was considered to be a Yugoslav citizen and concluded therefore that it would be unjust to other claimants to make an award for it \ldots .\textsuperscript{35}
\end{quote}

\textsuperscript{34} Official Gazette of Yugoslavia No. 53 of June 23, 1948 (translated from the Yugoslav).
\textsuperscript{35} Claim of Mile Raseta—Docket No. Y-1112, Decision No. 853.
As suggested in the last quoted decision, the Commission nevertheless undertook, in all such cases, to determine, by on-the-spot investigation, whether there had been any actual interference with the claimant’s right of ownership and possession, notwithstanding the assertion by the Government of Yugoslavia that the claimant was still a Yugoslav citizen and that his property had not been taken under the Nationalization Law; and, in appropriate cases, an award was made on the ground of a taking in fact.36

On November 13, 1945, the Government of Yugoslavia enacted the Pre-War Obligations Settlement Law (Decree No. 841, Official Gazette of Yugoslavia No. 88 of November 13, 1945, as amended by Decree No. 66 of August 16, 1946). It undertook to reduce by 90% all deposits in Yugoslav banks. Approximately 225 claims were filed seeking compensation on the theory that this law constituted a “nationalization” or “other taking” of property within the terms of the Agreement. After a study of the banking and currency laws of Yugoslavia, all such claims were denied:

Yugoslavia violated no principle of international law in providing, as part of the re-establishment of its monetary system, for the payment of obligations incurred prior to military occupation at a rate of ten old dinars to one new dinar, and that the operations of the Yugoslav Law on the Settlement of Pre-War Obligations did not constitute a “nationalization” or “other taking” of property within the meaning of the Yugoslav Claims Agreement of 1948.37

Some claims were based upon the refusal of Yugoslavia to permit the transfer of claimants’ bank deposits to the United States. It was urged that this constituted a nationalization or other taking of property. This argument was rejected on the ground that the provisions of the Yugoslav post-war exchange control laws were not discriminatory and that no principle of international law had been violated as the regulation involved was one of currency control.

The provision in the Agreement which limited claims to those arising out of takings by Yugoslavia presented other problems, particularly with regard to properties which had earlier been taken by the Independent States of Croatia and Serbia and other local de facto governments. The Commission denied all claims involving property taken by the Independent State of Croatia, holding that:

... the Agreement expressly covers takings “by Yugoslavia.” Croatia is not named in the Agreement. Hence, the basic question for decision is whether

the words "by Yugoslavia" mean or include "by Croatia." To decide this question we must look at the facts, including the historical background and legal characteristics and relationship of Croatia and Yugoslavia.

It appears well established that the Kingdom of Croatia was created by German and Italian forces and threat of force; that during its entire four-year life it was subject to the will of Germany or Italy, or both, in varying degrees, except as to civil administration matters; and that it ceased to exist upon the retreat of the German forces. We are also of the view that the Yugoslav Government-in-Exile was the legitimate government of Yugoslavia until it was succeeded by the present government which is now the legitimate government of Yugoslavia. On the basis of simple facts, as they emerge from proven historical events of recent existence, Yugoslavia and Croatia may not be viewed as the same entity and the words "taking by Yugoslavia," if given their ordinary meaning, may not reasonably be construed to embrace "taking by Croatia."

In the light of these generally accepted principles of international law we find no basis for holding that Yugoslavia is impressed with responsibility for takings by Croatia, of the sort involved herein, and therefore, that the Agreement of July 19, 1948 includes such takings or that either side intended that it should do so.

On the basis of the reasoning in this decision, the Commission denied claims for takings by the Independent State of Serbia, and other local de facto governments.

The Commission likewise denied those claims where the property had been taken by the Hungarian occupation authorities or by the Italian military forces.

An interesting situation was presented regarding the alleged taking by the Government of Yugoslavia of certain real property not located within the territory of Yugoslavia but in the Free Territory of Trieste. The Commission denied this claim, stating:

... it is clear that the Government of Yugoslavia is and has been occupying that portion of the Free Territory of Trieste in which the property is located as a conqueror and that it cannot acquire permanent possession or title to the property which is the basis of this claim.

A few claims were filed with the Commission seeking compensation for property taken prior to September 1, 1939, while others claimed

38 Claim of Socony-Vacuum Oil Company, Inc.—Docket No. Y-304, Decision No. 993 & 993-A.
compensation for property taken subsequent to July 19, 1948. Upon the basis of the clear terms of the Agreement, such claims were, of course, denied.  

Scope of Claims Jurisdiction

The Agreement settled all pecuniary claims of the Government of the United States against the Government of Yugoslavia, other than those arising from Lend-Lease and civilian supplies furnished as military relief, and all claims of nationals of the United States for the taking of property and of rights and interests in and with respect to property.

The United States filed one claim with the Commission, for the confiscation of a jeep by the Government of Yugoslavia on July 11, 1946, and for the loss of two transport planes which had been shot down by Yugoslav forces on August 9, 1946, and August 19, 1946. The Commission allowed this claim and stated that:

The right of the United States Government to file a claim for losses of this sort and to receive compensation out of the lump sum of $17,000,000 paid by the Government of Yugoslavia is expressly recognized in Section (a) of Article 1 of the Agreement of July 19, 1948 between the Governments of the United States and Yugoslavia. The Government of Yugoslavia has acknowledged by an Aide Memoire dated August 13, 1954, that it was contemplated by both Governments that compensation should be paid for the aircraft and jeep . . . .

The remaining claims filed with the Commission included almost every conceivable type of damage and property loss. The Commission's general approach to the problem of the scope of the Agreement was set forth in particularity when it contended that:

The Yugoslav Claims Agreement does not purport to compensate United States nationals for every kind of loss or damage suffered by them as a result of any action by the Government of Yugoslavia during the period, specified in the Agreement, between September 1, 1939 and July 19, 1948. Its provisions were expressly limited to claims against that Government "on account of the nationalization and other taking by Yugoslavia of property and of rights and interests in and with respect to property." Its coverage was apparently intended to be narrower than that provided in other international claims agreements entered into by the United States on behalf of its citizens. In treaties or agreements of that kind, which contemplated that all losses or damages would be compensable, clear and express provision to that effect has been made . . . .

While the remedial nature of the Yugoslav Agreement and of its implementing legislation indicates a liberal construction, it must be also kept in mind that

to subject the limited claims fund here available to any and all claims for loss or damage resulting, in any way, directly or indirectly, from the nationalization of the Yugoslav economy would not only do violence to the express language of the Agreement but a grave injustice to the many claimants whose properties and well-defined claims were particularly contemplated by the Agreement. Moreover, just as it must be said that the Agreement did not contemplate compensation for all types of loss or damage, it must also be said that claims were to be compensated only if they derived from the kind of conduct expressly described in the Agreement—the "nationalization or other taking" of property. And the International Claims Settlement Act provides that, in its determination of claims, the Commission shall first apply "the provisions of the applicable claims agreement"; and only thereafter, if required, the applicable principles of international law, justice and equity.45

As has been stated, war damage to property in Yugoslavia, calculated on the basis of 1938 values, amounted to approximately 46½ billion dollars. Many of the claimants sought large amounts of compensation for such damage or destruction. The Commission, in a comprehensive opinion, held that war damage was not compensable under the Agreement.

The uniform dictionary definition of the word "nationalization" and our understanding of the term, is that it means the taking of private property in the interests of the state. The most strained and artificial construction of its definition could not stretch it to include war damage. The words "other taking" cannot be defined in simpler words and we believe that they mean exactly what is ordinarily imputed to them, namely, taking of something, not damage to something. We must, therefore, hold that the words "nationalization or other taking," if given ordinary meaning, could not be construed to include war damage.

The records of the negotiations leading up to the Agreement with Yugoslavia also show conclusively that the negotiators did not intend to include claims for war damage. The negotiators consistently discussed war damage claims separately from other claims. Both sides deducted war damage claims in arriving at the lump-sum of $17,000,000. Initially the United States side asked compensation for war damages, but on the insistence of the Yugoslav Government that it was not internationally liable for such damages, the United States side changed its position and merely insisted that United States nationals should not be discriminated against, in the event Yugoslavia compensated its own nationals, or the nationals of other countries, for war damage. That is the meaning of Article 7 of the Agreement and the reason for its inclusion. This is substantiated by public pronouncements by the Department of State and by legislation of the Government of Yugoslavia.

The apparent reason, and we believe the principal reason, for the failure to include claims for war damage is that Yugoslavia had no international legal responsibility to compensate for war damage. It is well settled by international

precedent that private individuals are owed no compensation on account of loss or damage caused by legitimate military activity. See Hackworth, *Digest of International Law*, Chapter XVIII, Secs. 535, 536 and authorities cited therein; Borchard, *The Diplomatic Protection of Citizens Abroad*, pp. 255 et seq., and authorities cited therein.46

Some corporate claimants having subsidiaries in Yugoslavia urged that since the subsidiary had filed a war damage claim with the Government of Yugoslavia, pursuant to its registration laws, and since that claim was an asset of the subsidiary when the latter had been taken by Yugoslavia, the parent corporation should be compensated for the value of that asset on the theory that it had been deprived of its subsidiary’s war damage claim which, it was asserted, constituted an “interest in and with respect to property.” Such claims were rejected for the following reasons:

A claim, in the strict legal sense, to be an asset must be based upon some legal right or obligation. It cannot rest on a mere hope. Perhaps at some future date Yugoslavia will enact legislation for full payment or partial payment of war damages. However, if it does, it will be a matter of grace or favor and not a matter of right on the part of those who sustained the damage. Borchard, *Diplomatic Protection of Citizens Abroad*, p. 279; Hackworth, *Digest of International Law*, Vol. V, pp. 693-4. Of comparatively recent date, nations have compensated for war damage with a view to distributing the loss over the whole nation. (E.g., France: Laws of April 17, 1919, June 1919, May 20, 1946, October 28, 1946; Belgium: Law of October 1, 1947, July 6, 1948; Holland: Decrees F. 98 of June 16, 1945 and F. 255 of November 9, 1945; United States: Philippine Rehabilitation Act of 1946, 60 Stat. 128.) Such compensation is unlike involuntary compensation, such as reparations which are frequently exacted from defeated nations. As to the latter there are many examples, of which the recent Treaties of Peace with Rumania, Hungary, Bulgaria and Italy are illustrative (61 Stat. 1247-2230). As such claims are based upon actual payment of the amount agreed upon or a promise of payment they may be an asset. But, we do not believe that a mere hope that a nation will at some future date pay for war damage to nationalized property is sufficient basis for holding that a valid claim for war damage existed at the time of nationalization.47

Although, as already indicated, claims for the devaluation of bank deposits were held not compensable, the Commission did make awards in cases where the bank had been confiscated or where the claimant’s account had been taken under the Enemy Property Law of November 21, 1944.48

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46 See note 38 supra.
47 See note 38 supra.
Many claims upon unpaid obligations were filed by creditors of nationalized enterprises. The Commission denied such claims on the ground that under Article 4(c) of the Agreement, such debts remained valid and subsisting obligations of the Government of Yugoslavia. In its decisions in such matters, the Commission referred to an excerpt from the Report of the Senate Committee on Foreign Relations in recommending the bill which became the International Claims Settlement Act:

"In Article 4(c) the Yugoslav Government recognized the obligation of successor enterprises for the valid debts of predecessor enterprises nationalized or otherwise taken. An exception is contained as to a limited category of such debts. Where a person participates in the $17,000,000 distribution as the owner of an enterprise, he releases the Yugoslav Government from a debt obligation to the same person with respect to the same enterprise. The negotiators understood such cases of creditor-owner to be few in number and subject to the criticism that owners having control of an enterprise might have been in a position to enter questionable debts on its records. It was agreed that should an owner exercise the option of claiming dollar compensation for his ownership interest, he would release the Yugoslav Government of the debt obligation, such obligations being in all then known instances dinar obligations." (Senate Report No. 810, p. 11, 81st Congress, 1st Session.)

"... the claims settled do not include creditor interests. They are confined to ownership interests in property, either legal or beneficial, direct or indirect. This is consistent with traditional United States policy in connection with espousals."49

Mortgages on real property which had been nationalized or taken were recognized as property rights upon which a claim could be based:

[A] mortgage, duly recorded, is immovable or real property under the laws of Yugoslavia and as such is within the terms of the ... Agreement. ... [T]he nationalization or other taking of the real property effectively took from claimant her right to foreclose her mortgage, and such was the taking of an interest in property ... .50

On similar grounds, the Commission also made awards to the owners of life estates or remainder interests in nationalized real property.51

All claims for defaulted dollar bonds issued by the Government of Yugoslavia were denied.52 In this regard, the Commission was guided by the apparent intent of the notes exchanged between the United States and Yugoslavia on the day the Agreement was executed, which notes confirmed that Yugoslavia recognized "among its other international

52 Claim of Mileva Petkovitch—Docket No. Y-1269, Decision No. 338-A.
obligations, the dollar bonds issued or guaranteed by predecessor Yugoslav Governments.\textsuperscript{53}

In denying claims based upon Yugoslav dinar bonds, the Commission was influenced by the traditional policy of the United States Government not to espouse claims against foreign governments for defaulted government bonds. The Commission said:

When the United States Government departs from that policy and enters into a Convention for the settlement of defaulted obligations of a foreign government, appropriate language is inserted in the Convention. \ldots Since the Agreement with Yugoslavia provided only for the settlement of claims for the "nationalization and other taking by Yugoslavia of property and of rights and interests in and with respect to property, which occurred between September 1, 1939 and the date hereof" (July 19, 1948), we conclude that the failure to include dinar bonds was not inadvertent and that such bonds were omitted intentionally.\textsuperscript{54}

Claims against Yugoslavia based upon defaulted French franc bonds,\textsuperscript{55} pre-World War I bonds,\textsuperscript{56} Swiss franc bonds,\textsuperscript{57} and municipal bonds,\textsuperscript{58} were similarly disallowed.

As an additional item of damage in many claims for the nationalization or other taking of property, claimants sought compensation for the loss of income, profits or rents. Virtually all such items were disallowed as "conjectural and speculative and not susceptible to accurate determination." However, such items of loss were recognized, to some degree, by the general allowance of interest on the principal award from the date of taking until August 21, 1948, the date of payment by Yugoslavia of the $17,000,000 which made up the claims fund.\textsuperscript{59}

Many claims for the taking of real property were allowed notwithstanding that record title was still in the name of a deceased person through whom the claimants asserted their ownership. In many such cases, moreover, the claimants were unable to obtain judicial determination of their successor interests. The Commission nevertheless undertook to determine and apply the applicable law of the situs regarding the descent of real property:

It is understood that under the law of Yugoslavia, legal ownership of inherited

\textsuperscript{54} Claim of Jovo Miljus—Docket No. Y-1561, Decision No. 352-A.
\textsuperscript{56} Claim of Eric G. Kaufman—Docket No. Y-778, Decision No. 393.
\textsuperscript{57} See note 55 supra.
\textsuperscript{58} Claim of Ivan Baran—Docket No. Y-1694, Decision No. 341.
\textsuperscript{59} Claim of Jacob Holler—Docket No. Y-366, Decision No. 730.
real property must be established by a judicial proceeding in that country. However, the Commission is of the view . . . that even though no such proceedings were had, the heirs of a decedent acquire rights and interests in and with respect to property which may be converted into legal title by appropriate court proceedings and that such rights and interests are compensable . . . .

In reaching such determinations, the Commission was required, not only to establish the ownership of the property by the decedent but also to determine the date of death of the recorded owner and his heirs. This frequently led to involved problems of proof.

In one such claim, the claimant sought compensation for property recorded in the name of her father, a non-national of the United States, who, the claimant asserted, died on October 28, 1944, in a concentration camp. The Government of Yugoslavia informed the Commission that claimant’s father died on January 28, 1946, and, accordingly, since he had not been a national of the United States on the date the property was taken, urged that the claim be denied. That Government submitted a copy of a death certificate from the “Records of Vital Statistics” indicating that claimant’s father died subsequent to the date the property was taken. The claimant, on the other hand, submitted numerous affidavits to the effect that her father died in October, 1944. With regard to the date of death, the Commission held:

Although the evidence filed by the Government of Yugoslavia and the claimant is conflicting as to the date of death of claimant’s father, the preponderance of evidence shows, and the Commission holds, that [claimant’s father] . . . died in October 1944.61

The Commission then allowed the claim:

On the basis of the evidence, the Commission is satisfied that [claimant’s father] . . . died intestate in October 1944 at Kikinda, Yugoslavia; that there was no administration or probate proceedings upon his estate; and that at the time the property was taken, the decedent was the record owner of the interests in the property. . . . Accordingly, the decedent’s real property would pass to his heirs in accordance with the laws of intestacy at the situs of the property.62

As indicated, in determining the descent of real property, the Commission applied the law of the situs. Accordingly, where property was located in the “Vojvodina” area, the applicable Hungarian law was used; for property in Slovenia and Croatia, the Commission applied the Austrian Civil Code; and for property in Serbia, the Serbian Civil Code.

60 Claim of Elizabeth Edelmann—Docket No. Y-793, Decision No. 1200.
61 See note 60 supra.
62 See note 60 supra.
The Commission was frequently called upon to recognize, as the basis for claim, beneficial interests in property, both real and personal, where nominal or "legal" title was in another. Notwithstanding the fact that the concept of equitable title is unknown in Yugoslav law (as in most European jurisdictions), the Commission made awards in such appropriate cases, where the proof was as clear and convincing as could reasonably be expected.

One such claim in the category suggested was for farmland in Srpski Miletic, Yugoslavia, allegedly given to the claimant as a dowry but never formally transferred to her. It was alleged that she was the "beneficial owner" thereof, that she had used the property until 1944 and that it was considered in the community to be owned by her. In that case, the Commission was not persuaded that the claimant had established such an interest, largely for the reason that there had been a lapse of so considerable a period of time during which she apparently took no action to perfect title to the property.63

Two claims were filed on behalf of a trust which included shares of stock of a Yugoslav company which had been nationalized. One of the beneficiaries of each trust was not a national of the United States at the time of the taking of the corporation. The Commission denied the claims to the extent of the interests of the beneficiaries who were not then nationals on the ground that the Government of the United States, in its diplomatic espousal of claims, would look to the nationality of the beneficial owner of the claim as distinguished from the nominal or "legal" owner.64

In a claim for compensation for the value of certain shares of bearer stock of a nationalized Yugoslav corporation, the claimant alleged that his interest was one of beneficial ownership of the stock which was held by his brother as his agent, the stock having been purchased during the years 1930 to 1940 with money sent to the claimant's brother in Yugoslavia. The claimant acknowledged that the stock certificates had never been in his possession and that nominal ownership of the stock had never been in him.


The Government of Yugoslavia reported that these certificates had been registered in the name of the claimant pursuant to its 1946 regulations which required the registration of shares of stock in all Yugoslav corporations. At a hearing before the Commission, the claimant and his brother testified regarding the ownership of these shares. Additional documentary evidence introduced at the hearing included letters to the claimant and his brother from a bank in Switzerland and from persons in Yugoslavia regarding the ownership of these shares.

On the basis of all of the evidence, the Commission was persuaded that the claimant was the beneficial owner of the stock and entitled to an award.65

Valuations

Most of the claims filed were barren of evidence relating to value of properties involved. Some claims included evidence of post-war values; others of war-time values in occupation currencies; others included evidence of purchase prices in the 1920's and 1930's.

Among the initial and most difficult problems which had to be resolved were those relating to the valuation base and the conversion factor to be used in converting Yugoslav dinar values into U.S. dollars.

Most of the properties involved had been taken during or shortly after World War II. Valuations in terms of the highly inflated and otherwise distorted and widely fluctuating values of those years would obviously have been unrealistic and would have led to serious inequities to the claimants.

After careful consideration of all relevant factors, the Commission concluded:

... we believe it evident that the inflation present in the Yugoslav economy from 1939 onward created an abnormal situation and thus renders that period for appraisal or valuation of little value. Conversely, just as the factor of unjust enrichment attached to war-year values, the economic decline of the early and middle thirties depressed values to extremely low levels . . .

. . . .

Accordingly, we believe it proper to consider 1938 valuations as the initial point of reference. This does not exclude consideration of later valuations, including particularly those reflecting values at the more precise time of nationalization or other taking. If any such later valuations are available, and can be translated correctly into dollars, they will be given consideration with all other available evidence . . .66

Similarly, as to the conversion problem, after careful consideration of the many rates of exchange, official and otherwise, obtaining from 1934 onward, the Commission concluded:

... that where valuations of the property taken are determined in the decisions of this Commission as of 1938 that such valuations shall be converted into American money at the rate of 44 Dinars to the Dollar, a practical mean of any of the minor fluctuations of the rate within that year. By this we do not foreclose the use of a different rate in claims in which an acceptable valuation is available at or near to the time of the taking, and where such different rate was in effect at that time, or, by virtue of its near proximity in time, seems more appropriate for such use.67

In the great majority of awards, valuations were made in terms of 1938 prices; accordingly, the valuation in dinars was converted into dollars at the rate of 44 to 1. A few awards were based upon 1945 valuations in dinars; the rate of exchange employed in those cases were 50 dinars to $1. With respect to properties located in the area formerly under the jurisdiction of Italy, valuations were made in lire as of 1938; such valuations were converted into dollars at the rate of 19.01 lire to $1.

Many of the agrarian properties involved were encumbered by life estates. In arriving at the net value of such property, for the purpose of its award, the Commission adopted, as a basis for the valuation of life and remainder interests, the Makehamized mortality table which appears as Table 38 of the United States Life Tables and Actuarial Tables, 1939-41, and a 3½% interest rate, compounded annually, as prescribed by United States Treasury Department regulations of June 3 and 4, 1952, for the collection of gift and estate taxes, respectively.68

In claims involving inherited property, the Commission, in arriving at the net value of the claimant's interest, made a deduction for the inheritance tax which the claimant would have been compelled to pay if he had been required to validate his title to the property, in accordance with the Inheritance and Gift Tax Law of Yugoslavia of March 18, 1948 (Official Gazette of Yugoslavia No. 25 of March 26, 1947).

In a few of the claims, the Commission found that the value of the property was in excess of the amount claimed. In those claims, the Commission held:

We cannot overlook the fact, abundantly apparent from the Commission's records, that many claimants have been absent from Yugoslavia for many years and, consequently, out of touch with the values of property there, even when

67 See note 66 supra.
continuing contact with those using their property. Many of them have stated that they have not appropriate conception, or knowledge, of the actual value of their property, particularly as of the time of the taking. They were, nevertheless, required to state in their Statement of Claim filed with the Commission “the amount of the claim” (item (m)). It seems obviously unjust, under such circumstances, to hold the claimant to such a statement made adjunctly, as it was in many cases, as a mere matter of speculation, where the actual valuation of the property upon the evidence proves to be in excess of the amount so claimed. This is feasibly corroborated by the modern liberalization of the rules of pleading to permit amendment after the submission of the evidence to conform the pleadings to the proof. We are directed, moreover, by the law establishing the Commission to apply in the decision of the claims within our jurisdiction “the applicable principles of international law, justice and equity.” Such principles dictate the allowance of the claim, if otherwise judicially valid, for the amount determined as the value of the property taken even though it had earlier been apparently appraised at a smaller amount by a claimant unacquainted with the necessary facts. We, therefore, hold that the valuation supported by the evidence will be employed as the basis for the award herein.

As already indicated, each award included a separate allowance for interest on the principal amount of award, at the rate of 6% per annum, from the date of taking to August 21, 1948. Since the principal amount of all awards aggregated more than $17,000,000, and since the Act provided that interest was not to be paid unless the principal amount of all awards were satisfied from the fund, interest will not be paid on any award.

Conclusion

It has not been the purpose to present an exhaustive statement of all of the activities of the Commission in the Yugoslav claims area. A full-sized volume would be required for such a purpose. By the same token, it would not have been feasible to present a comprehensive discussion and analysis of the legal problems involved in all or even in most of the thousand-odd claims decisions rendered by the Commission. It is believed, however, that these observations concerning the activities of the Commission will serve the purpose of setting forth some of the more significant of problems of administration and point up some of the technical legal problems involved in this particular claims program.

There were many details and numerous difficulties encountered in bringing this claims program to a completion. Some of the problems resulted from delay in getting the program under way. Nevertheless, resolution of each individual situation in light of principles of inter-

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70 See note 66 supra.
national law, sound judgment and equity, does require considerable time. In the administration of such a claims program, the interests of the claimants must be kept to the forefront and an expeditious disposition of their claims effected. The problem of evaluation and appraisal of real property was somewhat unusual in international claims administration, by virtue of its location and the prevailing political atmosphere of the country involved.

The Commission undertook to break ground in an area of administrative adjudication which had been virtually unexplored. Disagreement may fairly be expressed with some of the Commission's decisions. There has been no attempt to minimize certain of the deficiencies in the operation. Undoubtedly, one of the fruits of experience under this program will be the foundation for establishing a sound policy for future administration of claims of this kind and type.

One is aware that under such a claims program there will be inequities to certain claimants. It would be impossible to create a law to fit all the interests and particular facts relating to every potential claimant. Since the Commission realized that its decisions may well be precedent for future determinations in the United States and in other countries which may undertake similar claims programs, each decision was accorded a tailor-made consideration. Much pioneer work has been done in the field of international claims by the Commission under this claims agreement. It is submitted that the Commission has established a sound foundation for administering future claims on behalf of United States nationals.
COMMENT

LAW AND MORALS

Leonard J. Emmerglick*

We are told that the task of law has shifted from adjusting the exercise of free wills to satisfying human wants. This is a function which the courts share with the legislature. The courts "legislate" when they must bridge gaps in common law rules, and when they must guess what the legislature would have intended on a point not present to its mind had that point been presented.2

Historically, the judicial process has taken materials from morals and created from them principles enforced by the courts. The separate equity court led the way. The early clerical chancellors borrowed copiously from their primary field of training.3 The chancellor made charity a duty, and then the common law courts converted the equitable principle into a common law rule.

Justice Cardozo points out in one of his brilliant essays that:

The pressure of society invests new forms of conduct in the minds of the multitude with the sanction of moral obligation, and the same pressure working upon the mind of the judge invests them finally through his action with the sanction of the law . . . .

But the courts have not kept up the level of their contribution to the growth of law by absorbing materials from the field of morals. We have come to depend for such advances mainly upon legislation and administrative agencies.

One important reason for this change is the assumption that the merger of law and equity somehow made it inappropriate for unified courts to continue to borrow from the field of morals. It was mistakenly assumed that equity was a fully matured body of principles, and that this was the very reason which dictated merger. But as a great English

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3 The first lay Chancellor appointed by an English king was Sir Robert Bourchier who became Chancellor in 1340. For more than 700 years before that time the doctrines of Chancery were formulated by clerics. And for several hundred years thereafter the office of Chancellor was occupied by ecclesiastics. In the long list of British Chancellors are to be found such names as St. Swithin, Thomas à Becket, Walter Hubert (Archbishop of Canterbury), Cardinal Beaufort, and Cardinal Wolsey, among many other eminent churchmen.
4 The Paradoxes of Legal Science 18 (1928).

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equity judge has observed: "The rules of courts of equity are not, like the rules of the common law, supposed to have been established from time immemorial. They have been established from time to time,—altered, improved, and refined from time to time." Equity was a growing body of skills in the ameliorating exercise of judicial discretion. It was not and never can be static or completed.

By taking the principles of equity to be perfect in symmetry and beauty and something completed, the courts relaxed or gave up their tendency to make good conscience into a rule of law. The Chancery Division of the unified English Court declared as long ago as 1903: "This is not a court of conscience." In 1905 Dean Pound found much to prove "The Decadence of Equity." In many jurisdictions judges appear to administer equity with only a legal point of view, and the growth of the law is retarded. It was the preoccupation with conscience on the part of the separate court which led to the steady incorporation of moral principles into rules of law. Thus, the enforcement of oral contracts, the rights of the assignee of a chose in action, the notion of fraud, the equitable estoppel, relief against unjust enrichment, the concept of fiduciary duty of trustee and agents, and the lien theory of mortgages, were established by equity and then adopted by law courts.

But very little advance in substantive principles of equity is to be found in the past half century. Emphasis has been on procedural

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6 Jessel, M. R. in In re Hallett's Estate, 13 Ch. D. 696, 710 (1879).
7 In re Telescriptor Syndicate [1903] 2 Ch. 174, 195.
8 See Pound, The Decadence of Equity, 5 Col. L. Rev. 20, 25 (1905).
10 See Walsh, Is Equity Decadent?, 22 Minn. L. Rev. 479, 495 (1938). All of the advances pointed to by Walsh represent nothing more than the extension of well-established equitable rules to new situations, as distinguished from the recognition of rights of action not previously sustained. The protection of purely personal as distinguished from property rights was generally denied until a separate equity court in New Jersey held that an individual has rights other than property rights which he can enforce in a court of equity. Vanderbilt v. Mitchell, 72 N.J. Eq. 910, 67 Atl. 97 (1907). See also Vassar College v. Loose-Wiles Biscuit Co., 197 Fed. 982 (W.D. Mo. 1912); Baumann v. Baumann, 250 N.Y. 382, 165
reform. It has been an over-emphasis, resulting from the tendency to apply the discipline of the exact sciences everywhere. We have proceeded as though the end and object of government is efficiency rather than justice, disregarding the fact that nothing in the Constitution, the Bill of Rights or the Declaration of Independence suggests that efficiency is the prime aim of government. No one would want to be without the benefits of our improved procedures and our modern court rules. But these advances are not a moral terminus. The administration of justice is not concerned with matter but with values, and to deal well with these it is not enough to imitate science.

By placing primary dependence upon legislation in place of judicial development of common law and equity, we merely substitute one kind of judging for another, "for a statute is merely a judgment of the High Court of Parliament."11 But there are these differences: the judicial process acts with the whole body of the law in view whenever it innovates; the legislative process generally is unconcerned with the symmetry and consistency of legal principles. Legislation quite often is the product of compromise and political expediency and results in half-measures. The judge, unlike the legislator, has no responsibility to "get results," or fulfill a party policy.12

Neither the merger of law and equity, nor the proliferation of administrative agencies, has impaired the creative authority of the courts or the need to use it. Every court of general jurisdiction is a channel through which moral values can be drawn into the law and be given the force of legal obligations.13 Law and morals are not antagonistic orders. Nor is it correct to speak of them as being merely related. Law is an ever expanding part of the field of morals, a minimum ethics.14 The soundest growth of the law takes place as the judicial process steadily meets new demands of justice and equity by enlarging its horizons.


12 See Cowan, Legislative Equity in Pennsylvania, 4 U. of Pitt. L. Rev. 1 (1937); Thompson, Anti-Loyalist Legislation During the American Revolution, 3 Ill. L. Rev. 81 (1908).

13 See Bordwell, The Resurgence of Equity, 1 U. of Chi. L. Rev. 741 (1934).

14 Cf. Jellinek, Die Soziakethische Bedeutung von Recht, Unrecht und Strafe (1878); Pound, Law and Morals (1926); and Cohen, Ethical Systems and Legal Ideals 41 (1933): "Law is just as much a part of the domain of morality as any other phase of human custom and conduct. It has no special purpose, end, or function, no restriction of moral scope, other than that which its positive and practical nature may impose in the way of limitations of applicability."
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THE PHILLIPS DECISION AND CONSEQUENT EXPANSION OF FEDERAL JURISDICTION OVER NATURAL GAS

During the sixteen years immediately following enactment of the Natural Gas Act, the Federal Power Commission fought a game but losing battle to keep independent producers of natural gas beyond the scope of its jurisdiction. The Supreme Court's decision in the case of Phillips Petroleum Co. v. Wisconsin rang down the curtain on this unique struggle with what the Commission's counsel has since styled "a firm admonition to correct the erroneous administration of the Act."

The Phillips decision, however, created more problems than it solved. The extent of FPC jurisdiction over sales and transportation of natural gas before it reaches interstate pipe lines for transmission to consuming states is not yet certain. Before discussing the possible areas of jurisdiction which might eventually accrue to the FPC, and the suddenly acquisitive attitude which the FPC is demonstrating toward these areas, an explanation of the background of the present jurisdictional problems in the natural gas field is in order.

A HISTORY OF THE PROBLEM

The Natural Gas Act was passed in June of 1938. Its basic purpose "was to protect consumers against exploitation at the hands of natural gas companies." In section 1(a), Congress declared "that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest." Section 1(b) provides that the Act shall apply:

... to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other

2 "An 'independent producer' ... means any person as defined in the Natural Gas Act who is engaged in the production or gathering of natural gas and who transports natural gas in interstate commerce or sells natural gas in interstate commerce for resale, but who is not primarily engaged in the operation of an interstate pipe line." 18 C.F.R. § 154.91(a) (Supp. 1954).

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transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.8

The exemptions of this section occasioned the sixteen-year struggle between consuming and producing interests.7 The struggle resulted in an ill-defined victory for the consumers in the Phillips case in June of 1954.

The problem which arose as a result of the Natural Gas Act is briefly this. It is clear that sales by an interstate pipeline company in the course of, or at the conclusion of, interstate transportation are covered by the act. But what of sales of gas to the interstate pipe line, made by the producer or gatherer? Clearly these sales are in interstate commerce, but are they outside of the jurisdiction of the FPC because of the production and gathering exemption?

The lines of battle were strictly economic.8 Consumer interests, fearful of the result if the producers were freed absolutely of price regulation or the threat thereof, have been led by the State of Wisconsin,9 Wayne County, Michigan, and similarly situated political bodies. The producing interests, apprehensive lest the money rewards which supply the incentive for taking the risks of oil exploration be taken away, have been led by the larger gas and oil companies with assistance from the producing states.

The first presentation of the question of whether the FPC has jurisdiction over the sale of natural gas by an independent producer to a pipeline company took place in the Columbian Fuel Corporation case.10 There the Commission concluded:

... it was not the intention of Congress to subject to regulation under the Natural Gas Act all persons whose only sales of natural gas in interstate commerce, as in this case, are made as an incident to and immediately upon the completion of such person's production and gathering. ...11

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8 "'Interstate Commerce' means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States," Natural Gas Act, § 2(7). "'Natural-gas company' means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale." Natural Gas Act, § 2(6).

7 For a more detailed account of the earlier stages of this struggle, see 19 Law and Contemp. Prob. 323, and, in particular, 382 (1954).

8 Id. at 325 et seq.


10 2 F.P.C. 200 (1940).

11 Id. at 208.
The men who handed down this decision witnessed or participated in the efforts to secure passage of the act. They based their conclusion on a study of the act itself and of its legislative history. They felt that the regulation of producers and gatherers would require a broader statute and more money than Congress had provided.

Their attitude was adopted and maintained by the Commission until the Phillips decision. It was reflected in unsuccessful efforts to have Congress define the scope of their jurisdiction so as to exclude sales by producers and gatherers.

The exemption which the Commission inferred in favor of independent producers was never explicitly acknowledged by the courts. Well before the Phillips decision, some doubts were cast upon the FPC interpretation of the Act by the case of Interstate Gas Co. v. Power Commission. Petitioner was an interstate pipeline company which produced gas from its own wells in Louisiana. This gas, commingled with other gas which the company purchased, was moved through field pipe lines, branch lines, trunk lines, and finally main trunk lines. From the company’s main trunk outlets in other states, it was sold to distributors for ultimate public consumption. The entire movement of gas was a continuing operation. The only processing the gas underwent on its journey was compressing (to facilitate extended pipeline movement) and this occurred after sale, though in the producing state.

In holding that the production and gathering exemption did not apply, Chief Justice Vinson said: “By the time the sales are consummated, nothing further in the gathering process remains to be done.” While thus indicating that the production and gathering exemption wasn’t being tested here, the Court said in reaching its conclusion:

Thus, where sales, though technically consummated in interstate commerce, are made during the course of production and gathering and are so closely connected with the local incidents of that process as to render rate regulation by the Federal Power Commission inconsistent or a substantial interference with the

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14 Legislative efforts in the Eightieth and Eighty-First Congresses, made with the backing first of three and then of two of the four Commissioners, culminated in the passage of the Kerr Bill, S. 1498, H.R. 1758, which exempted independent producers and gatherers. President Truman vetoed the bill on April 15, 1950. 96 Cong. Rec. 5304 (1950).
15 331 U.S. 682 (1947).
16 Id. at 692.
exercise by the State of its regulatory functions, the jurisdiction of the Federal
Power Commission does not attach. But such conflict must be clearly shown.\textsuperscript{17}
An accompanying footnote mentions that the FPC "has not asserted jur-
isdiction over all sales taking place in the natural gas fields even though
in interstate commerce for resale for ultimate public consumption. . . .
We express no opinion as to the validity of the jurisdictional tests em-
ployed by the Commission in these cases."\textsuperscript{18}
Thus the issue to be decided in the \textit{Phillips} case was made clear-cut.
The Court, while not denying that there might in some circumstances be
an exemption for producers and gatherers, specifically excepted from its
decision any conclusion as to the FPC jurisdictional test as laid down in
the \textit{Columbian} case.\textsuperscript{19}
Yet the history of Supreme Court consideration of this problem was
not without indication that the sales made by producers are exempt from
Federal regulation. A full two years after the decision in the \textit{Interstate}
case, the Supreme Court, in permitting the FPC to use the value of pro-
duction and gathering facilities in determining rates for resale in inter-
state commerce of natural gas produced by a company which was also
an interstate pipeline company, stated: "The use of such data for rate
making is not a precedent for regulation of any part of production or
marketing."\textsuperscript{20} [Emphasis supplied.] The precise question, however, was
not before the Court in that case. It finally came up before the Commis-
sion in the \textit{Phillips} case decided in 1951.\textsuperscript{21}
\begin{center}
\textbf{THE PHILLIPS CASE}
\end{center}
The Phillips Petroleum Company is a very large integrated corporation
operating in many phases of the petroleum industry. Its sales of natural
gas\textsuperscript{22} are made directly to interstate pipeline companies immediately
after Phillips has produced, gathered, and processed\textsuperscript{23} the natural gas.

\textsuperscript{17} Id. at 690.
\textsuperscript{18} Id. at 690-691.

\textsuperscript{19} Following the \textit{Interstate} case, the Commission, in addition to openly favoring legisla-
tion to exempt the independent producers, made an effort to put the matter at rest by its
own action. On August 7, 1947, it adopted a rule to this effect, Order No. 134, Docket No.
R-106. But this move, rare in the annals of bureaucracy, was doomed to be thwarted by
the Supreme Court interpretation of the Natural Gas Act.


\textsuperscript{21} In the matter of Phillips Petroleum Co., 10 F.P.C. 246 (1951).

\textsuperscript{22} In addition to producing natural gas, Phillips also purchases it from other companies
for resale.

\textsuperscript{23} As used here, "to produce" is to actually achieve the removal of the gas from a well;
Phillips’ production and gathering facilities extend into three states and embrace nine gathering systems and ten processing plants. Of the gas Phillips processes, roughly one-half is produced at its own wells. A large share of this is “casinghead gas.”24 Immediately after Phillips processes this gas, it sells it to interstate pipeline companies, in some cases within the very enclosure of the processing plant.25

By an order issued on October 28, 1948, the Commission instituted an investigation to determine whether the Phillips Petroleum Company was a “natural gas company” within the meaning of the act and therefore subject to its jurisdiction. Any rates found to be within FPC jurisdiction were to be examined to determine whether they were just and reasonable. Again the FPC refused to take jurisdiction. It based its decision on the rationale that since Congress had intended to exempt production and gathering, the processing and subsequent sale which is a part of or incidental to production and gathering is included in the exemption. The Commission further found that there would be a conflict between state and federal regulatory systems if jurisdiction were held to exist, and that therefore under the Interstate decision federal jurisdiction does not attach.

The decision was reversed by the United States Court of Appeals for the District of Columbia Circuit.26 The reversal was grounded largely on the holding that the sale was not in the course of production and gathering because production and gathering had ended before the sale occurred.

The Supreme Court affirmed the decision of the court of appeals.27 Its decision, however, was significantly broader than that of the lower court. Mr. Justice Minton’s majority opinion did not rest on the plain ground that production and gathering had ended. Rather, it chose the broader view developed in the Interstate case that sales in interstate commerce for resale by producers to interstate pipeline companies do not come within the “production or gathering” exemption.28

“to gather” is to bring together the gas so produced at a central point in or near the field (whether “gathering” includes making the gas ready for sale is disputed); “to process” is to effect the removal of impurities and heavier liquid hydrocarbons so as to convert “raw” natural gas into the natural gas used by the consumer. None of these terms is defined in the Natural Gas Act.

24 Natural gas produced in conjunction with the production of oil.
28 Id. at 680.
The Court was "satisfied that Congress sought to regulate wholesales of natural gas occurring at both ends of the interstate transmission systems." Rejecting the contention that only pipe line companies were meant to be covered, Mr. Justice Minton said for the Court:

Rather, we believe that the legislative history indicates a congressional intent to give the Commission jurisdiction over the rates of all wholesales of natural gas in interstate commerce, whether by a pipeline company or not and whether occurring before, during, or after transmission by an interstate pipeline company. [Emphasis supplied.]

The dissenting opinions of Mr. Justice Douglas and Mr. Justice Clark maintained that the Interstate case should scarcely be viewed as a precedent since the question involved in Phillips had been expressly reserved in Interstate, and, in addition, the facts in the earlier case were substantially different. Attention was also called to the effect the decision would have on the states' sphere of regulation. The dissenting opinions pointed out that state regulation of production and gathering is meaningless if the price to be charged at their conclusion is determined by the FPC.

MEANING OF THE PHILLIPS DECISION

Thus, in June of 1954, the Supreme Court with one decision changed the entire focus of natural gas regulation. While everyone knew the focus was radically different, no one knew what jurisdictional limits this new focus would assume. Clearly, the decision brought the Phillips Company under the jurisdiction of the FPC. But the sweeping language of the majority opinion could be interpreted to include other companies whose operations were never before considered as being likely objects of federal regulation. Let us consider briefly the various ways in which the Phillips decision might be construed.

The first and most obvious approach would be to limit the Phillips decision to its holding on the facts of that case. Phillips involved sales made to an interstate pipeline company after completion of processing. If this were regarded as a limiting test, the FPC would regulate only sales of processed gas made directly to the interstate pipeline companies. This interpretation would not rule out the possibility of exempting sales consummated during production and gathering or, indeed, at any time prior to completion of processing.

But the majority opinion did not purport to limit itself to the facts in-

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29 Id. at 684.
30 Id. at 682.
31 Id. at 690, 695.
volved in the Phillips sales. So sweeping is the dictum that "all whole
sales of natural gas in interstate commerce"32 are covered, that any sale of gas, even at the wellhead, falls within that language just so long as it is in interstate commerce and is for resale.

A second interpretation of the Phillips decision would be to accept its dicta at face value. The test resulting from this interpretation would be whether or not there has been a dedication of the gas to interstate com-
merce. To determine what constitutes a "dedication" in this sense would be a major problem. Possibilities might range from the requirement of a clear conscious dedication to recognition of a dedication where any percentage of the gas, however small, may find its way out of the state.

A third and more moderate approach is the suggestion by Commiss-
ioner Digby of the FPC to the effect that only a "direct sale of natural
gas in interstate commerce for resale"33 [Emphasis supplied.] should be regulated by the Commission. Apparently, the function of the word "di-
rect" in this context is to distinguish that sale which plainly and effective-
lively puts the gas into the current of interstate commerce from those preparatory transfers made in the course of producing, gathering and processing the gas. The Commissioner added that such "direct" sales would include "all sales of natural gas dedicated by contract for sale in interstate commerce for resale."34 Under such a test the FPC jurisdiction could presumably, in some instances, reach back as far as a wellhead sale. However, it would go no further back in the marketing process than a sale of the type involved in the Phillips case.

Any set of standards which incorporates the dicta of the Phillips case must necessarily involve one perplexing question: When is the sale of natural gas a sale in interstate commerce? It is appropriate here to point out that Congress did not, as it might, assert federal jurisdiction over all sales or transportation of natural gas which affect interstate commerce, but only over "transportation . . . in interstate commerce" and "sale in interstate commerce."35 As Mr. Justice Frankfurter has said: "... when it [Congress] wants to bring aspects of commerce within the full sweep of its constitutional authority, it manifests its purpose by regulating not only 'commerce' but also matters which 'affect,' 'interrupt,' or 'promote' interstate commerce."36

32 Id. at 682.
34 Ibid.
35 See § 1(b), Natural Gas Act, supra.
But the determination of whether a particular sale is in interstate commerce is exceedingly difficult. The natural tendency is to look for a mechanical test, an easily discernible act or waymark in the course of the production and marketing of natural gas, to which we can point and say: "It is here that interstate commerce begins," or "Any sales which occur after this point are in interstate commerce; any before it are not." A statute written to cover the specific problem arising here would very likely attempt this method. However, in this industry it is unrealistic to select a particular physical act as demarking the limits of federal regulatory power. The great variety of sales arrangements and marketing practices possible in the natural gas field would enable operators to avoid any regulation conditioned on such a physical arrangement.

The difficulties and lack of certainty implicit in a simple test of another sort, the dedication to interstate commerce, have already been mentioned. Another mental hazard endangering an honest appraisal of the extent of federal and state jurisdiction in these matters is the tendency to identify the limits of the states' power to tax with the limits of states' power to regulate prices or other aspects of a given field of commerce. That the power to tax is not coextensive with the power to regulate was expressed clearly by the majority opinion in *Polish National Alliance v. Labor Board* in which federal power to regulate the labor relations of an otherwise state-regulated fraternal insurance organization was recognized. The Court stated: "Thus, federal regulation does not preclude state taxation and state taxation does not preclude federal regulation." For this reason, cases which have held that the state cannot levy a tax on gas, the incidence of which occurs after processing has been completed and when the gas is about to be introduced immediately into interstate pipe lines, or cases which have held that a state may set minimum prices on natural gas upon its being taken from the well and before processing cannot be regarded as controlling the situation in which the independent producers now find themselves. In their situation it may prove necessary to show that they are not engaged in interstate commerce.

**Reaction of the FPC**

It is apparent that the FPC was faced with formidable difficulties in the wake of the *Phillips* decision. In obeying the Supreme Court man-

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37 322 U.S. 643 (1944).
38 Id. at 649.
date, the Commissioners acted quickly and in a manner which startled many, for they virtually matched the Supreme Court's decision in breadth and vagueness.\footnote{See Fed. Reg. Doc. 54-10160, filed Dec. 22, 1954, Commissioner Digby's dissent to the issuance of Rule 174 (B), 19 Fed. Reg. 8807 (1954).}

The Commission's first response to the Supreme Court "admonition" was Rule 174,\footnote{19 Fed. Reg. 4534 (1954).} issued on July 16, 1954. It was quickly modified by 174 (A)\footnote{Id. at 5081.} and then 174 (B).\footnote{Id. at 8807.} These rules were issued to define the new scope of FPC jurisdiction. Their principal requirements are that independent producers file rate schedules, file notice of intent to change rate schedules (which are subject to FPC approval), secure FPC permission to abandon any service, and secure certificates of convenience and necessity for their various operations. The most important feature of the rules is that they apply fully to all "independent producers" of natural gas. The natural result of the issuance of these rules was confusion on the part of many independent producers as to whether Rule 174 (B) applied to them or not. Their confusion arose principally from the feeling that their sales were not in interstate commerce.

To resolve doubts of this type, petitions were filed with the FPC for orders to remove uncertainties as to status. The object of these petitions was to establish whether FPC jurisdiction prevailed over the operations of the three filing companies, Deep South Oil Company, Shell Oil Company, and Humble Oil and Refining Company.\footnote{FPC Docket Nos. G-2952, G-5261, and G-4671 (1954).}

Deep South is a small individually-owned oil and natural gas company. It has no affiliations with any interstate pipeline. It neither owns nor operates processing or transmission facilities. From one of its fields, the Refugio field, it sells all of its gas, unprocessed, to United Gas, an integrated, interstate pipeline company. The sale point is at meters located at the edge of Deep South's lease. United Gas, although considered an interstate pipe line, sells 90\% of its gas to Texas purchasers in Texas. From another of its fields, the Big Hill field, Deep South sells all of its gas to the Texas Gas Co. under similar circumstances. The unprocessed gas leaves Deep South's control immediately after production and is carried by Texas Gas to the Winnie Processing Plant seven miles away. When the contract in the case was made, it was the policy of Texas Gas' predecessor not to make sales in interstate commerce. Presently, how-
ever, this is not the case, and roughly half of the gas processed at this plant finds its way into interstate commerce. Of the more than 300 wells supplying the Winnie Plant, only fourteen are Deep South’s. Texas Gas Co., acting unilaterally, dedicated the gas from Deep South’s wells to a buyer in interstate commerce.

The fact pattern in the Shell Co. petition is similar. Shell too is an unaffiliated independent producer with no transmission lines or processing plants. From its McElroy field it sells unprocessed gas to the Phillips Co., Phillips gathers this raw natural gas, processes it and sells most of it to the El Paso Natural Gas Pipeline Co., an interstate pipeline company. From its other field, the Nome field, Shell sells its gas to Texas Gas Pipeline Co, which transports it to the Texas Gas Co.’s Winnie Plant for processing, whence it is disposed of in the same manner as the Deep South Co.‘s Big Hill field gas referred to above.

The Humble Oil docket referred to forty-eight contracts for the sale of casinghead gas by an unaffiliated independent producer. Thirty-six of these contracts involved sales to Phillips and other purchasers of casinghead gas. Eight involved sales direct to El Paso Natural Gas Co., an integrated natural gas company which engages in interstate transportation and sale of natural gas. The other four contracts were so-called “Division Orders” which achieve the same result as the thirty-six sales contracts. Some part of the gas involved in each of the forty-eight contracts finds its way into interstate commerce.

The principal argument of the three petitioners was, in essence, that the Phillips decision should be limited to its bare holding. It was contended that “natural gas” as contemplated by the statute does not include the raw, unprocessed, unusable gas which is sold in these transactions, that the gas is not sold “for resale” but for manufacture (processing) or whatever else the purchaser wished to do with the gas, and finally that the sales are not interstate commerce.

On April 5, 1955, the presiding hearing examiner issued his decision. The decision made it clear that he felt that the dicta of the Phillips case was to be followed and that such was the purpose of Rule 174 (B). The argument that the commodity sold in the contracts was not “natural gas” was quickly disposed of. In answer to the contention that the sale is for manufacture and not “for resale,” the examiner points out that it is common knowledge that the purpose of the manufacturer is resale, and further that “it is perfectly clear that the true purpose of the

sale was to provide a market for the casinghead gas (including all component parts thereof) delivered by the seller.\footnote{47 Id. at 40.}

Concerning the principal issue of the case, whether or not the sales were in interstate commerce, it was concluded:

\ldots that the sales of gas here under consideration, and each of them, made by the petitioners herein, respectively, are sales in interstate commerce of natural gas for resale within the purview of the Natural Gas Act. Consequently, \ldots the petitioners, and each of them \ldots is, therefore, a natural-gas company within the meaning of the Act.\footnote{48 Id. at 58-59.}

The principal ground for so holding with regard to the sales and deliveries of gas by Deep South from the Refugio field, Shell from the McElroy field, and all of those by Humble, was that there was a constant uninterrupted flow of gas from the wellhead, through the various gathering lines and processing plants and into the interstate pipe lines.

Thus, the sale by Deep South to United for processing and eventual transmission by pipe line, is held to be in interstate commerce despite the fact that 90% of the gas sold remains in Texas and is resold and consumed locally. The fact that 10% of the gas goes out of state is the basis used for determining that the sale is a dedication to interstate commerce, a wholesale in interstate commerce. Gas is similarly held to be dedicated to interstate commerce when Humble sells it to producers and gatherers who in turn sell any part of it after processing to interstate pipe lines.

With regard to Deep South's Big Hill field gas and Shell's Nome field gas, the examiner was faced with an additional hurdle in that almost half of the gas sold by Texas Gas from the Winnie Plant was disposed of in purely interstate commerce and it was by no means sure that any part of petitioners' small contribution ever reached interstate pipe lines. But the examiner held that it was unnecessary to prove that the very gas which Shell or Deep South contributed went into interstate commerce. Molecule by molecule tracing was said to be impossible. Thus, it was enough if petitioners contributed a percentage of the mass of gas, some of which found its way into interstate commerce. According to these loose notions of sales in interstate commerce, the petitioners' sales were held subject to FPC regulation.

It seems apparent that this decision of the hearing examiner represents the boldest and broadest interpretation of the \textit{Phillips} case. Full effect is given to the \textit{Phillips} dicta in interpreting Rule 174 (B). Of
course, the decision is subject to review by the Commission, and there exists the possibility that it may be modified at that level. But any such speculation must recognize that the Commission itself promulgated Rule 174 (B) and made it applicable to all independent producers without excepting those whose connection with interstate commerce was only theoretical.

The aggressive reasoning of the examiner's decision is somewhat mitigated by the fact that, in these three petitions, no conflict with state regulations was shown and that the states themselves showed no interest in the proceeding. The examiner's opinion states: "The question whether, if the State of Texas had fixed a wellhead price for gas in these fields as was fixed by the Oklahoma Commission . . . recognition would have to be given to such regulation in determining the jurisdiction of the Commission herein is not presented in this proceeding." The decision seems here to be cautiously avoiding direct conflict with Chief Justice Vinson's language in the Interstate case, but it pays less attention than it might to the dicta of the Phillips case that state action since the passage of the Natural Gas Act does not affect the jurisdiction granted the FPC thereunder.

LEGAL CONSIDERATIONS

The most vulnerable aspect of the new FPC view, and therefore the most likely to be attacked by the opponents of federal regulation, is the Commission's remarkable readiness to classify a sale as being "in interstate commerce." Yet, as the examiner's decision well points out, cases which determine whether or not the state has gone too far in exercising its authority to tax or regulate, are not precedents for limiting the scope of federal power over commerce or the meaning of the phrase "in interstate commerce." Cases which have described the power of the states over commerce in the absence of congressional action are clearly not in point in this controversy, for here Congress has acted. By passing the Natural Gas Act, Congress asserted federal jurisdiction over sales and transportation of natural gas "in interstate commerce." As pointed out above, the phrase "in interstate commerce" is indicative of limited jurisdiction. Congress did not intend to preempt the entire field. So long as the courts admit the existence of what has heretofore been called "intra-

49 Id. at 53.
50 331 U.S. 682, 690 (1947).
52 See § 1(b), Natural Gas Act, supra.
53 See note 36 supra.
state commerce", many independent producers have reason to keep alive their hopes of escaping federal jurisdiction.

A strong case may be made for the position that a sale to a processor-transporter of natural gas who eventually ships across state lines but 10% of all the natural gas he purchases and processes is not a sale in interstate commerce. It is reasonable to assert that sales made directly to interstate pipeline companies or sales dedicated by contract to interstate commerce are clearly within the scope of regulation embraced by the Natural Gas Act and passed upon in the Phillips case. Yet, at the same time, substantial doubt must be admitted to exist as to the fitness of declaring that every transfer of natural gas, any part of which may eventually reach interstate commerce, is subject to the federal regulations set forth in the Commission's Rule 174 (B).

A significant development in recent Supreme Court cases may afford independent producers some comfort. In three major cases, the Court has used the completion of production and gathering as a jurisdictional boundary. In each case the jurisdictional issue involved a point after processing. In Mich.-Wis. Pipe Line Co. v. Calvert,54 the Court struck down a Texas tax, the incidence of which was after production, gathering and processing were completed. In the Phillips case, discussed earlier, the Court made it clear that after production and gathering had ended, the sale and transportation of natural gas was subject only to FPC regulation. Finally in the case of Natural Gas Pipeline Co. v. Panoma Corp.55 the Court, in a per curiam decision, struck down an attempt by Oklahoma to set a minimum price on gas, the sale of which occurred after production, gathering and processing had ended. The Court stated its position in the following succinct language:

In this case Oklahoma has attempted to fix a minimum price to be paid for natural gas, after its production and gathering has ended, by a company which transports the gas for resale in interstate commerce. We held in Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 . . . that such a sale and transportation cannot be regulated by a State but are subject to the exclusive regulation of the Federal Power Commission. The Phillips case, therefore, controls this one.

We disagree with the contention of the respondents that Cities Service Gas Co. v. Peerless Oil and Gas Co., 340 U.S. 179, . . . and Phillips Petroleum Co. v. Oklahoma, 340 U.S. 190, . . . are applicable here. In those cases we were dealing with constitutional questions and not the construction of the Natural Gas Act . . . . The later question was specifically not passed upon in those cases.56

54 See note 39 supra.
56 Ibid.
The use of processing as a test to determine when production and gathering has ended may prove significant in future cases. Despite the dicta of the Phillips case, the use of processing as a jurisdictional boundary may gain wider acceptance. No Supreme Court holding has asserted federal jurisdiction over gas not yet processed.

**Policy Considerations**

It is, of course, true that to look at a question solely from a legal viewpoint while failing to consider the real interests at stake is an empty exercise. Therefore, it would be well to mention some of the considerations which may influence Congress in its present efforts at reshaping natural gas legislation. These same considerations may well influence the courts in their attitude toward the problems arising under the present Act.

From the consumer standpoint, the advantages of a federal regulatory set-up are obvious. Much of the good that regulation of pipeline companies can do is undone if the prices those companies pay for natural gas goes uncontrolled and may possibly be subject to manipulation by sympathetic or interested parties. The virtual monopoly that pipelines have in some consuming states put those states at the mercy of those who are in a position to supply the pipeline company with gas.

With regard to the producers' position, there is the fear that direct or indirect federal regulation of the exploration and development of natural gas resources as though they were public utilities, with the possibility of a small fixed rate of return on expenditures, might make the risks of the business unattractive and lead to the stifling of the search for gas, and the waste of such gas as may be found incidental to other operations in the petroleum industry.

While the public interest may be thought to favor reasonable limits on producer profits, it must be pointed out that the present unregulated system has seen public demand on the open market rise every year to new heights. At the same time, the supply of natural gas is known to be limited, and the many millions of dollars invested in gas burning equipment may be an obstacle to reconversion to other fuel sources if the gas supply becomes too scarce and the gas too expensive. The gas industry's

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57 Wisconsin obtains 95% of its natural gas from a single company. See note 9 supra.
sick competitor, the coal industry, cautions that the above danger to the consumer is enhanced by disposal practices which cause much gas (called "dump gas") to be burned for public power and industrial needs at prices well below market value.

**Conclusions**

The conclusions to be drawn from a survey of the jurisdictional problems in the natural gas field are necessarily vague. The Phillips decision exploded a pattern which for sixteen years had determined the area of FPC jurisdiction. The dust is settling slowly, the more so because of the sweeping dicta of the Phillips decision and the always perplexing problem of differentiating between interstate and intrastate commerce. But even in the present confusion, some newer developments begin to loom clear. The states have lost all power to fix prices, regulate generally or tax the operations of natural gas companies once production and gathering have been completed, regardless of whether or not the gas has as yet been marketed. It seems obvious that further inroads into areas formerly regulated by the states are occurring. The actions before administrative boards, courts and congressional committees will finally effect the realignment. But, for the present, uncertainty is the keynote.

JAMES A. BELSON
NOTES

SECTION 7 OF THE CLAYTON ACT: PROBLEMS PRESENTED BY THE AUTOMOBILE MERGERS

The recent approval by the Department of Justice of two mergers in the automobile industry\(^1\) has brought once again to the fore the subject of the permissible scope of corporate integrations under Section 7 of the Clayton Act. Since the amendment of that section in 1950, there have been but few court decisions interpreting the new language, and the precise effect of the section necessarily remains in doubt. Nevertheless, from a consideration of the decisions under the earlier section and the reasons for its amendment, the probable basis for the approval of the automobile industry mergers, and the few decisions under the new section, some tentative conclusions can be drawn as to the probable application of the section to future mergers.

I. HISTORY OF THE ACT

Section 7 of the Clayton Act, as originally passed in 1914, was essentially a supplement to the Sherman Anti-Trust Act.\(^2\) Induced in part by the flood of corporate mergers taking place at the time, it was designed to prevent, by stemming the tide of corporate integrations, the potential violations of the Sherman Act threatened by the increasing industrial concentration. More specifically it was aimed at the acquisition by one corporation of control over another which—although not in itself constituting a violation of the Sherman Act as a combination in restraint of trade or an attempt to monopolize—would probably cause a significant reduction in the vigor of competition.\(^3\) To this end, Section 7 provided that:

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired

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\(^1\) The Hudson-Nash merger was approved by a clearance letter from the Department of Justice, January, 1954. The Department issued a clearance letter approving the Packard-Studebaker merger in June, 1954. These letters are in no way binding on the Government. They only indicate that at the time permission is asked, the Justice Department does not see fit to prosecute. They may do so in the future, however.


and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.\textsuperscript{4}

One major inadequacy of this provision is readily apparent: it applied only to acquisitions of stock and not to acquisitions of assets. Hence mergers which would be prohibited if accomplished by the purchase of stock could be readily accomplished by the equally effective device of the purchase of assets,\textsuperscript{5} and this indeed soon became the practice.\textsuperscript{6} This glaring loophole was closed by the 1950 amendment, however, and is of little significance for present purposes.

Of greater importance to an understanding of the present provision are the standards developed under the original Act to delineate between prohibited and permitted mergers. Literally applied, the language of Section 7 would have prohibited all stock-acquisition mergers between any companies formerly in competition with each other, regardless of the effect of the merger on competition generally, since the merger would necessarily foreclose competition between the acquired and the acquiring corporations. The courts, however, reasoning that Congress could hardly have intended to prevent otherwise legitimate business consolidations in the absence of any substantial impact on the public interest, soon reverted to the old "Sherman Act test" and held the prohibition to be applicable only if the effect of the merger would be to lessen competition to such a substantial degree as to injuriously affect the public interest.\textsuperscript{7} And in \textit{International Shoe Co. v. FTC},\textsuperscript{8} the Supreme Court gave its approval to this standard.

The result of this interpretation was to destroy the significance of Section 7 even in the area of stock acquisitions, since to establish a violation effectively it was necessary to prove at the same time a violation of the Sherman Act. It was this interpretation, together with the omission of any limitation on the acquisition of assets—which, indeed, was

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\textsuperscript{4} 38 Stat. 731 (1914).
\textsuperscript{5} See, e.g., United States v. Columbia Steel Co., 334 U.S. 498 (1948), involving the acquisition by U.S. Steel of a west coast producer. Since the acquisition was accomplished by a purchase of assets, it was not prohibited by the Clayton Act, and the prosecution had to be based on the Sherman Act. As such it failed because of an inability to establish that the combination was an unreasonable restraint of trade.
\textsuperscript{6} 52 Col. L. Rev. 766, 767-68 (1952).
\textsuperscript{7} Vivaudou Inc. v. F.T.C., 54 F.2d 273 (2d Cir. 1931); Temple Anthracite Coal Co. v. F.T.C., 51 F.2d 656 (3d Cir. 1931); United States v. Republic Steel Corp., 11 F. Supp. 117 (N.D. Ohio 1935); see Irvine, The Uncertainties of Section 7 of the Clayton Act, 14 Cornell L.Q. 28, 40 (1928) for a review of the earlier cases.
\textsuperscript{8} 280 U.S. 291 (1930).
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enough by itself to destroy the practical significance of the section—that ultimately induced Congress in 1950 to amend the section.

The amendment revised Section 7 to read:

No corporation engaged in commerce shall acquire directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.\(^9\)

Thus not only was the section expanded to include the acquisition of assets but also the competitive impact standard of the Sherman Act was changed in several respects. The test was made the effect on competition in the line of commerce generally rather than simply the lessening of competition between the acquired and the acquiring corporation, and the area in which the impact on competition was to be considered was broadened to "any section of the country" rather than "any section or community." The amended section thus avoided the arbitrary prohibition of all mergers implied by the literal language of the original Act and substituted what would appear to have been a more lenient standard for determining the propriety of a merger.

At the same time, however, Congress seems to have intended to impose a stricter test than had in fact been applied under the old section. The dominant theme in the arguments for amendment of Section 7 was the need to increase the effectiveness of the Clayton Act's prohibitions. The Senate committee report expressly repudiated the decisions applying the "Sherman Act test,"\(^10\) such as the International Shoe case, and both the Senate and House committee reports indicate an intention to enact a standard which, although not so narrow as to prohibit all corporate mergers, would be stricter than that applicable to the Sherman Act.\(^11\) That is, by liberalizing the language of the section, Congress seems to have intended, on the one hand, to remove the need for the judicial invocation of the Sherman Act standards\(^12\) and, on the other hand, to impose an in-between standard susceptible of a literal application.\(^13\) On this basis, at least one district court has found in the

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\(^13\) Thus it was believed, for example, that the steel merger which was held not to vio-
amendment an intention to disavow the earlier decisions and has declared the test under the new section to be simply whether there is a reasonable probability that the acquisition will be effective substantially to lessen competition.\textsuperscript{14}

\section*{II. The New Criteria}

Granted that the amended Section 7 was intended to impose a stricter test than the "unreasonable restraint of trade" test under the Sherman Act, there still remains the problem of what criteria are to be used to determine whether the effect of a given merger "may be substantially to lessen competition, or to tend to create a monopoly."

One possibility is the test applied by the Supreme Court under the identical language of Section 3 of the Act, which prohibits tying agreements and exclusive dealing arrangements where the effect of such agreements "may be to substantially lessen competition or tend to create a monopoly in any line of commerce." In the so-called \textit{Standard Stations} case,\textsuperscript{16} the Court held that a violation of this section was established by evidence simply that the exclusive dealing arrangements covered a substantial portion of the retail outlets in the field, without requiring any further showing of the impact of the device on the competitive structure of the industry.\textsuperscript{16} This purely quantitative test, however, has been strongly criticized as failing to take into account the many other economic factors which will determine the real effect of a given practice on competition within the industry—e.g., the structure of the industry and the practice of the other firms in the industry, the need of the device to preserve an effective competitive position, and so forth.\textsuperscript{17}

And whatever the merits of the test as applied to Section 3, there seem to be strong reasons for not extending it to Section 7, despite the identity of language. In the first place, unlike the temporary marketing devices dealt with by Section 3, the subject matter of Section 7 is the very structure and organization of the economy. While perhaps a


\textsuperscript{15} Standard Oil Co. v. United States, 337 U.S. 293 (1949).

\textsuperscript{16} See also International Salt Co. v. United States, 332 U.S. 392 (1947); United States v. Richfield Oil Corp., 343 U.S. 922 (1952); Automatic Canteen Co. of America v. F.T.C., 194 F.2d 433 (7th Cir. 1952), reversed on other grounds, 346 U.S. 61 (1953).

\textsuperscript{17} Lockhart and Sacks, The Relevance of Economic Factors in Determining Whether Exclusive Arrangements Violate Section 3 of the Clayton Act, 65 Harv. L. Rev. 913 (1952).
simple and clear test for determining the legality of the multitudinous marketing systems that might be employed by industry is of primary importance, it would seem that permanent corporate rearrangements should be prohibited only after the most extensive analysis of the economic effect of the action. Moreover, the purposes of the two sections are quite different and thus different tests would seem to be relevant. While the primary purpose of Section 3 is the protection of retailers against particular distribution methods imposed on them by wholesaler, Section 7 is directed against the general harmful effects on the competitive system of excessive corporate concentration. While a single test such as that used in the Standard Stations case might be adequate for the former, no single characteristic of a merger is sufficient to determine its effect on competition as a whole.  

Rather than any such single test, it would seem that the proper application of Section 7 requires an exhaustive consideration in each case of all the economic factors bearing on the probable impact of the proposed merger on competition within the industry. Only by such an analysis can it be determined whether there inheres in a merger a reasonable probability of effecting a substantial lessening of competition in the future. This broad approach to the problem seems to be that adopted by the Federal Trade Commission in its recent decision in Pillsbury Mills, Inc.:  

As we see it, amended Section 7 sought to reach the mergers embraced within its sphere in their incipiency, and to determine their legality by tests of its own. These are not the rule of reason of the Sherman Act, that is, unreasonable restraint of trade, nor are Section 7 prohibitions to be added to the list of per se violations. Somewhere in between is Section 7, which prohibits acts that "may" happen in a particular market, that looks to "a reasonable probability," to "substantial" economic consequences, to acts that "tend" to a result. Over all is the broad purpose to supplement the Sherman Act and to reach incipient restraints.  

While these are far from specific standards—specificity would in any event be inconsistent with the "convenient vagueness" of antitrust prohibitions—they can, we believe, be applied on a case-by-case basis. We think the present case is the type Congress had in mind—one that presents a set of facts which would be insufficient under the Sherman Act but nonetheless establishes, prima facie, a violation of Section 7 of the Clayton Act.  

While the approach suggested admittedly provides no simple tests for

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19 Id. at 8.
20 Id. at 13. The Commission held that a prima facie case of violation had been established and returned the case to the trial examiner for rehearing.
determining the legality of a merger, there seems no alternative to such a direct evaluation of economic consequences if the purpose of Section 7 is to be effectuated. Nor is the application of this approach as difficult as it at first appears, for once the problem is viewed in this light, the relevant factors and their significance in a given case will often be apparent. While an exhaustive listing of all the possible factors to be considered will not be attempted, the recent mergers in the automobile industry provide an excellent illustration of this approach. It is believed that the explanation of the Justice Department's approval of the mergers lies in just such an economic evaluation and that an analysis of the factors which seem to have prompted this approval will disclose many of the major criteria to be applied under Section 7.

III. THE AUTOMOBILE MERGERS—A CASE STUDY

(a) Relative size of merged units.—Perhaps the most important factor in the approval of the automobile mergers was that in both cases the mergers were of relatively small companies in an industry dominated by very large companies. According to estimates, Studebaker-Packard and Hudson-Nash each had only about 3 per cent of the total market after the mergers were consummated. The merger of two small companies, such as Studebaker and Packard, in a field dominated by giants hardly seems the sort of integration that Section 7 was meant to prohibit.21 Rather than lessening competition the result of such a merger is to create a stronger competitive force. Clearly a merger should not be prohibited where, as here, it actively fosters, rather than destroys, competition.

A related factor is the relative size of the acquiring and the acquired corporations prior to the merger. The major merger movements in the past which led to the enactment of Section 7 were almost invariably characterized by the acquisition by large corporations of control over their small competitors22 and any such attempts will undoubtedly be viewed with suspicion. Not only does such a combination result in the augmentation of an already dangerous size, but it is less likely to have been prompted by considerations of more effectively meeting competition. In such a case the reduction in the number of units is not compensated for by the creation of a more effective competing unit.

(b) Preservation of competing units.—Not only may a merger in

some cases foster increased competition, but it may also sometimes be necessary to preserve the merged firms as a competing unit. Thus it is generally agreed that the Act does not prohibit the acquisition by a competitor of a bankrupt or near bankrupt firm.\textsuperscript{23} While it does not appear that bankruptcy was imminent in the automobile cases, there were definite indications of financial difficulties which may well have been a factor in the decisions to merge.

(c) \textit{Number and strength of remaining firms}.—In general, the greater the number of the remaining firms in the industry, the more likely it is that a merger would be approved.\textsuperscript{24} This factor would seem to have militated against the approval of the automobile mergers, but it was apparently overcome by the advantages of increasing the competitive strength of the small firms. However, it might result in disapproval of any further mergers in the automobile industry—even between two small units such as Hudson-Nash and Studebaker-Packard. Since the number of competitors in this industry is already so small, any further reduction in the number might well be viewed with alarm.

(d) \textit{Ease of entry}.—Related to the consideration of the number of remaining firms is the ease with which new firms will be able to enter the field after the merger is completed—that is, the number of potential competitors. In the automobile industry of course new firms can enter with only great difficulty, and at first sight this would seem to have been a reason for disapproval of the mergers. The mergers did not, however, have any substantial effect in increasing the difficulty of entry, and in this case the existing difficulty simply served to emphasize the need to preserve effective competition among the already existing companies by permitting the small companies to form, through the mergers, stronger competitive units.

IV. \textsc{Future Mergers}

A peek into the crystal ball is always an open invitation to disastrous criticism. However, the present structure of the United States automobile industry offers a tempting inducement to throw caution to the winds and venture—somewhat timidly to be sure—into the role of the seer.

\textsuperscript{23} International Shoe Co. v. F.T.C., 280 U.S. 291 (1930). Here the acquired company was in such bad financial condition that it either had to sell to International or close its doors. The Court said such a sale had no purpose to lessen competition, so it was not, in contemplation of law, prejudicial to the public interest and did not substantially lessen competition or restrain commerce; H.R. Rep. No. 1191, 81st Cong., 1st Sess. 6 (1949).

\textsuperscript{24} Cf. id. at 8.
Today, five firms completely control the United States automobile market, General Motors, Ford, Chrysler, Studebaker-Packard and Nash-Hudson. The latter two together account for approximately six per cent of the "made-in-U.S." automobiles sold, and the former, the "Big Three," for virtually the entire remaining 94 per cent.

Mergers among these competitors are most likely to involve joinder of the two small units together, or absorption of one, or both of them, by one, or another, of the "Big Three". In view of the new criteria applicable to Section 7, how should the courts treat such mergers?

In the event that one of the smaller units merged with its counterpart, and the merged unit retained a share of the market equal to that formerly held by the individual companies, approval of the merger would seem to be indicated. The "acquiring" corporation and the "acquired" corporation are both relatively small, and the remaining competitors are unaffected in their proportionate share of the market. There is no reasonable probability of a substantial lessening of competition. The newcomer's difficulty of entry into the field is neither increased nor decreased.

The approval of this merger, even though indicated, is, of course, highly problematical. It is entirely possible that the Government might view this further reduction in the number of competitors in the automobile industry with alarm. Such a future merger might well be considered almost an automatic violation of Section 7. All in all, however, this type of merger should merit approval on the ground that it tends to increase, rather than decrease, the competitive forces at work in the automobile market.

Different considerations would be presented, however, by an attempt ed merger between a member of the "Big Three" and one of its smaller competitors. Here, the "acquiring" firm would already control nearly 50 per cent of the market, and the "acquired" firm only three per cent. At this level merger is almost certain to cause a substantial imbalance in the market with a consequent decrease in the proportionate share of remaining competitors. The inevitable result of such a merger would be the economic collapse of the remaining smaller unit, or its compulsory merger with one of the "Big Three".

The field would thus be reduced to the "Big Three". This situation presents an illusion of competition, but only an illusion. It is almost certain that real competition would soon cease to exist among the three remaining giants. It is naive to believe that they would not soon seize the easy opportunity to minimize their difficulties by price-fixing agree-
ments, production quota arrangements, and supply controls. Thus, although the structure of the industry would remain competitive, an effective monopoly would exist.

This concentration of power that reduction to the "Big Three" would bring about is precisely the sort of thing that the Sherman and Clayton Acts are designed to prevent. An apt comment, contained in Mr. Justice Douglas' eloquent dissent in the Columbia Steel Company case, is pertinent here:

The philosophy of the Sherman Act is that such power should not exist. For all power tends to develop into a government in itself. Power that controls the economy should be in the hands of elected representatives of the people, not in the hands of an industrial oligarchy. Industrial power should be decentralized. It should be scattered into many hands so that the fortunes of the people will not be dependent on the whim or caprice, the political prejudices, the emotional stability of a few self-appointed men. That is the philosophy and the command of the Sherman Act. It is founded on a theory of hostility to the concentration in private hands of power so great that only a government of the people should have it.25

Courts must be wary, therefore, and apply the new criteria with a long-range view to the possibility of eventual monopoly. In the automobile industry there is particular danger of monopoly whenever a member of the "Big Three" is a party to a proposed merger. The lessons taught by the already highly centralized structure of that industry should serve as useful guideposts measuring the desirability of other industrial mergers of like character.

V. Conclusion

On the whole, the 1950 amendment to Section 7 seems greatly to have increased its effectiveness as an instrument to arrest in their incipiency potential concentrations of economic power. By avoiding both the absolute prohibitions of its predecessor and the limited scope of the Sherman Act, the new Section 7 provides the flexibility necessary to achieve its purpose. The cost of such flexibility is of course the loss of hard and fast rules, but it is believed that the standard now provided—the probable lessening of competition or the tendency to create a monopoly—is a workable one. If applied in the light of broad economic factors such as those that seem to have been determinative in the automobile cases, the new section should provide a salutary influence in preserving a competitive corporate structure.

THOMAS H. POYE

25 United States v. Columbia Steel Co., 334 U.S. 498, 534 (1948) (Dissenting opinion); see note 5 supra.
THE POWER OF THE EXECUTIVE TO WITHHOLD INFORMATION FROM CONGRESSIONAL INVESTIGATING COMMITTEES

The power of congressional committees has become one of the most controversial subjects of our day. It has received widespread publicity in television, radio and the press, and the problems created by Congress' power to investigate are the object of increasing study by lawyers and by the courts.¹

The functions of congressional committees include: the securing of information to enable Congress to legislate wisely; the examining of activities of administrative agencies in their implementation of the laws; and the scrutinizing of the expenditure of public funds. When engaged in one or more of these activities, a committee may summon witnesses and require their testimony under threat of contempt proceedings.

Article I, Section I, of the Constitution placed "all legislative Powers" in a Congress consisting of a Senate and House of Representatives. The Constitution is silent as to the power of Congress to compel witnesses to testify or be cited for contempt. But, the power itself is one of the inherent rights of a legislature. If kept within proper bounds, it is "an attribute of the power to legislate."² The effective contempt statute originated in 1857 and is very similar to the law in effect today.³

Considerable attention has been given to the Fifth Amendment as it relates to congressional investigations.⁴ Quite distinct problems arose during the Army-McCarthy hearings over the power of a committee to require members of the executive department to produce requested information. Basic to this issue is the effect of the doctrine of separation of powers on the investigative powers of Congress.

¹ One of the better recent studies is represented in the Symposium on Congressional Hearings and Investigation in 14 Fed. B.J. 3-181 (1954).
³ 11 Stat. 155 (1880), 2 U.S.C. § 192 (1952). The provision presently reads: "Refusal of witness to testify. Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee . . . or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."
The Problem

On January 21, 1954, John G. Adams, Counselor for the Department of the Army, participated in a meeting of persons from executive departments, relative to charges and countercharges between the Army and Senator Joseph R. McCarthy of Wisconsin. At a hearing of a Special Subcommittee—the investigating the various accusations, Mr. Adams was questioned as to the nature of these discussions. His counsel, Mr. Welch, replied that he had been ordered not to testify concerning the meeting. Mr. Adams was instructed to furnish the Subcommittee with a written communication concerning this decision. In response, a letter from President Eisenhower to the Secretary of Defense was presented to the Subcommittee together with a memorandum from the Attorney General defending the President's action. In his letter, the President assumed direct responsibility for withholding the information sought. In doing so, he raised anew a persistent and perplexing problem.

Separation of Powers

In separate Articles, the Constitution provides for three branches of government. The First Article gives to Congress "all legislative Powers herein granted"; the president, by the Second Article, is given "the executive Power"; and the Third Article states that "the judicial Power of the United States" shall be vested in the Supreme Court and such in-

7 100 Cong. Rec. 6621 (1954). The President's letter is a classic statement of the doctrine of separation of powers. In pertinent part it read:

"Because it is essential to efficient and effective administration that employees of the executive branch be in a position to be completely candid in advising with each other on official matters, and because it is not in the public interest that any of their conversations or communications or any documents or reproductions, concerning such advice be disclosed, you will instruct employees of your Department that in all their appearances before the subcommittee of the Senate Committee on Government Operations regarding the inquiry now before it they are not to testify to any such conversations or communications or to produce any such documents or reproductions.

"I direct this action so as to maintain the proper separation of powers between the executive and legislative branches of the Government in accordance with the responsibilities and duties under the Constitution. This separation is vital to preclude the exercise of arbitrary power by any branch of the Government."
ferior courts as Congress may establish. The doctrine of separation of powers has as its essential aim the maintenance, to the extent feasible, of independence of judgment and action within each branch of government. Except as authorized by the Constitution, no one of the three branches is to encroach upon another. In this manner a dangerous concentration of powers was sought to be avoided, and governmental functions were retained by those departments best qualified to exercise them.8

Madison states in The Federalist:

... The accumulation of all powers, Legislative Executive, and Judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny. Were the Federal Constitution, therefore, really chargeable with this accumulation of power ... having a dangerous tendency to such an accumulation, no further arguments would be necessary to inspire a universal reprobation of the system.9

In continuing, he demonstrated that the doctrine does not mean that each branch should be antagonistic to the others, but that cooperation between them was essential for successful government.10 It is interesting to note that Madison felt the legislative department had the easiest road to encroachment on the other branches of government.

The Legislative department derives a superiority in our Governments from other circumstances. Its constitutional powers being at once more extensive, and less susceptible of precise limits, it can, with the greater facility, mask, under complicated ... and indirect measures, and the encroachments which it makes on the coordinate departments. It is not unfrequently a question of real nicety in Legislative bodies, whether the operation of a particular measure will, or will not extend beyond the Legislative sphere. On the other side, the Executive power being restrained within a narrower compass, and being more simple in its nature, and the judiciary, being described by landmarks, still less uncertain, projects of usurpation by either of these departments would immediately betray and defeat themselves.11

To legislate and to appropriate money for governmental expenditures, Congress must be informed of the activities of the executive branch. Comity and reasonableness on the part of the executive is necessary for orderly government. Yet, it would seem obvious that Congress may not

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8 For a fascinating review of the doctrine as applied in the United States and abroad see Vanderbilt, The Doctrine of the Separation of Powers and its Present-Day Significance (1953).
10 Madison observed that none of the state governments in existence at that time applied the doctrine literally.
assert a right to all the papers and information held by the executive department. Such a position would imply that Congress might also demand research data, proposed opinions, and like material of Supreme Court Justices. Conflict has arisen when Congress and its committees have failed to recognize a discretionary right in the executive to withhold information from the legislative branch.

**CONGRESSIONAL INACTION AND THE PRECEDENT ARGUMENT**

The executive, in its refusal to furnish data requested by Congress, bases its position mainly on the "precedent" argument. This is the basis of the memorandum from the Attorney General which accompanied the President's letter to the Secretary of Defense. After a short statement of the validity of the President's action, the memorandum of the Attorney General cited previous instances of the refusal of the executive to furnish information requested by Congress.

The House of Representatives, in 1792, authorized a committee to inquire into the causes of a failure of an expedition under Major General St. Clair. In the process of this investigation, the Committee asked the executive branch to furnish papers pertaining to the campaign. Washington, with his cabinet, came to the conclusion:

First, that the House was an inquest, and therefore might institute inquiries. Second, that it might call for papers generally. Third, that the executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would injure the public; consequently were to exercise a discretion. Fourth, that neither the committee nor the House had a right to call on the Head of a Department, who and whose papers were under the President alone; but that the committee should instruct their chairman to move the House to address the President.12

This was the first statement by the executive of his power to refuse to furnish information to a congressional investigating committee. As a recent book points out: "At the time, this aroused no controversy, for the Cabinet agreed that, so far as the St. Clair records were concerned, 'There was not a paper which might not be properly produced.' Accordingly, on April 4, the President directed the Secretary of War to lay before the House committee the records it desired."13 Other requests by congressional committees were not resolved in such an amicable manner. The following incidents from the Attorney General's memorandum are illustrative.14

12 1 Works of Thomas Jefferson 189-190 (Ford 1892).
14 See Wolkinson, Demands of Congressional Committees for Executive Papers, 10 Fed. B.J. 103 (1949).
### Date

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<thead>
<tr>
<th>Date</th>
<th>Type of Document Refused</th>
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<tr>
<td>February 22, 1950</td>
<td>Senate Res. 231 directing Senate Subcommittee to procure State Department loyalty files was met with President Truman's refusal, following vigorous opposition of J. Edgar Hoover.</td>
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<td>March 27, 1950</td>
<td>Attorney General and Director of FBI appeared before Senate Subcommittee. Mr. Hoover's historic statement of reasons for refusing to furnish raw files approved by Attorney General.</td>
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<td>May 16, 1951</td>
<td>General Bradley refused to divulge conversation between President and his advisors to combine Senate foreign Relations and Armed Services Committees.</td>
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<td>January 31, 1952</td>
<td>President Truman directed Secretary of State to refuse to Senate Internal Security Subcommittee the reports and views of foreign service officers.</td>
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<td>April 22, 1952</td>
<td>Acting Attorney General Perlman laid down procedure for complying with requests for inspection of Department of Justice files by Committee on Judiciary.</td>
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<td>Request on open cases would not be honored.</td>
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<td>Status reports will be furnished.</td>
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<td>As to closed cases, files would be made available.</td>
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<td>All FBI reports and confidential information would not be made available.</td>
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<td>As to personal files, they are never disclosed.</td>
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<tr>
<td>April 3, 1952</td>
<td>President Truman instructed Secretary of State to withhold from Senate Appropriations Subcommittee files on loyalty and security investigations of employees—policy to apply to all executive agencies. The names of individuals determined to be security risks would not be divulged.</td>
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In replying to the precedent argument, the legislative proponent relied most strongly on the numerous instances in which the executive departments have furnished information in response to a request or subpoena. But up to the present date, Congress has taken no effective measures to insure a compliance with its requests by the executive branch when the information requested has not been freely produced. There have, however, been some attempts in this direction.

During Cleveland's Administration, the President removed one George Duskin as District Attorney for the Southern District of Alabama and announced the appointment of a John Burnett, whose name was forwarded to the Senate for confirmation. The Senate Judiciary Committee

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16 Elaborate instances are given in 17 Cong. Rec. 2216-2221 (1886).
asked the Attorney General to supply it with all information on Duskin's conduct in office. The Attorney General replied that the President did not consider "that the public interest will be promoted by a compliance with said resolution and the transmission of the papers. . . ."17 This set off a lengthy congressional debate on the power of the executive to refuse to furnish such information. A majority and minority report was issued on a resolution condemning the Attorney General for his refusal to furnish the information requested.

The majority was of the opinion that a congressional committee could demand any information it desired of the executive. Senator Wilson of Iowa complained bitterly of the Administration's action:

... we must look elsewhere than in the field of public interest for the true reason for this most extraordinary position of this administration. . . . He now confounds the public interest with the partisan interest of his administration. . . . The administration has discovered that it has secrets, and glass doors are no longer used. Its manipulation of official patronage, in violation of its own declarations in favor of better methods, has made it the custodian of official files which it has not the courage to disclose.18

It is difficult for the president to refute this approach to the problem unless he makes public the information involved. This, of course, is not feasible if disclosure would truly be against the public interest. In the Duskin case, even the minority report denied the President's authority to withhold any document other than his private papers.19

Although the Senate adopted the face-saving resolution condemning the Attorney General,20 the President prevailed, for no information on Duskin's dismissal was furnished, and Cleveland's nomination of his successor was confirmed by the Senate.

Again, during the Theodore Roosevelt Administration, the executive was challenged by the legislative branch. The Senate adopted a resolution21 directing the Attorney General to inform it whether certain legal

17 17 Cong. Rec. 2213 (1886).
18 Id. at 2295.
19 The majority and minority reports are in 7 Sen. Misc. Documents 232 (1893). "The Minority admit, once for all, that any and every public document paper, or record on the files of any Department, or in the possession of the President, relating to any subject whatever, over which either House of Congress has any grant of power, jurisdiction, or control under the Constitution, is subject to the call or inspection of either House for use in the exercise of its Constitutional powers and Jurisdictions." 17 Cong. Rec. 2215 (1886).
20 17 Cong. Rec. 2810 (1886).
proceedings had been taken against the United States Steel Corporation, and if not the reason for inaction. In a letter to the Senate, President Roosevelt said the Attorney General had informed him there was no ground for legal action, and the Senate had been given all relative information. He stated further:

... I feel bound, however, to add that I have instructed the Attorney General not to respond to that portion of the resolution which calls for a statement of his reason for nonaction. I have done so because I do not conceive it to be within the authority of the Senate to give directions of this character to the head of an executive department, or to demand from him reasons for his action. Heads of the executive departments are subject to the Constitution, and to laws passed by Congress in pursuance of the Constitution, and to the directions of the President of the United States, but to no other direction whatever.22

The Senate, having been unable to get the documents from the Attorney General, thereafter summoned Herbert Knox Smith, Head of the Bureau of Corporations, to appear before its Committee on Judiciary. When he appeared, the committee informed him that if he did not at once transmit the papers and documents requested, the Senate would order his imprisonment. Mr. Smith reported this to the President and the latter ordered him in writing to turn the papers over to him, and defied the Senate to do its worst.23

Thwarted in its efforts to obtain the records from two heads of departments there was introduced the following Senate resolution:

"Resolved by the Senate, That any and every public document, paper or record, or copy thereof, on the files of any department of the Government, relating to any subject whatever over which Congress has any grant of power, jurisdiction or control, under the Constitution and any information relative thereto within the possession of the officers of the department, is subject to the call or inspection of the Senate for its use in the exercise of its constitutional powers and jurisdictions."24

During the prolonged debate that followed, Senator Bacon of Georgia attacked President Roosevelt’s position, arguing that the Senate is the judge of its need, and when that need has been determined, neither the president nor the head of any department may refuse its demands.25 An impasse between the two branches of government was again reached, but in this instance, no affirmative action was taken on the resolution as it was committed to the Judiciary Committee26 where it died.

23 Butt, the Letters of Archie Butt 305-306 (1924).
25 Id. at 846.
26 Id. at 3740.
During the course of debate on the resolution, Senator Bacon advanced another of the arguments supporting the right of Congress to demand any paper from the executive departments. In discussing the creation and maintenance of such departments, he said: "Congress creates them; Congress confers upon them every power which they have; Congress can take from them their power or can give more power. It can create other departments and it can destroy those which exist." 27

He implied that, because Congress could abolish the various departments, it had complete authority other them—including the right to demand any information in their possession. The answer of the executive to this reasoning is that the separation of powers doctrine established by the Constitution 28 places responsibility for executive departments in the President and forbids Congressional control. In a message to the Senate in 1886, President Cleveland said:

... though public officials of the United States might be created by laws enacted by the two Houses of Congress, this fact did not necessarily subject their offices to congressional control, but, on the contrary, that "these instrumentalities were created for the benefit of the people, and to answer the general purposes of government under the Constitution and the laws; and that they are unencumbered by any lien in favor of either branch of Congress growing out of their construction, and unembarrassed by any obligation to the Senate as the price of their creation." 29

The legislative history of Section 136 of the Legislative Reorganization Act of 1946 demonstrates that Congress has been aware of the Constitutional problems involved. Section 136, entitled Legislative Oversight by Standing Committees of Government, reads as follows:

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. 30 [Emphasis supplied.]

The word watchfulness was not the language recommended by the committee report to the House of Representatives. In that report, it was

27 Id. at 843.
30 60 Stat. 832 (1946).
recommended "That the standing committees of both Houses be empowered to carry on continuing review and oversight of legislation and agencies within their jurisdiction. . . ."31 The report said that although a separation of powers was established by the Constitution, it was not intended that each branch would go its own separate way. "Each year the gulf between Capitol Hill and the departments widens."32 Legislative supervision was thus necessary. It was stated by Senator La Follette:

. . . Congress has long lacked adequate facilities for the continuous inspection and review of administrative performance.

. . . Armed with the power of subpoena and staffed with qualified specialists in their respective provinces of public affairs, these committees would conduct continuous review of the activities of the agencies administering laws originally reported by the legislative committees.33

These proposals were forcefully challenged by Senator Donnell and other Senators on the ground that review of administrative agencies implied Congressional authority over the executive departments. The word review was changed to watchfulness.34 At that point it seemed that Congress was aware of the executive department as an equal branch of government. Senator John McClellan of Arkansas, however, offered an amendment aimed at giving investigating committees the power to subpoena the heads of executive agencies. He also wanted the contempt statute35 to apply to these proceedings.36 This amendment was defeated after very little debate by a voice vote.37

In 1948, the controversy between the legislative and executive branches almost reached a climax. The House Committee on Un-American Activities released a report which charged that Dr. Edward Condon, Director of the Bureau of Standards, was a weak link in national security and requested the Secretary of Commerce to turn over his personnel file, including the FBI report on him. This was refused. On March 13, 1948, President Truman issued a directive forbidding all executive departments and agencies to furnish information or reports concerning loyalty of their employees to any court or congressional committee, until the president had determined what response would be in the public interest.38

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32 Ibid.
34 92 Cong. Rec. 6445-7 (1946).
37 Id. at 6566.
At the same time the Condon report appeared, Congressman Hoffman introduced a resolution which had as its purpose:

... to make available to any and all standing, special, or select committees ... information which may be deemed necessary to properly perform the duties delegated to them by the Congress.89

The resolution passed40 and the House had done something which none of the seventy-nine previous Congresses would do—it met the issue head on. The resolution went to the Senate Committee on Expenditures in the Executive Department from which it was never reported out, and thus it died. Had it become law, what could be done if an agency head refused, at the president's direction, to produce certain information demanded by a congressional investigating committee? Presumably, the issue would be settled by a court decision holding the act unconstitutional. By enactment of the law an attempt would have been made to subordinate the executive to the legislative branch of government. The separation of powers established by the Constitution can be changed only on constitutional amendment.

Assuming that the law was upheld, what action could be taken against the president of he obtained the reports and refused to give them over? It was admitted by the resolution's proponent, Mr. Hoffman, that the president could not be held in contempt.41 The reason given for this was that the legislative branch has no authority over the president of the United States. Under the Constitution, impeachment would be the only course open to Congress. It is improbable that impeachment proceedings would develop in an instance of this nature, but if they are the solution, there appears to be no need for the law. Mr. Hoffman thought the president would not dare to withhold information in the face of this legislation because public opinion would be against such action. The president however, is answerable to public opinion in either case, and it is doubtful that the presence of the act would substantially strengthen the position of Congress.

The basic practical weakness of the congressional position is that, even with applicable legislation, the president need be moved only by impeachment proceedings. The head of any executive department need merely

89 H.J. Res. 342, 80th Cong., 2d Sess. (1948). Mr. McCormack indicated the purpose of the resolution when he stated: “We have a right to express our views, but we have no right to force them on the Executive, because if we use force it means that the Executive becomes completely subject to the Legislature.
40 94 Cong. Rec. 5822 (1948).
41 Id. at 5706.
turn the papers over to the president for his consideration, and if he deems it not to be in the public interest to divulge them, their retention by him would effectively end the controversy.

Congress, then, has done nothing to infringe on the claimed privilege of the executive, although it came exceedingly close to an attempt at control in 1948. If Congress did attempt so to limit the executive, the law would be futile both on a Constitutional and a practical basis.

THE LEGAL ARGUMENT

The second support of the executive position is the so-called legal argument, consisting of numerous case histories. It should be noted that no case has been found which directly applies to the problem at hand.

The contention that heads of executive departments are answerable to Congress was met and disposed of in 1803 in the case of Marbury v. Madison. In that decision, Chief Justice Marshall made this statement which is still the law today:

By the Constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders.

In such cases, their acts are his acts: and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual right, and being entrusted to the executive, the decision of the executive is conclusive. [Emphasis supplied.]

The Court held that it could not, by political action, attempt to usurp the executive powers. It also determined that presidential associates, necessary to his performance of executive functions, are answerable to him and act by his authority alone. They cannot, therefore, be under the authority of the courts or of Congress, but are merely provided for by Congress to aid the Executive.

The main legal arguments of the executive are found in the Opinions of the Attorney Generals. These opinions are naturally limited to upholding the executive position.

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42 For an example of this approach see Wolkinson, Demands of Congressional Committees for Executive Papers, 10 Fed. B.J. 233-240 (1949).
43 1 Cranch 137 (U.S. 1803).
44 Id. at 165-166.
In 1905, the Secretary of Commerce and Labor asked "To what extent and upon what grounds may the Secretary decline to furnish official records of the Department, or copies thereof, or to give testimony in a cause pending in court?"  

[Emphasis supplied.] The Attorney General answered:

... I am of opinion that ... you may properly decline to furnish official records of the Department, or copies thereof, or to give testimony in a cause pending in court, whenever in your judgment the production of such papers or giving of such testimony might prove prejudicial for any reason to the Government or to the public interest.  

[Emphasis supplied.]

Although the Attorney General’s opinion relates to the withholding of information from a court and not from a Congressional Committee, an analogy may be drawn. By examining judicial holdings with regard to the executive privilege in court, it is possible to determine the probable decision in a case involving proceedings for contempt of Congress against a head of an executive department. As stated above, there is no case directly in point.

In United States v. Reynolds  

it was argued that Congress had by statute recognized that the head of each department has control of the records of his department. The theory was merely mentioned in the opinion and the issue was not decided.  

The courts have repeatedly held, under the statute, that the departments can, in a suit between private individuals, withhold their records as confidential when so classed by departmental regulations. The right of the Army to refuse to disclose confidential information the secrecy of which it deems necessary to national defense, is indisputable.

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46 Id. at 331.
47 345 U.S. 1 (1953).
48 Rev. Stat. § 161 (1875), 5 U.S.C. § 22 (1952): “The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it.”
49 345 U.S. at 6 n. 9 (1953).
50 Boske v. Comingore, 177 U.S. 459 (1900); Touhy v. Ragen, 180 F.2d 321 (7th Cir. 1950), aff’d, 340 U.S. 462 (1951); Ex parte Sackett, 74 F.2d 922 (9th Cir. 1935); In re Lamberton, 124 Fed. 446 (W.D. Ark. 1903); In re Huttmann, 70 Fed. 699 (D. Kan. 1895).
In *Boske v. Comingore*52 the court upheld the right of an Internal Revenue Collector to withhold (under a Treasury regulation) information forming a part of the Bureau records from a state court. In disallowing a holding of contempt, the Supreme Court said: "Reasons of public policy may well have suggested the necessity, in the interest of the Government, of not allowing access to the records in the offices of collectors of internal revenue, except as might be directed by the Secretary of the Treasury."53 Thus, the Court has little difficulty upholding the executive's privilege when invoked in a court proceeding under the statute.54 Since the statute seems merely to be a recognition by the legislature of the executive's position, the court should uphold the executive's position in regard to congressional committees as well. Having limited the judiciary under the doctrine of separation of powers, there seems to be no reason that the same limitation should not apply to the legislature with regard to information which the executive believes to be prejudicial to the public interest.

The cases are illuminating in that the federal courts have never had before them a contempt citation by Congress against a head of an executive department. There can be no doubt that Congress can punish private persons for contempt and has repeatedly done so.55

In *McGrain v. Daugherty*56 it was held that Congress has implied power to compel private persons to give testimony to enable Congress to exercise its legislative function under the Constitution. It also held that a witness rightfully may refuse to testify where the bounds of the power are exceeded or where the questions propounded are not pertinent to the matter under inquiry. In *Sinclair v. United States*57 while reiterating what the Court said in *McGrain v. Daugherty*, the Court further stated:

52 177 U.S. 459 (1900).
53 Id. at 469.
54 A court has held that the privilege may be waived. In a case where the Administrator of the Wage and Hour Division of the Department of Labor was seeking an order enjoining defendant from violating the provisions of the Fair Labor Standards Act, the court held "that when a party seeks relief in a court of law, he must be held to have waived any privilege, which he otherwise might have had, to withhold testimony required by the rules of pleading or evidence as a basis for such relief." Fleming v. Bernardi, 1 F.R.D. 624, 625 (N.D. Ohio 1941).
57 279 U.S. 263 (1929).
It has always been recognized in this country, and it is well to remember, that few if any of the rights of the people guarded by fundamental law are of greater importance to their happiness and safety than the right to be exempt from all unauthorized, arbitrary or unreasonable inquiries and disclosures in respect of their personal and private affairs.\textsuperscript{58}

The limitations mentioned in the \textit{McGrain} case, \textit{supra}, were not specifically spelled out by the Court in relation to congressional committees' implied power to inquire into the individual's private affairs. This has resulted in Congress, under this so-called implied power, assuming boundless power over the individual in his private affairs. The courts have not afforded realistic protection to witnesses injured by the excesses of such committees, as they imply in the \textit{Sinclair} case.\textsuperscript{59} But the recognition in both cases that the investigative powers of congressional committees are limited by fundamental rights established in the Constitution, furnishes evidence that under the constitutional separation of powers the courts should uphold the discretionary power of the executive to withhold information.

In 1941, the Attorney General gave the executive position regarding investigative reports when he stated:

\begin{quote}
It is the position of this Department, restated now with the approval of and at the direction of the President, that all investigative reports are confidential documents of the executive department of the Government, to aid in the duty laid upon the President by the Constitution to "take care that the laws be faithfully executed," and that congressional or public access to them would not be in the public interest.
\end{quote}

\begin{quote}
This discretion in the executive branch has been upheld and respected by the judiciary. The courts have repeatedly held that they will not and cannot require the executive to produce such papers when in the opinion of the executive their production is contrary to the public interest.\textsuperscript{60}
\end{quote}

This statement has been criticized as unsupported by the authorities cited.\textsuperscript{61} It is contended that the cases stand for the principle that an individual cannot demand records of the executive departments in civil or criminal litigation. This is correct, but, as discussed above, the analogy between constitutional concern for separation of powers and constitu-

\textsuperscript{58} Id. at 292.

\textsuperscript{59} Huard, The Fifth Amendment—An Evaluation, 42 Georgetown L.J. 345 (1954).

\textsuperscript{60} 40 Ops. Att'y Gen. 45, 46-49 (1941).

tional concern for fundamental rights would indicate that the courts would uphold the executive's position here as they have upheld individuals' rights to non-disclosure.

Few state cases have been decided involving the power of the executive to withhold information on grounds of public interest. In 1877, a grand jury requested the court to hold the Governor of Pennsylvania in contempt because of his refusal to appear, under subpoena, to testify concerning riots and deaths in a railroad strike. In denying the request, the court said:

... We had better at the outstart recognize the fact, that the executive department is a co-ordinate branch of the government, with power to judge what should or should not be done, within its own department, and what of its own doings and communications should or should not be kept secret, and that with it, in the exercise of these constitutional powers, the courts have no more right to interfere, than has the executive, under like conditions, to interfere with the courts.

In 1951, the Development and Industrial Commission of Massachusetts had an economic analysis of industrial conditions made by a private firm. The Massachusetts Senate ordered a Commission member to produce the report, since it was believed the report would be of aid in legislating on the subject of taxation and employment security. The Commissioner refused, alleging an unconstitutional interference by the legislative branch with the executive branch. He stated further that the act establishing the Commission required the submission of an annual report, and that this was the extent of the legislature's control over the Commission. By a special procedure established by the Massachusetts Constitution, six justices rendered an opinion which upheld the right of the legislature to summon witnesses, and compel the production of documents and disclosure of information under threat of contempt proceedings. The decision was based on provisions of the State Constitution and upon the principle that such powers are inherent in a legislature. It was

62 Appeal of Hartranft, 85 Pa. 433 (1877).
63 Id. at 445. The court had stated earlier, by way of dicta, that: "The President of the United States, and the governors of the several states, are not bound to produce papers or disclose information ... when in their own judgment the disclosure would on public grounds be inexpedient." Id. at 438.
64 The court held that when the Senate entertains grave doubts as to its constitutional power to require the Commission to produce the report and as to its power to cite the reluctant member for contempt and punish or censure him, the justices of the Supreme Judicial Court of Massachusetts may be asked to render an opinion as to the constitutionality of the pending action under the Massachusetts advisory procedure.
further held that the separation of powers doctrine was not violated by requiring the Commission to provide the legislature with whatever information it required to carry out its legislative functions.\textsuperscript{65}

In limiting its decision, the court said: "We are not here dealing with any question of diplomatic, military, or other secrets, involving the security of the State, or with any instance where for other sufficient reasons disclosure is forbidden by law."\textsuperscript{66} The report involved could hardly be considered secret, nor was the refusal based upon the grounds of public detriment. It is believed that the limitation supplied by the court would, if such a claim were made, have constituted "sufficient reason" to forbid its release. It seems clear that the executive department may not adopt the attitude that the legislature is not entitled to any of the documents held by the executive branch. Refusal must be limited to those documents the disclosure of which is considered detrimental to the public interest.

The foregoing "legal" argument demonstrates that the courts have, by analogy, tended to uphold the position of the Executive. While the cases are not directly in point, they are pertinent and would be given serious consideration should the issue come before a court.

\textbf{The Executive Session Proposal}

Would it not be feasible to have the legislative committee consider disputed material in executive (closed) session and determine for itself whether disclosure would be against the public interest? The dangers involved in this procedure are so obvious as to have been recognized by members of Congress themselves. During the debate over House Joint Resolution 342,\textsuperscript{67} representative Sasscer of Maryland said:

\ldots We say that the information may not get out. I have been in public life for a long time. \ldots if you are in a conference with over two or three people, no matter how sincere they may be, if the subject matter of the conference has to do with some matter or information which is secret and other information that is not secret, then after days go by, your recollection becomes dim as to what is secret and what is not secret. \ldots Then it is only a short time before the information begins to seep out over your radio and through your news commentators.\textsuperscript{68}

As an example of the possibilities for harm, imagine secret disclosure to a Senate Committee of executive discussions on Formosa policy before a position was taken by the United States on the problem. A Senator

\begin{itemize}
\item \textsuperscript{65} Opinion of the Justices, 328 Mass. 655, 102 N.E.2d 79 (1951).
\item \textsuperscript{66} Id. at 661; 102 N.E.2d at 85-86.
\item \textsuperscript{67} 80th Cong., 2d Sess. (1948).
\item \textsuperscript{68} 94 Cong. Rec. 5724 (1948).
\end{itemize}
need not disclose what he heard about the intentions of the executive—he need merely state prior to presidential action that he is unalterably opposed to any defense of Formosa and that he hopes the British are of the same mind. In making the front page, he may upset foreign negotiations, disclose our position to Communist China, and let the cat out of the bag generally. It is no answer to say members of Congress would not act in that manner. It was said in regard to House Joint Resolution 342:

... I do not mean to indicate a lack of confidence in my brethren in the House. But I do recognize the apparent desire of some Members to do something sensational to get publicity. I have not seen any finer opportunity presented since I have been in Congress to bring about that sort of thing, which is quite contrary to what we are attempting to achieve in the proposed legislation.69

If discretion with regard to information held by the executive branch is to exist, it must reside in the President.

CONCLUSIONS

An attempt has been made to demonstrate that the legislative investigating committees have no more right to subject the executive to their will than the executive has to impose its will upon Congress. The Constitution, precedent, and reported cases do not furnish a basis for encroachment by either branch.

The Constitution established three branches of government and each was intended to be supreme in the functions assigned to it.

By the precedent argument it has been shown that Congress has done little for 150 years when the president or one of his departmental heads refused, on grounds of public interest to furnish committees with information ordered to be produced.

As to reported cases, no court has been found which has held a department head in contempt because of his refusal upon grounds of public interest to furnish the information requested. The decisions show that the executive privilege is recognized by the judiciary, and by analogy, the courts should apply the same ruling to congressional investigating committees.

Lastly, the inherent danger of effective disclosure and harm to the public precludes the possibility of publication to a committee in executive session.

The privilege does not apply to all matters, but is limited to material prejudicial to the public. It would be absurd to claim the privilege for

69 Congressman Boggs in 94 Cong. Rec. 5729 (1948).
all information the legislature requested of the executive. The executive has never claimed such a broad privilege.

The discretion must lie somewhere and it should be with the executive. "Discretion and the right of decision regarding executive papers must lie with the President as head of the executive branch of the government. But these must be guided by a recognition that the executive and legislative branches belong to the same government and are supposed to function as partners."70 That the executive has cooperated in most cases was shown by the legislative's argument in opposition to the executive "precedent" argument. There, by a recitation of many instances when the president cooperated with Congress, it was shown that the privilege of refusal has rarely been used except when presumably necessary on grounds of public policy.

The power of the Executive to withhold information from congressional investigating committees involves the broader issue of the nation's need for Presidential leadership. The following excerpt from an address by former President Truman on May 8, 1954, is in point:

The President is responsible for the administration of his office and that means for the administration of the entire executive branch. It is not the business of Congress to run any of the agencies for him.

Unless this principle is observed, it is impossible to have orderly government. The Legislative power will ooze into the Executive offices. It will influence and corrupt the decisions of the executive branch. It will affect promotions and transfers. It will warp and twist policies.

Not only does the President cease to be master in his own house, but the whole house of government becomes one which has no master. The power of decision then rests only in the legislative branch, and the legislative branch by its very nature is not equipped to perform these executive functions.

To this kind of encroachment it is the duty of the President to say firmly and flatly "No". The investigative power of Congress is not limitless. It extends only so far as to permit the Congress to acquire the information that it honestly needs to exercise its legislative functions. Exercised beyond those limits, it becomes a manifestation of unconstitutional power. It raises the threat of legislative dictatorship.71

This is a correct statement of the true basis of the executive's power to withhold information on grounds of public interest. It is not only a privilege and right of the executive—it is a duty.

RICHARD P. MILLOY

70 Barth, Government by Investigation 39 (1955).
71 Quoted in Barth, op. cit. supra note 71, at 219.
ENFORCEMENT OF UNITED STATES ANTITRUST LAWS
OVER ALIEN CORPORATIONS

Foreign corporations whose activities were carried on outside of the
territorial limits of the United States were, at one time, immune from
prosecution under the antitrust laws, no matter how damaging these
activities were to the foreign commerce of the United States. Beginning
in about 1944 the Justice Department attempted to extend the United
States antitrust laws to such foreign corporations. The Government
sought to force all foreign corporations who benefited from trade with
the United States to submit to the laws of the United States. Two initial
obstacles had to be overcome before the Government could put this new
policy into effect. Under the law, as it existed in 1944, it was impossible
to obtain jurisdiction over a foreign corporation which carried on its il-
legal activities outside of the United States, and it was very difficult to
obtain service on a foreign corporation through a United States sub-
sidary.

The rule that the laws of the United States could not be applied to the
foreign acts of foreign corporations was based on Justice Holmes' opinion
in American Banana Co. v. United Fruit Co., 1 in which he stated:

But the general and almost universal rule is that the character of an act as law-
ful or unlawful must be determined wholly by the law of the country where
the act is done. . . . For another jurisdiction, if it should happen to lay hold
of the actor, to treat him according to its own notions rather than those of the
place where he did the acts, not only would be unjust, but would be an inter-
ference with the authority of another sovereign, contrary to the comity of nations,
which the other state concerned justly might resent.

This rule was somewhat modified by later cases. It was held not to apply
to a conspiracy of foreign shipping corporations to monopolize the route
between New York and South Africa because the conspiracy was put into
operation in New York, 2 nor to a conspiracy to monopolize the export of
sisal from Mexico where the conspiracy was formed in the United States
by United States citizens. 3 In both of these cases, there were intended
detrimental effects to the foreign commerce of the United States. These
modifications of the American Banana rule gave our courts jurisdiction
over the foreign acts of corporations if those acts were part of a con-
spiracy either formed or partly executed in the United States. But all ac-
tivities carried on outside the United States were still outside the jurisdic-

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tion of our courts, even if these activities caused detrimental effects to the United States. This rule remained the law until 1945 when it was further modified by Judge Learned Hand in *United States v. Aluminum Co. of America.* Under this test, which is the law today, a United States court has jurisdiction over the foreign acts of foreign corporations if the acts intentionally affected the foreign commerce of the United States. Judge Hand reasoned that this would bring such acts within the previous modifications of the *American Banana* rule:

It is true that in those cases [Sisal and Thomsen] the person held liable had sent agents into the United States to perform part of the agreement; but an agent is merely an animate means of executing his principal's purposes, and, for the purposes of this case, he does not differ from an inanimate means. . . .

The *Alcoa* case completely removed the first obstacle in the path of the Justice Department's new policy of extending the effectiveness of antitrust law beyond the shores of the United States in those cases where foreign acts of foreign corporations caused harm to the United States. The Government could now prosecute any foreign corporation upon which process could be served. However, service of process on such corporation could be difficult and this was the second major obstacle that had to be overcome. Until this problem was solved, the fact that our courts had jurisdiction over the subject matter of such foreign acts was of little value. Jurisdiction over such a foreign corporation itself was necessary before any judgment or decree could be entered against it.

Section 12 of the Clayton Act provides that process may be served on the defendant corporation in antitrust cases "... in the district of which it is an inhabitant, or wherever it may be found." The Supreme Court has held that a corporation is "present" in a particular place "... when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on. . . ." It is not necessary, however, that the corporation itself carry on these activities. They may be carried on by an agent of the corporation. Thus, where a corporation or an agent performs continuous and systematic activities in a district, service may be made upon the corporation through its officers or agents.

It is, however, not always easy to determine who is an agent of the

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4 148 F.2d 416 (1945).
5 Id. at 444.
6 38 Stat. 736 (1914).
7 International Shoe Co. v. Washington, 326 U.S. 310, 317 (1945). It seems safe to conclude that if a corporation is "present" in a place, it can also be "found" there.
corporation, especially when a subsidiary corporation is the supposed agent. Generally, a subsidiary is not an agent of the parent corporation, but it may be so. The rule for determining whether or not a subsidiary is an agent of the parent was announced in *Cannon Mfg. Co. v. Cudahy Co.* 8 The facts of the case, as found by Mr. Justice Brandeis, were that:

Through ownership of the entire capital stock and otherwise, the defendant dominates the Alabama corporation, immediately and completely; and exerts its control both commercially and financially in substantially the same way, and mainly through the same individuals, as it does over those selling branches or departments of its business not separately incorporated which are established to market the Cudahy products in other States. The existence of the Alabama company as a distinct corporate entity is, however, in all respects observed. Its books are kept separate. All transactions between the two corporations are represented by appropriate entries in their respective books in the same way as if the two were wholly independent corporations. This corporate separation from the general Cudahy business was doubtless adopted solely to secure to the defendant some advantage under the local laws. 9

On the basis of this finding of fact, Mr. Justice Brandeis ruled that the subsidiary of Cudahy was not its agent: "The corporate separation, though perhaps merely formal, was real. It was not pure fiction." 10

The *Cudahy* case is law today. In a recent case brought against the Hudson Motor Car Company 11 the court quashed the service of process made upon it through its subsidiary, the Hudson Sales Corporation. This was done in spite of the fact that the subsidiary was a distributor of the cars produced by the parent, that the subsidiary’s principal place was in the same building as that of the parent, and that most of the officers of the Sales Corporation were officers of the Motor Car Company. The court in reaching this decision depended on the *Cudahy* case:

That the Sales Corporation is dominated and controlled, immediately and completely, by the Motor Car Company, is evident from the showing herein. But the element of control and complete domination does not make the Sales Corporation the agent of the Motor Car Company. . . . The Cudahy case is controlling here, and the factual considerations before the Supreme Court were substantially the same as those present here. 12

This rule makes it extremely difficult to serve process on a corporation through its subsidiary. It completely ignores the fact that the parent

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8 267 U.S. 333 (1925).
9 Id. at 335.
10 Id. at 337.
12 Id. at 724.
and subsidiary are a single economic entity. As long as the legal distinction between them is carefully maintained the subsidiary can rarely be an agent of the parent for the purpose of service of process.

The Cudahy rule is, of course, no obstacle to antitrust suits against United States corporations. Every such corporation is an inhabitant of some state and process can be served there. Under Section 12 of the Clayton Act, if a corporation can be served in some district, service may be had in any district where it transacts business. In the case of foreign corporations, however, the Cudahy rule is a serious roadblock. Most foreign corporations do not themselves do business in the United States, although they often have a domestic subsidiary corporation. The only method of service of process on these foreign corporations is to serve them through their subsidiaries. Everything depends, therefore, on whether the subsidiary is an agent of the parent. If it is, service may be made. If it is not, there is no way of bringing the foreign corporation into our courts because the service of United States courts is of no effect on foreign soil. The Cudahy rule, which makes it so difficult to obtain service upon a parent corporation through its subsidiary, would, if applied to foreign corporations, enable these corporations to perform illegal acts over which the United States courts, under the Alcoa rule, have jurisdiction without having to fear that a decree would be entered against them. It was imperative for the Government, therefore, to find some way to avoid application of the Cudahy rule to foreign corporations if its new antitrust program was to be effective. The first step in this direction was the suggestion made by the Government to the courts that a different rule should apply to corporations foreign to the United States. This proposal was abruptly dismissed:

The Government finally argues that the conduct required to hold an alien corporation under Section 12 may vary from that required to hold a foreign corporation. If by this the Government means that there is one rule which applies to alien corporations and another to foreign corporations it is clearly in error. The cases cited by the Government do not support this theory. All of them where pertinent apply the rule as I have heretofore stated it, and make no such distinction, nor do any of the other cases which I have read.

This is a logical stand. In our legal terminology the word "foreign" applies equally to out-of-United States and to out-of-state corporations. When our laws speak of a "foreign corporation," no distinction is usually

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13 See note 6 supra.
made between these two degrees of foreignness, nor is there precedent in our courts for drawing this distinction. For the courts to say that the \textit{Cudahy} rule is applicable only to out-of-state corporations, and to formulate a new rule for service of subsidiaries of out-of-United States corporations would change one of our basic legal concepts. This the courts apparently have been unwilling to do. Two cases, however, \textit{United States v. Scophony Corp.}\textsuperscript{15} and \textit{United States v. United States Alkali Transport Association},\textsuperscript{16} illustrate how the courts have found a method by which service on foreign corporations through their American subsidiaries might be facilitated without literally repudiating the \textit{Cudahy} rule.

The \textit{Scophony} case involved Scophony Limited, an English corporation which had a controlling interest in American Scophony, a United States corporation. The president of the American subsidiary was at the same time a director of Scophony Limited. The subsidiary’s principal purpose was to license Scophony Limited’s American patents, and Scophony Limited realized substantial profits from this undertaking. American Scophony was perhaps a legal entity—actually it was a part of the English corporation’s business. However, when the United States brought an antitrust action against Scophony Limited on the ground that it was using American Scophony to divide markets, an attempted service of process through American Scophony was quashed by the district court. In so doing the court was following the established rule regarding service on subsidiaries. Certainly the relationship between the American Scophony and Scophony Limited was no closer than the relationship between the Hudson Motor Car Company and the Hudson Sales Corporation. The district court judge realized that by quashing the service he was allowing Scophony Limited, to carry on its violations of the antitrust laws with impunity. He said in his opinion:

\begin{quote}
I am not unmindful of the effect of my holding here. However, that cannot determine my judgment. I cannot make the rule to fit the case. I can only apply the rule to the facts and having done so announce the result.\textsuperscript{17}
\end{quote}

The Supreme Court refused to accept this viewpoint. It found that American Scophony was an agent of Scophony Limited, for the purpose of receiving service. The Court avoided the application of the \textit{Cudahy} rule by finding that for the particular facts in this case, the rule had never been applied, and the Court could, therefore, refuse to extend the rule to these new facts without overruling its earlier decision. The Court

\textsuperscript{15} 333 U.S. 795 (1947).
\textsuperscript{16} CCH Trade Cases 57,481 (S.D.N.Y. 1946).
\textsuperscript{17} See note 14 supra.
drew a distinction between the type of business done in the Scophony case, the licensing of the parent corporation's patents by a subsidiary, and the manufacturing and selling activities done by Cudahy and its subsidiary:

Such a continuing and far-reaching enterprise is not to be governed in this respect by rules evolved with reference to the very different businesses and activities of manufacturing and selling. Nor, what comes to the same thing, is the determination to be made for such an enterprise by atomizing it into minute parts or events, in disregard of the actual unity and continuity of the whole course of conduct, by the process sometimes applied in borderline cases involving manufacturing and selling activities.  

But the real reason why the Court refused to extend the Cudahy rule to this new set of facts was that such an extension would make it impossible to obtain service of process on Scophony. The Court frankly states that such an "extension often would make valid service impossible, since process could not be issued to run for such corporations to the foreign countries of which they are 'inhabitants'."  

In the Scophony case the application of the Cudahy rule was avoided by distinguishing the facts. This was not done in the Alkali case where the rule was almost ignored. The defendant, Imperial Chemical Industries Limited, was served through its subsidiary, I.C.I. (New York). A motion to quash the service was denied because the court found that I.C.I. (New York) was an agent of I.C.I. (London). The finding was based on the fact that I.C.I. (New York) bought and sold for its parent corporation, that it was completely directed and operated by I.C.I. (London), and that some of its officers were also officers of I.C.I. (London). But the court gives no reason why the relationship between the parent and the subsidiary here is such that the subsidiary must be an agent. Certainly this relationship is not far different from those in the Cudahy and Hudson cases. The court, however, makes no attempt to explain why the Cudahy rule is not applicable, merely stated that:

I.C.I. [New York] is the alter ego of I.C.I. [London] for which it exists and acts. Formally the two are separate legal entities, but actually they are one in all that pertains to the activities of I.C.I. [London] in its alkali business in the United States.

It is not certain whether or not the court would have found I.C.I. (New

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19 Ibid.
20 See note 16 supra.
21 Ibid.
York) an agent if it had applied the Cudahy rule. However, by its failure to use that rule as a yardstick, the court seemed to indicate that it need not be applied to foreign corporations, and that there is perhaps a different rule for determining whether a subsidiary of a foreign corporation is its agent for the purpose of serving process. The Alkali case is especially important because the finding that I.C.I. (New York) was the alter ego of I.C.I. (London) was used to obtain service of process on I.C.I. in a later antitrust case, United States v. Imperial Chemical Industries. The court in that case merely accepted the finding made in the Alkali case, without making a thorough study of the issues involved.

The Scophony and Alkali cases did not, as a matter of form, exclude foreign parent corporations from the protection of the Cudahy rule. Technically, the Cudahy case still represents the law as to service on parent corporations through their subsidiaries, no matter whether the parent corporation be domestic or foreign. But these two cases do indicate that the courts will allow service much more readily on foreign corporations through their United States subsidiaries when this is the only way process can be served on them in an antitrust case. The Scophony and Alkali cases seem to eliminate the Cudahy rule as a serious obstacle to the Justice Department's antitrust program directed against foreign corporations. It is impossible to estimate, however, precisely to what extent the Cudahy rule is now applicable to foreign corporations, if it is applicable at all. In both the Scophony and Alkali cases the American subsidiaries were active in the same general field of business as their parent corporations. The subsidiaries were part and parcel of the enterprise which violated the laws of the United States. Another question is presented when the United States subsidiary itself does nothing which is closely related to the allegedly illegal activities of the parent corporation. Would service through the subsidiary be allowed in such a factual situation? A case now pending may provide an answer to this question. The Government has brought an antitrust action against certain Swiss watch manufacturers and organizations of watch manufacturers. Two of these organizations, F.H. and Ebauches, each control 50% of the Watchmakers of Switzerland Information Center, a New York corporation. Five hundred and fifty Swiss watch manufacturers are members of F.H. It is through this organization that wages, prices and export and import procedures are fixed. F.H.'s New York subsidiary does nothing of this

23 Complaint filed in the District Court for the Southern District of New York, October, 1954.
kind. It merely promotes goodwill, and provides technical information to watch repairmen. If the attempted service on F.H. is not quashed, no restriction as to service on foreign corporations through their United States subsidiaries in antitrust actions will remain. If it is quashed the Cudahy rule will retain some force with regard to foreign corporations, in certain factual situations.

Thus, the two initial obstacles to the Justice Department's program of prosecuting foreign corporations in antitrust actions were, in essence, swept away. An extensive prosecution of foreign corporations whose activities in foreign countries intentionally cause detrimental effects to the foreign commerce of the United States is now possible. But there is still no guarantee that in any particular case really effective action can be taken. In some cases no effective decree can be issued because it would conflict with the laws of a foreign country, or because compliance with it would necessitate that the defendant corporation dishonor obligations which it has incurred in foreign countries. A foreign corporation would be placed in a dilemma if a United States court entered a decree against it by which it was ordered to violate a law of a foreign country. As a result of the rule expressed in *American Banana Co. v. United Fruit Co.*, no United States court has put a foreign corporation into such a dilemma.

There has not been a single instance since the *American Banana* case in which this issue has had to be faced squarely by a United States court. But certain logical deductions must be drawn from this case. If a domestic court cannot pass judgment upon a corporation which persuaded a foreign government to do certain acts, because these acts thereby became the acts of a foreign government, it would appear to follow that no decree can be entered against a corporation which is acting in compliance with the laws of a foreign country for to do so would be to pass judgment on the acts of a foreign government. A recent decree entered against Philips, a Dutch corporation which was a defendant in an antitrust case, *United States v. General Electric Co.*, indicates that the courts still think along these lines. Part of the decree reads:

> Philips shall not be in contempt of this Judgment for doing anything outside of the United States which is required or for not doing anything outside of the United States which is unlawful under the laws of the government, province, country or state in which Philips or any other subsidiaries may be incorporated,

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24 See note 1 supra.

chartered or organized or in the territory of which Philips or any such subsidiaries may be doing business.

This case shows clearly that the courts, in framing their decrees, still follow the *American Banana* case. The courts do this primarily as a matter of policy to avoid conflict with foreign governments and reprisals against United States corporations.

The effectiveness of a decree of one of our courts may also be limited when it attempts to order a foreign corporation to dishonor obligations which it has incurred in a foreign country. This limitation is not based on the laws of our own country; it arises from the acts of foreign courts. An English case, *British Nylon Spinners v. I.C.I.*\(^{26}\) shows how this can happen. I.C.I., the defendant, acquired certain patents from DuPont, a domestic corporation, under an agreement made in 1946 between these companies. Six years later, a United States court found that this agreement violated the antitrust laws and ordered that it be cancelled. This would have presented no difficulty if I.C.I. had not given the British Nylon Spinners an exclusive license to the patents in 1947. I.C.I. could not return the patents to DuPont without breaking its contract with Spinners, nor could it abide by the terms of the contract without disobeying the decree of the United States court. The question which the English court had to answer was "... whether the judgment of the United States Federal Court provides a defense for the defendant company, Imperial Chemical Industries, Ltd., in the present action for specific performance ... of the contract which had admittedly been made between the plaintiff company and the defendant company.\(^{27}\) The Court of Appeal answered this question in the negative. It issued a decree restraining I.C.I. from parting with those patents to which they had given Spinners exclusive licenses. The English judge said:

> ... the contract of March 1947, being an English contract, was between English nationals and to be performed in England, the right which the plaintiff company has may be described as its right, under the contract, to have it performed and, if necessary, to have an order made by the courts of this country for specific performance.\(^{28}\)

The court would not deprive Spinners, a company over which the United States courts had no jurisdiction, of the benefits of a legal contract. Such a situation can easily arise out of many decrees made against foreign


\(^{27}\) [1954] 3 All E.R. 88, 91.

\(^{28}\) [1952] 2 All E.R. 780, 783.
corporations, and it may be expected that nearly all foreign courts will come to the conclusion reached by the English court.

In conclusion, it is evident that the Government's ability to carry on an effective antitrust program against foreign corporations is greatly facilitated by the removal of the two initial jurisdictional obstacles to that program. But there are certain limitations to the effectiveness of such a program which arise from the fact that foreign corporations are subject to foreign sovereignties, and must obey the laws of, and honor their legal obligations in, foreign countries.

WERNER J. KRONSTEIN
RECENT DECISIONS

ADMINISTRATIVE LAW—A Federal Communications Commission Regulation Which Precludes an Applicant From a Hearing When He Owns the Maximum Number of A-M, F-M or Television Broadcast Stations as Therein Provided Violates Due Process and the Communications Act of 1934, as Amended.

Storer Broadcasting Company filed an application with the Federal Communication Commission on August 31, 1953, seeking a license to own and operate a television station in Miami, Florida. At that time Storer and its wholly owned subsidiaries were licensed to own and operate seven standard broadcast stations, five frequency modulation broadcast stations and five television stations. The “multiple ownership” rules which limited a single individual or corporation to ownership of seven standard broadcast, seven frequency modulation broadcast stations and five television stations were then in effect. These rules are now §§ 3.35, 3.24 and 3.636 of the Commission’s Rules and Regulations. Rule 3.636 contains the provision that “The Commission, however, will in any event consider that there would be . . . a concentration of control contrary to the public interest, convenience or necessity for any party or any of its stockholders, officers or directors to have a direct or indirect interest in, or be stockholders, officers, or directors of, more than five television broadcast stations.” The other rules contain similar provisions. The rule unqualifiedly states that the addition of a sixth television station would result in a concentration of control inimical to the public interest, convenience or necessity. Since this was predetermined on a numerical basis, it was the logical consequence that Storer’s application for a sixth television station was denied without a hearing. Storer petitioned the U.S. Court of Appeals for the District of Columbia for review of the rule making order. Held, the portion of the rules as noted herein is invalid, and the failure to give a full hearing as conferred by § 309 of the Federal Communications Act, 48 Stat. 1064, 47 U.S.C. 6831 (1952), before an application is denied is violative of due process and the Act as amended. Storer Broadcasting Co. v. United States, 220 F.2d 204 (D.C. Cir. 1955).

The court was faced with the problem whether § 309 of the Communications Act conferred an absolute right to a hearing, or whether this procedural right was one which was amenable to modification by rules adopted by the Commission under § 303 (r), and if so, were the “multiple ownership” rules within the spirit and the letter of this latter section.

Section 303 states:

Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest and necessity requires shall . . . (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] . . .
Section 309 (b) states:

... Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate but in which both the burden of proceeding with the introduction of evidence upon any issue specified by the Commission, as well as the burden of proof upon all such issues, shall be upon the applicant.

The court turned its decision on § 309 and reasoned that the public convenience, interest and necessity could not be equated to a rigid rule of "multiple ownership," but must be determined on an ad hoc, quasi judicial basis.

The right, however, if not the duty of the Commission to promulgate general rules definitive of the public interest whereby applications will be denied has been explicitly acknowledged by the courts. Cf. F.C.C. v. American Broadcasting Co., 347 U.S. 284 (1954); Nat. Broadcasting Co. v. U.S., 319 U.S. 190 (1943); Logansport Broadcasting Corp. v. U.S., 93 U.S. App. D.C. 342, 210 F.2d 24 (1954); Black River Broadcasts v. McNinch, 65 U.S. App. D.C. 311, 101 F.2d 235 (1938). When determining what is in the public interest, convenience and necessity, the Commission is free to exercise its expert judgment. WOKO Inc. v. F.C.C., 80 U.S. App. D.C. 333, 153 F.2d 623 (1946). Although the Commission may elucidate general rules it may also proceed on a case by case basis, and it has been held that the choice is one that lies within the informed discretion of the administrative agency. Logansport Broadcasting Co. v. U.S., supra. If the former approach is adopted, as is the situation with the "multiple ownership" rules, the administrative agency rule making is not transmitted into an adjudication requiring formal findings and conclusions merely because the rule adopted may be determinative of specific situations arising in the future. Logansport Broadcasting Co. v. U.S., supra. In the Logansport case the court of appeals held that the Commission could allocate broadcast stations according to an overall plan, and deny a hearing to one applying for a frequency made unavailable by this plan. The court in the principal case approved of this decision but noted that it was one of three exceptions where a hearing may be denied, the other two being when an alien seeks a license or when a license is sought for an unlawful use. Thus it appears that a shadow is cast by the holding of the instant case whereby the determination of whether an application is in the public interest must be on an ad hoc basis. Underlying the legal issue is the policy consideration as to where the line should be drawn so that a proper balance would be achieved between administrative convenience and economy on the one side, and procedural safeguards as established by statute and guaranteed by due process on the other. Since the F.C.C. has signified its intention to appeal, these issues will in all probability be resolved by the Supreme Court.

The decision as it stands, however, presents the interesting question as to whether or not the F.C.C. may accomplish the end desired by the "multiple ownership" rules, even though the salient portions thereof have been struck
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down by the circuit court. The burden of proving that the granting of a
license will be in the public interest rests upon the applicant. Heitmeyer v.
F.C.C., 68 U.S. App. D.C. 180, 95 F.2d 91 (1937). In deciding whether an
application serves the public interest, the F.C.C. is free to exercise its expert
judgment subject only to the limitation that it act within the authority con-
ferred by the Act, pursuant to the evidence and in a reasonable manner. WOKO
cannot interfere with the Commission's decision unless it results from an abuse
of discretion, or is capricious, arbitrary or unconstitutional. F.C.C. v. American
(1951), Logansport Broadcasting Co. v. U.S., supra.

The "multiple ownership" rules indicate the policy which the Commission
believes to be exemplary of the public interest, convenience and necessity, and
in making such a determination the discretionary range of the Commission is
quite extensive. It is thus respectfully submitted that except in extreme cases,
where there has been a clear abuse of discretion, the Commission, in a full
hearing, will be able to enforce the spirit of the "multiple ownership" rules
even though the rules themselves are no longer in force.

THOMAS F. QUINLAN

CONFLICT OF LAWS—A STATE HAS A SUFFICIENT INTEREST IN SAFE-
GUARDING THE RIGHTS OF PERSONS INJURED WITHIN ITS BORDERS TO
ENACT A STATUTE AUTHORIZING DIRECT ACTION AGAINST A LIABILITY
INSURER BY A PERSON INJURED LOCALLY TO SUBJECT ITSELF TO SUCH DIRECT
SUITS, EVEN THOUGH THE CONTRACTS OF INSURANCE ARE MADE OUT-
SIDE OF THE STATE AND IN JURISDICTIONS WHICH ALLOW LIABILITY IN-
SURERS TO INCLUDE CONTRARY PROVISIONS IN THEIR CONTRACTS.

Louisiana has a comprehensive insurance code which requires, inter alia,
that all insurance companies which register to do business within the state
must agree to be sued directly even though a final determination of the lia-
bility of the insured has not been made. It also allows an injured party to sue
the insurance carrier without first proceeding against the insured. Appel-
lants, Mr. and Mrs. Watson, here brought such a direct suit against the Em-
ployers Liability Assurance Corporation, Ltd., a foreign corporation, basing
their complaint upon injuries allegedly suffered by Mrs. Watson as a result
of the use of a product made by the Toni Company. The Toni Company is
insured by Employers. The contract of insurance was made outside of Louisi-
ana and contains a provision that the insurer's obligation to pay shall not
arise until after a final determination of the insured's liability. Such a condi-
tion is considered valid by the state in which the contract was made. Em-
ployers is licensed to do business in Louisiana and has agreed that it shall be
subject to this type of action as required by statute. The suit was initiated in the Louisiana state courts but removed to the federal district court on the grounds of diversity of citizenship. The district court granted a motion to dismiss on the contention that these statutes were unconstitutional in that they violated the due process clause of the Fourteenth Amendment. The United States court of appeals affirmed the dismissal and the Supreme Court heard the case on appeal. Held, a state has a sufficient interest in safeguarding the rights of persons injured within its borders to enact a statute authorizing direct action against a liability insurance company by a person injured locally and to require that all insurance companies doing business within the state subject themselves to such direct suit, even though the contracts of insurance are made outside of the state and in jurisdictions which allow liability insurers to include contrary provisions in their contracts. *Watson v. Employers Liability Assurance Corp.*, 75 Sup. Ct. 166 (1954).

The basic question raised by this case is the power of a state to regulate foreign insurance contracts. It is a problem of legislative jurisdiction and is of particular significance under our system of government. Interstate (inter-sovereign) trade and business are controlled exclusively by Congress while, for the most part, the states themselves exercise the power to regulate for the safety, health and welfare of their citizens. Because of this division of legislative jurisdiction, the temptation to avoid a state’s law by an unnecessary but intentional interstate transaction is ever present.

A state which attempts to control activities outside of its territorial boundaries is met with two immediate constitutional objections, the due process clause of the Fourteenth Amendment and the full faith and credit clause. The due process clause, although not specifically prohibiting a state from exerting jurisdiction over foreign transactions and persons, has been held to prevent a state from legislating over matters unless it has jurisdiction. This has come to mean that there must be a connection between the legislative body and the subject before a state can gain such jurisdiction, and the nature of this connection is the essence of the problem.

In an early case the Supreme Court held invalid a statute which made it a crime to do any act within the state to effect insurance on local property if the insurance company was not licensed to do business by the state. The case reached the courts on a contract made outside of the state and the Court decided that such an attempt to regulate foreign contracts was a violation of the due process clause. Seemingly, the Court here felt that a state’s jurisdiction was limited to its territorial limits. *Allgeyer v. Louisiana*, 165 U.S. 578 (1897). Although it must be recognized that the Court was dealing with a penal statute, the case was heavily relied upon in a number of subsequent decisions. In *New York Life Ins. Co. v. Dodge*, 246 U.S. 357 (1918), the Court struck down an attempt by the Missouri courts to apply a local statute to a loan made in New York but based upon a Missouri insurance con-
tract. Although the statute in question was obviously designed to cover just such a transaction and there reached the courts, the Supreme Court held the loan contract to be separate from the contract of insurance and that the loan was a New York contract and outside the reach of the Missouri legislature. Again in *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930), the Court held against a Texas statute which altered a contract made in Mexico and which in no way affected either Texas residents or property. Here however the Court was careful to note that "Ordinarily, ... [a state] may prohibit performance within its borders, even of contracts validly made elsewhere, if they are required to be performed within the State and their performance would violate its laws." The Court, if unaware previously, seems to have realized that a doctrine of jurisdiction requiring a state to apply the lex locus contractus has its problems. In *Hartford Ind. Co. v. Delta Co.*, 292 U.S. 143 (1934), the Court again denied to a state the power to alter a foreign contract of insurance by statute. Here the Court once again noted that a state may have some interest in foreign contracts and implied that in some cases the interest might be great enough to allow it to legislate over them. However, it found on the facts presented that the connections between the state and the contract were too slight and casual to allow such jurisdiction.

The Court set the stage for its decision in the instant case in the earlier case of *Hoopeston Co. v. Cullen*, 318 U.S. 313 (1943). In *Hoopeston* an insurance company which did a large percentage of its business in New York, insuring New York property, was careful to make all of its contracts outside of the state. The issue presented to the Court was whether New York could legislate over this company as one "doing an insurance business" in the state. The Court recognized the fact that "Business may be done in a state although those doing the business are scrupulously careful to see that not a single contract is ever signed within the state's boundaries," *Hoopeston v. Cullen*, supra, 317. The Court, in upholding the state's right to regulate such insurance business, stated, "the Allgayer line of decisions cannot be permitted to control cases such as this, where the public policy of the state is clear, the insured interest is located within the state, and there are many points of contact between the insurer and the property," *Hoopeston v. Cullen*, supra, 319. Again in *Travelers Health Assn. v. Virginia*, 339 U.S. 643 (1950) the way was made easier for the present decision when the Court held that Virginia courts had jurisdiction over a corporation which was doing a mail order business within the state. It stated that certain "minimum contacts" must exist between the state and the corporation in order for jurisdiction to exist and held that those contacts were present in the facts presented.

The instant case stands for the proposition that a state's jurisdiction to legislate over insurance contracts is not limited by the territorial boundaries of the state itself. Rather, such jurisdiction is based on the contacts which exist between the state and the subject matter and also on the reasonableness
of the police power which is being exerted. In this respect, the instant case repudiates the Allgeyer line of decisions. It is submitted that testing legislative jurisdiction by the social interests of the state involved is the proper approach to this issue. It may not be as definite or easy to apply as a test based on state boundary lines, but it will lead more often to a sound determination.

FREDERICK M. HART

CONSTITUTIONAL LAW—THE GAMBLERS’ OCCUPATIONAL TAX ACT, AS APPLIED TO PETITIONER IN THE DISTRICT OF COLUMBIA, IS NOT A PENALTY UNDER THE GUISE OF A TAX, AND IT DOES NOT CONTRAVENE THE FOURTH AMENDMENT’S BAN AGAINST UNREASONABLE SEARCH AND SEIZURE NOR THE FIFTH AMENDMENT’S PROHIBITION OF COMPULSORY SELF-INCRIMINATION.

On October 7, 1952, an information was filed in the Municipal Court for the District of Columbia charging the petitioner with violation of the Gamblers’ Occupational Tax Act, 65 Stat. 529 (1951), 26 U.S.C. §§ 3285-3298 (1952). Section 3290 of the Act provides: “A special tax of $50 per year shall be paid by each person who is liable for tax under subchapter A or who is engaged in receiving wagers for or on behalf of any person so liable.” Section 3285 in subchapter A, referred to in § 3290, imposes a ten percentum tax on all wagers received by each person “who is engaged in the business of accepting wagers.” In § 3271(a) payment of the special tax of $50 is made a condition precedent to carrying on any business mentioned in the Act. The petitioner refused to pay the special tax required by § 3290 and did not comply with § 3291 which requires each person who is liable for the special tax to register with his particular district’s Internal Revenue Collector, giving his own name and place of residence, the place where he carries on his business, and the names and addresses of his employees or employers. For engaging in this wagering business the petitioner could be convicted of a felony under the D.C. Code § 22-1501 (1951), or for conspiring with his employers or employees to promote such activity he could be convicted of a felony under 18 U.S.C. § 371 (1952).

The Municipal Court sustained the petitioner’s motion to dismiss, holding that the Gamblers’ Occupational Tax Act was unconstitutional as applied to petitioner in the District of Columbia on the grounds that since laws enacted by Congress prohibit gambling in the District, the Act imposes penalties in the guise of taxes and compels a person who endeavors to comply with the Act to give information which would incriminate him under the District gambling laws and the Federal conspiracy statute. The Municipal Court of Appeals reversed on the authority of the decision of the Supreme Court in United States v. Kahriger, 345 U.S. 22 (1953), and the Circuit Court of Appeals for the District of Columbia affirmed that reversal. The Supreme Court
of the United States granted certiorari. *Held,* the Gamblers' Occupational Tax Act, as applied to the petitioner in the District of Columbia, is not a penalty under the guise of a tax, and it does not contravene the Fourth Amendment's ban against unreasonable search and seizure nor the Fifth Amendment's prohibition as to compulsory self-incrimination. *Lewis v. United States,* 75 Sup. Ct. 315 (1955).

In answering the three questions presented by the petitioner the Court stated that all three were controlled by the *Kahriger* decision, *supra.* As regards the contention that the Act imposes a penalty under the guise of a tax, the Court, citing *United States v. Stafoff,* 260 U.S. 477 (1923), said at 417: "The short answer to this argument is that this Court has long held that the Federal Government may tax what it also forbids." The petitioner's third contention, considered by the Court to be another facet of the Fifth Amendment argument, was that § 3293 of the Act which requires him to keep his special tax stamp posted "conspicuously" in his place of business, contravenes the Fourth Amendment's ban against unreasonable search and seizure. The Court said that the petitioner could not avail himself of this argument because he had not yet purchased the stamp.

The principal issue of this case is whether compliance with the Act would compel the petitioner to give information to the Government which is incriminating and thereby violate his constitutional rights under the Fifth Amendment. In the *Kahriger* case the Court held that payment of the waging taxes was not self-incriminating since the required disclosures in that case revealed violations of state law, not federal law. Mr. Justice Reed, speaking for the majority, said: "The waging tax with which we are here concerned applies to all persons engaged in the business of receiving wagers, regardless of whether such activity violates state law." [*Emphasis supplied.*] *United States v. Kahriger,* *supra,* at 26. There is no federal law prohibiting gambling in the states, but such activities are prohibited by the Federal Government in the District of Columbia, D.C. Code § 22-1501 (1951). However, even though the petitioner in the principal case intended to accept wagers within the District of Columbia, the Court considered payment of the special tax of $50 to be prospective and not retrospective so that the required disclosures are voluntary, not compulsory. In the majority opinion in the instant case Mr. Justice Minton states at 418:

The only compulsion under the Act is that requiring the decision would-be gamblers must make at the threshold. They may have to give up gambling, but there is no constitutional right to gamble. If they elect to wager, though it be unlawful, they must pay the tax.

In any federal proceeding a witness may exercise the privilege of remaining silent when confronted with questions, the answers to which might be used against him in a subsequent criminal proceeding, or which might uncover further evidence against him. *McCarthy v. Arndstein,* 266 U.S. 34 (1924). This
privilege is guaranteed by the Fifth Amendment. However, a witness in a federal proceeding may not refuse to answer on the grounds that he would thereby expose himself to state prosecution. United States v. Murdock, 284 U.S. 141 (1931); Brown v. Walker, 161 U.S. 591 (1896). Also, when a witness testifies in a state court under a state immunity statute, the Federal Government may use that testimony to aid in prosecuting that witness in a federal court. Feldman v. United States, 322 U.S. 487 (1944). Thus, the privilege is effective only against the agencies of the sovereign which guarantees it.

The privilege must be explicitly invoked by the witness at the first apprehension of danger of self-incrimination or he will be considered to have waived it. Once he starts to answer incriminating questions he must continue, or he will be subject to a charge of contempt. Rogers v. United States, 340 U.S. 367 (1951); United States v. Monia, 317 U.S. 424 (1943). The witness himself is the sole judge as to when the privilege should be exercised, but it is up to the court to consider the facts and circumstances of each particular case in order to determine the validity of the claim. In Blau v. United States, 340 U.S. 159 (1950), the Court said that it is immaterial whether the answers by themselves would support a criminal conviction. The privilege of remaining silent is available to a witness whenever the required admissions would furnish "a link in the chain of evidence needed in a prosecution." In connection with questions concerning the business activities of the witness, it has been held that the court should consider that the "chief occupation of some persons involves evasion of federal criminal laws" so that truthful answers by the witness might result in an admission of guilt. Hoffman v. United States, 341 U.S. 479 (1951). When an individual refused to file an income tax return because his income was derived from illegal traffic in liquor and this fact would have to be revealed on the form, the Court said that this was pressing the protection of the Fifth Amendment too far. The defendant could not draw a "conjurer's circle" around the entire return, but if the form called for incriminating answers he could have raised those objections on the return and left those answers blank. United States v. Sullivan, 274 U.S. 259 (1927). However, this cannot be done under the Gamblers' Occupational Tax Act since the Internal Revenue Service is not allowed to issue a $50 tax stamp unless all the answers required by § 3291 are submitted. Combs v. Snyder, 101 F. Supp. 531 (D.D.C. 1951), affirmed 342 U.S. 939 (1952).

In the Kahriger case, supra, Mr. Justice Jackson concurred with the majority's holding that the Act was not incriminating as applied to a petitioner receiving wagers in the state of Pennsylvania, but he said at 36:

But the evil that can come from this statute will probably soon make itself manifest to Congress. The evil of a judicial decision impairing the legitimate taxing power by extreme constitutional interpretations might not be transient. Even though this statute approaches the fair limits of constitutionality, I join the decision of the Court.

It is submitted that the principal case points out the "evil" of the Act. On
the basis of this decision Congress, in the exercise of its taxing power, could require each individual contemplating any act prohibited by a federal criminal statute to pay a tax and register with the Government prior to the commission of the crime since the required disclosures would pertain only to future criminal acts. But, when the petitioner in this case submits the names of his employees or employers as required by § 3291, is he not confessing that he has already conspired with them to commit an offense against the United States? The acquisition of the $50 tax stamp is certainly an overt act performed to affect the object of that conspiracy. However, the majority opinion made no reference whatsoever to the conspiracy statute. Also, the 10% tax of § 3285 of the Act is not prospective since it is paid only after wagers have been received. The Court did not have to decide whether or not payment of this tax would incriminate the petitioner because he was not charged with violating that section of the Act.

The petitioner is a convicted gambler, but he is still entitled to the protection of the safeguards of the Constitution. As said by Mr. Justice Black in his dissent at 419: "It should not be forgotten that breaches opened to get lawless gamblers remain to jeopardize the liberty of the law-abiding."

ROBERT E. CAHILL

CONTRACTS—Acceptance by Mail of an Offer of a Bilateral Contract Does Not Become Effective Until Received by the Offeror, as Long as the Offeree Has the Right to Reclaim the Letter from the Postal Authorities.

In response to an invitation to bid, the plaintiff Rhode Island Tool Company submitted to the Navy Department a bid to provide certain bolts listed in the invitation as items 1-15. Having failed to notice that items 13-15 were a more expensive bolt, the plaintiff's bid was based on the cost of the less expensive items 1-12. The defendant divided the contract and mailed a notice of award to the plaintiff for the last three items only. The plaintiff discovered its error and sent a telegram revoking its offer. The telegram was received by the defendant after it had mailed the notice of award, but before the notice had been received by the plaintiff. Held, there was no binding contract since the plaintiff withdrew its bid before the acceptance became effective. Rhode Island Tool Company v. United States, No. 49913, U.S. Ct. Cl., Feb. 8, 1955.

As in Harvey Franklin Dick v. United States, 113 Ct. Cl. 94 (1949), the court based its decision on postal regulations which allow a sender to withdraw letters from the mails after deposit. 39 Code Fed. Regs. §§ 42.22, 42.23 (1949). This provision, the court stated, makes the post office the agent of the sender, and, since an acceptance is not effective until received by the offeror,
no binding contract is formed while the sender may withdraw his acceptance from the mails.

Prior to postal regulations allowing withdrawal of deposited letters, it was well settled that the acceptance of an offer became effective when deposited in the mails. The issue here, then, was whether the post office regulation allowing removal of a deposited letter changed the time at which a binding contract was formed.

In Adams v. Lindsell, 1 B. & Ald. 681 (1818), it was established that an acceptance was effective when deposited in the mails, apparently on the ground "that at the time of mailing acceptance there had been an overt manifestation of assent to the proposal." 1 Williston, Contracts § 81 p. 234 (2d ed. 1936). Williston states that the court failed to consider that, since the contract was a bilateral contract the "acceptance must also have become effective as a promise to the offeror in order to create a contract" and adds at 237:

It may be forcibly argued that making a promise is something which necessarily requires communication, and that sending a letter which never arrives is no more making a promise to the person addressed than talking into a telephone when there is no connection with the person addressed . . . .

The lone state holding contrary to the majority rule is Massachusetts which bases its decisions on M’Culloch v. The Eagle Insurance Company, 1 Pick. 277 (Mass. 1822). This case was decided independently of Adams v. Lindsell, supra; however, a note was added to the decision indicating that Adams v. Lindsell had come down since it was decided and had that case been called to the court’s attention its ruling might have been different.

English courts have inferred that control of a deposited letter determines the time at which an acceptance becomes effective. Ex Parte Cote, L.R. 9 Ch. 27 (1873), cited by the court in the instant case, held that a French post office regulation allowing withdrawal of a letter from the mails made delivery of a negotiable instrument effective on arrival at its destination and not when deposited in the mails.

In Guardian Natl. Bank v. Huntington Co. State Bank, 206 Ind. 185, 187 N.E. 388 (1933), and Traders' Nat. Bank v. First Nat. Bank, 142 Tenn. 229, 217 S.W. 977 (1920), also cited in the instant case, the court felt that the change in post office regulations changed the time that acceptance became effective.

The wisdom of the majority rule was questioned in Note, 7 Harv. L. Rev. 301, 302 (1893). Under the rule, an offeree is bound on deposit of his acceptance, yet he may still withdraw his acceptance from the mails and destroy it. He is not, then, effectively bound until receipt by the offeror. Thus there appears to be grounds for feeling that the post office regulation gave cause for changing the old rule as well as grounds for thinking the old rule was wrong from its inception. The majority of decisions, however, have continued to follow Adams v. Lindsell, supra, and neither courts nor writers
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have considered the ability to withdraw an acceptance from the mails as controlling. 1 Williston, Contracts § 86 (2d ed. 1936); see Recent Cases, 47 Harv. L. Rev. 871 (1934). Williston states at 246 that:

Though the analogy is by no means perfect between a transfer of property or of a formal instrument on mailing and the formation of a bilateral contract by the mailing of a letter of acceptance, no reason is apparent why the possibility of withdrawal by the sender should be of any more importance in the latter case than in the former.

The Supreme Court of the United States in Tayloe v. Merchants' Fire Insurance Co., 9 How. 390 (U.S. 1850), decided the issue according to the majority view and no later case has been found overruling the decision. Support was given to the majority view in Wheat v. Cross, 31 Md. 99 (1869), wherein the court stated at 103 that:

... where parties are at a distance from each other, and trade by correspondence through the post, an offer made by one is a continuing offer until it is received, and its acceptance then completes the aggregatio mentium necessary to make a binding bargain. The bargain is complete as soon as the letter is sent containing notice of acceptance.

This appears to be the reasoning employed by most courts in determining the issue.

The law is well settled that acceptance of an offer by telegraph becomes effective on deposit with the telegraph company. Dick v. Vogt, 196 Okla. 66, 162 P. 2d 325 (1945); Western Union Telegraph Co. v. Gardner, 278 S.W. 278 (Tex. Civ. App. 1925); Postal Tel. C. Co. v. Lou. Cotton Seed Oil Co., 140 Ky. 506, 131 S.W. 277 (1910); Trevor v. Wood, 36 N.Y. 307 (1867). This is the law even though there has never been any doubt that a person could withdraw the telegram from the telegraph office, and if the telegraph company is anyone's agent, it is the agent of the sender.

There has been some legislation on the subject. California has declared that a contract is effective when the party accepting has put his acceptance in the course of transmission, Cal. Civ. Code §§ 1582, 1583 (West 1954), and the only exception made occurs when the party making the offer stipulates the acceptance must be received before it is effective. But this is true in any jurisdiction for the contracting parties can always agree to the time when the contract is to be effective.

It is evident that there is a difference of opinion as to the effect on the general rule of postal regulations allowing withdrawal of a letter from the mails. However, no overriding argument has been advanced for altering the rule as it has been established, and when a rule or principle of law is as firmly settled as is the majority view, any change is rightfully the duty of the legislature and not of the court.

ROBERT W. HILL
ESTATE TAX—WHERE DECEDENT HAS RELINQUISHED THE RESERVED POWER TO REVOKE A TRUST, IT DOES NOT AFFECT HIS ADDITIONAL RESERVED POWER TO CHANGE OR MODIFY THE TRUST, AND, THEREFORE, § 811(d) OF THE 1939 INTERNAL REVENUE CODE REQUIRES THAT THE CORPUS OF THE TRUST BE INCLUDED IN DECEDENT’S GROSS ESTATE.

In May, 1925, decedent conveyed certain property and insurance policies to Rhode Island Hospital Trust Company in trust, reserving to himself the power to revoke the trust in whole or in part, or to add to, annul, change or modify the trust in any way whatsoever. On September 23, 1937, settlor, by an instrument reciting the portion of the trust deed above stated, in exercise of said powers, did “change and modify” the terms and provisions of the trust. The instrument concluded, “I hereby declare said deed of trust bearing date of May 13, 1925, as modified by this instrument, to be irrevocable. In all other respects I hereby ratify and confirm said deed of trust.” Settlor filed a gift tax return in 1938 treating the 1937 instrument as a completed gift. Upon settlor’s death in 1949, the Commissioner of Internal Revenue determined a deficiency against the estate of settlor. This determination was based on the inclusion of the value of the trust assets in decedent’s gross estate under the Int. Rev. Code of 1939, § 811(d)(1), 53 Stat. 121 (now Int. Rev. Code of 1954, § 2038(a)(1)).

This section of the code provides for the inclusion in decedent’s gross estate the value of all property “To the extent of any interest therein of which the decedent has at any time made a transfer . . . , by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power . . . by the decedent . . . to alter, amend, revoke, or terminate. . . .” The Tax Court affirmed the determination of the Commissioner. Estate of Thomas E. Steere, 22 T.C. 79 (1954). Rhode Island Hospital Trust Company, executor of decedent’s estate, petitioned for review, alleging that by his instrument of September, 1937, decedent had relinquished all powers to revoke, change or modify. It is conceded that if decedent retained the powers to change or modify, § 811(d)(1) of the Code, supra, is operative. Held, affirmed, where power of revocation is clearly distinguished from power of alteration in a trust instrument, the express surrender of one power does not release the other power and prevent inclusion of the trust in decedent’s gross estate. Rhode Island Hospital Trust Co. v. Commissioner, 23 U.S.L. Week 2467 (1st Cir. March 10, 1955).

Much confusion has surrounded the construction of § 811(d)(1), in relation to the gift tax, Int. Rev. Code of 1939, § 1000(a), 53 Stat. 144 (now Int. Rev. Code of 1954, § 2501(a)). Historically, the gift tax was enacted in 1924 to supplement the estate tax. The purpose of the gift tax was to prevent or compensate for avoidance of the estate tax by taxing gifts of property inter vivos which, but for the gifts, would have been subject to the tax upon transfers at death. Estate of Sanford v. Commissioner, 308 U.S. 39 (1939).
The two portions of the code are in pari materia, and must be construed together. *Estate of Sanford v. Commissioner*, supra, 42; *Burnet v. Guggenheim*, 288 U.S. 280, 283 (1933). Inconsistency by the Commissioner of Internal Revenue as to when a gift was completed for purposes of the gift tax contributed to this confusion. This issue was resolved by the rule of the *Sanford* case, supra, which held that retention of control over disposition of trust property, whether for benefit of donor or others, renders the gift incomplete until the power is relinquished whether in life or at death. *Accord, Hesslein v. Hoey*, 91 F.2d 954 (2d Cir. 1937), *cert. denied*, 302 U.S. 756 (1937). Taxation is not so much concerned with the refinements of title as it is with the actual command over the property taxed. *Estate of Sanford v. Commissioner*, supra; *Burnet v. Guggenheim*, supra; *Corliss v. Bowers*, 281 U.S. 376 (1930).

Clearly, if the phrase from the 1925 deed of trust “add to, annul, change or modify in any way whatsoever” was in force at settlor’s death, it was not a completed gift within the *Sanford* rule and was encompassed by the language of § 811(d)(1) of the 1939 code.

Petitioner relied upon three premises to support its contention that to continue the quoted phrase in force would negate the express provision of the 1937 instrument that the trust “as modified” was “irrevocable”: (1) That “to annul” is equivalent to “to revoke” and the provision of the 1937 instrument that the trust, as modified, was to be irrevocable amounted to a release of the power to annul as well as the power to revoke. Since the power to “annul” is found in the same phrase as the power “to change or modify”, the settlor, by releasing one of the powers, must have intended to release them all. Hence, none of the powers was reserved by the 1937 instrument. (2) That to continue in force the power to “change or modify in any respect whatsoever” would nullify the express irrevocability provision, since an unrestricted power to modify would allow the settlor to make his estate the sole beneficiary and then permit him, in an action in equity, to terminate the trust. (3) That if settlor had intended to retain the power to change or modify, the draftsman would have spelled out such a reservation with great particularity.

All three contentions were dismissed summarily. Rejecting the first premise, the court treated “annul” in the 1925 instrument as surplusage, and considered both the stated power to revoke and the redundant power to annul extinguished by the irrevocability provision of the latter instrument, without affecting the power to change or modify. Petitioner cited Restatement, Trusts § 331, Comment b (1935), which states in part, “If the power to modify is subject to no restriction it includes the power to revoke the trust,” as authority for the second premise. Similar arguments were rejected in *In re Tyler’s Estate*, 109 F.2d 421 (3d Cir. 1940), and *Porter v. Commissioners*, 60 F.2d 673 (2d Cir. 1932). Judge Learned Hand in the *Porter* case, indicated that the original interests were defeasible only when the settlor did not profit by the change, and that equity would enforce this limitation. It was here suggested the
irrevocability provision should be considered an implied restriction upon the
power to modify. The speculation as to settlor’s intention as indicated by
the draftsman’s failure expressly to reserve the power in question was answered
by speculation to the contrary—that a careful draftsman would have expressly
surrendered the power to change or modify, had that been the settlor’s in-
tention.

Affirming the decision of the Tax Court, the court of appeals held the two
instruments were sufficiently definite to form a basis for decision. The 1925
deed of trust distinguished the power of revocation from the power of altera-
tion. The terms were used in the disjunctive and were not dependent upon
each other. The 1937 instrument maintained this distinction, citing the power
of alteration as the basis for the instrument, and providing for irrevocability
without referring to the expressly reserved power of alteration. It confirmed
all provisions of the 1925 deed not expressly modified.

As indicated in the principal case, ambiguities in an instrument upon which
the levying of a tax is dependent will generally be construed so as to bring the
largest return to the sovereign. This emphasizes the need for careful drafts-
manship and the use of express language in planning an estate. Carelessness
in this respect may permit defeasance of settlor’s intent, as well as the im-
position of a heavy tax burden.

DUNCAN A. BONJORNI

EVIDENCE—WHERE THE ACCUSED IN A CRIMINAL CASE IS FOUND TO BE
INSANE AT A JUDICIAL HEARING PRIOR TO TRIAL AND IS COMMITTED TO A
STATE MENTAL HOSPITAL AND, WHILE A PATIENT THERE, MAKES A
STATEMENT TO THE PSYCHIATRIST TREATING HIM THAT HE HAD FAKED
HIS SYMPTOMS OF INSANITY IN THE PSYCHIATRIC EXAMINATION CON-
DUCTED FOR THE PRELIMINARY HEARING, THIS STATEMENT IS PRIVILEGED
AND IT CANNOT BE RECEIVED IN EVIDENCE AT THE TRIAL OF THE ACCUSED
IF HE SHOULD LATER BE FOUND SANE.

Taylor was indicted in the District of Columbia in December, 1952, for
robbery, housebreaking and grand larceny. In March, 1953, before
trial, in proceedings under 18 U.S.C. § 4244, he was found to be insane
and therefore unable to stand trial. He was committed to St. Elizabeth’s
Hospital under 18 U.S.C. § 4246 until he should become mentally competent
to stand trial.

In October, 1953, the superintendent of the hospital certified that Taylor
was mentally competent to stand trial, and in November, 1953, he was tried.
His only defense was insanity. A psychiatrist, Dr. Gilbert, who examined
him five times on order of the court at the district jail where he was held
prior to the preliminary hearing, testified in his behalf. As a result of these ex-
aminations, which were conducted for the purpose of determining Taylor’s men-
tal fitness to stand trial, Dr. Gilbert testified that, in his opinion, Taylor was of
unsound mind at the time of the offenses, suffering from dementia praecox with
symptoms including hallucinations and delusions. The prosecution then called
Dr. Epstein, a psychiatrist on the staff at St. Elizabeth's Hospital who had
treated Taylor when he was confined there from March to October, 1953.
Dr. Epstein suggested that what he had learned from his patient was privileged.
The court ruled that it was not. Dr. Epstein then testified that Taylor told
him that he had not suffered from hallucinations or delusions, but had been
"going along with a gag" when he described such episodes to Dr. Gilbert.
Dr. Epstein's opinion was that Taylor suffered from a "psychopathic person-
ality disturbance," but was not insane. Taylor was convicted.
On appeal, the Government contended that since appellant was confined in
a state institution by order of the court, the relationship between him and
the staff doctor was not the ordinary relationship of physician and patient
contemplated by the District of Columbia privilege statute. D.C. Code § 14-308
(1951). Further, since under the statute information otherwise inadmissible
can be disclosed with the consent of the patient or his legal representative and
since neither raised any objection at trial when the court ordered Dr. Epstein
to testify, then the privilege was waived. Held, the relation of physician-
patient existed between Dr. Epstein and appellant. The fact that the ac-
cused was found to be insane at a judicial hearing prior to trial and committed
to a state mental hospital by court order is immaterial where the accused there
makes a statement to the psychiatrist treating him that he had faked his
symptoms of insanity in the psychiatric examination conducted for the pre-
liminary hearing. This statement is privileged and cannot be received in evi-
dence at the trial of the accused. Taylor v. United States, No. 12034, U.S.
At common law no privilege existed as to communications between physician
and patient, but this rule has been changed in most jurisdictions by statute.
William Laurie Co. v. McCullough, 174 Ind. 477, 90 N.E. 1014 (1910); In re
Young's Estate, 33 Utah 382, 94 P. 731 (1908). Although these privilege
statutes are substantially alike, some courts have held them to be remedial
and, therefore, to be liberally construed. Other courts have held that they
are in derogation of the common law and, therefore, should be strictly con-
strued. See New York City Council v. Goldwater, 284 N.Y. 296, 31 N.E.2d
31 (1940); and Myers v. State, 192 Ind. 592, 137 N.E. 547 (1922).
The District of Columbia Code 1951, § 14-308 provides in pertinent part:
In the courts of the District of Columbia no physician or surgeon shall be per-
mitted, without the consent of the person afflicted, or his legal representative, to
disclose any information, confidential in its nature, which he shall have acquired
in attending a patient in a professional capacity and which was necessary to
enable him to act in that capacity, . . . Provided, That this section shall not apply
to evidence in criminal cases where the accused is charged with causing the
death of, or inflicting injuries upon a human being, and the disclosures shall be
required in the interests of public justice.
This statute has been liberally construed and held to include not only oral information given by the patient but also any information obtained by the physician in his professional capacity which includes information which the physician obtained by his observation and examination of the patient and all inferences and conclusions drawn therefrom. *Sher v. DeHaven*, 91 U.S. App. D.C. 257, 260, 191 F.2d 777, 780, cert. denied 345 U.S. 936 (1952); *Labofish v. Berman*, 60 App. D.C. 397, 400, 55 F.2d 1022, 1025 (1932). As opposed to the view that this type of statute should be liberally construed, several leading authorities of the law of evidence take the view that the statute serves no useful purpose and should be abolished. See 8 Wigmore, Evidence § 2380 a (3d ed. 1940); Chafee, *Privileged Communications: Is Justice Served or Obstructed by Closing the Doctor's Mouth on the Witness Stand?* 52 Yale L.J. 607 (1943). There is a justification for the privilege at least in psychiatric cases. Due to popular ignorance of the field of mental illness the ordinary patient feels a sense of shame regarding his illness. Consequently, when a person consults a psychiatrist for treatment it can be reasonably supposed that the patient intends that his communications should be confidential. In addition, in order properly to treat his patient, the psychiatrist must explore the patient's deepest and innermost thoughts. If the patient were to consult the psychiatrist harboring the idea that the psychiatrist could be compelled to reveal the patient's communications, then the chances are that the task of the psychiatrist would become much more difficult and the possibility of prompt, effective treatment much less likely. See Weihofen, Mental Disorder As a Criminal Defense, 296-300 (1952).

The D.C. statute makes no distinction in the situation where the physician consulted is a psychiatrist. However, the majority of the court in the instant case properly held that while the privilege might be of doubtful value in many cases involving physical ailments, this information should certainly be held to be confidential and within the statute where mental illness is involved. *Taylor v. United States*, *supra*. As to whether Dr. Epstein was attending Taylor in a "professional capacity" even though Taylor was his patient by virtue of a court order, the majority followed the great weight of authority and held that such patients are entitled to the protection of the statute. *Linscott v. Hughbanks*, 140 Kan. 353, 37 P.2d 26 (1934); *Casson v. Schoenfeld*, 166 Wis. 401, 166 N.W. 23 (1918).

This clearly seems to be the reasonable view, in that if a state provides facilities for the treatment of all its insane citizens, then it should be immaterial whether the mental patient is a charitable case, a criminal, or a paying patient as long as he is in the hospital for treatment and not solely for examination. The fact that Taylor made the statement in question to a conference of several physicians should not, it seems, take it out of the statute as Judge Prettyman, in his dissent, thinks it should. *Taylor v. United States*, *supra*. In the treatment of disease today it seems to be common practice for physicians
to work in groups on a particular case. For a patient to make a statement in the presence of two or three physicians rather than one would not indicate that the patient had given the physicians the privilege of telling the whole world about it.

Judge Prettyman in his dissent also notes that because Dr. Epstein was acting in the capacity of a Government officer and not as a personal physician the privilege does not exist. This would be true if the basic premise were correct. If, for instance, Dr. Epstein had been the superintendent of St. Elizabeth's and Taylor had called him as superintendent and made the identical statement to him, then this would not be privileged. Dr. Epstein would be, in that instance, acting in the role of a Government officer. See Commonwealth v. Sykes, 353 Pa. 392, 45 A.2d 43 (1946).

Even though it seems clear that the physician-patient privilege existed in this case, it seems equally clear that it had been waived at trial. When Dr. Epstein took the stand he suggested that this statement was privileged. Taylor v. United States, supra. When the court overruled him, there was no objection by either the accused or his counsel, either then or when the jury was charged, or in the motion for a new trial. Since under the statute, this information can be disclosed with the consent of the patient or his legal representative, this prolonged silence should be deemed to be a consent.

In conclusion, while the majority opinion which found a privilege to exist is based on sound authority, this privilege as far as psychiatric cases are concerned should certainly apply to those situations where the party invoking it does not interpose a plea of insanity. Even in that situation, however, if the party fails to object to the introduction of the privileged evidence, then this failure to object should be considered a consent and the testimony should, therefore, be admissible. In addition, if the party does interpose a plea of insanity and calls expert witnesses to testify to his mental condition, then the conclusion should be drawn that the party has opened the door to the introduction of all evidence relevant to his mental condition. Otherwise, the situation which exists in this case in which an accused can put in expert medical testimony favorable to his defense and at the same time keep out unfavorable testimony would contradict sound principles of public justice. On the basis of the facts in this case, therefore, the privilege should be deemed to have been waived and the judgment should have been affirmed.

JOHN J. O'MALLEY, JR.
FEDERAL TORT CLAIMS ACT—In an Action Based on a Multi-State Tort the Federal Tort Claims Act Requires That Liability of the Government Be Determined by the Law of the State in Which the Negligent Government Employee Was Located When He Acted.

On November 1, 1949, an Eastern Air Lines plane on final approach for landing at the Washington National Airport was struck by a military-type aircraft owned by the Bolivian Government. All persons aboard the Eastern plane were killed. The executors of the estates of Ralph F. Miller and his wife, passengers on the Eastern plane, brought suit in the United States District Court for the District of Columbia against Eastern Air Lines, the pilot of the military plane, and the United States. The action against the Government was brought under the Federal Tort Claims Act, 28 U.S.C. § 1346 (b) (1952) which provides:

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

In the Federal Tort Claims action the trial judge found that the accident occurred in the District of Columbia and that the negligence of the control tower personnel, employees of the United States, contributed proximately to the accident. DAMAGES of $50,000 were adjudged against the Government for the death of Ralph F. Miller. The Washington National Airport and control tower are located in Virginia and the plane was flying over Virginia, the District of Columbia, and Maryland when the negligent acts and omissions of the Government employees occurred. On appeal, the United States Court of Appeals for the District of Columbia Circuit reduced the judgment to $15,000. Held, that in the Federal Tort Claims Act Congress provided in explicit terms for the Government's liability to be measured under the law of the place where its negligent employee's act or omission occurred and that therefore the Act requires the Virginia law to be applied limiting recovery for wrongful death to $15,000. Eastern Air Lines v. Union Trust Company, 221 F.2d 62 (D.C. Cir. 1955).

The reduction of the judgment against the Government results from the court's interpretation of § 1346 (b), supra. The majority of the court is silent as to the basis for the reduction since the judge who dissented on this issue wrote the opinion of the court in which he incorporated his dissent. The opinion states that "They [the majority] hold that Congress thus provided in explicit terms for the Government's liability to be measured under the law..."
of the place where its negligent employee's act or omission occurred, and that therefore the Act requires Virginia law to be applied in this case."

The dissent reasoned that an act in legal and popular usage includes the immediate consequences of the muscular contraction, and interpreted the "place where the act or omission occurred" to mean the "place where the tort occurred." This is stated as consistent with Restatement, Conflict of Laws § 377 (1934), which reads: "The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place." Reference was also made to the testimony of Assistant Attorney General Shea before a congressional committee. In answer to an inquiry as to where a claimant brings suit he answered "Either where the claimant resides, or in the locale of the injury or damage." *Hearings before Committee on the Judiciary on H.R. 5373 and H.R. 6463, 72d Cong., 2d Sess., at 9 (1942).*

The words "the law of the place where the act or omission occurred" have been applied in previous cases to determine the substantive law to be applied when the entire tort occurred in one state and the action was brought in another. A typical application is found in *Olson v. United States*, 175 F.2d 510, 512 (8th Cir. 1949), in which the court states:

> Since, therefore, the negligent act complained of occurred in Utah, the law of that state and not that of South Dakota was controlling. Under § 931(a) of the Act, supra, the district court for the district in which the plaintiff resided had jurisdiction of the action but the standards and tests of the state where the accident occurred controlled on questions of negligence and the nature and extent of recovery including the capacity and rights of the plaintiff and the liability of the United States.

This particular citation is also noteworthy in that the court equates the state in which "the negligent act complained of occurred" to "where the accident occurred" much in the same manner as did Mr. Shea, *supra*.

The first consideration in dealing with the problem presented by the unusual facts of the instant case must be whether or not an ambiguity exists in the statute as applied to those facts so as to warrant reference to legislative history. In favor of a strict application of the statute to these facts it may be stated that the words "in accordance with the law of the place where the act or omission occurred" would be meaningless if not considered another instance under the Act in which claimant's right to relief may differ from those he might have against a private person under like circumstances. Furthermore, a literal application of the statute leads to simplicity as well as to clear and certain results.

In contending that the statute is ambiguous it may be urged that the context of § 1346 (b) is one of general waiver of sovereign immunity and to construe "the place where the act or omission occurred" as a limitation to that waiver is to consider the words out of context. Secondly, where the Government is a joint or concurrent tort-feasor in the case of a multi-state tort, two bodies of
The legislative history of the Federal Tort Claims Act shows no intention on
the part of Congress to change the general conflicts rule that the place of in-
jury is the place of wrong. It was originally enacted as Title IV of the Legis-
lative Reorganization Act of 1946, 60 Stat. 842. The bill was accompanied by
"in accordance with the law of the place where the act or omission occurred"
as "in accordance with the local law." What is meant by "local law" is not clear but there is no indication that it is to be given a special meaning. The
fact that there was never a conscious attempt by Congress to deal with the
problem of multi-state torts is also indicated in the record of the Hearings,
document contains the same interpretation found in Sen. Rep. No. 1400, supra,
and in the former, which contains the testimony of Mr. Shea cited by the dis-
senting judge, the following exchange appears at page 30:

Mr. Shea. . . .

Under the other bill it was not specifically provided that local law should
govern, and certain express provisions were made, for instance, as to distributions.
Mr. Celler. Do you need that? Is that necessary to express it?

Mr. Shea. I should think the earlier bill would probably be construed as apply-
ing the local tort law, but this bill specifically covers it, leaving the distribution
in case of death and so forth to local law.

Mr. Celler. The only trouble is in future bills you may have to put that
precedent in. If you leave it out the courts may not construe it should apply.
I am only thinking out loud to get your reaction.

Mr. Shea. This bill provides explicitly for the application of local law. [Em-
phasis supplied.]

The courts have construed § 1346 (b) liberally as a waiver of sovereign im-
munity. In Employer's Fire Ins. Co. v. United States, 167 F.2d 655 (9th Cir.
1948), the court permitted an insurance company to intervene as a subrogee
in an action against the United States. At 657 the court states: “Where a
statute contains a clear and sweeping waiver of immunity from suit on all claims
with certain well defined exceptions, resort to that rule [of strict construc-
ction] cannot be had in order to enlarge the exception.” [Emphasis supplied.] In
United States v. Yellow Cab Co., 340 U.S. 543 (1951), the Court allowed the
United States to be impleaded as a third party defendant and incorporated that
statement of the Ninth Circuit in its opinion.
Having found a clear congressional mandate in § 1346 (b) it is not clear whether the court in the instant case found no warrant to refer to legislative history or did review the legislative history of the Act to find that mandate. The court has held that the Government's liability under the Federal Tort Claims Act is to be measured by the law of the place at which the negligent Government employee was located when he acted or failed to act. Any consideration that the "negligent or wrongful act or omission," in itself, may have taken place where the negligent transmissions were received, or that the place of wrong is the place where plaintiff's right was violated, is set aside. In addition, a Virginia statute is applied even though the Virginia courts would not have done so since the death did not occur in that state. This does not seem to be an application of the law of Virginia. It follows that if contributory negligence is used as a defense by the Government in an action based on a multi-state tort the legal consequences of plaintiff's actions will be determined by the law of the state in which the Government employee was located when the act occurred.

It is submitted that either a literal construction of the statute in the case of a multi-state tort is not warranted or the application in the instant case is too restrictive. In any event, the unusual procedure employed in relaying the opinion of the court through the dissenting judge has resulted in confusion which should be remedied by a clear judicial statement.

ARTHUR F. MC GINN, JR.

INCOME TAX—SUMS RECEIVED AS EXEMPLARY DAMAGES FOR FRAUD OR AS THE PUNITIVE TWO-THIRDS PORTION OF A TREBLE DAMAGE ANTITRUST RECOVERY, OR PURSUANT TO THE "INSIDER PROFITS" PROVISION OF THE SECURITIES EXCHANGE ACT ARE TAXABLE AS GROSS INCOME.

Respondent Glenshaw Glass Company was engaged in protracted litigation which was terminated by a settlement in which Glenshaw received approximately $800,000. Glenshaw claimed that the portion of the settlement representing punitive damages was not taxable as gross income. In a companion case, respondent Goldman Theatres, Inc. had been awarded treble damages in a suit brought pursuant to § 4 of the Clayton Act. Goldman claimed that the punitive two-thirds of the recovery was not taxable as gross income. Held, punitive damages are gross income within the meaning of § 22(a) of the Internal Revenue Code of 1939. Commissioner of Internal Revenue v. Glenshaw Glass Co., 75 Sup. Ct. 473 (1955).

In a separate opinion handed down the same day the Court considered a case in which petitioner had recovered certain profits which had accrued to one of its directors and claimed that they were not taxable as gross income. The recovery was based on the "insider profits" provision of the Securities Exchange Act, 48 Stat. 896 (1934), 15 U.S.C. 78(p) (1946), which provides
that such profits "shall inure to and be recoverable by the issuer." This provi-

vision is made applicable to investment companies by § 30(f) of the Invest-
ment Company Act, 54 Stat. 836 (1940), 15 U.S.C. 80a-29(f) (1946). Held, the recovery by a corporation of "insider profits" is gross income within the meaning of § 22(a) of the Internal Revenue Code of 1939. General American


The taxpayers in the instant cases claimed no constitutional barrier to the imposition of the taxes in question but urged that the statutory definition of gross income should be construed in the light of the following definition of income contained in Eisner v. Macomber, 252 U.S. 189, 207 (1920):

"Income may be defined as 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 . . . .

In Central R. Co. v. Commissioner of Internal Revenue, 79 F.2d 697 (3d Cir. 1935), a recovery from a faithless fiduciary was found to be in the nature of a penalty imposed by law and not "income" within the Eisner v. Macomber definition. The court construed the Eisner v. Macomber definition as the definition of the term "income" as used in the Sixteenth Amendment and held that, a fortiori, the recovery was not made taxable by statute. Confronted with the statutory definition the court stated at page 699: "But what is not income cannot be so made by definition." The Board of Tax Appeals (now the Tax Court) followed the Central R. Co. case in Highland Farms Corpora-
tion v. Commissioner of Internal Revenue, 42 B.T.A. 1314, 1322 (1940), where it held that "A penalty imposed by law does not meet the test of taxable income set forth in Eisner v. Macomber . . . ."

The foundation of the Government's position was that by enacting § 22(a) of the Int. Rev. Code of 1939 (now § 61(a) of the Int. Rev. Code of 1954) "Congress has plainly imposed a tax on all gain received by the taxpayer . . . . except such gain as has been by law specifically exempted from tax." [Brief for Petitioner in Glenshaw, pp. 15-16]. Section 22(a) sets forth the following general definition of gross income:

"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service . . . of whatever kind and in whatever form paid. . . . or [from] the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever . . . .

[Emphasis supplied.]

The more persistent approach has been to view the Eisner v. Macomber definition as extending only to the principal question before the Court, which was whether the distribution of a corporate stock dividend constituted taxable income of the shareholder. In United States v. Kirby Lumber Co., 284 U.S. 1 (1931), the Court found that a clear profit realized by a corporation in pur-
chasing its own bonds for less than the issuing price was taxable. Justice Holmes stated at page 3: "We see nothing to be gained by the discussion of judicial definitions. The defendant in error has realized . . . an accession to income, if we take words in their plain popular meaning. . . ." In Helvering v. Brun, 309 U.S. 461 (1940), the Court specifically stated that the statute followed closely the Sixteenth Amendment and found taxable without apportionment the gain accruing to a lessor by reason of the forfeiture of the lessee's improvements on real property. The Court of Claims followed the Kirby and Brun cases in Park & Tilford Distillers Corp. v. United States, 107 F.Supp. 941 (1952), and declared that the decisions in the Central R. Co. and Highland Farms cases "do not seem to us persuasive." The Court of Claims held that the recovery by a corporation of "insider profits" pursuant to the Securities Exchange Act is taxable. Prior to the instant cases the most realistic statement regarding the status of the Eisner v. Macomber definition was the following one of the Second Circuit in General American Inv. Co. v. Commissioner of Int. Rev., 211 F.2d 522, 523 (2d Cir. 1954): "The decision in Eisner v. Macomber still stands, but the definition has met the common fate of generalities, and it has long since given way to an empirical case by case approach. . . ."

In the Glenshaw case, supra, the Supreme Court interprets § 22(a) as showing a congressional intent to exert the full measure of its taxing power without limitation as to the source of the receipts. The Court remarks at page 476-477 that "In that context—distinguishing gain from capital—the [Eisner v. Macomber] definition served a useful purpose. But it was not meant to provide a touchstone to all future gross income questions." In concluding that punitive damages are taxable as gross income the Court characterized the recoveries as "instances of undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion." Commissioner of Int. Rev. v. Glenshaw Glass Co., supra at 477.

In General American Investors, 19 T.C. 581 (1952), the Tax Court found that the recovery of "insider profits" was in the nature of a "profit" to the petitioner and taxable under § 22(a). On appeal the Second Circuit rejected the idea that the recovery was a "profit" to the petitioner but held that it was income within § 22(a) since "Petitioner had unrestricted discretion to use the funds for any purpose whatsoever; they were in no sense donations or contributions to capital, or payments by way of restoration of lost capital, or compensation for any loss suffered by petitioner." General American Inv. Co. v. Commissioner of Int. Rev., 211 F.2d 522, 524 (2d Cir. 1954). As shown above, this characterization of income was adopted by the Supreme Court in Glenshaw. The Court decided the General American Investors case on the same principles as the Glenshaw case stating "We see no significant difference in the nature of these receipts which might make that ruling inapplicable." General American Inv. Co. v. Commissioner of Int. Rev., at 479.
The scope of income tax coverage is now unquestionably greater than that envisaged by the Court in *Eisner v. Macomber* and other early tax cases. The Third Circuit expressed this in *Commissioner of Int. Rev. v. Glenshaw Glass Co.*, 211 F.2d 928, 933 (3d Cir. 1954) where it stated “There is as yet no decision which has adopted the contentions made by the Government here.” The court reluctantly affirmed the Tax Court determination that punitive damages are not taxable and concluded its opinion by stating at pages 933-934:

The position of the United States would indeed, if adopted, bring symmetry into this aspect of the law of income taxation. . . . But we think if such a result is to be achieved after nearly two decades it should be effected by the Supreme Court and not by this tribunal.

Future “gross income” cases will probably be limited to whether specific transactions resulted in “undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion.” [Emphasis supplied.] Income is still essentially gain but the concept is no longer restricted to gain which finds its source in “. . . capital, . . . labor, or . . . both combined. . . .” The same result will obtain under § 61(a) of Int. Rev. Code of 1954, for in the *Glenshaw* case, *supra*, the Court remarks at page 477 that “The definition of gross income has been simplified [in the 1954 Code], but no effect upon its present broad scope was intended.” The instant cases stand as a warning to tax lawyers that *Eisner v. Macomber* will no longer be accepted as a general restraint on income tax coverage.

ARTHUR F. MC GINN, JR.

NEGOTIABLE INSTRUMENTS—A BANK IS NOT LIABLE IN TORT FOR THE PAYMENT OF ALTERED CHECKS TO THE DAMAGE OF DEPOSITOR’S CREDIT AND BUSINESS.

Plaintiff issued four checks drawn on defendant bank in the amount of $11,241.67 payable to a designated payee. Plaintiff’s employee altered the name of the payee and defendant made payment on these checks and debited plaintiff’s account. Plaintiff sued in both contract and tort. The count in tort alleged that because defendant bank “negligently and carelessly omitted and failed to use any vigilance, care or diligence” in paying the checks it injured plaintiff’s credit and business position to the extent of $30,000 beyond the amount of the checks. That part of the complaint resting on contract was not challenged. The bank’s motion to dismiss the cause of action in tort was dismissed by the New York Supreme Court, Special Term, and the bank appealed. *Held*, the bank’s payment of the altered checks did not give rise to a tort action as distinguished from a contract action. The order was modified so as to grant defendant’s motion to strike out the cause of action in tort. *Stella Flour & Feed Corp. v. National City Bank*, 136 N.Y.S.2d 139 (Sup. Ct. Dec. 21, 1954).
Between a bank and its depositor there exists a contractual relationship of debtor and creditor. From this relationship there arises a duty on the part of the bank to make payments out of the depositor’s checking account only in accordance with the order of the depositor. Where it has made payment on forged or altered checks and has, therefore, failed to comply with the order of the depositor, the bank will usually not be permitted to debit the drawer’s account. See Britton, Bills and Notes §§ 132, 143, 282 (1943).

The instant case does not involve any question of negligence or ratification on the part of the drawer, or of any other conduct which would relieve the bank of liability. The bank did not challenge the theory of its contractual liability to the extent of its wrongful debit. But whether the bank is liable solely in contract or in tort as well for the additional damage to the drawer’s credit is the question upon which this case turns.

The distinction between tort and contract liability in modern law rests, for the most part, on the nature of the interest violated. If the gist of the action is that a purchased promise has not been performed, the action sounds in contract; but if the gist of the action is the violation of some duty which has not been created solely by a contract between the parties, the action sounds in tort. Normally, this distinction is adequate to classify the right of action which arises from a given transaction. If the defendant had a contractual duty to do something, and did not even attempt performance, he is liable only in contract; if he did not have a contractual duty to perform the act in question, but performed it negligently to the injury and damage of the plaintiff, he is liable only in tort.

When, however, the defendant had a contractual duty to perform, attempted performance, and performed negligently, the transaction gives rise to two different causes of action, one in contract and one in tort. The failure to perform the promise is a breach of contract; the negligent action is a tort. The importance of the distinction lies in the measure of damages. The scope of liability for a breach of contract is determined at the time the contract is made. Hadley v. Baxendale, 9 Ex. 341, 156 Eng. Rep. 145 (1854). The scope of liability for a tort is determined at the time the tort is committed.

In the instant case, the plaintiff seems to have founded his count in tort on the bank’s breach of its common law duty to perform the contract carefully. The theory of the count is that this duty is not contractual in nature, but simply one application of the general common law duty to act carefully whenever a person acts at all. The gist of the count is not that the bank breached its promise to pay only in accordance with the order of the plaintiff, but that in attempting to perform this promise, the bank acted carelessly to the injury of the plaintiff’s credit and his consequent economic detriment.

The majority denied recovery in tort on the principle that where one negligently breaches his contract he is usually liable in contract and not in tort. It is conceded that a bank has a high contractual responsibility, but the ma-
The majority sees no reason for treating such a breach as a separate legal wrong. To do so they contend would "push a banker's responsibility to a point far beyond the area in which the banking and commercial community have been led to believe that responsibility ended." *Stella Flour & Feed Corp. v. National City Bank*, supra, at 142. In referring to the bank's negligent conduct it does so only as a "counterweight" which would be available to the depositor against an allegation by the bank that its failure to perform the contract was due to the depositor's negligence.

The dissenting opinion challenging the principle set forth by the majority that a negligent breach of contract usually gives rise to a contractual but not a tort action. In so doing it relies upon the statement by Wharton that: "Where a contract, creates a duty, the neglect to perform that duty, as well as the negligent performance of it, is a ground of action for tort. Wharton On Negligence, 2d Ed., p. 364 (1878)." *Stella Flour & Feed Corp. v. National City Bank*, at 146. The dissent then cites a number of cases where the bank has been held liable in tort for refusing to honor a properly drawn check. In the principal case the bank has not merely refused but there are allegations of a wrongful payment. It is reasoned, therefore, that such negligent conduct, which has caused foreseeable harm, should likewise give rise to a cause of action in tort.

As indicated by the majority opinion, a tort has been frequently defined as a "wrong independent of contract." *Stella Flour & Feed Corp. v. National City Bank*, at 145. Such a statement is not entirely accurate, however. There are many cases which have permitted a plaintiff to elect between an action in contract and one in tort where his injury has resulted from the defendant's negligent performance of the contract. *Lawall v. Groman*, 180 Pa. 532, 37 A. 98 (1897); *Lane v. Boicourt*, 128 Ind. 420, 27 N.E. 1111 (1891). In many jurisdictions plaintiff may bring both counts in a single action. *France & C.S.S. Corp. v. Berwind-White C. M. Co.*, 229 N.Y. 89, 127 N.E. 893 (1920); *Harris v. Simplex Tractor Co.*, 140 Minn. 278, 167 N.W. 1045 (1918). The tort liability is imposed in these cases because the defendant's negligent activity has caused foreseeable harm to the plaintiff, and unless the parties have agreed to limit liability, there seems to be no reason for exempting defendant from liability for the injury incurred.

Wharton's statement, as interpreted by the dissent to the effect that the failure to perform a contractual duty as well as the negligent performance of it gives ground for an action in tort, does not seem to be well founded. Such a broad rule would result in nearly every breach of contract giving rise to an action in tort, and it is well settled that the mere omission to perform a contractual obligation is never a tort. *Barret v. Company*, 80 N.H. 354, 117 A. 264 (1922); *Commonwealth Title & C. Co. v. N.J. Lime Co.*, 86 N.J. Eq. 450, 100 A. 52 (1916). However, notwithstanding this rule, where the bank has wrongfully failed to pay a check which has been properly drawn, tort liability
has generally been imposed. *First Nat. Bank v. Stewart*, 204 Ala. 199, 85 S. 529 (1920); *Rolin v. Steward*, 14 B. 594, 139 Eng. Rep. 245 (1854); *Marzetti v. Williams*, 1 B. & A.D. 415, 109 Eng. Rep. 842 (1830). Since such cases do not differ substantially from the wrongful payment of forged or altered checks, the dissenting judge's reasoning that such negligent conduct should likewise incur tort liability seems sound.

In the principal case we are dealing with more than a mere omission by the bank to perform its contractual obligation as in the cases where the bank refuses or fails to pay the depositor's checks. Here the bank has taken positive action and it has been negligent. The reason advanced for holding a bank liable in tort for wrongfully refusing to pay a check is that a bank renders a peculiar service of public interest and it is chartered by the government for the purpose of holding and safely keeping the money of its depositors. It is under obligation to pay the checks, drafts and orders of a depositor so long as it has in its possession sufficient funds which are not encumbered by the attaching of an earlier lien in favor of the bank.

Since a depositor does have a cause of action in tort for a bank's refusal or failure to honor a properly drawn check it would seem that he certainly should have a similar right where the bank has negligently performed its contract by wrongfully paying an altered check.

To restrict the plaintiff to recovery in contract may prevent him from being adequately compensated for his loss, because it is doubtful whether the type of injury sustained was foreseeable at the time the parties entered into the contract. It would seem that the bank should be liable for the consequences of its negligent conduct not only on the theory that banks have generally been held liable for the mere failure or refusal to pay out on checks properly drawn, but also on the theory that where one has been negligent in the performance of his contractual duty, he is liable in tort for the foreseeable harm caused by his conduct.

WILLIAM C. FLANAGAN

SALES—UNDER THE PERISHABLE AGRICULTURAL COMMODITIES ACT, BUYER MAY REJECT FOR MATERIAL BREACH OF CONTRACT NOT RELATING TO CONDITION OR QUALITY OF GOODS.

In August, 1948, in the course of interstate commerce, parties executed a contract for the sale and delivery of a carload of lettuce. The terms of the shipment were "f.o.b. acceptance final," the goods to be billed "open" to Johnstown, Pa. On the same day seller notified buyer that the car, then in transit, had been diverted to Johnstown, Pa., billed "advise." The following day, two days prior to arrival of the car at destination, buyer notified seller that as a result of the change in billing they considered the contract cancelled. Seller sought reparations under § 6(a) of the Perishable Agricultural Commodities
Act, 46 Stat. 534 (1930), 7 U.S.C. § 499f(a) (1952), and was awarded $715.20, full purchase price of the goods, with interest. Schuman Co., 9 Agriculture Dec. 222 (1950). The District Court for the Western District of Pennsylvania, in a trial de novo, 48 Stat. 587 (1934), 7 U.S.C. § 499g(c) (1952), made a similar ruling and entered judgment for seller. Schuman Co. v. Nelson, 122 F. Supp. 497 (W.D. Pa. 1954). On appeal, held, reversed, the Perishable Agricultural Commodities Act is applicable only when the buyer seeks to reject for cause affecting the condition or quality of the goods. Buyer's right to reject in this case is to be determined by whether or not the change in billing constituted a material breach of the contract. Schuman & Co. v. Nelson, 219 F.2d 627 (3d Cir. 1955).

The problem here presented is whether under the Perishable Agricultural Commodities Act, supra, a buyer is denied the right to reject a shipment, the terms of which are "f.o.b. acceptance final," for a breach of contract not relating to the condition or quality of the goods. § 499(b) of Title 7 provides:

It shall be unlawful in or in connection with any transaction in interstate or foreign commerce . . .

(2) For any dealer to reject or fail to deliver in accordance with the terms of the contract without reasonable cause any perishable agricultural commodity bought or sold or contracted to be bought, sold, or consigned in interstate or foreign commerce by such dealer;

Acting under § 499(o) of Title 7, the Secretary of Agriculture has defined rejection "without reasonable cause" as "the act of any person who has purchased . . . produce in commerce . . . (2) of advising the seller or shipper or his agent that such produce will not be received in accordance with the contract or offer. . . ." 7 C.F.R. § 46.2(q) (Supp. 1954). The term "f.o.b. acceptance final" is deemed to mean that the buyer accepts the commodity f.o.b. cars at shipping point without recourse. 7 C.F.R. § 46.24(m) (Supp. 1954).

The Department in L. Gillarde Co., 4 Agriculture Dec. 594 (1945), and the court in LeRoy Dyal Co. v. Allen, 161 F.2d 152 (4th Cir. 1947), both without the question squarely before them, indicated that the loss of the right to reject was absolute. In both instances it was held there was not a material breach of the contract, and the question was not controlling.

In determining the extent to which the meaning of the term "f.o.b. acceptance final" is controlling, the court looked to 7 C.F.R. § 46.24 for the purpose of construing terms. Sub-section (1) defining "f.o.b. acceptance" states that the buyer "has no right of rejection on arrival." An "f.o.b. acceptance final" contract has the same characteristics as an "f.o.b. acceptance" contract, but in addition denies the buyer the right to sue for damage or deterioration during transit caused by defective shipping condition. LeRoy Dyal Co. v. Allen, supra. But in defining each of the terms the regulations speak only of the risk of loss and the rights of the buyer for damage or deterioration of the merchandise.
Considering this, the court held that while the phrase "has no right of rejection on arrival" was absolute in its declaration of the rights of the buyer, its meaning must be conditioned by context. It was felt that the right to reject was not absolutely lost, and that the obligation to accept must necessarily be restricted by some standard. Recognizing the power of the Department to issue regulations as provided by the Act, the court limited its function to placing a reasonable construction on the regulations, keeping in mind the purpose for which the Act was passed and the regulations issued. This purpose, as disclosed by an examination of the legislative history of the Act in the Dyal case, supra, was "to eliminate unfair practices in the marketing of perishable agricultural commodities . . . by making it difficult for unscrupulous persons to take advantage of shippers by wrongful rejection of the goods upon arrival at a point where it is expensive and impractical for shipper to enforce his legal rights." LeRoy Dyal Co. v. Allen, supra, 156. Basing its decision on this premise, the court of appeals decided that the phrase "has no right of rejection on arrival" is applicable only when buyer seeks to reject for a cause affecting the condition or quality of the goods. Once this distinction is made, a rejection for a material breach not relating to the condition or quality of the goods is not a refusal to receive "in accordance with the contract," hence § 499(b)(2) of Title 7 does not become operative. Applicable state law as determined by conflict of laws doctrine then becomes controlling as to the rights of the parties.

In the principal case the court has emphasized one of the dangers inherent in basing a decision on a portion of a statute without considering its meaning with regard to the whole statute. The action of the court in limiting and defining the application of this Act will serve to keep it within its original purpose and meaning, and to protect the rights of all parties affected.

DUNCAN A. BONJORN

TRUSTS—A BEQUEST OF PROPERTY IN TRUSTS TO BE DISTRIBUTED AND PAID OVER TO SUCH "RELIGIOUS, CHARITABLE, SCIENTIFIC, LITERARY, EDUCATIONAL, OR FRATERNAL CORPORATIONS OR ASSOCIATIONS" AS THE TRUSTEES, IN THEIR DISCRETION, SHOULD SELECT AND DETERMINE CREATES A MIXED TRUST AND THE ENTIRE BEQUEST IS INVALID.

The residuary clause of the will of Jennie S. Goetz contained a bequest to The National Bank of Washington, D. C., and The Old National Bank of Martinsburg, West Virginia, and their successors to distribute and pay over all the residue of her estate "unto such religious, charitable, scientific, literary, educational, or fraternal corporations and associations as they may, in their discretion, select and determine. . . ." The next of kin contended that the residuary clause was invalid and petitioned for a declaratory judgment to that effect. The trial court held it to be valid. The next of kin took an appeal to the Su-
The residuary clause is invalid. Even though the testatrix intended to create a charitable trust in part, scientific, literary, educational, or fraternal corporations can be operated for profit and therefore, are not charitable institutions. Since a mixed trust is created and there is no method of apportionment between the charitable purposes and the scientific and other trusts for profitable purposes, the entire bequest is invalid. Consequently, the defendant trustees hold the residuary property in trust for the next of kin. *Goetz v. Old National Bank of Martinsburg*, 84 S.E.2d 759 (W. Va. 1954).

When a settlor creates a single trust for the purpose of conferring benefits on the community and also to confer benefits on private individuals, the question of its validity arises since private trusts are governed by different rules of law than charitable trusts. A charitable trust, for instance, may be of indefinite duration while a private trust is controlled by the rule against perpetuities which states that the trust must be limited in its operation to lives in being and/or twenty-one years. *Johnston v. Cosby*, 374 Ill. 407, 29 N.E.2d 608 (1940); *Alexander v. House*, 133 Conn. 725, 54 A.2d 510 (1947). See 2 Bogert, *Trusts and Trustees* § 284 (1953). In addition, if this type of trust were given legal effect it would be within the power of an individual to limit the alienability of his property to any extent by devoting some small portion of the undivided income thereof to a charitable purpose. Of course, such a disposition is against public policy. *Mason v. Perry*, 22 R.I. 475, 48 A. 671 (1901). Where the settlor specifically states that a certain portion of the trust should be devoted to charity and the remainder to private purposes then the trust will be construed as constituting two separate trusts and each part is judged separately. *Amory v. Trustees of Amherst College*, 229 Mass. 374, 118 N.E. 933 (1918). Due to the fact that charitable trusts lessen the burdens of Government they are favorites of the law and are upheld provided that they are sufficiently definite to permit enforcement in a court of equity and do not conflict with existing law. Due to this attitude and because the courts make every effort to sustain and fulfill the intention of the testatrix, the courts generally search very diligently to find a means of separating the principal. *Gossett v. Swinney*, 53 F.2d 772 (8th Cir. 1931); *St. Louis Union Trust Co. v. Little*, 320 Mo. 1058, 10 S.W.2d 47 (1928). Thus, where it can be shown that the non-charitable purposes can be accomplished by a definite sum of money, the courts have held that the testator must have intended a separation on that basis and the trust will be upheld. *Smart v. Durham*, 77 N.H. 56, 86 A. 821 (1913).

In situations where no separation can be made and where some of the purposes are charitable and some seem *prima facie* not to be charitable, nevertheless, the context may indicate that these latter purposes may be intended to be limited to charitable purposes. That is, the residuary clause is read in relation to the whole will. Thus, where a bequest was made to a trustee to be
held by it without limit as to time, the income to be distributed to "corporations, organizations, societies, institutions, and trusts which are devoted exclusively to religious, charitable, scientific, literary, historical or educational purposes . . . and which are exempt from taxation" the court held that a valid charitable trust was created. In arriving at its decision the court found the testator's intention to create a charitable trust sufficiently indicated in two facts: first, that this part of the will was prefaced with the statement that it was her wish to use her property for the benefit of the community; and second, that the bequests were made only to institutions exempt from taxation, which exemption is a characteristic of charitable institutions. *Mitchell v. Reeves*, 123 Conn. 549, 196 A. 785 (1938). In *Gossett v. Swinney*, *supra*, the court went beyond the four corners of the will and considered evidence *aliunde* relating to the environment and domestic status of the testator to find an intent to create a charitable trust. Having found an intent to create a charitable trust, the courts generally construe the words in the particular clause so as to give effect to this intent. Thus, where a bequest was made in trust for such "charitable, fraternal, benevolent and educational uses, purposes, societies, institutions, associations, and corporations as the trustees shall select" it was held that a valid charitable trust was created. While the words "fraternal" and "educational" could include non-charitable institutions, those terms were given a restricted meaning so that the intent of the testator would not be frustrated merely because some of the adjectives he used were not completely synonymous with "charitable." In other words, the principle of *ejusdem generis* was applied. *Clark v. Cummings*, 83 N.H. 27, 137 A. 660 (1927). See 1 Scott, Trusts § 398.1. Even where the objects are stated disjunctively some courts have inferred an intention by the testator that they should be treated conjunctively, "or" being interpreted as "and," so that the term "charitable" if used in the series of objects will be included in all the objects. *Thorpe v. Lund*, 227 Mass. 474, 116 N.E. 946 (1917). But see *Attorney General for New Zealand v. Brown* [1917] A.C. 393.

As opposed to this liberal construction of language designed to find an intent to create a charitable trust, some courts have construed the language with every inference drawn to defeat such a trust. *Matter of Shattuck's Will*, 193 N.Y. 446, 86 N.E. 455 (1908). But cf. *In re Hall's Estate*, 282 N.Y.S. 856 (1935); *Matter of Frasch*, 245 N.Y. 174, 156 N.E. 656 (1927); *Butterworth v. Keeler*, 219 N.Y. 446, 114 N.E. 803 (1916). The reasons for this method of construction are that there is a presumption against the disherison of an heir and that the courts are not permitted to surmise or conjecture what the testator's intention was. *Wills v. Folts*, 61 W. Va. 262, 56 S.E. 473 (1907); *Dobleare v. Dobleare*, 124 Conn. 286, 199 A. 555 (1938).

The principal case has followed this latter method of construction. Specifically, having found that a scientific, literary, educational, or fraternal corporation *can* be operated for profit, the court seemed to make no effort to
find whether the testator intended that expenditures to those corporations be limited to charitable purposes. *Goetz v. Old National Bank of Martinsburg, supra*, at 769. This is unfortunate, particularly in view of the cases which the court cites to support its decision. In *Mitchell v. Reeves, supra*, 123 Conn. at 559, 196 A. at 791, the bequest for "religious, charitable, scientific, literary, historical, or educational purposes" was upheld as a charitable trust, the term "scientific" was given a restricted meaning to include only scientific work intended to benefit the public welfare, citing *Matter of Frasch's Will, supra*. Likewise, in *Tilden v. Green et al.*, 130 N.Y. 29, 44, 28 N.E. 880 (1891), a devise "to promote such scientific and educational objects as my . . . trustees . . . may . . . designate," created a charitable trust. Regarding bequests to fraternal orders, it is the general rule that a gift to such orders will be upheld as a valid charitable gift. *Roberts v. Corson*, 79 N.H. 215, 107 A. 625 (1919).

In conclusion, it is submitted that the court in the principal case, by its failure to seek out the testatrix' intent, did not follow the better reasoned decisions. The pertinent question is: Did the testatrix intend to limit her bequest to charitable institutions? If this decision is followed to any degree it may well bring about verbose, complex wills which would, in turn, breed litigation.

*JOHN J. O'MALLEY, JR.*
BOOK REVIEWS


Within the covers of this slim volume Dean Griswold presents an eloquent appreciation of one of the fundamental guarantees of our individual liberty. He seeks to illuminate a part of our constitutional heritage—a segment of that heritage which has lately been in particularly deep darkness. He has set himself an ambitious task—a vital, timely and necessary task.

In these fear-ridden days it has become fashionable to belittle the importance of individual rights and to deride those who rise in defense of such rights. The accent is on "national security"—a perfectly respectable phrase now used to cloak a multitude of sins against the Constitution. It is heartening, therefore, to find this sure, strong voice recalling our Anglo-American tradition of the individual's right to be free from oppression by the state.

"The Fifth Amendment Today" is a collection of three speeches delivered by Dean Griswold, at various times and places, during 1954. The first speech opens with a succinct historical sketch of the Fifth Amendment. The discussion, however, centers about the proposition that the privilege against self-incrimination is and must be available to the innocent as well as to the guilty. It is required reading for those who unthinkingly apply the phrase "Fifth Amendment Communist" to all who invoke the privilege. In a very lucid manner Dean Griswold sets out various circumstances in which an innocent man may feel compelled to avail himself of the privilege. The false and evil myth that invocation of the privilege carries with it a necessary inference of guilt is stripped of its patriotic pretensions and revealed for the un-Americanism it really is.

The second speech entitled "Per Legem Terrae" is concerned with due process of law and the development of that concept from the Magna Carta to our Constitutions—state and federal. This naturally leads to the observation that due process is largely a matter of procedure.

A failure to appreciate the intimate relation between sound procedure and the preservation of liberty is implicit ... in that saddest and most short-sighted remark of our times: "I don't like the methods, but ..." For methods and procedures are of the essence of due process, and are of vital importance to liberty.1 [Emphasis supplied] ... 


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Torture is a procedure, and inquisition without charge, forcing a witness to testify against himself, and the other things which were standard practice in the infamous Star Chamber would all fall into the category of procedure. Liberty is established and preserved by the development and maintenance of proper procedures. It is, in the last analysis, only through procedural rules that the individual is protected against arbitrary governmental action. And, . . . the very essence of liberty is the protection of the individual against arbitrary application of the collective power of the state.\(^2\)

This second speech then moves on to a searching inquiry into the power and responsibility of our national legislature in its investigative function. A basic Code of Practice is suggested for congressional investigations.

The concluding thought is that “the essence of communism is the subordination of the individual to the state.”\(^3\) Conversely the essence of liberty lies in the freedom of the individual from the arbitrary exercise of power by the state. We are urged to take the great opportunity now afforded us to fight for and re-establish our constitutional rights.

In the third speech, Dean Griswold presents the Fifth Amendment as a “symbol of our best aspirations and our deep-seated sense of justice.”\(^4\) Much of this material is a summation of matters discussed in the two preceding talks. In particular, the Dean reiterates his belief in the availability of the privilege to a witness who is guiltless of crime. Here, too, he briefly develops the relationship between the Fifth Amendment privilege and the freedoms guaranteed by the First Amendment. He suggests that the Fifth Amendment is sometimes used erroneously as a protection of the right to free speech and free assembly. In such cases, of course, an inference of guilt from the refusal to answer is quite unwarranted.

There is here also a spirited defense of the Fifth Amendment in the course of which the obnoxious phrase “anti-anti-communist” is subjected to merciless surgery. No thinking person can fail to note how thoroughly this meaningless jargon is demolished. No one can henceforth repeat it without cringing.

The most valuable matter presented in this third speech, however, deals with what we might expect if the Fifth Amendment did not exist. There is much in this idea to provoke sober reflection. The changes in governmental policy that the Amendment’s absence might entail are frightening to contemplate.

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\(^2\) Id. at 39.
\(^3\) Id. at 51.
\(^4\) Id. at 53.
This brief sketch in no way exhausts the scope of the book. There is more, much more, and all of it is worth reading. Great and fundamental issues are dispassionately presented with an admirable economy of words. There is here no attempt to spellbind the reader, to bemuse him with subtle phraseology, to encumber his judgment by sheer weight of material presented. No—this is simple truth, fundamental truth, presented without fanfare.

It is perhaps a fault that the tone is so dispassionate, the atmosphere so calm. Undoubtedly some fire and spirit have been lost in the transition from oral delivery to the printed page. There is little evidence that the speeches have been edited to increase their eye appeal. Rather one receives the impression that they have been merely reprinted as delivered. The importance of the problem involved should have dictated its presentation in the most attractive form possible. One wishes that Dean Griswold, or the editors, had increased the force of these written expressions.

These minor difficulties cannot be allowed to detract from the importance of the text. The thought embodied here, the principles explained and illuminated must be disseminated widely. Dean Griswold has performed his task well. He deserves our thanks for bringing sanity and common-sense to a field where these virtues have lately been so notable for their absence.

LEO ALBERT HUARD*


American intellectuals are faddists. In the Progressive era they took up muckraking; in the 1920's they affected a genteel despair; in the depression years they became left-wing "social democrats." Now the fashion is conservatism, and a profitable fad it is, too. Mr. David Riesman has written a best-seller deploring the hordes of aimless, witless "other-directed" citizens who clutter our landscape in these degenerate modern times. Mr. Peter Viereck has made more noise, if less money, over his discovery that the age of Metternich was culture's palmiest day. Mr. Daniel Boorstin has told us that the genius of American politics is essentially conservative, and Mr. Arthur Bestor excoriates the followers of John Dewey who have subverted our old-fashioned, conservative

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educational system. The recent study of American conservatism by Mr. Clinton Rossiter was awarded the Charles A. Beard prize in history even before it was published. Among the Partisan Review crowd, Burke and Tocqueville have replaced Marx, and for the lower middlebrows Time chants, in antique mode, the "wonders of the conservative intuition and prophecy, speaking resonantly across the disappointing decades."

One of the most articulate of these new American conservatives is Mr. Russell Kirk, who first announced the gospel in The Conservative Mind, which is a useful and readable summary of Burke, John Adams, Tocqueville, Calhoun, and other lesser deities in the conservative pantheon. When certain critical readers of his earlier book objected that Mr. Kirk had failed to produce "a cure for all the ills to which flesh is heir," he decided to retrieve his "critics' gauntlets from the dust and give them what they asked for." The result is A Program for Conservatives, which is the clearest, most detailed, and most complete formulation of the new conservative orthodoxy. It is an important book, not merely because Mr. Kirk is a forceful and intelligent writer with decided opinions, but even more because this book is a kind of synthesis of neo-conservative thought.

Conservatism, Mr. Kirk believes, is "not restricted to any social class or any economic occupation or any level of formal education." In fact, "the United States, throughout most of our history, have been a nation substantially conservative," and "the best men in our political life usually have desired to be esteemed as conservatives." What characterizes true conservative thinking is not blind adherence to "free competition" or to "the American standard of living," but a "belief in a moral order which joins all classes in a common purpose, and through which men may live in justice and liberty." "The enlightened conservative does not believe that the end or aim of life is competition; or success; or enjoyment; or longevity; or power; or possessions. He believes, instead, that the object of life is Love."

Today "American conservatives are confronted by dangers and discontents which exceed, in number and intensity, even the perils which plagued the age of Edmund Burke and John Adams." "The ascendancy of Benthamite ideas, the triumph of mechanical and industrial uniformity, the decay of those classes which formerly had leisure and means to pursue liberal studies without much impediment, the demands of total war, and the hostility of the mass-mind" have endangered the very bases of true conservatism. The American conservative is in danger of forgetting his "high calling: the duty of keeping man truly human."
Program for Conservatives is intended to be at once a diagnosis and a prescription for these societal ills. Admitting that he raises more questions than he answers and that he often slips into generalization, Mr. Kirk has attempted to write a practical guide for the average conservative, and the adequacy or inadequacy of his book should reveal a great deal about the movement which it represents.

Mr. Kirk believes that "the unbought grace of life" in today's society is being "trodden down under the hoofs of a swinish multitude." In education, the now "thoroughly obsolete" ideas of John Dewey have produced a "triumph of mediocrity" and leaders "whose principal tool is defecated intellect and whose principal motive is gratification of shabby private ambition." The liberal dogmas of economic determinism, Deweyite pragmatism, cultural and ethical relativism have made us forget that "the real causes of our troubles [are] in the heart of man—in our ancient proclivity toward sin." The "triumph of the machine" in producing "the decay of variety and individuality among the modern masses" has brought forth the "rootless man, a social atom, without traditions, without enduring convictions, without true home, without true family, without community, ignorant of the past and careless of future generations." The failure of the conservatives' battle "against every endeavor of the state to encroach upon the remaining elements of free association and true community" has led to "the stifling uniformity of totalitarian democracy." Those economists who conceive society to be "an equalitarian tapioca-pudding" have caused us to forget the basic rule of social justice: "To each man, the things that are his own." Because of "the enervation of . . . the spirit of class, duty, and honor," "disorder . . . is increasing most ominously in modern society." Since we have failed to put "laws above men and prescriptive rights above present expediency," Mr. Kirk is certain that "creeping socialism" is upon us. The fine old edifices of freedom, beauty, and tradition are crumbling, and the conservative in these sad days has "his appointed part . . . to save man from fading into a ghost condemned to linger hopeless in a rotten tenement."

Such is Mr. Kirk's view of "the present forlorn state of society." Before adopting his gothic air of gloom, it might be well to ask whether the facts bear out his contentions. Has there, in fact, been "a progressive degeneration of the arts" since 1790? When one compares crime statistics from Chicago in 1950 with those from London in 1750, is he so positive that "disorder . . . is increasing most ominously in modern society"? Has there been a "gradual reduction of public libraries, in-
tended for the elevation of the popular mind, to mere instruments for idle amusement at public expense”? Would the “magazine-rack of any drug-store in America,” crowded these days with books by Whitman, Emerson, Trevelyan, Stendhal, Forster, and Tocqueville, “suffice to drive . . . Horace Mann to distraction”? Is “today’s man” really poorer than his father “in terms of meat on the table, floor space in his house, durability of clothing, tranquillity of environment”? Are “the self-employed and . . . persons like doctors and lawyers and all the respectable professions” included in social security programs “because the government wants more money to spend, and for no other sensible reason”? Is the declining birthrate due to “social boredom”? Surely Mr. Kirk has taken too literally his own advice that “the most urgent need of our time is for Don Quixotes to lead us,” for his book is marked by the exaggeration, distortion, and factual inaccuracy which led the Spanish crusader to mistake windmills for giants.

Not only must one question the accuracy of Mr. Kirk’s picture of our sad, fallen state, but even more must he doubt his analysis of the reasons why we allegedly tumbled from the paradise of the 1790’s. A typical cloistered intellectual, Mr. Kirk thinks that books are the chief dynamic in social change. If our public schools today do not impart the fine old aristocratic training in Latin and Greek, which Mr. Kirk and Mr. Arthur Bestor desire, that fact is less the result of any malign influence of John Dewey than of the overcrowded, overworked nature of our school system under universal, compulsory education laws. Let Mr. Kirk attempt to impart his quaint medieval lore in a vocational high school in Spanish Harlem, and he may come to understand that modern educational methods are a desperately necessary effort to cope with real problems, not some subversive attempt to uproot culture.

But Mr. Kirk is correct in thinking that ideas are important, and it is, therefore, the more disturbing to find that he consistently distorts those with which he does not agree. His blistering attacks on Dewey, Riesman, Veblen, and others abound in factual errors of a most elementary sort. To call Veblen, who led the revolt against the abstract “laws” of economics, “a Jacobin, with a Jacobinical love of abstraction,” is misleading; but to write of the man who challenged the basic assumptions of Marxist economic theory, that “his master was Marx,” is vicious misrepresentation. Mr. Kirk announces that “the modern thinking conservative must employ some of the methods of revolutionaries,” but surely ignorance and willful obscurantism should not be among them.
One's reservations about the neo-conservative diagnosis of our current social diseases become frank skepticism when he looks at their prescription for a cure. Mostly Mr. Kirk advises harmless placebos. In general he is "rather Johnsonian, preaching a respect for the idea of order, but saying very little about any practical application of orders in the United States of America." Nobody can disagree with most of Mr. Kirk's reversible sentences, which can be gauged only by their sententiousness. He thinks, for example, that we can solve "the problem of social boredom," by remembering "that the Christian idea of leisure is expressed in the holy-day," and that we ought to utilize our leisure to make more money, to cultivate our families, and to study history. True conservatives will "search for ways to turn the amorphous modern city into a series of neighborhoods, with common interests, amenities, and economic functions." They will defend "the classes and regions in which tradition is still a living force." Obviously these neo-conservatives have followed W. S. Gilbert's advice:

You must lie upon the daisies and discourse in novel phrases of your complicated state of mind,
The meaning doesn't matter if it's only idle chatter of a transcendental kind. And every one will say,
As you walk your mystic way,
"If this young man expresses himself in terms too deep for me,
Why, what a very singularly deep young man this deep young man must be!"

Though he carefully cloaks himself in transcendental verbiage, Mr. Kirk occasionally and inadvertently makes a concrete remark on a specific situation. The total of these revelations is not pretty. He is sure that "there is such a thing as 'creeping socialism'; that the federal school-lunch program is the "vehicle for totalitarianism"; that the Bricker amendment is an "urgent" need; that there has been no serious violation of civil liberties and that "the people who talk most glibly about 'witch-hunting' conjure up their own witches, really, in an endeavor to forget their private insignificance"; that "the dispute over loyalty has resulted in very little actual injustice or repression in America, as yet"; that tenements should not be demolished because they are "a buttress of tradition in general" and because "the most conservative bodies of citizens in all Italy are the slum-dwellers in the oldest quarters of Rome and Naples, the poorest of the poor, hard haters of all modern social reform."

Such, in reality, is Mr. Kirk's program for conservatives. It would be charitable to think of Mr. Kirk as a man born out of season, a
hundred and fifty years too late, a modern Miniver Cheevy. But a close reading of his pages will not warrant so lenient a view. Factually inaccurate and intellectually sleazy, *A Program for Conservatives* is a rather pretentious apology for what Arthur Schlesinger, Jr., has correctly characterized as a "negative philosophy of niggling and self-seeking." Mr. Kirk has confused conservatism with reaction.

DAVID DONALD*


The war-time evacuation of persons of Japanese ancestry from the West Coast was recommended by the Army,1 authorized by the President,2 ratified by Congress,3 and upheld by the Supreme Court as constituting a reasonable military judgment in the circumstances.4

In the post-war years that judgment has been questioned, and in 1948 Congress in effect conceded that the step had been unnecessary by providing financial compensation for those who had been uprooted thereby,5 "to redress these loyal Americans in some measure for the wrongs inflicted upon them."6 One would have supposed that this measure implied a solemn and public judgment that what was thought necessary in 1942 had been proved in fact unnecessary in the light of hindsight. But the American-Japanese Evacuation Claims Act is nowhere mentioned in the volume under review, although it purports to be a definitive work on the whole problem, and although it seeks to demonstrate that the evacuation program was "a great and evil blotch upon our national history."7

The authors make one distinctly valuable contribution to the growing literature on the subject. They show fairly conclusively that neither of the theories of responsibility espoused by previous commentators—one, that the evacuation was the result of an economic pressure move-

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1 War Department, Final Report, Japanese Evacuation from the West Coast, 1942 (U.S. Gov't Printing Office, 1943).
7 P. 325.
ment designed to influence the military commander; the other, that it was a consequence of a political pressure campaign similarly directed—has any foundation in fact. Instead, they supply a third theory of their own, namely, that the evacuation was the culmination of nearly a century of anti-foreign, anti-non-Caucasian agitation, which culminated in the stereotype of the wily Oriental, the Japanese in our midst. Just how this theory can explain the emotions of 1942, when the country carefully distinguished between persons of Chinese ancestry and those of Japanese ancestry, is nowhere set forth; nor do the authors undertake to elucidate how, in the documented instances of Filipinos, a Chinese-American, and a Negro attacking and shooting persons of Japanese ancestry on the West Coast in 1941-42, the assailants must be held to have accepted the stereotype. The new explanation, it is submitted, is no more valid than the older ones. The fact of the matter is that after Pearl Harbor and the Japanese successes in the Far East the military authorities were determined, not only to avoid a further surprise attack, but to prevent at all costs the existence of a possible fifth column that might assist a potential invader. That determination was supported by all branches of the government. It may seem today to have been a manifestation of war fears to the extent of hysteria, but its origin lay in the events of Pearl Harbor and the months that followed, not in racial dogma. In this connection it is vital to recall that the reasonableness of any military action, as the Supreme Court held over a century ago, is to be judged on the basis of the facts as they appeared to the commander at the time, and that the discovery afterwards that his information was wrong does not make him a trespasser. The fact that Congress in 1948 provided for restitution to those removed does not amount to a judgment that the removal was palpably erroneous as of 1942.

The authors deal at some length, not only with the mechanics of the evacuation, but with the administration of the relocation centers and the ultimate release procedures. Yet, surprisingly enough, there is no indication whatever in the text that the ultimate release program was a consequence of _Ex parte Endo_.

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8 Pp. 95-96.
10 “We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified.” Korematsu v. United States, 323 U.S. 214, 224 (1944).
11 323 U.S. 283. The decision was announced December 18, 1944, and the authors state (p. 173) that mass evacuation was terminated the day before. There is, however, a judicial determination that this involved some back-dating and that actually the evacuation orders
When they deal with the law, the authors' starting point is *Ex parte Milligan*,\(^{12}\) and almost all of their conclusions are rested on what the majority said in that case, doctrine that is treated as particularly infallible gospel. Of course the rotund periods of Davis, J., do not lack appeal. But before erecting them into absolutes, it is well to recall that on the essential point of decision—*viz.*, the illegality of trying Milligan by military commission in view of the applicable statutory provision\(^{13}\)—all nine justices were agreed; and hence contemporary professional opinion regretted that the Court divided over what were dicta at best, and judicial stump speeches at worst.\(^ {14}\) Nor do the authors seem to be aware that, when the *Milligan* issues next arose, some of the over-exuberant language of the majority opinion had to be limited.\(^ {15}\)

In conclusion, the authors place the responsibility for the evacuation, first on General De Witt, next on Secretaries Stimson and McCloy and President Roosevelt, and finally on the Supreme Court. They say that "the role of the court in the Japanese-American episode of World War II was still one of the great failures in its history," and that "in this way did the United States Supreme Court strike a blow at the liberties of us all."\(^ {16}\)

Some years ago, Professor Grodzins, in a detailed and carefully documented account of how the evacuation decision was reached in Washington, demonstrated that Attorney General Biddle, who had argued vigorously against mass evacuation of Japanese alien enemies, concurred in the plan for evacuating all Japanese, aliens and citizens alike.\(^ {17}\) Why

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\(^{12}\) 4 Wall. 2 (U.S. 1866).

\(^{13}\) The statute, 12 Stat. 755 (1863), specifically provided that persons held as Milligan was, were, if not indicted by the grand jury, to be released. Milligan was never indicted; hence by the plain terms of the statute he could not be further detained, much less tried by a military commission.

\(^{14}\) 1 Am. L. Rev. 572 (1867).

\(^{15}\) Ex parte Quirin, 317 U.S. 1, 45 (1942). In view of the authors' intimation (p. 384, n. 10) that the Milligan "conspiracy" was a mere figment of alarmed imagination, it is suggested that they examine Milton, Abraham Lincoln and the Fifth Column (Vanguard Press, 1942).

\(^{16}\) Pp. 333-334.

that officer should now be absolved from all responsibility for the evacuation is another question that the authors do not undertake to answer.

The explanation for the apparent paradoxes of the work under review is not too difficult to find. Messrs. tenBroek, Barnhart, and Matson have written a tract, not an objective study. Although, as indicated, they have exploded two earlier theories of responsibility, their uncritical use of questionable authorities necessarily undermines a good many of their conclusions; and occasionally, as when they attempt to demonstrate the 105% loyalty of all Americans of Japanese ancestry, including those who received their education in Japan, they prove too much. They point out that the persons convicted of war-time espionage were non-Japanese, but fail to mention that two Americans of Japanese ancestry were duly convicted of treason. They do point out that only six per cent of the eligible Nisei in relocation centers volunteered for military service and that “over a quarter of the Nisei refused to answer the ‘loyalty’ questions in the affirmative, thus indicating an unwillingness to serve.” It is of course asking a lot of a man, after interning him as a security risk, to expect him to volunteer cheerfully as a soldier of the interning power. None the less, these instances, fairly assayed, support, far more than the authors are willing to admit, the military judgment that blood tends to be thicker than the jus soli and the accident of birth. After all, we would consider it strange if an American born to American parents in, say, Venezuela, were Venezuelan in his loyalties; why then should it be mere prejudice to believe that a Nisei may have had emotional links to Japan?

The present book makes valuable contributions to our knowledge concerning the evacuation, but, assuredly, it is not the definitive work on the subject; and it proves once again that neither the imprint of a university press nor an abundance of references—there are 1229 footnotes here, by actual count—is an infallible guarantee of objective scholarship.

FREDERICK BERNAYS WIENER*

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18 P. 304 and nn. 167-168.
19 Kawakita v. United States, 343 U.S. 717 (1952); D' Aquino v. United States, 192 F.2d 338 (9th Cir. 1951), cert. denied, 343 U.S. 935 (1952).
20 P. 168.
21 A re-reading of the dissent of Mr. Chief Justice Fuller in United States v. Wong Kim Ark, 169 U.S. 649, 705 (1893), will be rewarding in this connection.
* Member of the District of Columbia Bar.
BOOKS RECEIVED


