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XXXV
THE McNABB-MALLORY RULE: ITS RISE, RATIONALE AND RESCUE

JAMES E. HOGAN* AND JOSEPH M. SNEE, S.J.**

The McNabb-Mallory rule is an amalgam of the federal prompt arraignment requirement and the supervisory power of the Supreme Court over the methods of administering criminal justice. Professors Hogan and Snee, after tracing the sometimes confused judicial background of this mixed rule of evidence and procedure, contend that it represents the best traditions of a free, democratic society. The authors also raise some novel constitutional objections to the spectacular but abortive attempt by the Eighty-fifth Congress to curtail the operation of the rule, contending that "involved here are the integrity and the honor of an independent judiciary."

Over a hundred years ago Simon Greenleaf, in his venerable treatise on the Law of Evidence, felt able to cover the topic of illegally obtained evidence in two sentences:

It may be mentioned in this place that though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility, if they are pertinent to the issue. The Court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it form an issue, to determine that question.¹

However valid it may have been in 1850, such abrupt treatment of the subject is no longer either proper or possible.

It is still customary to regard Greenleaf's statement as the general common law rule, but it is always necessary to add that, in the federal courts at least, the rule has been whittled away to a sliver by a series of far-reaching exceptions. These are four in number:

¹ 1 Greenleaf, Evidence § 254a (6th ed. 1850).
(1) Evidence secured by illegal search or seizure in violation of the fourth amendment.²
(2) Evidence secured by shocking methods which offend basic concepts of justice and decency.³
(3) Evidence secured in violation of the Federal Anti-Wiretap Statute.⁴
(4) Evidence secured in violation of the prompt arraignment requirement of the Federal Rules of Criminal Procedure.⁵

This article examines in some detail the last-named of these exceptions, the so-called McNabb rule. The first third of the article is taken up with the content of the rule. An effort is made to fit into some intelligible pattern the fragments of the rule scattered about the labyrinth of federal case law dealing with the topic of prompt arraignment. The second third of the article is devoted to the rationale of the rule. Here the focus is upon the policy considerations which have been at the root of the Court's readiness to suppress confessions obtained during illegal detention. The final third of this article is a summary, an analysis and a critique of the major legislative proposals for modifying the rule.

I

The Content of the Rule

The tag, McNabb rule, although a convenient method of referring to the body of law growing out of the efforts to use confessions secured during an illegal detention, should not be permitted to obscure the fact that there are really two rules involved; one a rule of procedure and the other a rule of evidence. Rule 5(a) of the Federal Rules of Criminal Procedure specifies that arrested individuals are to be brought before a committing magistrate without unnecessary delay.⁶ It is only when this rule of procedure is not obeyed that the rule of evidence suppressing confessions obtained during unnecessary delay comes into play. Strict

⁶ Fed. R. Crim. P. 5(a): Appearance before the Commissioner. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or officer, a complaint shall be filed forthwith.
logic then would demand discussion, first, of the elements of a violation of Rule 5(a), and second, of the consequences which attend such violation. However, since the Supreme Court initially concerned itself with the consequences once the prompt arraignment rule has been violated, and only lately has shifted its attention to the question of when an arraignment is and when it is not a prompt one, this reverse development will be respected in this article.

**McNabb v. United States**

Before the startling decision of the United States Supreme Court in *McNabb v. United States,* federal law enforcement agents had long been accustomed to look upon the various provisions demanding prompt arraignment which dotted the Statutes at Large as empty of force or consequence. All this was destined to be changed by the activities of these agents in connection with the investigation of the murder of a federal revenue agent during a raid on an illegal still in the back country of Tennessee. Several uneducated mountaineers of the McNabb clan were arrested late at night, thrust into a barren cell, held for several days, and subjected intermittently to prolonged questioning. They were not taken before a United States Commissioner for arraignment as required by law. This treatment yielded confessions by three of the McNabbs.

When the Government sought to introduce these confessions at the first degree murder trial, the defense objected on the ground that their use would violate the fifth amendment. The Government countered that the Constitution barred only involuntary confessions and maintained that the McNabbs' confessions were voluntary. This was the issue tendered eventually to the Supreme Court. It was not, however, the one which the Court resolved in deciding the case.

In fact, the precise ground on which the *McNabb* case was decided has always been somewhat of a mystery. The opinion of Mr. Justice Frankfurter has an elusive quality which has bewitched the defense, bothered

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9 As a matter of fact, the defendants had been promptly arraigned, but this fact was not disclosed by the trial court record. On retrial of the case, the McNabbs were convicted, and this second conviction was sustained on appeal. See McNabb v. United States, 142 F.2d 904 (6th Cir. 1944). See also Inbau, The Confession Dilemma in the United States Supreme Court, 43 Ill. L. Rev. 442 (1948).
the prosecution, and bewildered the judiciary. Out of the fog, however, there are some points which emerge with more or less clarity. First, it is certain that the reasons for excluding the confessions flow from a non-constitutional source. Second, the doctrine announced in the case is derived from the inherent power of the Supreme Court to formulate "rules of evidence to be applied in federal criminal prosecutions." Third, the Court conceives this power to be broad enough to permit the exclusion of admittedly relevant evidence in order to promote some broad policy consideration. Finally, the fact that the officers who arrested the defendants had not arraigned them speedily was of at least some importance in the decision of the case.

But how important was this failure to arraign promptly? This is the question which has baffled those who seek to apply the rule. The first and even the second reading of the Court's opinion leave one with the definite impression that it was the decisive factor in the case; that it was the bare failure to comply with the arraignment statute that resulted in the exclusion of the confession. The host of other "circumstances" in McNabb—the barren cell, the low educational attainments of the defendants, the prolonged questioning—all served but to point up the wisdom of a prompt arraignment requirement. The outcome of the case, it seems, would have been the same had the President of the University of Tennessee been arrested and confined for two days in the best suite in Chattanooga's finest hotel; had he been served a menu which would have sent a gourmet into an ecstasy; and had he been questioned for short periods by polite, mild-spoken federal agents while soft music was played in the background. In brief, the teaching of McNabb is that the Government broke the law by failing to arraign promptly, and no federal court can accept evidence obtained by a procedure expressly forbidden by Congress.

Further study of the opinion, however, will cast some long shadows of doubt on such a tidy statement of the rule. Indeed, one begins to wonder whether the opinion has any utility in situations not substantially on all fours with the factual backdrop of the McNabb case. At several places Mr. Justice Frankfurter seemed to particularize the result to the very case before the Court. For one thing, he repeatedly noticed the "circumstances disclosed here," the "circumstances in which the state-

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10 "In the view we take of the case, however, it becomes unnecessary to reach the Constitutional issue pressed upon us." 318 U.S. at 340.
11 Id. at 341.
12 Ibid.
13 Id. at 344.
14 Id. at 341.
ments admitted in evidence against the petitioners were secured,"15 "such violations of legal rights as this case discloses,"16 "the circumstances revealed here."17 Perhaps these random references could be chalked up simply as efforts to buttress the main holding of the case to emphasize the abuses which are invited when arraignment is tardy. However, there is one passage in the opinion that makes one hesitate to dismiss these references so quickly. There the Justice itemized all the aggravating factors of the McNabbs' detention and then declares, "Plainly, a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in wilful disobedience of law."18 The phrasing of this sentence invites the contention that it was not the "disregard" alone but rather "such a flagrant disregard" which prompted the Court to exclude the confessions.

The upshot of this hedging by the Court is an opinion which means all things to all men. While this is a quality earnestly to be sought in literature, it is hardly a desirable feature for a judicial opinion. As one critic of the decision put it, "The majority opinion was either carelessly vague, or it purposely left open a wide area of interpretative application."19 It is regrettable that the Court did not spend a little less time philosophizing about the evils of the third degree and a little more time in unequivocal enunciation of the new rule. As it was, however, the Court chose to trade clarity for a pot of message and to camouflage the matter of the new rule by the manner of expressing it.

Aftermath of McNabb

The reception accorded the new rule by the lower federal courts during the thirteen months which followed its promulgation was something less than enthusiastic. This coolness stemmed from two sources. First, it was immediately evident that most of the judges in these courts were unsympathetic, if not openly hostile, toward a rule which suppressed evidence not only relevant but also cogent and often crucial in order to effectuate what seemed to them an exaggerated concern for individual rights.20 Secondly, it is fair to say that these judges felt that if the

15 Id. at 344.
16 Id. at 346.
17 Id. at 347.
18 Id. at 345. (Emphasis added.)
20 "In our judgment, this new rule will inure to the benefit of the guilty rather than the innocent, and will seriously impair the work of law enforcement officers." United States v. Haupt, 136 F.2d 661, 671 (7th Cir. 1943).
Supreme Court was going to make "bad law," it could at least make clear "bad law." Since the dimensions of the new rule were not spelled out it was an extremely difficult one to apply. One should not be surprised, then, to find the judges who first considered the import of the McNabb case speaking very broadly, very vaguely, and at times rather incomprehensibly when they discussed the new rule.

A study of these early cases interpreting McNabb discloses that the courts advanced four widely different versions of the rule it embodied:

1. The admissibility of a confession is in all cases determined solely by whether it is voluntary; however, delay in arraignment is a factor to be considered in assessing its voluntariness.21

2. Any confession secured during the illegal portion of a detention is inadmissible.22

3. Any confession procured in the course of a detention which becomes illegal is inadmissible.23

4. Any confession secured prior to arraignment is inadmissible.24

This failure of the lower federal courts to fathom the meaning of the McNabb rule moved the Supreme Court to grant certiorari in Mitchell v. United States.25

Mitchell v. United States

In 1944 the Supreme Court took a second look at its fledgling McNabb rule, and in Mitchell v. United States,26 endeavored to spell out a little more clearly its boundaries. In some respects it succeeded; in others, unfortunately, the opinion of Mr. Justice Frankfurter served only to

21 Those courts which subscribed to this version of the McNabb rule emphasize the fact that the Court painstakingly detailed all the unpleasant "circumstances" of the McNabb's detention: the barren cell, the prolonged interrogation, the isolation from friends, etc. et cetera. United States v. Grote, 140 F.2d 413 (2d Cir. 1944) (semble); Gros v. United States, 136 F.2d 878 (6th Cir. 1943) (semble).

22 United States v. Keegan, 141 F.2d 248 (2d Cir. 1944).

23 This was the interpretation first given to the McNabb rule in the jurisdiction which it most affected. In Mitchell v. United States, 78 U.S. App. D.C. 171, 138 F.2d 426 (1943), the court excluded a confession made almost simultaneously with the arrest, i.e., while there had as yet been no delay in arraignment, because the Metropolitan Police then proceeded to hold the defendant for eight days without bringing him before a committing magistrate.

24 This reading of McNabb was put forward in Haupt v. United States, 136 F.2d 661 (7th Cir. 1943). It flies in the face of the Supreme Court's statement in the McNabb case that the "mere fact that a confession was made while in the custody of the police does not render it inadmissible." 318 U.S. at 346.


26 322 U.S. 65 (1944).
obscure further its real meaning. The *Mitchell* case involved what may be conveniently termed a "threshold confession." In this situation the accused makes a clean breast of his connection with the crime almost simultaneously with his arrest. It may happen at the time of his apprehension, or as he is being driven to the station, or during the delay occasioned by the so-called "booking" procedure. In the *Mitchell* case, the defendant, having confessed shortly after his arrest, was held eight days before his arraignment was carried out. The narrow question before the Supreme Court was whether such a threshold confession is to be suppressed if the police illegally detain the defendant after it has been secured. Reversing the Court of Appeals for the District of Columbia, the Court held that if the detention is legal at the time of the confession, subsequent illegal delay in arraignment will not contaminate it. The Court stated that "the illegality of Mitchell's detention does not retroactively change the circumstances under which he made the disclosures. These . . . were not elicited through illegality. Their admission, therefore, would not be use by the Government of the fruits of wrong-doing by its officers."27 This decision nipped in the bud two heretical views of *McNabb*. It squarely held that only confessions obtained during the illegal portion of the detention are objectionable. And, a fortiori, it made it clear that the new rule did not ban all prearraignment confessions.

Had the Court confined itself to the resolution of the limited question before it, *Mitchell* would have gone far in fixing the periphery of the *McNabb* rule. However, the opinion was replete with intonations which fed the controversy over whether the illegal detention in and of itself barred the confession. At times Mr. Justice Frankfurter all but said that it does. He stressed that *McNabb* was not decided on the ground that the confessions were involuntary, and stated that "under the duty of formulating rules of evidence for federal prosecutions, we are not confined to the constitutional question of ascertaining when a confession comes of a free choice and when it is extorted by force. . . ."28 At yet another point he was at pains to point out that the confession there before the Court was not the product of illegality on the part of the police. "These [disclosures] . . . were not elicited through illegality. Their admission, therefore, would not be use by the Government of the fruits of wrong-doing by its officers."29 When these statements are thus isolated, they indicate almost beyond dispute that the *McNabb* rule asks simply, was the confession made after the time when the accused should have been brought

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27 Id. at 70.
28 Id. at 68.
29 Id. at 70.
before the committing magistrate. An affirmative answer will lead to the exclusion of the confession.

On the other side of the ledger, the *Mitchell* opinion is studded with remarks that indicate that illegal detention, although significant, is not of itself decisive. The Court declared that it suppressed the McNabb admissions because "the defendants were illegally detained under aggravating circumstances. . . ." Later Mr. Justice Frankfurter summarized the earlier decision thus:

Inexcusable detention for the purpose of illegally extracting evidence from an accused, and the successful extraction of such inculpatory statements by continuous questioning for many hours under psychological pressure, were the decisive features in the *McNabb* case which led us to rule that a conviction on such evidence could not stand.81

This last was destined to become the most quoted passage of the opinion.

Here then is the recurrent riddle of the *McNabb* case. If the illegal detention alone bars a confession, why did the Court repeatedly detail the circumstances of psychological pressure? If it is the illegal detention plus psychological pressure which bars the confession, then wasn't this just another involuntary confession situation? If the *McNabb* confessions were in fact excluded on the ground of involuntariness, why was the Court at such pains to point out that the case was not bottomed on a constitutional ground? After reading *McNabb* as "clarified" by *Mitchell*, one begins to gain an appreciation of the frustration a dog must experience when chasing its tail.82

*Aftermath of Mitchell*

The Supreme Court's decision in the *Mitchell* case sent the *McNabb* rule into eclipse. To the judges of the lower federal courts, who had viewed the earlier decision with ill-concealed astonishment and apprehension, the *Mitchell* case signaled a face-saving retreat by the Court from the untenable position which it had occupied the year before. The *McNabb* rule was dead; it was the task of the lower courts to bury it. This they proceeded to do with irreverent haste. In the four and one half year interim between the *Mitchell* holding and that in *Upshaw v. United States*, the rule was invoked successfully by only one defendant.84 A review of the appellate decisions during this period discloses

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80 Id. at 67.
81 Ibid. (Emphasis added.)
82 "[T]he rule remains surrounded by a vague penumbra, and its outlines defy definition." Note, 47 Colum. L. Rev. 1214, 1220 (1947).
83 335 U.S. 410 (1948).
that the circuit courts accomplished the entombment of the rule in two ways. Some were almost too frank in treating the doctrine as a temporary aberration whereas another line of decisions took a more subtle tack and just distinguished it in such a way that it lost all meaning.

Typical of the approach of those courts which openly denounced the rule is this summary of the McNabb decision: "failure to take the accused before an arraigning officer was not the reason the confession was held inadmissible. The real basis of the decision was the coercive and unfair treatment to which the defendant was subjected."35 According to those who subscribed to this view, the McNabb decision was just one of the ever-swelling stream of cases that has poured from the Court in an effort to define what it is that will make a confession involuntary, so that its admission into evidence would violate due process of law. Mention has already been made of the passages in McNabb and later in Mitchell which would support such an interpretation. However, there undeniably is a great deal in those opinions that does not harmonize with the view of those who blandly assert that the test of admissibility was, is and ever shall be voluntariness. Why, for example, did the Court avow that it was deciding the McNabb case on nonconstitutional grounds? Why was Mr. Justice Frankfurter so careful to note that the rule emanated from the Court's supervisory powers? And, finally, why was the holding in Mitchell prefaced with a reminder that in supervising the federal courts "we are not confined to the constitutional questions of ascertaining when a confession comes of a free choice and when it is extorted by force, however subtly applied."?36 It seems apparent that if a judge genuinely desires to throw some light on the prompt arraignment problem, he cannot cavalierly write off McNabb; he must come to grips with the problem posed by the ambivalent language in the Supreme Court cases.

The second approach to the extinction of the McNabb rule was nurtured in the Court of Appeals for the District of Columbia. On the one hand, the court summarily rejected the idea that any confession obtained after the point when the prisoner should have been arraigned was ipso facto inadmissible.37 Yet at the same time the court hesitated to discount

35 Ruhl v. United States, 148 F.2d 173, 175 (10th Cir. 1945); accord, Brinegar v. United States, 165 F.2d 512 (10th Cir. 1947); Blood v. Hunter, 150 F.2d 640 (10th Cir. 1945); United States v. Heitner, 149 F.2d 105 (2d Cir. 1945); Paddy v. United States, 143 F.2d 847 (9th Cir. 1945).
36 322 U.S. at 68.
37 "[U]nreasonable delay, without accompanying aggravating circumstances, in presenting a prisoner to a magistrate (though itself unlawful and inexcusable), does not render
The main thrust of McNabb by holding that the case had worked no change in the traditional rule of voluntariness. The court concocted instead what on the surface seems a *via media* but which under analysis shades into the traditional voluntariness standard. A confession is vitiated, said the court, only if the illegal detention *induced* the damaging statements. Thus, the court perceived a vital distinction between cases where the unnecessary delay in arraignment *induced* the confessions and those where the confessions merely occurred during the illegal detention. The court evidently regarded the fragile distinction between the two situations as too obvious for amplification. At any rate, it never troubled to explain it. Nor did it deem it necessary to expand on the difference between a confession which was induced by illegal detention and one which was coerced and, hence, involuntary. As one reads this series of decisions the conviction grows that although the court purports to apply the rule, it, in point of fact, mutilates it.

The attempt by the Court of Appeals for the District of Columbia to steer a middle course ran afoul in *Upshaw v. United States*. There the local police frankly admitted that the arrest of the defendant was illegal for lack of probable cause. Moreover, they conceded that the sole motive for a thirty-one hour detention of the defendant was the hope that he would make some damaging statements. With commendable candor, the United States Attorney startled the appellate court by confessing error and acknowledged that the police conduct warranted the application of the McNabb rule. The court, however, brushed aside this confession of error simply as proof that the United States Attorney did not know a corpse when he saw one, and then pronounced the confession a non-induced one. This set the stage for the second attempt by the Supreme Court to clarify its delphic decision in McNabb.

*Upshaw v. United States*

The fact situation in *Upshaw v. United States* case brought the Supreme Court to the crossroads with its McNabb rule. Its decision
either had to lay the rule forever to rest or see it resurrected as a formidable rule of exclusion. For here, unlike McNabb, there were no coercive or aggravating circumstances to complicate the illegal detention. And here, unlike Mitchell, the confession was not secured until long after the detention had become illegal. As matters developed, the McNabb rule did in fact come within one vote of extinction, for in the interim since Mitchell, Mr. Justice Reed had converted three of the new members of the Court to his position of unyielding opposition to the rule. However, the rule managed to survive this most serious assault upon it and to come forth from the contest stronger and clearer than perhaps at any period in its existence.

It fell to the lot of Mr. Justice Black to write the opinion for the majority. It was no light undertaking, for he had to explain away much of the language in the earlier opinions which had stunted the growth of the rule. He first disposed of the fact that in the earlier cases the Court had stressed the aggravating circumstances of the McNabbs' detention. This was done, he avowed, to show that the record left no doubt that the McNabbs were not promptly taken before a judicial officer as the law required, but instead were held for secret questioning, and "that the questioning of the petitioner[s] took place while they were in the custody of the arresting officers and before any order of commitment was made." Next he neatly dodged the stumbling block posed by the loose language in Mitchell by dismissing it as dictum, stating that, "we hold that this case falls squarely within the McNabb ruling and is not taken out of it by what was decided in the Mitchell case." Mr. Justice Black then redefined the McNabb rule: "a confession is inadmissible if made during illegal detention due to failure promptly to carry a prisoner before a committing magistrate, whether or not the 'confession is the result of torture, physical or psychological. . . ." That statement of the rule is about as clear-cut as one could expect it to be. In effect it means, and can only mean, that given the concurrence of unlawful detention and a confession, the former contaminates the latter.

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42 Chief Justice Vinson and Justices Jackson and Burton joined him in a lengthy and exhaustive dissenting opinion in which he stated well and forcefully the case against the McNabb rule.
43 335 U.S. at 413.
44 Id. at 412. (Emphasis added.)
45 Id. at 413.
46 "This language in the Upshaw case and the actual holding in the case indicate that a majority of the Supreme Court, as then constituted, was firmly committed to the doctrine that a confession, though in all other respects properly obtained, should be excluded if obtained while the confessor is being detained in violation of an arraignment statute."
However, as was true of the earlier McNabb and Mitchell opinions, there were features about the Upshaw decision which foreboded still more confusion in determining the scope of the rule. Mr. Justice Black thus summed up the mistake of the court below: "That court thought the McNabb case did no more than extend the meaning of 'involuntary' confessions to proscribe confessions induced by psychological coercion as well as those brought about by physical brutality."47 This unfortunate synopsis of the lower court's decision portended more trouble for the clarified McNabb rule. Although Mr. Justice Black had made it certain beyond cavil that the rule was not an offshoot of the voluntariness criterion, he left the way open for future argument that the "detention-induced confession" doctrine, which was the real basis for the court of appeals' Upshaw ruling, might still be a valid interpretation.

Aftermath of Upshaw

The Upshaw decision dealt a body blow to those who had worked so energetically to emasculate the McNabb rule. However, so deep-seated was their antagonism toward the rule that they were still not prepared to bow to the mandate of the Supreme Court. Having failed in their attempt to dismiss the rule as nothing more than a complicated restatement of the voluntariness standard, its foes cast about for a new way to deaden its impact on time-honored police investigative practices. Mitchell v. United States48—the same source that yielded the "voluntariness" theory—was revisited and provided yet another device for undermining the McNabb rule. Having been rebuffed in their efforts to use the dicta of the Mitchell case, opponents of the rule began to appreciate the avenues opened by the holding itself. They remembered that the Supreme Court had there stated that if at the moment the confession was obtained the detention was legal, then it could be used at trial no matter how long and how illegally the prisoner was subsequently held. It therefore behooved the Government to seek to expand as far as possible the allowable period between the time of the arrest and the time at which the prisoner must be tendered to the committing magistrate. In other words, the emphasis shifted from the query, "What are the consequences of an illegal detention?" to "When does a detention take on the aspect of illegality?"


47 335 U.S. at 412.
48 Supra note 25.
One should not be surprised, then, to observe in the lower federal courts during the interval between the Upshaw case and United States v. Mallory an ever increasing attention directed toward the wording of Rule 5(a). This attention contrasts sharply with the pre-Upshaw era, when, at best, little concern was shown with respect to the requirements of the rule. This re-examination of Rule 5(a) revealed one inviting method of checking the influence of the McNabb rule. Unlike its predecessor statutes, Rule 5(a) did not specify that an arrestee bearraigned “forthwith” or “immediately.” Instead it required only that he be presented to the magistrate “without unnecessary delay.” “When,” began to inquire judges, prosecutors, defense counsel and police alike, “is a delay a necessary one?”

There were four types of “delay” which the Government felt could be classified as necessary. (1) Delay occasioned by the “booking” procedure at the precinct station. The rule, it was argued, certainly admitted of fingerprinting the accused and noting the arrest; it did not require the arresting officer to make a beeline for the magistrate’s office. (2) Delay resulting when an arrest occurs late in the afternoon or after the regular office hours of the committing magistrate. This type of delay appears in several forms: (a) the arrest takes place while the commissioner is still available, but he will have closed shop for the day by the time the “booking” process is completed; (b) the arrest happens in the evening, at a time when the magistrate is at home; (c) the arrest is made late at night or in the early morning hours, when presumably the committing magistrates have retired for the evening; (d) the arrest occurs after a weekend and/or holiday period has begun so that it will be a matter of days, instead of hours, before the commissioner will be in his office. (3) Delay caused by police investigative procedures other than the desire to interrogate the prisoner. This may be for the purpose of conducting

53 See, e.g., Pixley v. United States, 220 F.2d 912 (10th Cir. 1955); Duncan v. United States, 197 F.2d 935 (5th Cir. 1950); United States v. Walker, 176 F.2d 564 (2d Cir. 1949).
54 See, e.g., Pierce v. United States, 91 U.S. App. D.C. 19, 197 F.2d 189 (1952); Haines v. United States, 188 F.2d 546 (9th Cir. 1951).
a line-up, or to check the veracity of the prisoner's exculpatory statements, or to conceal the fact of the accused's capture lest his co-conspirators flee before the police can close in upon them. (4) Delay resulting from the desire to interrogate the prisoner.\textsuperscript{55} Arrestment is postponed in the hope that the prisoner under police questioning may be prompted to make some damaging statement, either in the form of a confession, a damaging admission, an easily explodable alibi, or a story different from that he will tell at his trial. By hypothesis, no physical or psychological coercion is exerted; all that occurs is an interrogation, pure and unsullied.

At this point it is proper to remark parenthetically that this sudden and keen interest on the part of the Government in the exact requirements of Rule 5(a) was not motivated by a disposition to adhere to them. Rather it originated in the desire to fix the time when its wrong-doing would commence so that full use could be made of the Mitchell holding.

It is significant that in all but one case\textsuperscript{56} at the appellate level in which the Government took the position that the delay was necessary, the lower federal courts agreed. With only an occasional ripple of dissent, the circuit courts held that it was permissible to hold a person while leads are checked; that it was not mandatory that a magistrate be summoned late at night, early in the morning, on weekends, holidays, or for that matter at anytime after his office hours; that it was permissible to interrogate the defendant for a reasonable time after his arrest in the hope that a confession could be secured.\textsuperscript{57}

Moreover, in the face of the holding in Upshaw, these same courts began once again to question the content of the McNabb rule itself. Witness the stubborn refusal of the Second Circuit to follow the Supreme Court's mandate: "this was a voluntary confession. The fact that it was made while he was under illegal arrest does not make it incompetent."\textsuperscript{58} Witness also the vacillation of the Court of Appeals for the District of Columbia, which first read Upshaw to teach that confessions secured during illegal delay, without more, are inadmissible,\textsuperscript{59} and then


\textsuperscript{56} The single exception was Rettig v. United States, 99 U.S. App. D.C. 295, 239 F.2d 916 (1956).

\textsuperscript{57} See cases cited supra notes 50-55.

\textsuperscript{58} United States v. Walker, 197 F.2d 287 (2d Cir. 1952).

\textsuperscript{59} "In view of that holding, we must consider it to be a settled principle that, when arresting officers unnecessarily delay taking a prisoner before a committing magistrate, any
reversed its field by rejecting a defendant’s “contention that his illegal detention . . . invalidated his confession even if it did not produce it.” The failure of the Court in Upshaw to destroy by name the detention-induced confession rule of the District of Columbia had left the door open to even more quibbles over the meaning of the McNabb rule.

Mallory v. United States

In 1957 in the case of Mallory v. United States, the United States Supreme Court for the first time passed directly on the question of what is and what is not an unnecessary delay within the meaning of Rule 5(a). Its decision in that case was destined to excite more comment, controversy and consternation than any of the previous “arraignment cases” including McNabb itself.

One afternoon in the District of Columbia a woman was raped by a masked attacker in the laundry room of the apartment house in which she lived. After the crime was committed, Andrew Mallory, who had been living in the basement of the apartment building, disappeared. The victim’s story led the police to suspect that either he or one of his relatives had committed the crime. The following afternoon at about 2:30 p.m. Andrew Mallory was apprehended and placed under arrest. The prisoner was taken to police headquarters where a team of detectives questioned him for about thirty minutes. At four o’clock that same afternoon Mallory agreed to take a lie detector test. The test was not administered until eight o’clock that evening. Within an hour or so Mallory began to make a series of oral and written admissions. It was not until then that the police made a token effort to locate a committing magistrate.

Over the defendant’s strenuous objection the confession was admitted into evidence at trial. The court of appeals approved this action, and the case coursed its way to the Supreme Court. There Mr. Justice Frankfurter, writing for a unanimous Court, declared that the demands of Rule 5(a) were not being observed at the time the confession was made, that the gap between the defendant’s arrest at 2:30 p.m. and his confession made to them during that delay is inadmissible; and that this is true even though the confession was not induced by the illegal detention nor by any form of coercion, but was voluntarily given.” Garner v. United States, 84 U.S. App. D.C. 361, 363-64, 174 F.2d 499, 501-02 (1948).

62 See note 6 supra.
confessions that evening amounted to an "unnecessary delay." However, as has been characteristic of all the Court's opinions in this area, the Mallory decision left much uncertainty as to its import in fact situations not on all fours with it.

The decision clearly outlawed one type of delay, that solely for purposes of interrogation. This was the sort of delay that occurred in the Mallory case, for the defendant could readily have been arraigned the afternoon on which he was arrested. Just as clearly a dictum in the case approved a delay long enough to permit the police to take their prisoner through a booking procedure at the precinct office. Mr. Justice Frankfurter stated that "the arrested person may, of course, be 'booked' by the police."64

What Mallory did not make clear is the latitude allowed to the police in the event the arrest takes place at a time when a committing magistrate is not on duty. To avoid violation of Rule 5(a) is it necessary that the officer who arrests at such hours rout a magistrate out of bed in order to conduct an arraignment? In the District of Columbia where a large volume of arrests occur at times when no magistrate is on duty, this presents an especially serious question. At one point in the Court's opinion, there is language which indicates that arraignment need not be conducted at odd hours of the day and night. Summarizing the McNabb case, Mr. Justice Frankfurter said, "the Court held that police detention of defendants beyond the time when a committing magistrate was readily accessible constituted 'willful disobedience of the law.'"65 On the other hand, there was much in Mallory which militated against a holding that arraignment may be delayed until the regular office hours of the magistrate begin. The Court stated that Rule 5(a) "allows arresting officers little more leeway than the interval between arrest and the ordinary administrative steps required to bring a suspect before the nearest available magistrate."66 At another point, the Court declared:

The police may not arrest upon mere suspicion but only on "probable cause." The next step in the proceeding is to arraign the arrested person before a judicial officer as quickly as possible so that he may be advised of his rights and so that the issue of probable cause may be promptly determined. The arrested person may, of course, be "booked" by the police. But he is not to be taken to police headquarters in order to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support the arrest and ultimately the guilt.67

64 354 U.S. at 454.
65 Id. at 453. (Emphasis added.)
66 Ibid.
67 Id. at 454. (Emphasis added.)
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It is difficult to predict which of these two directions the Court will follow—the one requiring arraignment only when the magistrate is "readily accessible" or the one requiring arraignment "as quickly as possible." However, it is helpful to remember that the Mallory case did not involve an arrest at an odd hour. Therefore, it is arguable that the language in the opinion about "little . . . leeway" between arrest and arraignment and which speaks of arraignment "as quickly as possible" assumes a situation where the magistrate is "readily accessible."

Aftermath of Mallory

The Mallory decision was greeted by law enforcement officials of the District of Columbia (where its impact was greatest) with something bordering on panic. The Chief of the Metropolitan Police Department declared (hyperbolically, it is hoped) that the decision renders the Police Department "almost totally ineffective."68 There were loud demands for a legislative re-examination of the law of arrest, and in the Congress bills were introduced either to expand the period of allowable detention69 or to abolish the McNabb rule itself.70 The courts braced themselves for an epidemic of moves by defense counsel to contort the Mallory decision into some benefit for their clients. And the prosecutors began to comb the opinion word by word in search of some way to limit the ruling.

In the year after the Mallory decision was rendered, the Court of Appeals for the District of Columbia gave major consideration to its implications in seven cases. Some of these permitted ready solution; others presented knotty problems indeed.

One which was not too difficult was Perry v. United States,71 where the defendant made damaging statements at the time of his arrest, but the police then postponed arraignment for six days. This case was on all fours with the Mitchell case, and the court had no trouble in approving the use of the confession. A more complicated threshold confession case arose in Metoyer v. United States,72 where the defendant confessed orally early in the afternoon, as soon as the Metropolitan Police talked to him, but the police delayed his arraignment about an hour so that a written statement could be prepared for his signature. The court agreed that the oral confession was unobjectionable, but Chief Judge Edgerton dissented

71 253 F.2d 337 (D.C. Cir. 1957).
72 250 F.2d 30 (D.C. Cir. 1957).
from the majority ruling that the written one should likewise be received. He read Mallory, correctly it would seem, to make it "illegal for the police to hold a man in their own custody in order to conduct a definitive inquiry instead of arraigning him promptly before a committing magistrate."

More difficult to decide was the series of five cases raising the question of arraignment requirements when an arrest is made after hours. In the first two cases the court either ignored or overlooked the possibility of drawing a distinction between the Mallory arrest-in-the-afternoon situation and cases where the arrest is made when the commissioner is not readily accessible. In Watson v. United States,74 where the defendant was picked up at 6:40 p.m. and confessed at 3:15 a.m., the court without discussion stated that the facts in Mallory so closely "parallel those in the instant case that we see no basis for distinction." Later in Starr v. United States,75 where the defendant, arrested at 1:00 a.m., confessed between 8:00 a.m. and 10:00 a.m., the court stated flatly, "There is no reading of Mallory which makes appellant's written statement admissible in evidence."76

Finally, in a case involving Milton Leo Mallory, another of the clan, Mallory v. United States,77 the court began to retreat from the position it had taken in Watson and in Starr. Here, the defendant was arrested at 8:00 p.m. on Thanksgiving Day on a charge of carnal knowledge of an eight-year-old child. He confessed at 9:00 a.m. The United States Attorney argued that the delay was necessary because the commissioner's office was closed and because time was needed to conduct medical tests to verify the child's story. A divided court (Judge Bazelon dissented), in an abbreviated opinion which did little more than state facts and give a result, held the confession admissible.

These decisions, made as they were by three-judge panels and displaying as they did no disposition for close analysis of the problem, served but to set the stage for Trilling v. United States,78 which was heard by the full court. There the defendant was properly arrested at 5:30 in the morning. He confessed at 8:30 a.m., but the police, instead of arraigning him, conducted an interrogation for several hours thereafter in a partially successful effort to implicate him in other crimes. In a seventy-

73 Id. at 34 (dissenting opinion).
76 Id. at slip op. 2.
78 Nos. 13069, 13165, and 13212, D.C. Cir., April 17, 1958.
one page decision the court upheld, five-to-four, the use of the first confession, and disapproved, six-to-three, the use of the others. Implicit in the ruling that the first confession was admissible was a holding that one arrested in the early hours of the morning need not be arraigned until the courts are open. The authority of this ruling, however, was diluted by the dissent of four judges. Judge Bazelon, with whom Chief Judge Edgerton concurred, took in his lengthy dissenting opinion the extreme position that any and all questioning between arrest and arraignment is taboo. It is difficult to reconcile his reading of McNabb with the Supreme Court’s decision in the Mitchell case where a pre-arraignment confession was upheld. Moreover, the Supreme Court has never intimated that confessions in response to police interrogation during a necessary delay are inadmissible, and the Federal Rules of Criminal Procedure themselves are silent on the subject of pre-arraignment interrogations. To read Rule 5(a) as Judge Bazelon suggests—to ban all such questioning—is to cross the sometimes thin line between interpretation and interpolation.

What is even more incredible about the Trilling decision is that three members of the court voted to receive into evidence the confessions made during the course of the day, when arraignment could easily have been had. These dissenters clung tenaciously to the proposition that only intensive interrogation is proscribed by the McNabb rule. The key to their view is to be found in this passage of Judge Prettyman’s opinion:

I think, if the circumstances are that the police are investigating a crime and asking available person’s relevant questions, they are performing a proper function. They are not required to charge all such persons with the crime. They need not forthwith take all such persons before a magistrate. It seems to me such persons are not under “arrest”, within the meaning of Rule 5(a), even if they are under some sort of compulsion to go to headquarters and answer questions. The Rule cannot mean that every person questioned in connection with a crime must be arraigned.79

To give effect to the dangerous doctrine that police can place anyone whom they would like to question “under some sort of compulsion to go to headquarters” would be to leave the liberty of every citizen to the whim of any policeman. There may be a distinction between arrest and compulsion to go to the police station. There is certainly no difference.

In the recent case of Porter v. United States80 the court further solidified its stand that arraignment need not take place when the magistrate is not normally available. Here the defendant, arrested at 10:30 p.m., signed a statement less than an hour later. Mr. Justice Reed, recently retired from the Supreme Court and sitting on the court of appeals by

79 Id. at slip op. 48-49 (dissenting opinion). (Emphasis added.)
designated, rejected any contention that arraignment need occur during hours when the magistrate is not "readily accessible."\textsuperscript{81} Moreover, he flatly disagreed with the position, again proffered by Judge Bazelon in dissent, that all pre-arraignment interrogation is proscribed by Rule 5(a). "On arrest the prisoner must be taken before any reasonably accessible magistrate without unnecessary delay. But until there is such an opportunity to reach such an official, the Supreme Court has not held that reasonable questioning without more of prisoners must cease."\textsuperscript{82} It would seem that a situation is rapidly developing in the District of Columbia which requires clarification by the Supreme Court.

\textit{Capsule Statement of the Rule}

As was observed earlier, the confession arraignment problem actually involves the operation of not one rule, but two. Each of these rules has given the courts more than its share of trouble. How far can one now speak about the content of either rule with some assurance of accuracy? As far as the \textit{McNabb} rule itself is concerned, it is the opinion of the writers that the law has at last crystallized. In the proper operation of the rule, the time the arraignment actually occurs is immaterial. So also is the question of whether physical or psychological coercion was used, and the related question of whether the detention induced the confession. To apply the rule one need ask only whether the defendant was being illegally detained at the time he confessed. If the answer is in the affirmative, the confession cannot be used against him. If in the negative, his attorney must look elsewhere for grounds to exclude it.

On the other hand, the meaning of Rule 5(a), insofar as it contemplates a necessary delay between arrest and arraignment, is rather unsettled. This much at least is, in the opinion of the writers, clear:

1. Some delay between arrest and arraignment is permitted by Rule 5(a).
2. Delay \textit{solely} for the purpose of non-coercive questioning of the accused is always illegal.
3. The booking procedure is a necessary delay.
4. The delay occasioned by a brief verification of the defendant's exculpatory statements is legal.
5. Other delays dictated by prudence and not emanating from police desire to interrogate the accused may be legal.
6. When the delay is otherwise legal, police may interrogate the accused.

\textsuperscript{81} Id. at slip op. 7.
\textsuperscript{82} Ibid.
The gray zone lies in the legality of delaying the arraignment until the magistrate arrives for regular duty. After some backing and filling, the Court of Appeals for the District of Columbia has taken the stand that Rule 5(a) does not require arraignment at inconvenient times. At first blush one is sorely tempted to reject this reading of Rule 5(a). First of all, the court itself sharply divided on the issue. Secondly, Mr. Justice Reed, who stated most emphatically that round-the-clock arraignment is not required, has been a staunch antagonist of the McNabb rule since its inception and is perhaps disposed to limit it at every opportunity. Last and least, the ability of the court of appeals to gauge the temper of the Supreme Court in the confessionarraignment area has been less than spectacular. In fact, it has suffered the reversal of its theories in Mitchell, Upshaw and Mallory.

These weighty considerations to the contrary notwithstanding, it is the opinion of the writers that the court of appeals is on solid ground in its belief that arraignment at odd hours of the day and night is not indicated by Rule 5(a). The Supreme Court in its only utterance on the question of necessary delay read the rule to require arraignment only when a magistrate is "readily accessible." In view of the references in the text of the rule to "the nearest available commissioner," this seems to be a sound construction. Any intimations to the contrary in the Mallory decision can either be explained by the context of the opinion or dismissed as dicta. Perhaps the strongest reason for rejecting the concept of twenty-four-hour-a-day arraignment is its impracticality on a nation wide scale. It is true that in the District of Columbia where the number of those empowered to arraign is large, some accommodation can be worked out. However, Rule 5(a) applies to every arrest by a federal officer in the United States. Round-the-clock arraignment would place an intolerable burden on committing magistrates throughout the country.

II

The Wisdom of the Rule

Just as it was necessary in discussion of the content of the McNabb rule to break it down into the rule of evidence and the rule of procedure which are its components, so also is a similar breakdown a prerequisite to intelligent appraisal of the policy considerations behind the rule. One must first ask what is the moving force behind the requirement of Rule 5(a) that those who have been arrested be arraigned with a minimum of delay. Then the line of inquiry must shift to the possible rationale for

\[88\] 354 U.S. at 453.
the Supreme Court's suppression of any confession obtained after the permissible period of detention has expired. Much of the furor that went up after the Mallory decision was announced could have been avoided had there been a more widespread realization that there were two rules with two rationales, and had a little more effort been aimed in the direction of discovering just what those rationales might be.

Rule 5(a), in a nutshell, requires prompt arraignment of arrested individuals. The Mallory decision defines what is meant by prompt arraignment. But prescinding from the difficult problem of what is and what is not a permissible delay in arraignment, one is moved to inquire why the principle of arraignment without unnecessary delay is so important; why it is that the Supreme Court has refused to countenance the disingenuous efforts by law enforcement officials to subvert that principle. Such questions require re-examination of fundamental concepts connected with the law of arrest and with our system of administering criminal justice.

First of all, it must be borne in mind that any arrest based on suspicion alone is illegal. This indisputable rule of law has grave implications for a number of traditional police investigative practices. The round-up or dragnet arrest, the arrest on suspicion, for questioning, for investigation or on an open charge all are prohibited by the law. It is undeniable that if those arrests were sanctioned by law, the police would be in a position to investigate a crime and to detect the real culprit much more easily, much more efficiently, much more economically, and with much more dispatch. It is equally true, however, that society cannot confer such power on the police without ripping away much of the fabric of a way of life which seeks to give the maximum of liberty to the individual citizen. The finger of suspicion is a long one. In an individual case it may point to all of a certain race, age group or locale. Commonly it extends to any who have committed similar crimes in the past. Arrest on mere suspicion collides violently with the basic human right of liberty. It can be tolerated only in a society which is willing to concede to its government powers which history and experience teach are the inevitable accoutrements of tyranny.


Nor should one be lulled into the belief that such arrests are the exception; rather does it seem that they are the rule. In fact there is such a gulf between what the police may do and what they actually do that many have come to identify the two. In the District of Columbia, for instance, not too long after the *Mallory* ruling came down, the Metropolitan Police arrested almost one hundred “suspects” in connection with the investigation of a robbery perpetrated by three juveniles. One wonders if those who sent up such a clamor when Andrew Mallory was set free had much to say about this gross act of illegality on the part of the police.

The observance of Rule 5(a) would quickly put an end to most such arrests. The police would look rather ridiculous parading a regiment of arrestees before a committing magistrate and endeavoring to convince him that there is probable cause to link them all with a crime admittedly committed by one or two. The inexorable result of police compliance with Rule 5(a) would be the rapid disappearance of the odious arrest on suspicion. But before there can be talk of obedience to the mandate of the prompt arraignment statute there is needed both a reawakening and a rededication. Society must reawaken to the fact that in the long pull the rights of its citizens are only as strong as their weakest claimant; that to wink at the invasion of those rights when some segments of the populace invite them is to invite similar encroachment upon the rights of others. And society must rededicate itself to the principle that there is a price too great to pay for maximum law enforcement efficiency. Rigid adherence to the prompt arraignment provision is the most feasible way of guaranteeing that that price will never be paid. “It is a commonplace that these provisions [The Bill of Rights] result in some impairment of the efficiency of law enforcement agencies. But it is part of our fundamental belief that this price is worth paying, since it safeguards the freedom of the whole population.”

Another factor that is overlooked by many who oppose the *Mallory* decision is that arrest, even on probable cause, is not properly a vehicle for the investigation of crime. “In the Anglo-American law, there is no regular provision for police examination of a person suspected of crime. If a person, even a person under arrest, refuses to speak to a police officer or a detective, the officer has no legal means of compelling

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86 Hall, supra note 84 passim.
87 See Trilling v. United States, Nos. 13069, 13165 and 13212, D.C. Cir., April 17, 1958; slip op. at 24, n.11.
88 Fraenkel, supra note 84, at 748.
a reply. . . . The rules of law do not provide for a period of time for questioning."89 To be sure, when the circumstances attending the commission of a crime point very strongly in the direction of one individual, the police are permitted to take him into custody. And the very fact that he is in the custody of a governmental agency which has as one of its functions the investigation of crime tempts the police to use an interrogation process to aid in that investigation. Any detective knows that the mere fact that a prisoner is questioned more often than not will yield a confession, or at the least a damaging admission.90 Moreover, even if the prisoner at first shows no disposition to talk, there is the opportunity to change this by persuasion or trickery. In the absence of rough treatment, what objection, it is asked, can there be to permitting the police to utilize this magnificent opportunity to secure conclusive evidence of guilt?91

In order to answer this last question, it is necessary to nail down precisely what is the function of the arrest on probable cause. Here again wrong has been so widespread and so long continued that many have come to regard it as right. There is such a gap between theory and practice that the latter has obfuscated and all but obliterated the former. It must be remembered that there is quite a difference between the prisoner arrested on probable cause and the defendant convicted of crime. The arrestee is presumed to be and very often is in fact innocent. The "probable cause" justifies some curtailment of his liberty, but it does not permit its extinction except in capital cases. It is the function of arrest first to subject him to the jurisdiction of the court and secondly to afford opportunities for steps to be taken to guarantee his presence at trial. "In theory, an arrest must be based on some incriminating evidence, and the function of such detention is not to isolate a suspect for questioning but rather to make certain that he will appear at the time of the trial."92

The constitutionally protected right to bail is utterly inconsistent with any right in the police to hold the arrestee for questioning. The police have no right to defer indefinitely the presentation of their prisoner before a magistrate where his bond will be fixed. Observance of Rule 5(a)

89 Paulsen, supra note 85, at 411.
90 "Holding the suspect incommunicado furnishes the setting most favorable for obtaining a confession." Wicker, supra note 46, at 511.
91 For discussion of the need for police interrogation of arrestees, but with no mention of the illegality of this practice under present law, see Inbau, The Confession Dilemma in the United States Supreme Court, 43 Ill. L. Rev. 442 (1948).
92 Paulsen, supra note 85, at 411.
gives meaning to the right of bail.\textsuperscript{83} Much of its significance disappears if the police seal off their prisoner from the protective counsels of the magistrate. The right to bail is a weak and ineffectual one indeed without the prompt arraignment statute to implement it.

A third consideration that must be kept in mind when debating the pros and cons of the Mallory decision is that in this country the administration of criminal justice is carried out by an accusatorial system rather than an inquisitorial system. Periodically, it seems, the nation is afflicted with mass unawareness of what the accusatorial system is and of what it means. The administration of criminal justice is an undertaking as dangerous as it is necessary. Under the ideal operation of this process, all of the guilty are punished and all of the innocent are freed. Unfortunately, however, the difficult task of meting out justice is necessarily entrusted to fallible human beings. This means that miscarriages are inevitable, no matter how assiduously they are avoided, and there is substantial danger that guilty men will go free and that innocent men will be convicted. There is nothing that can be done to eliminate these evils, but by increasing the opportunities for one to occur, it is possible correspondingly to minimize the chances that the other will result.

The Bill of Rights is a lasting monument to the belief of those who founded this nation that it is far, far better that the guilty escape justice than that injustice be visited upon the innocent. Moreover, it embodies their belief that this goal can be accomplished by handicapping the police in their task of law enforcement. The system that it establishes is accusatorial in nature; that is, the defendant need prove nothing; the prosecution must prove all.

The American people like to boast that they are willing to pay the price the accusatorial system exacts in the terms of handicaps to the police in return for the insurance it provides against the unjust punishment of innocent citizens. Unfortunately, present day police techniques force one to label such a boast as hypocritical. The system of administering criminal law in this country has degenerated into an incredible hybrid of the accusatorial and inquisitorial. Those who generations from now set out to write the history of our legal institutions will puzzle over a framework of criminal justice, which, during a public trial before an impartial judge with defense counsel present to give aid, will not suffer the defendant to be asked a single question without his consent. And yet that same legal system will condone the relentless questioning in secret at all hours of the day and night of that same defendant with only

\textsuperscript{83} U.S. Const. amend. VIII.
those whose duty it is to ensnare him to determine where the line between fair and foul is to be drawn. This is a tragic indictment of contemporary society. The preaching of one thing and the practicing of another is often one of the first warnings of social decay.

Prompt arraignment with its accompanying statement to the accused of the host of rights conferred on him by the Constitution is the surest method of preserving the accusatorial system in substance as well as in form. On the other hand, toleration of the wholesale disregard of Rule 5(a) is an open invitation to the police to gnaw away at the structure of that system.

There is yet another benefit to be anticipated by enforcement of the procedure spelled out in Rule 5(a). It is common knowledge that any appreciable delay between detention and arraignment creates the danger that third degree tactics will be used. The prompt production requirement is "intimately related to the problem of eliminating the third degree since the use of coercion to obtain confessions most frequently occurs while the accused is being held in violation of these statutes." A cursory study of the cases reaching the Supreme Court gives ample evidence that this evil is still with us, and understandably so. The investigation of brutal crimes is not a dispassionate matter. Does anyone wonder that police officers, aroused at the heinous nature of a crime and confronting a suspect who refuses to talk, will call into play psychological and physical brutality to insure that he does not escape the toils of justice?

Whenever Rule 5(a) is referred to as a weapon against third degree, protests are voiced that it is a superfluous safeguard. After all, it as argued, every jurisdiction in the nation does and must recognize the rule that involuntary confessions are inadmissible as evidence. This argument is not sound for at least two reasons. First of all, the rule excluding the coerced confession prevents only the use of the confession; it in no way bars the use of the coercion. As things stand today, our society will overlook the infliction of brutal tortures upon an arrested per-

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94 Fed. R. Crim. P. 5(b) states: Statement by the Commissioner. The commissioner shall inform the defendant of the complaint against him, of his right to retain counsel and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules.

95 Note, 47 Colum. L. Rev. 1214, 1215 (1947).

96 Paulsen, supra note 85.
son in an attempt to wring from him a confession, yet will condemn in its Constitution\textsuperscript{97} anything resembling such tortures to punish him once he is convicted. The second reason is the more cogent one. There is every reason to believe that the rule excluding coerced confessions is an overrated safeguard.\textsuperscript{98} For one thing, it is no easy matter for an accused to establish that force, especially the psychological variety, was exerted on him. Certainly the police officer who is willing to use the third degree will not be assailed by many scruples about swearing that he did not. And the accused himself is regarded with suspicion. Usually he will have a police record; always he stands only to gain by lying. Further, the very fact that the defense of coercion is raised so often in bad faith makes it very difficult to recognize a genuine claim of police brutality. And even assuming that the jury does believe that the confession is involuntary, it is not likely to avail the defendant much. Even the most avid defender of the jury system would hesitate to claim that a juror will or can shut out of his consideration of a defendant's guilt or innocence a confession he believes is involuntary but true.

In summary, then, these are the benefits to be anticipated and the evils to be avoided by compliance with Rule 5(a): (1) arrests on suspicion, an intolerable invasion of the citizen's fundamental right to liberty, are prevented; (2) the rights accorded one accused of crime are saved from subversion; (3) the substance of the accusatorial system of criminal justice is preserved; (4) resort to third degree tactics is made impossible. Viewed in the light of these considerations, Rule 5(a) takes on the aspect of a \textit{sine qua non} in any scheme of civil liberties.

Many who are firmly convinced of the merit of the policy which is expressed in Rule 5(a) still balk at the implications of the \textit{McNabb} rule. It is one thing, they argue, to say that arrested persons should be arraigned quickly; it is yet another to declare that if they are not so arraigned perfectly reliable confessions which they may make are to be denied admission into evidence. In the acid rhetoric of Professor Wigmore, the argument runs thus:

\begin{quote}
Titus, you have been found guilty of conducting a lottery; Flavius, you have confessedly violated the Constitution. Titus ought to suffer punishment for crime, and Flavius for contempt. But no! We shall let you both go free. We shall not punish Flavius directly, but shall do so by reversing Titus' conviction. This is our way of teaching people like Flavius to behave, and of teaching people like Titus to behave, and incidentally of securing respect for the Constitution. Our way of up-
\end{quote}

\textsuperscript{97} U.S. Const. amend. VIII.

\textsuperscript{98} McCormick, Evidence § 112 (1954).
holding the Constitution is not to strike at the man who breaks it, but to let off somebody else who broke something else.99

This, it is lamented, is punishment of society for the sins of the police. Two wrongs should not equal a right to bar the confession. "[W]hat knowledge of realities, of the practical necessities of social protection through law enforcement, does even a Holmes possess—after four decades in the ivory towered cloisters of an appellate bench?"100

This is a powerful argument. It was formulated by our greatest authority on the law of evidence; it has the support of many whose work in the field of evidence entitles any view they may express to respect and consideration.101 To meet this argument it is necessary to probe deeply the McNabb rule in search less of its content and more of its raison d'être.

At first blush one is inclined to relate the McNabb rule to the traditional rule excluding involuntary confessions. The rule is seen as an outgrowth of the Court's awareness that the barrier against receipt of coerced confessions is one easily vaulted. This is true because more often than not the determination of the question of voluntariness reduces itself to an issue of credibility. Naturally the accused is at a disadvantage in such a case, and even more so, if he has a criminal record. Moreover, this defense is so often counterfeit that it is difficult to detect the real article when it appears. The McNabb rule then is regarded as a judicially created safeguard against the involuntary confession. It creates a presumption that any confession secured during an illegal delay is coerced. It is then an implementation of Rule 5(a), which in turn was designed to end opportunity for resort to third degree tactics. There is much in the language of Mr. Justice Frankfurter in the McNabb decision itself which supports such a view.

However, it is plain that if McNabb does create a presumption of involuntariness, that presumption is a conclusive one; it admits of no rebuttal.102 There are many cases where the delay, albeit illegal, was manifestly free from any suggestion of coercion. It is true that illegal

99 4 Wigmore, Evidence § 2184 (3d ed. 1940). These comments were made with reference to the rule of exclusion formulated in cases where the fourth amendment has been violated, but they apply a fortiori to the McNabb rule.


101 See the opinion of Judge Cardozo in People v. Defoe, 242 N.Y. 13 (1926). See also Inbau, The Confession Dilemma in the United States Supreme Court, 43 Ill. L. Rev. 442 (1948); Waite, supra note 100.

delay does afford the opportunity for third degree tactics and that therefore any confession secured during such delay is ipso facto deserving of close scrutiny. However, it would seem that if the danger of coercion were in the forefront of the Court's mind in formulating the McNabb rule that danger could have been taken into account by a rebuttable, rather than a conclusive presumption of involuntariness. Thus it would appear that the justification for a rule as drastic as McNabb must be sought elsewhere.

Perhaps the most popular view of the rule is to regard it as a judicially imposed sanction on the police for violation of the Federal Rules of Criminal Procedure. "[T]he decision, either broadly or narrowly interpreted, propounds once again the wisdom of a judicial policy which turns known criminals loose upon society as a means of punishing the police." This explanation is especially appealing when one realizes that Rule 5(a) is a nullity without the McNabb rule to back it up. On the assumption that the rule is such a sanction, many opponents of it level criticism at the Supreme Court for taking unto itself functions which are foreign to its role in our system of government. They see the McNabb rule as an instrument of judicial review over the actions of the executive and regard it, therefore, as a threat to the principle of separation of powers. This criticism contains just enough truth granules to cloud the real issues raised by McNabb and to create the danger that the fight over the wisdom of the rule will be waged on the wrong battleground.

It is true that a rule such as the McNabb case formulated does tend to curb certain abuses of law by the executive. Care must be taken, however, lest the main aim of the rule be confounded with some of its side effects. In the first place, Mr. Justice Frankfurter has disclaimed any attempt by the Court to punish the police for non-compliance with arraignment statutes. Speaking of the Court's rule making power, he declared, "This power is not to be used as an indirect mode of disciplining police misconduct." Moreover, a second look at the McNabb rule in operation quickly reveals that only remotely does it tend to promote the policy of Rule 5(a). The admissibility of a confession does not in any way hinge upon when or whether the arraignment takes place. The police stand to lose nothing by delay in arraignment; they simply have nothing

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103 Waite, supra note 100, at 681. See also Inbau, supra note 101, at 443, 462.
104 "Unfortunately the [prompt arraignment] statutes themselves provide no sanctions for their enforcement, and criminal and civil actions against the offending officer have proved woefully inadequate." Note, 47 Colum. L. Rev. 1214, 1215 (1947).
The clue to the real purpose behind the McNabb rule is found, paradoxically enough, in an analysis of the strongest argument against it. The stock attack on the rule takes the line that evidence should be admitted or excluded during a trial solely on the basis of its probative worth. Those who propound this thesis challenge the propriety of use by the Court of the rules of evidence to further collateral goals, however laudable these may be.

At the outset it must be conceded that the McNabb rule is a departure from the criterion of probative value as the measure for the admissibility of evidence. On the other hand, those who criticize the rule on this basis must, if they would be consistent, carry their attack further. They must defend the use of evidence secured by illegal search, by wiretapping and by means which shock one’s sense of decency. Such evidence is now excluded from federal courts, yet no one can challenge its probative value. In fact, sometimes it would appear that the probative worth of evidence varies in direct proportion with the despicable nature of the means by which it is secured.

This raises squarely the question of whether the Supreme Court has any right to notice the source of the evidence used during a criminal trial in a federal court. It is submitted that it has not only the right to take note of it but also the duty to do so. The Court must never confine itself to the question whether justice is being done; it must also take heed of how it is being done. The Court is charged with the solemn duty of maintaining the machinery of justice free from corrosive influences—influences which will become apparent only when it is much too late to do much about them. The admission into evidence during the  

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105 “Since a confession is not rendered inadmissible by subsequent illegal detention, once the police obtain a voluntary confession within the statutory period they may disregard the prompt production statutes.” Id. at 1217-18.

106 Professor Waite, one of the more outspoken critics of the McNabb rule, does not confine his attack to that rule alone. He lashes out also at the Weeks doctrine which bars evidence secured by illegal search. Waite, supra note 100, at 681-82.
course of a federal criminal prosecution of "the fruits of wrongdoing by the police," propagating as it does the vicious doctrine that the end justifies the means, can only serve to cheapen the entire criminal proceeding.

Perhaps this will become clearer if we envision a trial under a system which rigidly adheres to the rule that illegally obtained evidence is admissible. Suppose that the Government in a narcotics trial opens its case with testimony by an agent of the Federal Bureau of Narcotics. He begins to testify to the contents of a telephone conversation between the defendant and his wife which he overheard by use of a wiretap. When the defense raises the objection that such testimony will itself be the commission of a crime, the judge rules that notwithstanding the fact that a federal offense is committed in his courtroom by such testimony, this does not detract from the probative value of the evidence and it is admitted.

A bit later the prosecutor offers in evidence certain letters which were seized when agents ransacked the defendant's home a few days before the arrest. Again his counsel objects, this time on the ground that the Government has violated his client's rights under the fourth amendment. But the prosecutor glibly points out, and the trial court agrees, that although the constitutional rights of the defendant were indeed grossly violated, the probative value of the letters is still unimpaired.

Later in the trial, the prosecutor offers some dope capsules found on the defendant's person when he was arrested. A colloquy between the trial judge and counsel quickly discloses that it would be more accurate to say that the capsules were found in rather than on the defendant's person. For it appears that the defendant, anticipating that his arrest was imminent, had swallowed the capsules. The alert and resourceful agents who arrested him were not deterred. Utilizing a stomach pumping device, they forced the struggling defendant to regurgitate the capsules. Once again the trial court agrees with the Government's contention that this conduct by the federal agents, albeit shocking, has in no way diminished the probative worth of the evidence.

107 Upshaw v. United States, 335 U.S. 410, 413 (1948).
108 Such testimony is presently excluded from evidence in federal trials on the ground that § 605 of the Federal Communications Act prohibits its receipt. Benanti v. United States, 355 U.S. 96 (1957); Nardone v. United States, 302 U.S. 379 (1937).
110 In Rochin v. California, 342 U.S. 165 (1952), the Supreme Court held that use
At the capstone of its case against the defendant the Government produces a confession secured from him several days after his arrest. The fact that this confession was the fruit of an illegal detention is dismissed lightly by the prosecutor. In the absence of a showing of coercion, he announces, the delay alone casts no doubt on the trustworthiness of this damaging piece of evidence.\(^{111}\)

Now if one thinks only in terms of each individual case, there seems to be no cause for complaint, since the defendant was proved guilty by reliable and relevant evidence. But if one takes a broader view, he cannot but wonder at the effect of such trials or anything resembling them on the morale of any society which tolerates them. He is haunted by the words of Justice Brandeis, "If the government becomes a lawbreaker, it breeds contempt for the law . . . ."\(^{112}\) And he begins to understand what the Court had in mind when it said:

The untainted administration of justice is certainly one of the most cherished aspects of our institutions. Its observance is one of our proudest boasts. This Court is charged with supervisory functions in relation to proceedings in federal courts. See McNabb v. United States. Therefore, fastidious regard for the honor of the administration of justice requires the Court to make certain that the doing of justice be made so manifest that only irrational or perverse claims of its disregard can be asserted.\(^{113}\)

Here then are the real roots of the McNabb rule. Trials which are the outgrowth or fruit of the Government's illegality debase the processes of justice. They cannot be countenanced in any nation which expects its citizens to esteem those processes. It is important that the trial demonstrate the guilt of the accused, but it is important also that it not disclose the criminality of the accuser.

To prove its case, the government was obliged to lay bare the crime committed by its officers on its behalf. A federal court should not permit such a prosecution to continue. . . . The court's aid . . . is denied in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination.\(^{114}\)

\(^{111}\) Such evidence, of course, is presently excluded by the holding in McNabb v. United States, 318 U.S. 332 (1943).

\(^{112}\) Olmstead v. United States, 277 U.S. 438, 485 (1927) (dissenting opinion).


\(^{114}\) Olmstead v. United States, supra note 112, at 480-84.
A conviction must not be secured other than "by methods that commend themselves to a progressive and self-confident society." By formulating rules such as that found in *McNabb v. United States*, the Court is not trying to punish the executive department for illegality. It is simply avoiding contamination by plunging into the cesspool itself. One cannot improve on this language of Mr. Justice Frankfurter in his *McNabb* opinion:

We are not concerned with law enforcement practices except in so far as courts themselves become instruments of law enforcement. We hold only that a decent regard for the duty of courts as agencies of justice and custodians of liberty forbids that men should be convicted upon evidence secured under the circumstances revealed here.116

### III

**The Revolt Against the Rule**

Seldom in the long and stormy history of the United States Supreme Court has one of its decisions produced such widespread comment and confusion as that which greeted its holding in *Mallory v. United States*. On the one hand, the decision was denounced as an intolerable handicap to the efficient and effective enforcement of the criminal law. The Court was roundly castigated for upsetting the delicate balance between the rights of the individual and the rights of society through its excessive solicitude for those who commit crime. Perhaps the general attitude of those who recoil from the result in the *Mallory* case can best be seen in this biting observation of Senator Ervin of North Carolina: "Frankly, I believe that in recent years enough has been done for those who murder, rape, and rob; and that it is about time for Congress to do something for those who do not wish to be murdered, or raped, or robbed."117 On the other side, there were many who hailed the *Mallory* decision as a long overdue vindication of the civil liberties of the citizen in the face of the mounting power of the state. To them the opinion of Justice Frankfurter stood as a retaining wall against the erosion of the fundamental rights which are the core of our form of democratic government.

Two other factors played no small role in fanning the flames of debate over the wisdom of the *Mallory* ruling. First of all, for the past year many voices have been raised in criticism of the course of decision recently followed by the Supreme Court. In case after case, it has seemed

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115 318 U.S. at 344.
116 Id. at 347.
to these critics, the Court has gone out of its way to invade the province of the states\textsuperscript{118} and of its co-ordinate branches of government.\textsuperscript{119} The Mallory opinion was seen as a link in a chain of power grabbing rulings on the part of the judiciary, decisions which struck at the very roots of the federal-state relationship and at the delicate balance between the executive, the legislative and the judicial branches of the federal government. Criticism of the Mallory case then was simply a part of the chorus of protest against Court action in general. Secondly, the brunt of the decision is borne by the District of Columbia, which becomes (as was noted earlier) the only metropolis in the nation whose local police are denied the opportunity for thorough interrogation of suspects as they seek to investigate what may be loosely termed the common law crimes. It is in this city that the Congressman spends almost two-thirds of each year. Foes of the Mallory case constantly reminded these legislators that a confessed rapist had been turned loose on the city by the Court; that he now walked the same streets as did their wives and daughters. The District of Columbia was pictured as a city in which law enforcement was paralyzed because the Court had handcuffed the police. Scarce-ly a week went by in which some segments of the local press did not headline the release of some obviously guilty felon on some legal technicality. Moreover, it was darkly hinted that copies of the Mallory opinion were being circulated through the underworld, and that soon the District would experience a migration of hoodlums, thieves, sex maniacs and murderers, who would proceed to set up their sordid operations in the sanctuary of crime into which the nation’s capital had been converted by the Supreme Court.

The genuine concern over the rights of the citizen vis-à-vis the state, coupled with the desire to take a slap at the Supreme Court and the fear that Washington would become a mecca for criminals, produced a rash of legislative proposals in the second session of the Eighty-fifth Congress—all aimed in some way, shape or form at the arrest-arraignment problem. No less than seven different measures received at least some consideration.\textsuperscript{120} Although none of these became law, it seems certain, in view of the great interest in the matter shown by so many legislators, that the issue will be high on the agenda of the Eighty-sixth Congress.


\textsuperscript{120} In addition to the five proposals considered specifically infra, see H.R. 8600, 85th Cong., 2d Sess. 1958); H.R. 13493, 85th Cong., 2d Sess. (1958); S. 2970, 85th Cong., 2d Sess. (1958).
It will be useful then to devote some study to the more significant of the legislative proposals which were made during the past months. Four matters will be discussed to some extent in connection with each of these proposals: (1) its provisions; (2) the change, if any, it would work in the present law; (3) its advisability as a solution to the problem; and (4) its constitutionality.

By way of preparation for such an analysis, it is helpful once again to recall the two components of the McNabb rule, the rule of procedure and the rule of evidence. As one might suspect, the efforts to overhaul the law of prompt arraignment took one of two courses. Two proposals were directed toward the rule of procedure, whereas no less than five bills focused on the evidentiary rule of exclusion. This ratio is rather surprising in view of the fact that the latter rule had been in force for almost fifteen years and in view of the further fact that it was a ruling interpreting the former which had provoked the entire controversy.

Two Senate bills embodied changes in the present requirements pertaining to the interrogation and arraignment of arrested individuals. Senator John Butler of Maryland introduced a measure\(^{121}\) which would spell out in terms of hours the length of the permissible interim between arrest and arraignment. Senator Wayne Morse of Oregon, on the other hand, proffered a code of police procedure\(^{122}\) which must be followed as a preface to any interrogation of suspects. Each of these proposals is worthy of careful study.

**The Butler Bill\(^{123}\)**

Senator Butler's "horological" approach took the form of an amendment to Rule 2 of the Federal Rules of Criminal Procedure. It provided basically that an accused must be presented to a magistrate within twelve

\(^{121}\) S. 3355, 85th Cong., 2d Sess. (1958) (hereinafter referred to as S. 3355).

\(^{122}\) S. 3325, 85th Cong., 2d Sess. (1958) (hereinafter referred to as S. 3325).

\(^{123}\) S. 3355 provided:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Rule 2 of the Federal Rules of Criminal Procedure is amended by inserting "(a)" before the text thereof, and by adding at the end a new paragraph as follows:*

"(b) Whenever these rules shall require that an arrested person be taken before a court, commissioner, or other officer empowered to commit persons charged with offenses against the laws of the United States, such person shall be taken before the court, commissioner, or other officer within a period of twelve hours from the time the person was arrested, or, if with diligent effort it is impossible to comply with this requirement within such twelve-hour period, within such longer period as may reasonably be necessary to bring the person before the court, commissioner, or other officer, as the case may be. If any arrested person is not taken before a court, commissioner, or other officer as provided in these rules within the time herein prescribed, he shall be released from custody."
hours from the time of his arrest. In an effort to impart some flexibility to this mechanical procedure, the bill admitted of reasonably necessary additional delay in cases where arraignment was not "with diligent effort" possible at the expiration of twelve hours.

How would the Butler bill have changed the present law of prompt production as expressed in Rule 5(a)? On the surface it would seem that the bill was simply a definition of the phrase "without unnecessary delay." In reality, however, it amounted to an amendment of that requirement. If the measure were ever to become law, Rule 5(a) would require in effect arraignment "without unnecessary delay after twelve hours of detention." It is useful to examine the operation of this statute in the fact situation of the Mallory case. The accused was arrested at two-thirty in the afternoon. The twelve-hour period of the Butler bill would not expire until two-thirty the following morning. Since no committing magistrate could be obtained "with diligent effort" at that hour, it would seem that the police could legally prolong the detention until nine or ten o'clock that morning.

It is submitted that S. 3355 is an unwise solution to the prompt arraignment problem for at least three reasons. First of all, since the Butler bill in effect changes the present meaning of Rule 5(a), orderly legislative procedure dictates that such change take the form of an amendment to that rule, instead of coming in the back door, so to speak, by an amendment of Rule 2. Since Rule 2 simply states some vague platitudes about statutory construction, as indisputable as they are unhelpful, there seems to be no legitimate reason for intruding the detention-confession issue at this point in the Federal Rules.

This technical objection to the Butler bill aside, the proposal is open to a second and more fundamental criticism. It sanctioned in so many words incommunicado detention, albeit for a limited time, of every person arrested by a federal law enforcement officer. By so doing the measure was simply a thinly veiled invitation to those officers to interrogate in an effort to secure a confession. Thus there would have come into being in our law a small-scale inquisition to be conducted under the auspices of the police.

Finally, the philosophy of the Butler bill encouraged circumvention of the constitutional safeguards given to an accused. It allowed and in fact

124 Rule 2 of the Federal Rules of Criminal Procedure provides, "These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity of procedure, fairness in administration and the elimination of unjustifiable expense and delay."
encouraged the police to prey upon the defendant’s unawareness of those rights by sealing him off from the magistrate and the counsel who would inform him of their existence. It thereby placed the Congress in the unbecoming posture of devising schemes to frustrate and subvert those basic guarantees.

Assuming arguendo that the Butler bill is a desirable contribution to the solution of the confession-detention problem, there yet looms in its path one mighty stumbling block: the bill is almost certainly unconstitutional. One accused of a crime has a right to obtain counsel,¹²⁵ to know the nature of the charge against him,¹²⁸ and he is entitled to be free on bail¹²⁷ (except in capital cases, where a discretion is lodged in the trial judge¹²⁸). These rights, derived from the sixth and eighth amendments, are implemented by the arraignment proceeding.¹²⁹ The accused cannot rightly complain of a necessary delay in his presentation before that magistrate. He can, however, challenge the constitutionality of an automatic twelve-hour delay.¹³⁰ In substance, the Butler bill provided that only after a detention of twelve hours or more does one who is accused of crime have a right to bail, to counsel and to knowledge of the charge against him. Such a watering down of the sixth and eighth amendments would require a constitutional amendment.

The Morse Bill¹³¹

If the Butler bill went far in the direction of cutting down the pre-arraignment rights of the accused, the proposal of Senator Morse went

¹²⁵ U.S. Const. amend. VI.
¹²６ Ibid.
¹²⁷ U.S. Const. amend. VIII.
¹³⁰ This is especially true when one considers that such twelve hour delay may in its turn lead to additional postponement of the arraignment if sometime during that period the magistrate should close his office for the day.
¹³¹ S. 3325 provided:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) chapter 203 of title 18, United States Code, is amended by inserting immediately following section 3060 of such chapter a new section to be designated as section 3061 and to read as follows:

§ 3061. Caution to accused persons

"No officer or employee of the United States Government or of the municipal government of the District of Columbia shall interrogate, or request any statement including a confession from a person accused or suspected of an offense, without first informing him—

"(a) of the nature of the offense;
"(b) that he does not have to make any statement regarding the offense of which he is accused or suspected;
even further in the opposite direction of expanding and increasing those rights. The Morse bill had two noteworthy features. In the first place, it established four prerequisites to the interrogation of any suspect, whether he be under arrest or not: (1) he must be informed of the nature of the offense; (2) he must be told that he is not required to make any statement; (3) he must be informed that he may have counsel present while he is being questioned; and (4) he must be cautioned that any statement he makes may be used against him. The second feature of the bill was that it set up a rule of evidence which demanded the exclusion from any federal criminal prosecution of any admission or confession unless the specified conditions precedent have been met.

The Morse bill would not have altered the present law excluding confessions made during an unnecessary delay in arraignment. On the contrary, Senator Morse simply used the existing law as a point of departure. He built on this foundation a structure of additional rights for all who are suspected of federal crimes. In operation his measure would lead to the exclusion of certain confessions made during a legal detention or even during no detention at all. It embodied a willingness to implement the right to counsel and the privilege against self-incrimination by insuring not only that the accused has these constitutional rights, but also that he knows that he has them. The Morse bill was, of course, unobjectionable on constitutional grounds. It simply created safeguards for the accused over and above those absolutely required by the Bill of Rights.

The Willis-Keating Bill

The dissatisfaction which certain elements in the Eighty-fifth Congress felt over the Mallory decision found its main outlet in a spate of bills which in one form or another looked toward the abolition of the McNabb rule itself. Typical of these proposals is this phrasing from the Willis-Keating bill:132

> "(c) that he has the right to have legal counsel present at all times while he is being questioned or is making any statement; and
> "(d) that any statement made by him may be used as evidence against him in a criminal prosecution."

Sec. 2. (a) Chapter 223 of title 18, United States Code, is amended by inserting immediately following section 3500 of such chapter a new section to be designated as section 3501 and to read as follows:
> "§ 3501. Admissibility of statements
> "No statement, including a confession of guilt, shall be admissible in evidence in a criminal prosecution in any district court of the United States or in the municipal court for the District of Columbia until there is established proof that the provisions of section 3061 of this title have been complied with."

. . . Evidence, including statements and confessions, otherwise admissible, shall not be inadmissible solely because of delay in taking an arrested person before a commissioner or other officer empowered to commit persons charged with offenses against the laws of the United States.

Legislation along the above lines was introduced in both houses of Congress.

Extensive hearings were held during the first and second sessions of the Eighty-fifth Congress by a special subcommittee of the House Judiciary Committee. Eventually the full committee reported favorably H.R. 11477, the Willis-Keating bill. In addition to the provision set forth above, this bill contained a part (b), which read:

No statement, including a confession, made by an arrested person during an interrogation by a law-enforcement officer shall be admissible unless prior to such interrogation the arrested person had been advised that he is not required to make a statement and that any statement made by him may be used against him.

This bill was passed in the House by a healthy majority and sent to the Senate. Before its fate in that body is recounted, it is well to pause at this point and appraise the measure in terms of its content, wisdom and constitutionality.

The Willis-Keating bill, as noted above, had two parts. Part (a) was designed to do away utterly with the McNabb rule of exclusion. No effort, however, was made to alter either the terms of Rule 5(a) or the interpretation of that rule made by the Supreme Court in the Mallory case. Part (b) of the bill did two things. It first created a new right for defendants, the right to a caution as a preface to any interrogation. It then implemented this new safeguard by a rule of evidence excluding any confession or statement made where such caution has not been given.

For a number of reasons, the advisability of part (a) of the Willis-Keating bill is open to challenge. First of all, it was a naked attempt to undermine Rule 5(a). In theory the bill made no change in that rule. Its practical effect, however, was to reduce it to a pious admonition. One cannot read the report\(^\text{133}\) which accompanied this bill to the floor of the House without becoming convinced that its sponsors favored unnecessary delay in arraignment; that they sanctioned interrogation of the accused during this delay in an effort to extract a confession; that they approved of the isolation of an arrested person from his family, his friends and above all his counsel; that they drew the line only at the use of third degree methods to extort a confession. One might ask then why these

advocates of unnecessary delay did not simply legalize it by amendment of Rule 5(a). The answer may lie in their awareness that the unnecessary delay they so strongly supported is unconstitutional. This realization forced recourse to methods which circumvented what could not be abolished—the principle of prompt arraignment.

There were those among the supporters of the Willis-Keating bill who sought to maintain that part (a) was not aimed at the indirect repeal of Rule 5(a). They defended the abolition of the McNabb rule on the ground that the rules of evidence should not be used to discipline police misconduct or disregard for law. Protesting that they did not seek to encourage illegal detention or to weaken Rule 5(a) in any respect, they insisted that the bill was aimed only against the exclusion of relevant evidence simply because there had occurred some collateral violation of law by police officers. Evidence, they urged, should be admitted or excluded solely on the ground of its probative worth; the confession secured during illegal detention, provided only that it is voluntary, is not any the less probative for being the fruit of wrongdoing.

For two reasons this familiar argument, coming from those who back the Willis-Keating bill, was suspect. First, one is led to wonder why the attack on exclusionary rules was confined to the McNabb rule alone. If it is so abhorrent to exclude relevant evidence solely because it was obtained by the Government's illegal act, did not logic dictate similar legislation aimed at the Weeks doctrine, excluding probative evidence secured by illegal search and seizure, and at the Nardone doctrine, excluding probative evidence obtained by illegal wiretapping? There is, however, a stronger ground for skepticism about the contention that the drafters of the bill found an exclusionary rule of evidence so repugnant. It should be remembered that the second part of the proposal set up a new safeguard for the accused—he was to be warned of his privilege against self-incrimination. How was the new right to be implemented? Oddly enough, it was implemented by a "little McNabb rule"; that is, by a congressionally created exclusionary rule of evidence. For example, if some police officer or federal agent should neglect or omit to warn a suspected rapist that he need not make a statement, any confession made in the absence of such warning could not be admitted in evidence at his trial. It seems clear beyond argument that, if the first part of the Willis-Keating bill did express a distaste for the exclusion of

illegal but reliable and probative evidence, it was patently inconsistent with the second part.

Is there any constitutional objection to the abolition of the *McNabb* rule? The Supreme Court on a number of occasions has stated that the *McNabb* rule of exclusion does not apply to the states, *i.e.*, it is not a requirement of due process of law. This is in keeping with its ruling that the *Weeks* doctrine in the area of illegal search is not binding on the states. Thus a state can receive into evidence a voluntary confession secured during an illegal detention without fear of violating the fourteenth amendment. From the fact that the *McNabb* rule is not part of the constitutionally protected concept of due process it does not necessarily follow, however, that no constitutional question is raised by legislative efforts to abolish that rule.

In the second part of this article it was suggested that the *McNabb* rule is more than a judicially created rule of evidence promulgated in the absence of any contrary action by the legislature. And it is more than an effort by the Court to fashion a sanction for the prompt arraignment provision lest it become a dead letter. It was suggested that the *McNabb* rule and its kindred exclusionary rules have the unique function of preserving the dignity of the process by which criminal justice is dispensed. They embody the judgment of the United States Supreme Court that the receipt of evidence obtained by the criminal action of the federal government can result only in the ultimate degradation of the criminal trial as conducted by the federal judiciary. The Court has stated that by receiving such evidence it becomes akin to an accomplice in willful violation of law.

If this be a correct rationale of the exclusionary rules in general and of the *McNabb* rule in particular, legislation seeking to wipe away any of these rules of exclusion becomes an effort on the part of the Congress to force the Supreme Court to receive evidence when the Court has already determined that to do so is to degrade and ultimately to defeat that function of the Government which is its office; namely, the administration of justice. The question arises whether Congress has such power. Now there can be no doubt that Congress has the power to prescribe rules of evidence for federal courts. In the *McNabb* rule, however, there is involved something which is, to be sure, a rule of evi-

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137 318 U.S. at 345.
dence, but yet is something much more. It is a method devised by the Supreme Court to preserve intact its own integrity as well that of every criminal trial in the federal system.

This brings into play the constitutional principle of separation of powers. Specifically it raises the question whether, without seriously contravening that principle, the Congress can legislate the Court into a position where the latter in its own estimation becomes *particeps criminis*. It is at least arguable that Congress cannot. It does not stretch the doctrine of separation of powers very far to say that it means that the legislature lacks the power to annul the judiciary's determination that the use of certain evidence will cheapen the administration of criminal justice. Even on the assumption that the Court acted unwisely in making that determination, the Congress can no more set it aside than the Court can invalidate a statute simply because it deems it unwise. It would seem that Mr. Justice Frankfurter had this in mind in *Wolf v. Colorado*, when, in response to the suggestion that Congress could cancel the *Weeks* doctrine by a statute, he said, "a different question would be presented if Congress under its legislative powers were to pass a statute *purporting* to negate the *Weeks* doctrine. We would then be faced with the problem of the respect to be accorded the legislative judgment on an issue as to which, in default of that judgment, we have been forced to depend upon our own."\(^{138}\)

When it is looked upon as an attempt by Congress to compel the Supreme Court to administer tainted justice, the Willis-Keating bill represents a serious encroachment by the legislature upon the domain of an independent Supreme Court. There is thus at stake in the controversy over this bill much more than a rule of evidence; much more than a balancing of the conflicting interests of the individual and society. Involved here are the integrity and the honor of an independent judiciary.

**The O'Mahoney Amendment**

Perhaps the various considerations just discussed account at least partially for the curious fate which befell the Willis-Keating bill when it reached the Senate. It was, of course, referred to the Committee on the Judiciary. There the Subcommittee on Improvements in the Federal Criminal Code conducted extensive hearings, during which the writers were privileged to testify. When the bill was reported out of the Judi-

\(^{138}\) 338 U.S. at 33. (Emphasis added.) Mr. Justice Black in a concurring opinion concluded, however, "that the federal exclusionary rule . . . is a judicially created rule of evidence which Congress might negate." Id. at 39-40.
ciary Committee, it had been altered by the addition of a single word. Whereas the House version declared that no confession should be excluded "solely because of delay" in arraignment, the Committee, acting on the recommendation of Senator Joseph O'Mahoney of Wyoming, had inserted the word "reasonable" so that the bill prohibited the exclusion of confessions "solely because of reasonable delay."

When the measure reached the Senate floor, a long debate was carried on in an effort to pinpoint the extent to which this amendment would change either the original House bill or the present state of the law. One thing was clear. The amendment substantially cut down the sweep of the bill which the House had passed which would have required the admission into evidence of any and all voluntary confessions no matter how long the delay between arrest and arraignment. The O'Mahoney amendment, on the contrary, clearly envisioned the exclusion of a voluntary confession at least where the delay was unusually protracted. What is less clear, however, is the effect of the bill, as amended, on the existing law announced in McNabb and in Mallory. This stems from the fact that Rule 5(a) speaks of "unnecessary delay" while the proposed bill speaks in terms of "reasonable delay." On the one hand, it can be argued that the O'Mahoney amendment takes a middle ground between the unnecessary delay banned by Rule 5(a) and the endless delay fostered by the Willis-Keating bill. In this view, the Senate version would cut down the McNabb rule somewhat, but would stop far short of abolishing it. On the other hand, it can be contended that unnecessary delay and unreasonable delay are synonymous, and that therefore the bill as altered by Senator O'Mahoney would not change the present state of the law. In short, since an unnecessary delay is still illegal under Rule 5(a), such delay could hardly be deemed a reasonable one. This statement by Senator William Langer of North Dakota during the debate in the Senate over the O'Mahoney amendment points out the problem very well:

Instead of saying that a confession is excludable unless taken "without unnecessary delay" between arrest and arraignment, the present bill states that a confession shall not be excluded if taken during a period of "reasonable delay." Semanticists may be able to find a shadow of distinction in the phraseology; jurists convinced of the propriety of the McNabb-Mallory rule will not.139

This question of what difference, if any, there is between unnecessary delay and unreasonable delay preoccupied the Senators during the floor debate. Senator O'Mahoney was often called upon to explain. The following colloquy is typical of many.

Mr. COOPER. . . . My question is whether the Senator's amendment is intended to weaken that rule [Rule 5(a)]. Does the amendment mean that the accused may be detained for a little more time?

Mr. O'MAHONEY. No; the amendment is not intended to weaken the rule at all.140

Later he emphasized again, "We are not cutting down the word 'unnecessary' when we say 'reasonable.' We are standing firmly behind rule 5(a)."141

As Senator O'Mahoney repeatedly denied that his amendment would cause any change in the existing law, two questions arose in the minds of the senators. Why not use the word "unnecessary" in the bill and thus harmonize it with the language of the Federal Rules? And if the amended bill simply codifies the present decisional law, why pass any legislation at all? Senator O'Mahoney had this to say in response to these questions: "The purpose of using the word 'reasonable' is that the word 'unnecessary' has been [sic] the cause of some of the misinterpretations. 'Unnecessary' is the word which has led to the mechanical and automatic interpretation which Justice Frankfurter himself condemned in the Mallory decision."142 Apparently then, what the Senator had in mind by the use of "reasonable" in place of "necessary" in his amendment was to avoid the overly strict interpretations of the Mallory decision in the months immediately following its rendition. He wanted to make it clear that confessions were not to be barred simply because the police had not arraigned the accused after the regular hours of the magistrate.

When the matter finally came to a vote, the amendment passed by a narrow 41-39 margin.143 The bill, as amended, then passed 65-12144 and was referred to a conference in an effort to reconcile the differences between the two versions.

The Conference Bill

Those in the House who had attempted in the original Willis-Keating bill to subvert Rule 5(a) had seen their efforts in turn subverted by the O'Mahoney amendment. What was perhaps even more disturbing to them was the realization that their efforts to cut down the rights of the accused and correspondingly increase the powers of law enforcement

140 Id. at 17041.
141 Id. at 17042.
142 Id. at 17041.
143 Id. at 17116.
144 Id. at 17125.
agencies had so completely boomeranged that the rights of the defendant had been in fact augmented. This was so because part (b) of the House version, which excludes all confessions obtained in the absence of a caution, was also passed by the Senate. Thus the bill which was contrived to sweep away McNabb and eviscerate Mallory had in the Senate been transformed into a measure which (1) indirectly reaffirmed the principle of prompt arraignment, (2) codified the McNabb rule of exclusion, (3) created a new safeguard for all arrested persons, and (4) enacted a new rule of exclusion.

In desperation the House conferees cast about for a middle ground between two unacceptable extremes: the Senate bill or no bill at all. Their search for this middle ground was complicated by the fact that Senator O'Mahoney and the other Senate conferees absolutely refused to remove the word “reasonable.” The solution to this dilemma was ingenious. The House conferees concocted a definition of “reasonable” which was nothing more or less than the traditional voluntariness test. After three days of frantic conferences, Senator O'Mahoney was prevailed upon to accept the definition of his amendment, which took the form of a proviso. Part (a) of the bill now read:

... Evidence, including statements and confessions otherwise admissible, shall not be inadmissible solely because of reasonable delay in taking an arrested person before a commissioner or other officer empowered to commit persons charged with offenses against the laws of the United States; Provided, that such delay is to be considered as an element in determining the voluntary or involuntary nature of such statements or confessions.146

Thus this congressional merry-go-round had turned out a proviso contrived to emasculate the O'Mahoney amendment, which had emasculated the Willis-Keating bill, which in turn had sought to emasculate Rule 5(a). However, the proviso was such a cumbersome creature that there is room for doubt that it really achieved its purpose or, for that matter, any purpose at all. It can be argued that all it did in fact was supplement Senator O'Mahoney's codification of McNabb by a codification of part of the law banning use of involuntary confessions. Nonetheless there was real danger that it would really destroy McNabb and bring about a return of voluntariness as the sole measure of the admissibility of a confession. It was the fear of this latter interpretation which led Senator John Carroll of Colorado, in the closing seconds of the last ses-

sion of the Senate, to raise the point of order\textsuperscript{146} which doomed the efforts to annul the \textit{McNabb} rule. He maintained that in violation of the rules of the Senate there had been added in conference what was "new matter," \textit{i.e.}, material which had never been considered by either chamber. This point of order was sustained\textsuperscript{147} at 4:10 in the morning, and the Senate then adjourned \textit{sine die}. And so in a bit of dramatic parliamentary interplay in the early Sunday dawn, the effort to overthrow the \textit{McNabb} rule died aborning.

\begin{thebibliography}{9}
\bibitem{147} Id. at 18101.
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A STUDY IN ADMINISTRATIVE LAW: THE POWER REACTOR DEVELOPMENT COMPANY HEARING BEFORE THE ATOMIC ENERGY COMMISSION*

FRANCES T. FREEMAN JALET**

The granting by the Atomic Energy Commission of a permit to construct an atomic reactor for commercial power purposes brings sharply into focus two conflicting emotions—hope for the peaceful, economically valuable harnessing of the atom, and fear for the safety and health of the community. Mrs. Jalet analyzes the administrative law problems involved in this grant in the light of the unique powers and duties of the Commission.

I
INTRODUCTION

The grant by the Atomic Energy Commission\(^1\) of a provisional construction permit for a nuclear facility to the Power Reactor Development Company of Detroit, Michigan\(^2\) raises issues of significance in the field of administrative law and poses many perplexing problems. These are magnified and multiplied by the fact that the subject matter of the Power Reactor Development Company case\(^3\) involves atomic power, a concept

* The writer wishes to express appreciation to those who made material available to her. Among these special acknowledgement is due to Mr. Benjamin Sigal, counsel for intervenors, Mr. Graham W. Claytor, Jr., counsel for PRDC, Miss Harriet Dempster of the staff of the Atomic Energy Commission, Professor Leo A. Huard of Georgetown University Law Center, and the officials of The Atomic Industrial Forum and the Power Reactor Development Company.

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\(^2\) Power Reactor Development Company, hereinafter referred to as PRDC, is a non-profit corporation composed of 21 member companies, many of them utility companies, who came together to produce a full scale nuclear power reactor in order to test its feasibility as a future commercial enterprise. Two other companies are associated with PRDC in the venture. Atomic Power Development Associates, Inc., a non-profit corporation engaged in research and experimental development activities in the fast breeder reactor field, is under contract to furnish such services to PRDC. The Detroit Edison Company owns the land on which the reactor is being constructed and leases it to PRDC. Detroit Edison has agreed to construct adjacent turbine generating facilities for the production of electricity and to purchase the steam required to operate these facilities from PRDC.

\(^3\) On January 7, 1956, PRDC filed its application for a construction permit. The Commission gave the case its docket number F-16. The Commission does not publish bound reports of its hearings and therefore all subsequent citations to the hearings and to the case will be by the date of the proceeding and the docket number.
so vast as to dwarf men's thinking. Ever since the secret of nuclear fission was revealed to a staggered public and it became known that a new source of energy transmutable into power was available, its adaptation for the preservation of life rather than its destruction has been of primary concern.

It is the conversion of atomic energy into atomic power in the form of electricity that presages such hope for man's future. But at the same time the generation of power accomplished by means of nuclear reactors is fraught with dangers and surrounded by hazards that make necessary the exercise of extreme caution in its development. The risk to public health and safety is great and it is because of this that the Power Reactor Development Company case has come into being as a controversy. It was in protest to the construction in a populous area of this "most dangerous of all reactors" that interested parties intervened to halt the construction. This case amounts to more than a simple example of license application based on a formal hearing before an administrative agency. It has implications affecting the well-being not only of the people of Michigan, but of the entire United States and even the world.

II

THE ATOMIC ENERGY INDUSTRY AND THE POWER REACTOR DEVELOPMENT PROGRAM

One of the first assertions of writers on the atomic energy industry is a reference to the unique nature of this newest quasi-private enterprise. "Quasi," because it is surrounded and hemmed in by restrictive rules and regulations made by a Government created administrative agency which has no precedent—the Atomic Energy Commission. Of this powerful, almost wholly autonomous body, one of the earliest students of the subject, James R. Newman, writing in collaboration with Byron S. Miller, said: "Never before in the peacetime history of the United States has Congress established an administrative agency vested

4 Laurence, Dawn Over Zero (1946).


with such sweeping authority and entrusted with such portentous responsibilities as those conferred on the Atomic Energy Commission.\textsuperscript{9} The authors, of course, were referring to the McMahon Act of 1946 first establishing the Atomic Energy Commission.\textsuperscript{10} The Commission was set up to manage and control all aspects of the atomic energy program. A virtual Government monopoly was established in this field which has been only slightly lessened by the amendatory provisions of the Atomic Energy Act of 1954.\textsuperscript{11}

It is because of the still almost uncurtailed control exercised by this regulatory body that the facts and the issues in the case of the Power Reactor Development Company present problems to which there is no ready answer either in the decided cases or general principles of law. The \textit{Power Reactor Development Company} case represents the first formal hearing under the Rules of Practice of the Atomic Energy Commission; rules so new at the time the case began, that they were not yet fully promulgated, although the Commission was using them as guidelines.\textsuperscript{12} This case is peculiar in that the need for secrecy places in the hands of the Commission a control over information which comes into sharp conflict with our traditional concept of freedom to know. Professor Kenneth Culp Davis describes this as one of the most difficult problems in administrative law because of the clash between “the right to a full disclosure of evidence and the national security interest in keeping confidential some of the evidence . . . ”\textsuperscript{13} This is in large part true of the instant case. Although the specific direction of the 1954 act\textsuperscript{14} has led the Atomic Energy Commission to embark on an accelerated program of declassification of hitherto restricted data and to adopt a policy of readier access to such data represented by the Access Permit Program,\textsuperscript{15} nevertheless there remain areas of obscurity and limitations upon accessibility that seem almost insoluble where, as here, there is not just an occasional overlapping, but a continuing need for scientific and technological information both by the military and by industry.

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\textsuperscript{9} Id. at 3-4.
\textsuperscript{12} "[A] motion by intervenors for access to certain restricted data, filed November 21, 1956, and amended January 11, 1956, was denied by order of the Commission dated March 5, 1957.” Brief for AEC Staff p. 5. The date of PRDC’s application for license was June 6, 1956. The rules of practice were promulgated December 8, 1956.
\textsuperscript{13} Davis, The Requirements of a Trial Type Hearing, 70 Harv. L. Rev. 278 (1963).
\textsuperscript{15} The Commission showed a tendency to relax its strict regulations by granting an access permit to an economist on April 13, 1956.
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Statement of Facts

Pursuant to the Power Reactor Development Program\textsuperscript{16} of the Atomic Energy Commission (hereinafter referred to as the Commission or AEC), the Power Reactor Development Company (hereinafter referred to as PRDC), made application on June 6, 1956 under section 104(b)\textsuperscript{17} of the Atomic Energy Act of 1954 for a license to construct and operate the Enrico Fermi Reactor,\textsuperscript{18} a nuclear power reactor of the fast breeder sodium-cooled type.\textsuperscript{19} A provisional construction permit was granted August 4, 1956\textsuperscript{20} and ground was broken on August 8th for the building of a nuclear power plant at Lagoona Beach, near Monroe, Michigan. On August 31, 1956, within the thirty day period set by the Commission's regulations,\textsuperscript{21} three labor unions, the United Automobile Workers, the International Union of Electrical Workers, the United Paperworkers, and certain individuals as officers thereof (all hereinafter designated as intervenors), petitioned for leave to intervene.\textsuperscript{22} An answer of PRDC unsuccessfully challenged the right of these parties to intervene. The Commission granted the request and issued a notice of hearing October 8, 1956\textsuperscript{23} designating Jay A. Kyle of the Federal Communications Commis-

\textsuperscript{16} The Commission has invited proposals for the development, design, construction and operation of power reactors to demonstrate the practical value of such units for commercial use. Atomic Energy Commission Release No. 695, September 21, 1955.

\textsuperscript{17} Section 101 makes it unlawful for any person to transfer, acquire, produce, manufacture, process, import or export materials used in the utilization or production of Atomic Energy except as provided in §§ 103 and 104. Section 103 is concerned with the issuance of commercial licenses to persons whose activities will be useful, in accordance with commission standards of safety, and who will make available to the commission, data that is in the public interest. Section 104 authorizes licenses to those doing research in medical therapy and industrial and commercial research.

\textsuperscript{18} Named for famed physicist Enrico Fermi who designed the first atomic reactor made of a uranium and graphite pile and constructed under the stadium in Chicago, Illinois. See L. Fermi, Atoms for the World (1957).

\textsuperscript{19} There are many types of reactors. Some are deemed quite reliable having undergone long periods of testing and successful operation such as the pressurized water reactor. Others, like the fast breeder sodium-cooled reactor which was designed for PRDC, are still in the experimental stages never having been heretofore operated on full scale and at full power. For a report of reactor development in this country see: Twenty-third Semiannual Report of the Atomic Energy Commission, S. Doc. No. 72, 85th Cong., 2d Sess. (1958).

\textsuperscript{20} Commission's rules of practice provide for provisional construction permits. 10 C.F.R. § 50.35 (Supp. 1958).

\textsuperscript{21} 10 C.F.R. § 2.102(a) (Supp. 1958).

\textsuperscript{22} Petition to Intervene filed August 31, 1956.

\textsuperscript{23} Timely notice is required pursuant to the Commission's regulations. 10 C.F.R. § 2.735 (Supp. 1958).
sion as hearing examiner without power to render an intermediate decision. This notice likewise contained a specification of the issues and denied intervenors' request for suspension of the provisional construction permit. Following a pre-hearing conference held November 29, 1956, and after two postponements, hearings were begun January 8, 1957, lasting until August 7 of the same year.

The manner in which the original intervenors came into the case is noteworthy. It came to the attention of the unions, whose members would in all probability be working on the project, that the Advisory Committee on Reactor Safeguards disapproved of the grant of a facilities license to PRDC because there was insufficient information available to give reasonable assurance that the reactor could be operated at the proposed site without undue risk to public health and safety. Furthermore, there was serious doubt that such information would be available by the time the plant was scheduled to go into operation. In their petition intervenors charged the AEC with wrongful suppression of this information.

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28 Since 1957, the Advisory Committee on Reactor Safeguards has had statutory authority and cannot be dissolved. By statute also, the terms of office and the function of the committee are outlined which assures that its members will be independent in the formation and expression of their views. This new committee consists of 15 members appointed by the Commission to serve for a term of four years. The functions of the Committee are to review safety studies and facility license applications which are referred to it by the Commission—to make reports on them—to advise the Commission with respect to the hazards involved and to perform such other duties as the Commission may request. 71 Stat. 579 (1957), 42 U.S.C. § 2039 (Supp. V, 1958). Prior to 1957 the Committee had no statutory authority and its advice could be ignored by the AEC.
30 According to the license application and the construction permit which has issued, the earliest date set for the completion of the reactor is December 15, 1959 and the latest date is December 15, 1960.
report and asserted that it had been disregarded in granting the provi-
sional construction permit to PRDC. The Commission replied by making
public the full text of the letter\textsuperscript{31} it had received on June 6, 1956 from
the Advisory Committee and stated that there was no obligation upon the
Commission to follow the Committee's advice—that it was only one of
the factors to be considered along with others in reaching a decision as
to whether it was proper to issue a permit.

III
Scientific and Technological Aspects

Before proceeding to develop and study the various issues in the case
as raised by the respective parties, it seems desirable to present a brief
explanation of the scientific and technological problems involved in
building and operating PRDC's fast breeder nuclear power reactor in
order to balance the hazards inherent in the undertaking against the
national need for such a facility.

The Fission Process

The basis upon which nuclear power rests is the fissioning of the
nucleus or core of the atom.\textsuperscript{32} The atom, receiving its name from the
Greek words, "a" (not) "temniem" (to cut), implying something indi-
visible, can now be divided. The energy contained in the atom can be
released if the atomic nucleus is bombarded with neutrons so that it
splits into smaller nuclei. The initial split or fission then starts a chain of
similar reactions which continues until no more fissionable nuclei remain.
As this process takes place, the kinetic energy given off manifests itself
as heat which is directly proportional to the number of atoms penetrated
and split. With a sufficient quantity of fissionable fuel, enough heat will
be produced to generate useful amounts of electricity. The vessel in
which these reactions take place and which serves as a sort of furnace
is quite properly known as a "reactor."

Only the heaviest elements lend themselves to the fissioning process.
Examples of fissionable elements are uranium-235, uranium-233 and
plutonium-239 (produced from uranium-238). Uranium-233 is made
from thorium-232. Uranium is found in nature in two forms, uranium-
238 and uranium-235. Only seven percent of all uranium found in nature
is uranium-235, but uranium-233 can be made from thorium-232 which
also occurs naturally. Thus, without means to convert uranium-238 and

\textsuperscript{31} Report of Advisory Committee on Reactor Safeguards dated June 6, 1956.
Thorium-232 into fissionable material, our supply of atomic fuel would not be very great. This lends emphasis to the importance of the breeding process which produces more fuel than is consumed.

**The Fast Breeder Reactor**

A fast breeder reactor is one, usually with a very small core, containing fissionable fuel. The intensity of the reaction and of the heat emitted must be controlled in some way, and as it is not possible to use a moderator, a coolant surrounds the core.

In a fast reactor, propagation takes place because the material used to capture stray neutrons is one that, by absorbing them, will itself be transformed into fissionable fuel. Here atomic fuel is created by conversion. Thus, if either uranium-238 or thorium-232 are placed in the reactor their absorption of neutrons will change them into plutonium-239 and uranium-233 which are fissionable atomic fuels that can be removed and used either to fuel another reactor, or to replace the spent fuel in the reactor which created it. The reactor has thus bred its own fuel.

*Why Reactors Present Hazards*

The danger in reactors is not from a violent atomic explosion which it is said cannot occur, but from radioactivity. There is a possibility that the radioactive fission products which have been formed by the operation of the reactor will be released into the atmosphere and cause radiation hazard in the surrounding area. The word used is *possibility*, not *probability*, for it is considered most unlikely that this will happen.

The radioactive material is located in the fuel elements which compose the core of the reactor. When in the fission process the uranium nucleus splits into two smaller nuclei, most of the resulting fission fragments are radioactive, emitting gamma, beta and alpha rays. These fragments are known as fission products. The greater the amount of fission products contained in a reactor, the more hazardous it is, and the quantity of fission products is in turn determined by the size of the core. The core of a fast breeder reactor is relatively small, thus providing one safety feature. Nevertheless, it is still dangerous.

There is the added safety feature of containment. The fission products are enclosed within the reactor and cannot escape unless it breaks open. The fuel element itself is clad in a protective metal (zirconium in the case of PRDC), and the products resulting from the fissioning of the

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33 A moderator is a substance used in certain types of reactors to reduce the speed of the neutrons released in a fission process. It is not used in a fast breeder reactor because it is desirable to keep the neutrons going at a fast pace for the process of breeding.
fuel are, along with the zirconium protection, surrounded by many containments. In the PRDC reactor, the fuel element itself serves as a primary enclosure for the fission products, and in order for these products to escape, the fuel elements must be broken down or destroyed in some way such as melting, burning, or crumbling into small fragments. The fuel element is encased in the primary containment known as the reactor vessel which is made of strong steel. Outside this is the graphite primary neutron shield. This is surrounded by the primary shield tank also of steel. This, in turn, is enclosed by a heavy concrete and steel biological shield. All of this is known as the reactor compartment—a sealed region filled with an inert gas. This compartment is further insulated by its location below the operating floor of the reactor building, which has outside walls of strong steel.

If all containments are breached, there is a real hazard in the dispersion of gases from the fission products if, as a result of high temperatures which cause melting, they are transformed into the gaseous state. Though it is not likely that such gases could escape from the reactor building which is designed as a “gastight shell,” there could be leakage. Thus if the reactor vessel, the primary shield tank, and the reactor compartment should all be breached, the immediate hazard may not be to the surrounding country but to the employees in the building who have been exposed. The building itself, of course, will not be accessible for a number of weeks or even months.

There are many safety devices that are not just built into the design of the reactor and building which houses it, but are especially created as auxiliary safeguards, such as control rods or the “power scram mechanism” which brings about automatic shut down, and the “period scram” which will not permit the reactor to achieve the necessary reactivity in too short a period (usually well over 10 seconds) thus avoiding loss of control and consequent meltdown.

From what has been said about fast breeder reactor technology, it can be surmised that the Enrico Fermi Reactor under construction at Lagoona Beach does present hazards, resulting chiefly from the radioactive substances which will be dispersed in the event of an accident. Although likelihood of the release of any significant quantity of radioactive material into the environment is said to be remote in the case of properly designed reactors, it remains a possibility. This can occur as the result of a power runaway in either of two ways; (1) the core melts

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34 Brief for Applicant, pp. 42-43.
and the uranium fuel elements are exposed in all their radioactivity; or (2) the several containments that serve as a shield are breached and radioactive substances are released into the atmosphere. In both cases this has been induced by an extraordinary temperature rise. The first event is just what happened to the Government’s experimental EBR I Reactor. The second has not occurred. In the case of the EBR I the temperature was allowed to soar as part of an experiment, but through human error the excursion was not stopped in time, and there was an accident resulting in the meltdown of the core. There was no damage to persons or property, only to the core itself. But it is a sharp warning of what could happen, and the cause has not yet been satisfactorily explained. It is to be noted that the EBR I is a fast breeder reactor of considerably lower power than the Enrico Fermi.

The site of a reactor is an important factor in evaluating its safety. The PRDC reactor is located at Lagoona Beach, Michigan, on a 915 acre tract running to the western shore of Lake Erie. It is about seven and one-half miles from the city of Monroe which has a population of some twenty thousand persons, and about thirty miles southwest of Detroit with its two million inhabitants. Surrounding it within a five mile radius are low, marshy farm lands. Such a site, although somewhat isolated, cannot be deemed remote.

IV

ISSUES IN THE CONTROVERSY

The issues raised by the intervenors are all of a serious nature. They run the whole gamut of administrative agency functioning, and those relating to procedural derelictions go to the heart of the administrative process. It is asserted that there was insufficient information relative to the safety of the reactor and the financial qualifications of the company upon which to base the issuance of a provisional construction permit to PRDC. It is alleged that the Commission violated the Atomic Energy Act of 1954 and its own regulations in making this grant; that in the determination of these facts, procedures were permitted which deprived intervenors of an opportunity to present their case fully, and that therefore a fair hearing was denied them in contravention of their rights under the first and fifth amendments.

35 The date—November, 1955.
36 Brief for Applicant, p. 54.
37 Seventeen principal issues are set forth by the intervenors in their brief. Post-Hearing Brief of Intervenors, pp. 8-9.
Lack of a fair hearing is predicated upon various acts and refusals to act by the Commission itself and its presiding officer. More important among these are (1) the limiting of the issues; (2) the refusal to grant a hearing on intervenor's motion for access to restricted data; (3) the assent of the hearing examiner to the submission of testimony in the form of written narrative statements without the consent of intervenors; (4) the fact that the hearing examiner was not permitted to make an intermediate decision; and (5) the allegation that Chairman Lewis L. Strauss was biased and should either have disqualified himself or have been disqualified.  

All these issues, with the exception of the fourth, are argued persuasively in the Post-Hearing Brief of Intervenors, and in its memoranda supporting the various motions. PRDC, which bears the burden of proof, in an equally persuasive brief, presented in painstaking detail fact and opinion supporting its view that the construction permit, with some of the modifications suggested by the AEC, be continued in effect. The brief for the AEC Staff, which was separated from the legal office of the Commission for the purposes of this case, deals cautiously and carefully with the substantive issues in the proceeding, and ably meets the accusations of intervenors with respect to the procedural issues in its several answers, with supporting memoranda.

The Finality of a Construction Permit

The question of whether or not the grant of a construction permit assures that a license will follow discloses further the relative position of the parties to this proceeding. In order to obtain a license a two-step procedure is followed akin to that found in the Federal Communications Act of 1934 from which it is borrowed. The applicant must first secure a construction permit to build the facility and then a license to operate it. It is widely known that in FCC cases the grant of a construction permit is almost tantamount to the issuance of a license. The question thus arises whether this may become true under the AEC's licensing program. The construction of a television or radio station requires a size-

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39 Id. at pp. 8-9. Allegation (5) was decided against intervenors and will not be discussed in detail here.
40 The Administrative Procedure Act does not require a separated staff in initial licensing proceedings. The General Counsel's Office of the AEC was leaning over backward to be fair. 60 Stat. 240 (1946), 5 U.S.C. § 1004(c) (1952).
42 Conversion of construction permit to license, 10 C.F.R. § 50.56 (Supp. 1958); Brief for AEC, pp. 16-17.
able investment, but is as nothing compared with the cost of a nuclear reactor plant. There was, therefore, grave concern on two fronts. Businessmen wanted assurance that the tremendous investment would not be in vain, and questioned whether the proposed law provided sufficient protection to those venturous souls who undertook to build atomic facilities. Others, such as workers in the proposed plant and residents of the environmental community, wanted equally firm assurance that because of the large sums expended, the AEC would not be pressured into granting a license, despite perhaps lingering doubts as to safety. There was fear among industrialists that an arbitrary administrative decision might prevent the operation of the facility when completed, which the ambiguities of the Atomic Energy Act of 1954 did little to allay. Therefore the AEC sought by its regulations to proffer this assurance.

The kind of information necessary for the granting of a construction permit is to all intents and purposes the same as that required for the issuance of a license. Thus the issuance of a construction permit may be thought to afford practical assurance that a license will follow. But the AEC in its laudable and justifiable concern for the “public health and safety” has reserved to itself the right to refuse such license if intervening changes either in the position of the applicant (probably financial) or in the rules and regulations of the Commission make such refusal advisable, or if evidence that the facility as constructed cannot be safely operated makes it mandatory. Section 50.35 in allowing for extended time for providing information, in effect further dilutes this assurance.

Where, because of the nature of a proposed project, an applicant is not in a position to supply initially all of the technical information otherwise required to complete the application, he shall indicate the reason, the items or kinds of information omitted, and the approximate times when such data will be produced. If the Commission is satisfied that it has information sufficient to provide reasonable assurance that a facility of the general type proposed can be constructed and operated at the

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43 The estimated cost as of the present writing is $71,595,832.00. Laurence, First Large “Breeder” Reactor Represents a Milestone in Atomic-Power Progress, N.Y. Times, April 27, 1958, § 4, p. E9, col. 6.


45 See WJTV-TV v. FCC, 97 U.S. App. D.C. 391, 231 F.2d 725 (1956) where the issue of the Commissioners being pressured into granting a “station license” to intervenors because construction had been started ahead of time was before the court.

proposed location without undue risk to the health and safety of the public and 
that the omitted information will be supplied, it may process the application and 
issue a construction permit on a provisional basis without the omitted information 
subject to its later production and an evaluation by the Commission that the final 
design provides reasonable assurance that the health and safety of the public will 
not be endangered.47

Ability to secure a provisional construction permit appears, at first 
glance, encouraging because it has been made easier to meet the Com-
mision's requirements. (Applications will be accepted without having 
all the necessary information at hand; some of the data may be supplied 
later.) However, the lack of full information weakens the assurance that 
can be given by the Commission as the AEC Staff clearly indicates in 
its brief: "Section 50.35 affords far less assurance to the applicant of 
the ultimate issuance of a license than would issuance of a construction 
permit under Section 50.45."48

The other aspect of this dilemma is the one facing the intervenors, 
the persons who will suffer not with their money but possibly with their 
lives if an unsafe facility is permitted to be constructed and a nuclear 
accident occurs. As this discussion has attempted to show, their position 
is not an enviable one and fully justifies their participation in this case 
to protect their interests and those of the public.49

The alarm of intervenors stems from the view that conversion from 
permit to license is almost automatic, and is heightened by statements 
such as the ensuing one, appearing in the Joint Committee's Report on 
the bill leading to the enactment of the 1954 Act: "Section 185 . . . 
requires the issuance of a license if the construction is carried out in 
accordance with the terms of the construction permit."50 Section 185 
itself reflects this interpretation. The concluding sentence reads, "For all 
other purposes of this Act, a construction permit is deemed to be a 
'license'."51 However, reassurance can be found in the language of the 
construction permit that has been issued to PRDC which says:
The conversion of this permit to a license is subject to submittal by PRDC to the Commission (by amendment of the application) of the complete, final Hazards Summary Report . . . . The final Hazards Summary Report must show that the final design provides reasonable assurance to the satisfaction of the Commission that the

47 10 C.F.R. § 50.35 (Supp. 1958). (Emphasis added.)
48 Brief for AEC Staff, p. 23.
health and safety of the public will not be endangered by operation of the reactor in accordance with the specified procedures.52

**Substantive Issues: Safety and Financial Qualifications**

The two principal substantive issues in the PRDC case concern the safety of the reactor and the financial qualifications of the company to construct and operate it.53 As to the first, the company must "provide reasonable assurance that a facility . . . can be constructed and operated at the proposed location without undue risk to the health and safety of the public."

With respect to the second, a showing of financial responsibility, there must be assurance that the company has funds, either in hand or pledged, sufficient to carry on the project. "The Commission will be guided by the following considerations . . . . (b) The applicant is technically and financially qualified to engage in the proposed activities in accordance with the regulations in this chapter."55 There could hardly be a more ambiguous guide for the Commission or for those seeking to comply. A considerable portion of the applicant's brief is devoted to the presentation of its financial condition and the sources from which funds have been and will be received; all predicated upon estimated costs of the project. This aspect of the case is beyond the purview of this paper except that it seems well to note that the figures for this undertaking continue to rise. Originally scheduled for completion in 1960 at a cost of $48,500,000, the expense has now risen to $51,100,000.56 And this figure rises still higher to $71,595,832 when the cost of research and development are added—"a truly staggering total for a business enterprise which may yield no return."58

The issuance of the provisional construction permit to PRDC means

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52 Construction permit No. CPPR-4 issued by the Atomic Energy Comm'n August 4, 1956, p. 3. (Emphasis added.)
53 Intervenors devote their entire reply brief to analyzing these two issues. A major portion of PRDC's first brief covers these same issues, explaining the safety of the reactor and seeking to interpret the regulations as not requiring a "rigid or mathematical" standard of proof of financial responsibility.
56 Forum Memo, April 1958, p. 10.
58 It is true PRDC has applied for a non-commercial license under § 104 of the Act (license for research and development). Still it is hoped that the reactor will prove to have "practical value" (which would bring it under the requirements of § 103), in order that it may become commercially feasible. If the reactor successfully breeds fuel (plutonium), sale of this fuel will yield a return.
that the Commission must have been satisfied that there was reasonable assurance that this fast breeder sodium-cooled reactor could be constructed and operated at Lagoona Beach, Michigan, "without undue risk to the health and safety of the public." 59 Intervenors strongly attack this finding, declaring that it is based on insufficient evidence in existence at the time of the issuance of the permit as well as now. It is their firm contention that the resolution of any doubts concerning safety cannot be left to the future, but must be resolved before the permit can issue. If the regulations are interpreted otherwise, they assert, the regulations violate section 185 of the act which admits of no such construction:

All applicants for licenses to construct or modify production or utilization facilities shall, if the application is otherwise acceptable to the Commission, be initially granted a construction permit. . . . Upon the completion of the construction or modification of the facility, upon the filing of any additional information needed to bring the original application up to date, and upon finding that the facility authorized has been constructed and will operate in conformity with . . . the provisions of this Act and of the rules and regulations of the Commission, and in the absence of any good cause being shown to the Commission why the granting of a license would not be in accordance with the provisions of this Act, the Commission shall thereupon issue a license to the applicant. For all other purposes of this Act, a construction permit is deemed to be a "license." 60

It is submitted that there is nothing in the language of section 185 to indicate that the determination of "reasonable assurance" is not to be made at the time of the issuing of the construction permit, nor that it may be fixed at some future time. The AEC and PRDC interpret the wording providing for "the filing of any additional information needed to bring the original application up to date" 61 as indicating a congressional intent that information upon which to base "reasonable assurance" could be supplied later. 62 It is the writer's view that the meaning of this phraseology is simply that unforeseen and unexpected contingencies must be allowed for—that changes in the design of the reactor or alteration in the financial situation of the parties may necessitate an amendment to the application. Not without stretching the language beyond its natural

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59 10 C.F.R. § 50.35 (Supp. 1958). See Avins, Health and Safety in the Atomic Industry, 31 Temp. L.Q. 145, 146 (1958). "The very proximity of a nuclear reactor to a populated area which makes the operation of the reactor commercially feasible for power purposes also increases the risk that, if there is an accident, serious or even fatal consequences may result to a large number of people."


61 Brief for the AEC Staff, p. 16.

62 Id. at 15-16. The AEC Staff concedes that the legislative history of § 185 is not enlightening. Id. at 16.
meaning can it be said to contemplate that the additional information will concern the safety of the reactor. Its safety was supposed to have been determined beyond a reasonable doubt, before the construction permit issued. Section 185 seems doubtful authorization for section 50.35 of the Commission's regulations by virtue of which a provisional permit issued to PRDC. The initial grant provided for is for a construction permit—pure and simple—not a conditional one.

Nevertheless, AEC's separated staff argue that granting a permit to PRDC was not a violation of the act because under it the Commission was empowered by section 161(q) to make "such rules and regulations as may be necessary to carry out" its purposes.63 Section 50.35 is one such regulation and it envisages just such a case as this in which it was not possible to give reasonable assurance of safety at the time of the application for a permit.64 In extending the time for providing technical information, the section states, "Where, because of the nature of a proposed project, an applicant is not in a position to supply initially all of the technical information otherwise required to complete the application," the Commission may issue a permit on a provisional basis subject to later production and evaluation of the data when supplied at approximate times. Before issuing the permit, however, the Commission is to be satisfied that the omitted information will be supplied and satisfied as well that it has information sufficient to provide "reasonable assurance" that the facility can be constructed and operated at the site without undue risk to public health and safety.65 Thus the award of a permit is achieved more easily and quickly by the applicant who is enabled to supply some information at a subsequent time. In addition, the acceleration of the Commission's program is furthered. It is stressed by both PRDC and AEC, in their briefs, that one of the reasons motivating the Commission in issuing the permit was to avoid serious delay in the development of a project which pointed the way to a major advance in the industrial application of nuclear energy. The brief further argued that if work could commence without waiting for all the scientific and technological problems of nuclear reactors to be solved, the stride ahead would proceed that much faster and the nation could retain its leadership in this field (for there is some question as to whether it is not being usurped by the Soviet Union and Great Britain).66

66 The headline topic on page 42 of the AEC's Brief is "The importance of avoiding
The choice of the term "reasonable assurance" may well have been deliberate for it affords the Commission wide leeway in becoming "satisfied." The term is interpreted by PRDC and AEC as meaning "enough data to indicate that it is probable or likely that by the time the reactor has been constructed such reactor or a reasonable modification thereof can be adequately proved to be safe for operation"; that by that time the missing information will have been supplied and a finding of "reasonable assurance" of safety fully warranted.\textsuperscript{67} Intervenors concede that the term does not mean positive certainty, but that the strong probability that is required must be determined before the permit can issue. Their contention has merit, for aside from any question of law, the facts\textsuperscript{68} presented in the PRDC case lead to grave doubts as to the feasibility and propriety of the construction of a fast breeder reactor—the most dangerous type—in a populous area.\textsuperscript{69}

One other argument of AEC and PRDC should be noted. They both seek to justify a finding of "reasonable assurance" of safety upon the fact that there is no inherent danger in the "mere construction of the proposed PRDC reactor"\textsuperscript{70} that "construction per se does not involve unnecessary delay." Under this topic the brief states, quoting Ernest R. Acker, Vice-President of PRDC, "We believe that this time saving is important to the advancement of the technology of nuclear power production . . . ." The staff itself says, "The urgency of developing economically competitive nuclear power in the United States, as a matter of both domestic and international policy has been frequently stated by both the Congress and the Commission." Brief for the AEC Staff, pp. 42-43. The full extent of Russia's program is, of course, not known. England has built a fast breeder reactor in Dounreay, Scotland which was to have been in operation this year; but the date has now been postponed to the spring or summer of 1959. Forum Memo, August 1958, p. 20.


\textsuperscript{68} Two facts stand out: (1) the cause of the accident which resulted in the meltdown of the core of the EBR I (the Government's experimental breeder reactor) is not yet known; (2) the highly speculative and tentative nature of the testimony of the witnesses for PRDC and AEC, all of whom spoke not in terms of certainty, but of resolvable doubt and probability. Among them were members of the ACRS who advised the Commission against granting a permit.

\textsuperscript{69} Consider the Windscale incident in England which led to considerable radiation damage in the area surrounding the reactor—milk produced within a 200 mile radius was dumped as being contaminated with radio-iodine. The condition, fortunately, was temporary since radio-iodine has a short half-life (8½ days). The accident occurred as the result of a temperature rise to excessive heights so that the uranium fuel rods split. The uranium caught fire and radioactive dust swept up the chimney falling on the surrounding area. A complete and sprightly account of this incident is found in Muldoon, Alice in Nuclear Energy Land, 42 Mass. L.Q. Dec. 1957, 9 and continued in Muldoon, Alice in Nuclear Energy Land, 43 Mass. L.Q. March 1958, 38.

\textsuperscript{70} Brief for Applicant, p. 39.
public hazard." These claims overlook the fact that the language of the regulations is "construct and operate." The two words as well as the two functions go together and are not to be separated or considered as distinct. There is obviously no point in the construction if it is not to operate, just as in a sense there is little value in receiving a construction permit unless it is almost certain to be followed by a license to operate. The intervenors, therefore, with reason termed such assertions "specious," and considered any evidence on this point irrelevant and immaterial since it raised no issues. Intervenors were perfectly willing to concede that construction alone presents no more than the normal dangers which are a part of any building project.

V

ADMINISTRATIVE LAW PROBLEMS

Intervention—A Preliminary Issue in the Proceeding

The first challenge offered by the applicant, PRDC, concerned the right of the labor unions to intervene. This issue obviously was decided against the company. It raises interesting questions of the rights of affected parties.

Intervention in administrative law is a concept that has developed as this newest branch of our law has emerged and grown. It was early singled out for rather extensive treatment by Professor Walter Gellhorn. Intervention means participation in a proceeding already initiated by others, and is permitted in order to protect interests obliquely affected, including the public interest. Intervention in on-going administrative proceedings is a frequently employed procedural device by which non-parties seek to protect their interests. However, the nature of the interest required in order to intervene is not easily defined. A precise determination of what persons have "sufficient interest to warrant their intervention in the proceedings" is difficult for the legislature. It has

71 Brief for the AEC Staff, p. 44.
74 Gellhorn, Administrative Law—Cases and Comments 496 (1st ed. 1940).
76 "The problem of ascertaining the necessary and permissible parties to administrative proceedings is inherently many times more difficult than that of determining the parties to a judicial proceeding." Oberst, Parties to Administrative Proceedings, 40 Mich. L. Rev. 378, 379 (1942).
therefore become customary to place the burden of ascertaining such persons upon the agency. To this end, specific questions of intervention are generally left to agency discretion with no absolute right to intervene afforded.\textsuperscript{77}

It has been observed that ordinarily in license proceedings there is no person other than the applicant whom the agency must consider,\textsuperscript{78} but more and more the interrelationship and expansion of enterprises has led to overlapping of activities and interests which requires that notice of hearings and right to participate therein be given to other persons or groups whose interests are affected. With respect to the granting of licenses, as in the instant case, there was at the time the labor unions intervened no requirement that every application be followed by a hearing. There was a requirement that notice be given that an application had been made and the construction approved, after which requests for hearing could be made. This has since been changed by a statute\textsuperscript{79} which provides that public hearings must be held after thirty days notice on applications for facilities licenses, whether or not the application is contested.

An interesting case in which a party deprived of the right to intervene was held entitled to intervention is \textit{FCC v. NBC (KOA)}.\textsuperscript{80} There a broadcasting station operating on the same frequency as KOA applied for an increase in power and for operation unrestricted to its previous daytime hours. Claiming to be aggrieved because this would interfere with its broadcast and thus effect a modification of its license, KOA sought to intervene. The petition was denied and a hearing was held in KOA's absence. A second petition was likewise denied, but permission was granted to file briefs and present oral argument amicus curiae. The Commission evidently felt that the provision in the statute requiring "opportunity to show cause" warranted such an allowance. The Court held KOA "was entitled to be made a party" for "a licensee cannot show cause unless it is afforded opportunity to participate in the hearing, to offer evidence, and to exercise the other rights of a party."\textsuperscript{81} There is no discussion in the case of whether the limited participation allowed prevented KOA from adequately presenting its case, but it can be implied that such a view was an underlying motive for the Court's decision. The grounds upon which the dissenters, Justices Frankfurter and Douglas, rested their argument are the usual ones relating to the administrative

\textsuperscript{77} Davis, Handbook on Administrative Law, 288-89 (1951).
\textsuperscript{78} Gellhorn & Byse, 839.
\textsuperscript{80} 319 U.S. 239 (1943).
\textsuperscript{81} Id. at 246.
process in such cases; that the decision was within the discretion of the agency, and to rule otherwise would "clog the administrative process." They noted that intervenors impede the progress of the hearing, and obfuscate the issues by prolonged and confusing cross examination.\(^{\text{82}}\) Perhaps the 6,300 page record in the \textit{PRDC} case is some evidence of the truth of this statement. Nevertheless the right of intervenors to participate is a strong one directly authorized by the language of the statute,\(^{\text{83}}\) and mere slowing down of the administrative process is a small price to pay for the protection of affected parties.

In \textit{Vinson v. Washington Gas Light Co.},\(^{\text{84}}\) there was likewise a statutory right to intervene, but the question was as to the fairness of the hearing. The Commission refused to allow motion of counsel that "there be no restrictions as to the type of evidence presented." The two issues of "right to intervene" and "broadening of the issues" often arise together.

It is clear that in the case of the intervenors in the \textit{PRDC} case that their petition to intervene was properly granted. As parties affected by the grant of a license to construct and operate a power reactor, an ultra-hazardous activity, they were very directly affected.

\textit{Right to Expand the Issues}

In accordance with its rules of practice, the Commission specified the issues in the \textit{PRDC} case.\(^{\text{85}}\) Intervenors sought to expand the issues, but the Commission denied their motion interpreting its rules of practice as indicative of no such privilege.\(^{\text{86}}\) A careful reading of that provision supports their view, but it is nevertheless maintainable that a regulation which delimits the issues exceeds the authority of the Commission and may be adjudged a denial of a full and fair hearing on the ground that a protestant is entitled to be heard on all matters as to which he claims to be aggrieved.

Intervenors, in their argument, cited cases to show that administrative agencies customarily expand the issues so as to include all related matters upon which the protestant wishes to submit evidence. But their position

\(^{\text{82}}\) Id. at 254.


\(^{\text{84}}\) 321 U.S. 489 (1944).


\(^{\text{86}}\) 10 C.F.R. § 2.736 (Supp. 1958). "The answer of an intervenor shall fully advise AEC and other parties of his position and whether or not he proposes to appear and present evidence." The answer is designed to make known intervenor's position and there is no mention of enlargement of issues; nor can this be implied from the mere fact that an answer is provided for.
is an overstatement of the prevailing rule, for it can by no means be said that there is any unanimity with respect to this practice. The intervenors relied on *Clarksburg Publishing Co. v. FCC,*\(^{87}\) a proceeding for grant of a permit for the construction of a television station, to which there had been a protest. The applicable section of the Communications Act was cited\(^{88}\) for an extension of the issues beyond matters alleged in the protest which had framed the issues. A broadening was permitted, but it is to be noted that it was the Commission itself which sought to extend them. The statutory language read, "the application involved shall be set for hearing upon the issues set forth in said protest, together with such further specific issues, if any, as may be prescribed by the Commission."\(^{89}\)

In *Vinson v. Washington Gas Light Co.,*\(^{90}\) the case came before the Supreme Court on certiorari upon the petition of intervenors, the Director of Economic Stabilization and the Administrator of the Office of Price Administration, who claimed that the statutes under which they functioned entitled them to have the Commission enlarge the scope of the hearing. As to this claimed right to broaden the issues, the Court said, "One of the most usual procedural rules is that an intervenor is admitted to the proceeding *as it stands,* and . . . is not permitted to enlarge those issues or compel an alteration of the nature of the proceeding."\(^{91}\) Such language seems more applicable to intervention in court proceedings than an administrative hearing (courts often seem to use the same standards for both, although it would seem a distinction should be made). The position of intervenors in the *PRDC* case is stronger because the intervenors have in effect initiated the proceedings, and, being a participant in them from the beginning, would seem to have a right to submit evidence on all issues which relate to their protest.

**Elements of a Fair Hearing**

Glibly stating that the requirements of "due process" demand a "fair hearing" is easily done, but a determination of what constitutes a fair hearing is more difficult. This difficulty is enhanced by the very tie which binds a fair hearing to due process itself. Being an outgrowth of this basic concept, fair hearing has become affected with its amorphous and malleable nature, and varies almost as much in meaning as does

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88 Id. at 215, 225 F.2d at 516.
90 321 U.S. 489 (1944).
91 Id. at 498. (Emphasis added.)
the term due process.\textsuperscript{92} To some extent its definition is dependent upon the language of the statute setting up the particular agency or upon the provisions contained in the enactment under which the action is brought,\textsuperscript{93} since the agency has many different types of proceedings that come before it.\textsuperscript{94} If these statutory sources are silent, then the court may read into the case the necessity of a fair hearing on the basis of traditional fair play.\textsuperscript{95} Of course, there is always the possibility of invoking the time-worn but none the less just and true criterion of "the circumstances of the particular case."\textsuperscript{96} There is even evidence that although no particular attribute of a fair hearing has been denied, if the case as a whole reveals errors which by their cumulative effect can snowball into a "vitiating unfairness," then the "rudimentary principles of fair play which are the very foundation of due process of law" have been violated, and the party thus denied a fair hearing.\textsuperscript{97} Regarding a hearing before the Atomic Energy Commission, the act provides that "the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding . . . ."\textsuperscript{98}

\textit{Written Narrative Evidence}

PRDC maintains, and intervenors concede, that in administrative proceedings the common law rules of evidence are relaxed and not

\textsuperscript{92}In general "due process of law has never been a term of fixed and invariable content." FCC v. WJR, 337 U.S. 265, 275 (1949). Justice Frankfurter said in his concurring opinion in the case of Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 162-63 (1951):

"[D]ue Process" cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, "due process" is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.

\textsuperscript{93}See Morgan v. United States, 298 U.S. 468 (1936).


\textsuperscript{95}"The right to a fair and open hearing is one of the rudiments of fair play assured to every litigant by the Federal Constitution as a minimal requirement." Railroad Comm'n v. Pacific Gas & Elec. Co., 302 U.S. 388, 393 (1938).

\textsuperscript{96}FCC v. WJR, 337 U.S. 265, 276 (1949); see United States v. Nugent, 346 U.S. 1, 10 (1953).

\textsuperscript{97}Gellhorn, op. cit. supra note 74 at 545-46; and see Colyer v. Skeffington, 265 Fed. 17 (D. Mass. 1920).

strictly applied, but that does not mean they are to be ignored. Wigmore states that there can hardly be any doubt as to the superiority of oral over written testimony. He gives as his reason that the delivery of testimony by writing leads naturally to the taking of testimony "out of the presence of the tribunal of decision." The whole benefit of the demeanor of the witnesses as effecting their credibility is lost; and it was just such an argument that counsel for intervenors advanced at the hearing.

Davis defines a hearing as "any oral proceeding before a tribunal," and notes that "probably an opportunity to submit written evidence or argument without an oral process is not within the term." Aside from Davis' interpretation which finds an intendment that written evidence is not embraced within the term hearing when merely taken alone, consider the added force of the companion word "fair," which points all the more strongly in the direction of Wigmore's plea for the best evidence. The word hearing itself implies use of the auditory senses and so would seem to indicate a verbal rendition. Technically, this can be accomplished by reading the written testimony and while this has been done, it overlooks the important reason for oral testimony—its value as demeanor evidence, going to credibility.

Furthermore, in the instant case we have not an informal hearing where the AEC's rules of practice provide for the "submission of written data, views, or arguments with or without oral argument;" but a formal hearing under section 189(a) of the Atomic Energy Act of 1954, as to which the Commission's rules provide that "every party to the hearing shall have the right to present such oral or documentary evidence and rebuttal evidence and conduct such cross examination as may be required

99 Mr. Justice Frankfurter speaking of the difference between procedures in courts and administrative agencies says, "These differences in origin and function preclude wholesale transplantation of the rules of procedures, trial, and review which have evolved from the history and experience of courts." FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 143 (1940); see ICC v. Louisville & N.R.R., 227 U.S. 88 (1913).

100 3 Wigmore, Evidence § 799 (3d ed. 1940).

101 "The prejudice comes from the fact that we are denied, as we see it, the true and full disclosure of the facts. True and full disclosure of the facts as we see it includes the question of whether or not the witness or how the witnesses testify, whether they remember and what their demeanor on the stand is. That is part of the problem of the true and full disclosure of the facts. That is how we are prejudiced." Record, p. 213.

102 70 Harv. L. Rev. 193, 194. (Emphasis added.)


104 The rules governing formal hearings are found at 10 C.F.R. § 2.730-56 (Supp. 1958).

for a full and true disclosure of the facts."\textsuperscript{106} The sentence immediately following (differently phrased in the Administrative Procedure Act)\textsuperscript{107} adds, "the parties shall be encouraged to present evidence in written form."\textsuperscript{108} But certainly none of this amounts to a direction that written evidence must be submitted, or requiring any party to accept evidence in written form which ordinarily\textsuperscript{109} is presented orally on direct examination. For example, the Interstate Commerce Commission through its shortened procedures has developed a practice peculiarly suited to its operations of permitting written evidence with the consent of all the parties. Intervenors' contention here, therefore, is that the hearing examiner improperly ignored intervenors' refusal to accede to this procedure. They took this position early in the proceedings at the Pre-Hearing Conference\textsuperscript{110} and argued in their memorandum in support There of that "nothing in the Commission's rules authorizes the examiner to determine in advance, over timely objection prior to the party's offer of specific evidence, that the party may present any testimony it chooses in narrative form with exhibits."\textsuperscript{111} Counsel observed that the encouragement to present evidence in written form contemplates encouragement to agree to such presentation of evidence, and is not compelling on a party without assent thereto.\textsuperscript{112} PRDC answered in rebuttal that "although Intervenors claim their consent is necessary, there is no such requirement in either the Act or the Regulations and there is no reason why there should be where the objector claims no prejudice."\textsuperscript{113}

A look at the cases is not very helpful since there is a paucity of them on this issue. The leading case is considered to be \textit{Yakus v. United States},\textsuperscript{114} in which the Supreme Court through Mr. Chief Justice Stone upheld the conviction of petitioners for selling beef at prices above the

\begin{itemize}
  \item \textsuperscript{106} 10 C.F.R. § 2.747 (1956) (Evidence).
  \item \textsuperscript{107} Section 7(c) of the Administrative Procedure Act provides: "In rule making or determining claims for money or benefits or applications for initial licenses any agency may, where the interest of any party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form." 60 Stat. 241 (1946), 5 U.S.C. § 1006 (1952).
  \item \textsuperscript{108} 10 C.F.R. § 2.747 (1956) (Evidence).
  \item \textsuperscript{109} 5 Moore, Federal Practice ¶ 43.03, at 1318 (2d ed. 1957). See Fed. R. Civ. P. 43(a) providing that the testimony of witnesses shall be taken orally in open court "unless otherwise provided by these rules."
  \item \textsuperscript{110} Prehearing conference was held by Hearing Examiner on November 29, 1956.
  \item \textsuperscript{111} Brief of Intervenors, p. 38.
  \item \textsuperscript{112} Id. at 38. (Emphasis added.)
  \item \textsuperscript{113} Memorandum of Applicant in Opposition to Objections Filed by Intervenors, p. 10.
  \item \textsuperscript{114} 321 U.S. 414 (1944).
\end{itemize}
maximum prescribed by the Price Administrator under the Emergency Price Control Act of 1942,\footnote{Emergency Price Control Act, ch. 26, § 203(a) 56 Stat. 31 (1942).} despite their protest that there was a denial of due process because of the refusal of the Price Administrator to grant an oral hearing at which to offer testimony of witnesses in opposition. The procedure to be followed provided for protest by way of affidavits, written evidence, and briefs, although an oral hearing could be requested, and in all probability would have been granted.\footnote{Id. at 436.} As the petitioner did not avail himself of the opportunity to request an oral hearing in this way, the Court said, “in advance of application to the Administrator for such a hearing we cannot well say whether its denial in any particular case would be a denial of due process.”\footnote{68 Stat. 953 (1954), 42 U.S.C. § 2231 (Supp. V, 1958). (Emphasis added.)} There is, therefore, no clear holding that such written evidence satisfied due process, and it is questionable whether the right to a hearing can be thus fettered by the prerequisite of a showing of the inadequacy of written evidence.

\textit{No Intermediate Decision Required}

The question arises whether the withdrawal of the power usually exercised by a hearing examiner to make an intermediate decision resulted in the denial of a fair hearing in the \textit{PRDC} case. The first consideration is that the Atomic Energy Act of 1954 provides that “the provisions of the Administrative Procedure Act . . . shall apply to all agency action taken under this Act” \textit{with the exception} of “agency proceedings or actions which involve Restricted Data or defense information,” and for these “the Commission shall provide by regulation for such parallel procedures as will effectively safeguard and prevent disclosure of Restricted Data or defense information to unauthorized persons with minimum impairment of the procedural rights.”\footnote{Administrative Procedure Act § 8(a), 60 Stat. 242 (1946), 5 U.S.C. § 1007(a) (1952).} The Administrative Procedure Act sets forth that the officer who presides shall initially decide the case, or, if the agency determines that it is to make the initial decision, the presiding officer shall first recommend a decision.\footnote{Ibid.} In short, at some point the hearing examiner is to state his position, for it was he who heard the evidence and had opportunity to observe the demeanor of the witnesses. It was he who controlled the proceeding. But the language of section 8(a) makes an exception in the case of rule making and applications for initial licenses,\footnote{Ibid.} the latter of which we are
concerned with here. In such cases there is no strong direction that there shall be a decision by the presiding officer. In its place there is permitted either a tentative decision by the agency or a recommended decision by one of its responsible officers or the entire procedure may be omitted "in any case in which the agency finds upon the record that due and timely execution of its function imperatively and unavoidably so requires." Thus the Atomic Energy Commission is not bound to allow an intermediate decision by its presiding officer. Furthermore, in conformity with these provisos the Commission has included a section in its rules of practice, the pertinent parts of which are as follows:

(a) After hearing, the presiding officer will ordinarily render an intermediate decision, which decision shall become final unless exceptions are taken ... or the Commission has directed that the record be certified to it for final decision.

(b) However, in any case involving an application for an initial license the Commission may direct that the presiding officer certify the record to it without an intermediate decision.

The Commission having thus reserved to itself the determination as to whether or not an intermediate decision is required in a particular case, and there being no contrary directive in the controlling statute, the parties to the proceeding cannot complain that the hearing examiner is denied this privilege. But it may be surmised that a case is weakened by the absence of an intermediate decision or a trial examiner's report, and it is at least arguable that an intermediate decision is one ingredient of a fair hearing. In the PRDC case intervenors have demanded that an intermediate decision issue, and the AEC Staff has acknowledged in its reply brief "the parties are entitled to an intermediate decision before any final decision is rendered." Certainly a hearing as long and involved as this one, extending over a period of three-quarters of a year, would seem to require that an intermediate decision be rendered, and it would even seem that intervenors might justifiably demand that Examiner Kyle make this decision, but they have not done so.

121 Ibid.
123 It is noteworthy that Counsel for PRDC conclude their memorandum, "no need is seen either for an intermediate decision in this case, or for oral argument before the Commission." Reply Memorandum for Applicant, p. 11.
124 See NLRB v. Mackay Co., 304 U.S. 333 (1938), where the Court held that the due process clause does not guarantee any particular form of procedure. Thus submission of a tentative report by the trial examiner and a hearing on exceptions thereto were not essential.
125 Reply Brief for AEC, p. 28.
The statutory framework for atomic energy information control is based upon the concept of "restricted data" as defined in the Atomic Energy Act of 1954 to mean: "all data concerning (1) design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy, but shall not include data declassified or removed from the Restricted Data category pursuant to section 142."

Attorney Harold P. Green, who at the commencement of these proceedings represented one of the intervenors, in a most illuminating and discerning article considers many facets of the problem of "information control" under the 1954 act. As have other writers, he questions whether the Commission's discriminatory restrictions, although they sound reasonable on their face, can be legally enforced since they present "serious threats to justice." The denial to intervenors' counsel in the

126 68 Stat. 924 (1954), 42 U.S.C. § 2014(w) (Supp. V, 1958). This definition appears substantially the same as that contained in the 1946 act making allowances for differences in terminology attributable to advances in technological knowledge; for example, the use of the term "special nuclear material" in place of "fissile material," and the addition of the functional word "design" to the phrase "manufacture or utilization." Likewise the word "energy" has been substituted for "power." Section 10(b)(1) of the 1946 act reads:

The term "restricted data" as used in this section means all data concerning the manufacture or utilization of atomic weapons, the production of fissionable material, or the use of fissile material in the production of power, but shall not include any data which the Commission shall from time to time determines may be published without adversely affecting the common defense and security.


128 Discrimination comes about through limits placed upon access to restricted data which make no allowance for the fact that "a number of firms have had substantial and comprehensive access to Restricted Data for many years in their role as government contractors or under AEC study arrangements... They and their staffs have acquired substantial classified know-how not open to those who are only newly entering the atomic energy field." Id. at 100-01. See 10 C.F.R. §§ 25.1-.31 (Supp. 1958) for regulations dealing with access to restricted data.

129 The imprisonment of the whole new science and technology behind a wall of secrecy inhibits not only research and development but also the free debate essential to a democratic society. Reubhausen & von Mehren, The Atomic Energy Act and the Private Production of Atomic Power, 66 Harv. L. Rev. 1450 (1953). From such language a threat to our constitutional guarantees of freedom becomes apparent. On the subject of secrecy in relation to science, see Gellhorn, Security, Loyalty and Science (1950), treating in some detail the "bottling up" of scientific data through restrictions and calling for declassification or
PRDC case of access to restricted data without security clearance will be studied in the light of this charge, keeping in mind the almost unlimited statutory authority to control dissemination of restricted data\textsuperscript{130} which has been vested in the AEC—an authority which, until the hearing in the instant case, has gone unchallenged, and which has not yet been subjected to judicial scrutiny. It is submitted that the sweeping limitations placed on the access to knowledge which normally would be freely available to all raises serious questions of censorship and poses a threat to the freedom to know.

\textit{Motion for Access Denied}

Intervenors filed, on November 21, 1956, a motion for access to certain restricted data without security clearance, and requested a hearing in order to present facts in support of it.\textsuperscript{131} After an answer by the AEC Staff and the submission by both parties of amendments, the hearing examiner denied the motion.\textsuperscript{132} The intervenors enumerated some fifteen grounds as the basis for their motion. What they come down to is that access to restricted data is essential to the proper preparation of intervenor's case, and that security clearance should not be required of them as counsel because the information they seek “has no relationship to national defense considerations,” and is concerned “only with civilian applications of atomic energy.”\textsuperscript{133} At first blush the argument of the intervenors has some merit. However if this information is so crucial to their case, should not their counsel seek the security clearance which is requisite for its acquisition?

The reply of the AEC Staff found that the intervenor’s request was

de-secretization. On the subject of American security policies see Shils, The Torment of Secrecy (1956), who says, “In science, the true bearer of secrets is Nature, and no security policy can prohibit it from disclosing these secrets from others who are qualified to interrogate it.” Id. at 11.

\textsuperscript{130} As one article so aptly has put it, all data is “born secret.” What is needed is that it be “born free” so that it would become secret only through affirmative action of the Commission. Reubhausen & von Mehren, op. cit. supra note 129 at 1484. The authors referred to conditions under the 1946 Act, but there is no change under the 1954 Act. See Green, op. cit. supra note 127 at 92. “[T]he statutory definition embraces all information which falls within its terms, and no action by the AEC is necessary to make such data Restricted Data.” (Emphasis added.)

\textsuperscript{131} In the Matter of Power Reactor Development Company, Docket No. F-16, Intervenor's Motion for Access to Certain Restricted Data of Nov. 21, 1956.

\textsuperscript{132} In the Matter of Power Reactor Development Company, Docket No. F-16, AEC Order of March 5, 1957.

\textsuperscript{133} In the Matter of Power Reactor Development Company, Docket No. F-16, Intervenor's Motion for Access to Certain Restricted Data of Nov. 21, 1956.
too broad, seeking as it did access to all relevant data, and that in any event, "any Restricted Data which might be asserted to be relevant to the proceeding would have only collateral relevance." The AEC thus claimed that it was perfectly possible to hear the issues fully without introduction into evidence of the restricted data. The separated staff asserted further that if there was "relevant classified information which must be developed for purposes of a full hearing," the Commission's "parallel procedures" provide a mechanism for investigating and hearing classified information. Intervenors did not show that they were incapable of utilizing these procedures. The position was taken that the Commission has no legal authority to grant access to restricted data without clearance in the face of the requirements of section 145 of the Atomic Energy Act. As to the charge that the Commission did not properly fulfill its obligation to further the policy of section 141 of the act to encourage "dissemination and declassification" of scientific and technical information, it was said that this "is not an issue on which Intervenors are entitled to be heard in this proceeding," although it was not stated why.

The answer of PRDC to intervenors' motion for access to certain restricted data is brief indeed, being filed only "for the purpose of making its position clear on the record" and stated that PRDC considers the issues raised by intervenors' motion and AEC's answer thereto as presenting a controversy "solely between the Intervenors and the Commission, at least at that stage of the proceeding."

It is worthy of notice that the AEC Staff had concluded its disputa-
tion with the declaration that so far as its preparation for hearing in the case had disclosed, the information concerning the design, construction and operation of the PRDC reactor, and the safety considerations

134 The AEC Staff acknowledged in an Amendatory Memorandum that with respect to one issue—financial qualification—necessary information was definitely restricted. This related to the probable future prices for grades of plutonium to be produced in the reactor. In the Matter of Power Reactor Development Company, Docket No. F-16, Answer of AEC to Intervenor's Motion for Access to Certain Restricted Data, Dec. 27, 1956.


139 Answer of Power Reactor Development Company to Intervenor's Motion, as amended for Access to Certain Restricted Data.
relating thereto, is wholly unclassified, and resort to classified information should not be necessary.\footnote{140}

**Parallel Procedures**

A brief consideration of the parallel procedures\footnote{141} provided to carry out the Commission’s responsibility under section 181 of the Atomic Energy Act of 1954,\footnote{142} may show whether resort to them would supply “a mechanism for investigation and hearing of classified information” which would obviate the difficulties under which intervenors claim to be required to operate. First, and foremost, these procedures are available only to *cleared counsel*\footnote{143} (and such other *cleared* persons as are needed by the party for the preparation of his case). As the attorneys for intervenors refuse to take this necessary step it can be seen at once that these procedures offer no assistance to them. To some degree the provisions of subpart H of the rules of practice tend to minimize the problems of restricted data for uncleared counsel by limiting all parties to the proceeding in their use of such data.\footnote{144} Nevertheless the fact remains that restricted data is available only to “appropriately cleared counsel,” and by mere language alone the rigidity of this requirement is not softened nor its effect changed.

**Information Control**

An examination into the tenability of the positions of the respective parties in this matter of access to restricted data opens up the whole question of information control\footnote{145} and its effect upon the proceedings.\footnote{146}


\footnote{141} 10 C.F.R. § 2.800-14 (Supp. 1958).


\footnote{143} 10 C.F.R. § 2.805 (Supp. 1958).

\footnote{144} 10 C.F.R. § 2.806 (Supp. 1958).

\footnote{145} “‘Information control’ is nothing more or less than the security protection of national secrets.” Green, Atomic Energy Information Control, 38 Chicago Bar Record 55 (1956).

\footnote{146} A Pandora's box of troubling problems flow from “the decision of our Government to permit the use of vital national defense secrets by private enterprise in the development and exploitation of civilian applications of atomic energy. The problem of information control now is an almost virgin territory of the law, but it bids fair to become one of the most vexing and challenging legal and institutional problems of our generation.” Id. at 55. (Emphasis added.)
It leads to a consideration of situations where the inexorable safeguards inherent in due process of law have been relaxed in the name of national security on the ground of Government privilege147 or on some superseding legislative direction.148 From the cases decided under such circumstances, guidance can be found only by analogy since the PRDC case is one of first impression and does not seem to fit any pre-existing categories of law or fact. This newness is enhanced by the very uniqueness of the Government agency which plays a dominant role in the proceedings, and by the unparalleled control it has been given over atomic energy secrets.149

Beginning with the Atomic Energy Act of 1946, and continued in the present act, atomic energy secrets were set apart from other national secrets, and clear statutory guidance was afforded. They were classified as restricted data and a special category of persons was designated who could have access to them. There has been some raising of this "shroud of secrecy" attributable to congressional intent to permit wider dissemination of scientific and technical information "so as to provide that free interchange of ideas and criticism which is essential to scientific and industrial progress and public understanding. . . ."150 Yet despite legislative prodding, "as might be expected, the urge to declassify does not match the zeal to classify."151 If the participation in this proceeding by


148 United States v. Nugent, 346 U.S. 1 (1953). In this case a conscientious objector was called for induction into military service and refused to respond, appealing to the Department of Justice. The FBI refused to produce its report for inspection but submitted a "fair resume" which the Court deemed adequate. Lack of opportunity to meet the undisclosed adverse evidence was held not a denial of due process. Justices Frankfurter, Black and Douglas dissented. Mr. Justice Frankfurter said: "[I]t is not possible to be confident that a 'resume is fair' when one cannot know what it is a resume of." 346 U.S. at 13. See Bouziden v. United States, 251 F.2d 728 (10th Cir. 1958). In this conscientious objector case, the party was held not entitled to the production of the entire FBI report.

149 1 Atomic Energy L. Rep. ¶ 5002.


151 Gellhorn, op. cit. supra note 129 at 31.
the intervenors has done nothing else, it has led to a speeding up of declassification.

The details of classification and clearance, which are interrelated, can be developed only briefly here. All classified information is divided, as in the case of most government agencies dealing with national secrets, into confidential, secret and top secret. Security clearance is required for access to such information. The procedures set up in compliance with section 145 of the Atomic Energy Act of 1954, unlike those of the 1946 Act which offered only "Q" clearances, afford two types of security clearance depending upon the nature of the restricted data involved. These are known as an "L" clearance and a "Q" clearance; the former relates to confidential information and is of a lower grade; the latter makes secret information available on an extremely limited basis to those whom the AEC decides really need to know. Both are designed to make restricted data available to individuals engaged in private activities connected with the development of civilian applications of atomic energy. An applicant for an "L" clearance need only show a potential use for the data in his business, trade or profession. A person desiring a "Q" clearance must demonstrate a need to know such data in his business, trade or profession. Access under both types of permits is thus limited in varying degrees. Top secret data is wholly excluded from the scope of access permits.

Against this background of policy and regulation one seeks for a clue as to how counsel for intervenors can adequately represent their client, assuming that knowledge of restricted data is essential to the presentation of their case. The data sought is peculiarly within the hands of a governmental body, but the normal means of assuring the production of papers is not open. Compulsory process cannot reach restricted data. There is a privilege here for the AEC, but it rests on something much stronger than section 22 of the Departmental Housekeeping Statute

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152 "L" clearance is used in cases involving a relatively low order of access to restricted data, and involves only a National Agency check unless derogatory information is developed, in which case a full background investigation is called for.

153 "Q" clearance are based upon a full background investigation of character, associations and loyalty by the Civil Service Commission or the FBI.


155 60 Stat. 240 (1946), 5 U.S.C. § 1005(c) (1952). See Tobin v. Banks & Rumbaugh, 201 F.2d 223 (5th Cir. 1953), cert. denied, 345 U.S. 942 (1953), where a subpoena was upheld for the production of the company's records. Of course, here it is the agency that is seeking the subpoena and not a private party.
of 1789\textsuperscript{156} by virtue of which agency heads have effectively barred their subordinates from disclosing official information.\textsuperscript{157} The AEC needs no such crutch upon which to base its rules and regulations for it has only to cite the provisions of the Atomic Energy Act which give it practically \textit{carte blanche} with respect to national secrets in the atomic energy field. State secrets, it is acknowledged by Wigmore,\textsuperscript{158} are singularly subject to privilege, and because of the relationship of atomic secrets to the common defense and security, they fall under such a classification.

But lest it seem from the trend of these remarks that the intervenors are without any rights with respect to restricted data which the Commission is determined to withhold, there are straws which lean in the other direction. Frail and elusive though they seem, they can be grasped. The "thought blockade"\textsuperscript{159} which surrounds security programs related to atomic energy can be penetrated. Emboldened by these words, a solution can be sought in an analysis of the cases.

\textit{An Analysis of the Cases}

Decisions in which the courts have been forced to weigh the claimant’s need for information against the particular agency’s need to withhold it have the greatest significance for the issue of access to restricted data. A balancing of the equities in such cases is not easy and not all determinations lead to a just result.\textsuperscript{160} Knowledge which can be helpful to one’s cause but which is entombed in secrecy is useless indeed. What kind of a showing is necessary to move the courts to require its release? The answer to that question should provide some guidance here. It will cover a wide range of controversies.

Cases in which administrative agencies have relied on undisclosed evidence vary more in their factual origin than in the ultimate decisions of the courts concerning them. Almost unanimously the judiciary frowns upon evidence taken secretly without notice to the parties concerned,

\begin{itemize}
  \item \textsuperscript{157} Mitchell, Government Secrecy in Theory and Practice: "Rules and Regulations" as an Autonomous Screen, 58 Colum. L. Rev. 199 (1958) discusses the leading cases in the area.
  \item \textsuperscript{158} 8 Wigmore, Evidence § 2367 (3d ed. 1940).
  \item \textsuperscript{159} Palfrey, The AEC Security Program: Past and Present, 11 Bull. Atom Scientists 131 (1955). Professor Palfrey says: "In the broad debate in the government security program, the atomic experience has long been pigeon-holed and discounted as a special case. A thought blockade has been erected by the observation that in atomic energy it is clearly worth paying the price exacted by a stringent screening program." Id. at 131.
  \item \textsuperscript{160} In \textit{Jay v. Boyd}, 351 U.S. 345 (1956), an elderly alien who had resided in this country for forty years was deported. His deportation was based in part on confidential evidence not disclosed to him.
\end{itemize}
because lack of some opportunity to meet it "is contrary to all principles of justice and fairness and a clear violation of the right to due process of law." 161 Though it has been said 162 that a party need not always have a chance to know and to meet the case on the other side, one would seem to be entitled to know the evidence upon which the decision of an administrative tribunal is based. Especially is this true in trial hearings, 163 of which the PRDC case is an example.

The question arises whether resort to extrinsic facts has any relation to the evidence in the case if not introduced as such. Is it any more than an exercise of the privilege of members of administrative tribunals for them to rely upon their "expertise," that is their special knowledge of the subject, which exists independent of and with no foreknowledge of the controversy? The Atomic Energy Commission may well take the position that some of the data upon which it will base its decision in the PRDC case will, of necessity, be of this kind. The decisions seem to signify that resort to such information can be had, but must be made known, for even the opinions of experts are open to question. 164

In many of these cases the controlling fact seems to be whether the party claiming prejudice has had opportunity to rebut the evidence or, where appropriate, to cross-examine witnesses. However, some consideration should be given to the fact that the decisions of administrative agencies often rest on matters of policy and involve the weighing and balancing of public as against private interests. It is thus incumbent upon the agency to review fully all the facts pertaining to a particular case, even to the extent of reliance upon evidence independent of that offered by the affected parties. 165 The agency function is thus broader than that of a court; it is doing more than merely trying the case before

161 Carstens v. Pillsbury, 172 Cal. 572, 158 Pac. 218 (1916). In that case dealing with workmen's compensation the court said: "Due process of law requires that the party against whom a claim is asserted shall have opportunity to be present when the evidence to sustain the claim is introduced." Id. at 577, 158 Pac. at 220.


163 For a discussion of administrative trial hearings, see Gellhorn & Byse, Administrative Law Cases and Comments 833-1183 (1954).

164 In McCarthy v. Industrial Comm'n, 194 Wis. 198, 215 N.W. 824 (1927), the agency was not bound to accept the opinions of an expert who differed with their own expert knowledge on the subject. See City of Elizabeth v. Board of Pub. Util. Comm'r's, 99 N.J.L. 496, 123 Atl. 358 (1924).

it. But recognizing this does not gainsay the fact that the parties are entitled to know the facts upon which the agency decision rests. Not to divulge them is not only unfair, but amounts to fatal error.\footnote{Ohio Bell Tel. Co. v. Public Util. Comm'n, 301 U.S. 292 (1937).}

In the instant case PRDC may be relying on data the contents of which are unknown to intervenors because access to it has been denied them. It cannot be said, however, that they were unaware of its source or existence. The right of cross-examination and rebuttal was fully open to them (and availed of) with respect to most of the persons whose written narrative testimony was placed in evidence. However, it can be assumed that any secret data upon which the witnesses based their statements was not revealed and so could not be refuted, unless by accident. The right to cross-examine, according to the authorities, is not an indispensable ingredient of a fair hearing.\footnote{Professor Gellhorn suggests that "the Constitution does not mention cross-examination by name and that its use is not explicitly or implicitly commanded unless we believe that the due process clause ineluctably demands it." Gellhorn, Administrative Law Cases and Comments 608 (1940). "The administrative process is providing an effective leadership for reform of evidence practices." Their more liberal rules have meant a "sharp decline in litigation of evidence questions in the reviewing courts." Davis op. cit. supra note 162 at 473–74.}

It is but one means of getting at the truth, and one of the best ways.\footnote{Consider Reilly v. Pinkus, 338 U.S. 269 (1949), where an order of the Postmaster General restricting use of the mails was nullified because the serious charges warranted a reasonable opportunity to cross-examine witnesses.}

The most usual grounds for refusing access to restricted data is the all encompassing term “national security.” Cases that concern national security have a very strong pull in the direction of a holding for the Government, yet in \textit{Cole v. Young},\footnote{351 U.S. 536 (1956).} the Court so defined the term “national security” as to favor the private party, a former Government employee. The Supreme Court stated that the question before it was the meaning of “national security” as used in the Act of 1950 giving to the heads of certain departments and agencies of the Government (including AEC) \textit{summary suspension} and unreviewable dismissal powers over their employees when deemed necessary “in the interests of national security.” Cole was suspended from classified Government service as a food and drug inspector for the Department of Health, Education and Welfare.

The Court held that the Act of 1950 was designed to provide for the dismissal of “security risks”; that is employees having access to classified materials whose loyalty was in doubt, and not persons such as Cole. The
Court said it would not "lightly assume that Congress intended to take away those safeguards in the absence of some overruling necessity such as exists in the case of employees handling defense secrets."170

Cole v. Young illustrates, therefore, that the Court is not deaf to a plea for the recognition of rights growing out of procedural due process. The Cole case may prove helpful to the intervenors in support of their view that they should have been granted access to restricted data without security clearance of counsel because the definition of "national security" laid down by the Court narrows the concept and thus broadens the area to which it is not applicable. It is a movement away from secrecy and toward freedom. That within the concept of "national security" there can be a dichotomy (national safety and general welfare) augurs well for the recognition of similar divisions in other spheres equally sacrosanct—restricted data, for instance.

United States v. Reynolds,171 frequently cited as a leading case on the question of government privilege, has particular significance with respect to the PRDC case because the classified nature of the materials sought made them unattainable. The case arose under the Federal Tort Claims Act. A military aircraft, engaged in a highly secret mission to test secret electronic equipment, crashed, and the widows of deceased crew members brought an action to recover damages. In order to prove their case, the production of the Air Force accident investigation reports and statements made by surviving crew members was demanded. The Judge Advocate General supplied an affidavit attesting to the need for secrecy in the interests of national security.172 The surviving crew members were allowed to testify on all matters relating to the accident except those of a "classified nature." The district court ordered the Government to produce the documents in order that the court might determine whether they contained privileged matter. The Government refused. Mr. Chief Justice Vinson, speaking for a divided Court (Justices Frankfurter, Black and Jackson dissenting) said,

The Court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect. . . .

Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers. Yet we will not go so far as to say that the court may automatically

170 Id. at 546.
171 345 U.S. 1 (1953).
172 Id. at 5.
require a complete disclosure to the judge before the claim of privilege will be accepted in any case.\textsuperscript{173}

By this language it would appear that the Court thinks it is sufficient to dispose of any action amounting to "judicial abdication" by merely stating that such a thing cannot happen; then it immediately turns about and lets it happen by refusing to require full disclosure of the facts upon which the claim of privilege is based. It even goes so far as to rebuke the judge in the trial court who had requested to review the documents in camera: "The Court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by a judge alone, in chambers."\textsuperscript{174} Mr. Chief Justice Vinson noted that "the showing of necessity that is made will determine how far the Court should probe in satisfying itself that the occasion for invoking the privilege is appropriate," and added that "even the most compelling necessity cannot overcome the claim of privilege if the Court is ultimately satisfied that military secrets are at stake."\textsuperscript{175} In the Reynolds case the claim of privilege apparently outweighed any compelling necessity for the information sought. Relating this to the PRDC case, unless the intervenors can show a crying need for the restricted data to which they have sought access, and that it is free from the taint of the "military,"\textsuperscript{176} it would seem doubtful that a court of law would enforce their demand. On the other hand, it may be recognized that it is not possible to claim as vital that which is not only unknown but unknowable.

It is now appropriate to analyze another recent decision of the Supreme Court which may have a strong influence on this controversy. In Jencks v. United States,\textsuperscript{177} Jencks was indicted for having falsely signed an affidavit submitted in compliance with the National Labor Relations Act in which he swore that he was not a member of the Communist Party. Upon the trial the judge ruled against an attempt by counsel to reach FBI reports of the prior testimony of the witness for the Government. It was held that a preliminary showing of inconsistency is not a prerequisite to an accused's right to the production for inspection of docu-

\textsuperscript{173} Id. at 8-10. (Emphasis added.)
\textsuperscript{174} Id. at 10.
\textsuperscript{175} Id. at 11.
\textsuperscript{176} But it is questionable whether any scientific information can be free of possible military application. It has been said: "if military significance were alone to be the determinant of secrecy the consequences would be boundless. Almost all matters of science and technology are likely to have military value in some degree." Gellhorn, Security, Secrecy and the Advancement of Science, in Civil Liberties Under Attack 91 (1951).
\textsuperscript{177} 353 U.S. 657 (1957).
ments in the Government's possession. A sufficient foundation is established by the testimony of the witness which related to events and activities reported in these documents. The Court, through Mr. Justice Brennan, stressed the crucial nature of the oral testimony of the witness. This decision has been widely discussed as sanctioning invasion of the inviolable FBI files. It was decided chiefly on a point of evidence and is so limited in its application by some later decisions.\footnote{178} Other courts cite it as pointing in the direction of freer access.\footnote{179} It is noteworthy that the Government made no claim of privilege against disclosure "on the grounds of national security, confidential character of the reports, public interest or otherwise."\footnote{180} The case would be a sturdier support for intervenors if the decision had been made in the face of a Government claim of privilege.

Yet it is submitted that even had there been a showing of perhaps not "privilege" but of "confidential nature," the decision might have been the same because ordinarily the confidential nature of information is not sufficient to bar access to it.\footnote{181} A very recent case supporting this view which was decided in reliance upon the Jencks case is Communist Party of the United States v. Subversive Activities Control Bd.\footnote{182} The produc-

\footnote{178} United States v. Carr, 21 F.R.D. 7 (S.D. Cal. 1957), cited the Jencks decision as a very narrow one. United States v. RCA, 21 F.R.D. 103 (E.D. Pa. 1957), ruled that the Jencks case goes no "further than to hold that disclosure of prior statements of a person, made either to a government agent or before a grand jury, may be compelled for the purpose of impeaching him when called as a witness in the course of a criminal proceeding."

\footnote{179} In Blalock v. United States, 247 F.2d 615 (4th Cir. 1957), the court held that although the Jencks case points in the direction of freer access to FBI files, the Nugent case, discussed supra note 148, still controls in cases of conscientious objectors, and the furnishing of a resume will satisfy due process.

\footnote{180} 353 U.S. at 369-70.

\footnote{181} In the case of Chew Hoy Quong v. White, 249 Fed. 869 (9th Cir. 1918), it was held that declaring Quong an inadmissible alien on the basis of an undisclosed confidential letter resulted in an unfair hearing. But in a recent deportation case the court said that they could not read into the statute "the type of hearing which petitioner claims is intended (i.e. that the informants who were the source of the confidential information should be produced for cross-examination by the alien) particularly because of the 'political' type of decision required of the Commissioner ..." Cha'bo Li Chi v. Murff, 250 F.2d 854, 858 (2d Cir. 1957).

\footnote{182} 254 F.2d 314 (D.C. Cir. 1958). Compare this case with Kaiser Aluminum & Chem. Corp. v. United States, 157 F. Supp. 939 (Ct. of Claims 1958). A report containing an advisory opinion on an intra office policy was not required to be produced because privileged. However, there was no showing of need, and many other documents requested were supplied. The court said: "The Jencks case does not open the Government files to ransacking. It only requires the production of papers, 'touching the subject matter of their testimony at the trial.'" Id. at 945. (Emphasis added.)
tion of FBI reports recording testimony of a witness whom the Government placed on the stand was required. Judge Prettyman said that documents are not protected against compulsory disclosure because they are "confidential," because a confidential document is not necessarily privileged. His opinion is noteworthy also for the way in which it relates the decision in the Jencks case to an administrative proceeding:

If this were a civil action in a court, or if it were a criminal case, the Party would be entitled to the production of these reports. The question is whether production is one of the fundamentals of fair play required in an administrative proceeding. We think it is.

... The opinion of the Supreme Court in the Jencks Case, as we read it, is based upon the elementary proposition that the interest of the United States is that justice be done. The same elementary proposition applies here and leads to the same result. The decision in Jencks v. United States and the opinion by Judge Prettyman are proof that things are not immutable; that documents formerly deemed inaccessible can be reached—even the well nigh sacrosanct files of the FBI. That Mr. Justice Brennan's ruling was recognized as applicable in an administrative proceeding gives it added weight here.

In exploring these cases which have just been reviewed, the quest has yielded some encouraging signs and revealed a judicial mood favorable to disclosure. Even the tag "national security" has been dissected. In those instances where access was denied the Court was divided. Thus, at another time, upon a different showing, the opposite result is possible.

But one is still left with the question how undisclosed "secret evidence" is evidence at all, in view of the position of the courts that "nothing can be treated as evidence which is not introduced as such." If it is not possible for restricted data to be introduced into the record because of the need to preserve secrecy, then such matter is not before the hearing examiner for consideration. It becomes questionable not only how a fair and complete hearing can be had, but how this defect can be remedied on review, since "a finding without evidence is beyond

184 It is a recognized principle of due process as applied to administrative proceedings, that if at any time there is opportunity for the party to fully present his case, the requirements have been satisfied whether the full hearing be had before the administrative body itself or is made available upon judicial review. Jordan v. American Eagle Fire Ins. Co., 83 U.S. App. D.C. 192, 169 F.2d 281 (1948). See United States v. Storer Broadcasting Co., 151 U.S. 192 (1956).
the power of the Commission,"186 and a review without findings on which to base it cannot be had.187 Thus unrevealed evidence becomes no evidence. The PRDC case has not yet progressed to the stage of Commission findings and possible judicial review.

A Limitation Upon Judicial Review

A puzzling question posed by the inaccessibility of restricted data concerns the province of the court upon judicial review. Will it feel bound by the AEC's classification of information as restricted, or will it make its own determination? How can this be accomplished when the secret nature of the data makes it inaccessible to the judges as to the petitioner? Will the court be obliged to obtain security clearance in order to hear the case, or can the Commission make the exception provided for in Section 145(b) of the Atomic Energy Act, and permit examination without clearance, perhaps, in camera? There is the further quandary of how strictly scientific and technological information is to be appraised by judges unskilled in such lore. Will recourse to the expertise of the administrative agency become necessary? Such queries indicate a limitation upon the judicial function which in effect denies another access—access to the courts. They deepen the meaning of the sense of futility expressed by Mr. Justice Roberts as he dissented in Yakus v. United States:188

When these cumulative burdens placed upon the protestant who seeks review are fairly appraised it becomes apparent that he must carry an insupportable load, and that, in truth, the court review is a solemn farce in which the Emergency Court of Appeals and this court, on certiorari, must go through a series of motions which look like judicial review but in fact are nothing but a catalogue of reasons why, under the scheme of the Act, the courts are unable to say that the Administrator has exceeded the discretion vested in him.189

VII

Concluding Thoughts

In the Power Reactor Development Company hearings the coalescence of substantive and procedural issues binds them together so that the problems raised concerning the right to intervene, the enlargement of issues, the form and availability of evidence, all bear upon the factual issue of the safety of the reactor. How can its dangers be conclusively shown when needed technological and scientific facts are hidden and

186 265 U.S. at 288.
187 See Mr. Justice Black's discussion in his dissent in SEC v. Chenery Corp., 318 U.S. 80, 95 (1942).
188 321 U.S. 414 (1944).
189 Id. at 458. (Emphasis added.)
unobtainable, when all facets of the controversy cannot be pursued because of the limitation of the issues, and when the evidence that is admitted is in written form and thus less susceptible to proper evaluation? So restricted, the right to intervene becomes an empty gesture—like entering the ring with the more telling blows barred. Under such circumstances one can seriously question whether a fair hearing has been accorded the intervening labor unions—a matter which can be decided only upon judicial review.

Authority is not lacking for the action the AEC has taken. The Commission has been scrupulous in the observance of its regulations as it chose to interpret them (although others may view them in a different light). What has been done falls squarely within AEC rules, though that does not assure correctness of the action. A direction that the Commission specify the issues does not necessarily mean that their scope is to be narrowed to those issues only. Permission to use written testimony need not be interpreted as a requirement to do so. Limitations upon access to scientific facts can be deemed unwarranted where they hinder the preparation and proper presentation of one’s cause, and when they are invoked in the face of a clear directive to declassify. The ability to withdraw from the hearing examiner the power to render an intermediate decision (even to dispense with it altogether) does not mean it was proper to do so in the instant case. As to those rules which relate to substance, section 50.35, providing for the issuance of a provisional construction permit, affords a permissive base for the Commission’s reliance upon the indefinite and slender requirement of “reasonable assurance” of safety, but finds little if any support in the statute.

An administrative agency is not the sole interpreter of its own regulations, despite the fact that such interpretation is accorded great weight. Rules and regulations are not inviolable or unassailable. They cannot be supported if they conflict with the terms of the authorizing statute or if they thwart its policy or purpose.\(^{190}\) Regulations are spawned by the act but only in order to give expression to the legislative intent.

\(^{190}\) The necessity that regulations accord with the statute is remarked upon in the case of Manhattan Gen. Equip. Co. v. Commissioner, 297 U.S. 124 (1936), where Mr. Justice Sutherland said:

The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the Statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute is a mere nullity.

297 U.S. at 134.
It becomes apparent that the crux of the matter lies in the body of law that governed the conduct of the hearing in the PRDC case—the Commission's rules and regulations. These obviously were drawn with great care and with meticulous attention to preserve the unfettered freedom of action so uniquely an attribute of the Atomic Energy Commission since its birth. It is as though they constitute a protective shield surrounding the actions of the Commission, making them almost as impervious to attack as are the various containments that shield the reactor itself. But this armor is not impenetrable. Rules and regulations promulgated in furtherance of the national desire to forge ahead in the development of nuclear power through private enterprise may not take precedence over the need for caution in matters involving atomic energy, and over the paramount duty of the Commission to protect the health and safety of the public.
COMMENTS

TAX SAVING INCENTIVES TO FOREIGN TRADE

Jan M. Z. Kaczmarek*

Substantial tax savings are now available to the corporation engaged in foreign trade but the amount of saving will vary in relation to the type, size and structure of the enterprise. Each saving may be an incentive to foreign investment and a step toward satisfying the need for capital abroad. Mr. Kaczmarek's study examines four basic corporate types and their activities in order to demonstrate the various tax advantages and disadvantages in a quantitative manner.

The problem of tax planning is an individual one. At the outset there are three common business issues: (1) what possible tax savings are available; (2) what conditions must be complied with to be eligible for the savings; and (3) whether the expense and effort of complying with the conditions is worth the tax saved. In answering these questions each corporation will decide the significance to its foreign operation of the available plans. But before answers can be made the tax saving possibilities must be estimated and compared. To begin an analysis, the wide variety of companies will be separated into categories. Those most likely to turn with interest to foreign trade can be helpfully classed among four stages of extension into operation abroad: export, manufacture, extracting, and portfolio investment.

Much has been written on the convolutions of the tax saving provisions,1 both singly and in connection with the larger perspective in which they should be viewed. No elaboration is necessary here as to the technical arrangements available, nor as to the legal foundations of their operation. Rather, the previous work in the field will be used as a starting point for the quantitative examination of the various savings which it is thought may contribute to the making of a choice from among

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1 The most complete treatment of the combination possible from the point of view of American law is offered in Brainerd, United States Income Taxation of the Foreign Company, 34 Taxes 231 (1956). For a study of foreign law see Gibbons, Tax Factors in Basing International Business Abroad, Part II (1957). Certain tax savings are available to Western Hemisphere Trade Corporations (WHTC) under certain conditions as well as to firms trading in United States possessions and in China (now suspended). See Int. Rev. Code of 1954 (hereinafter cited by section number only) §§ 921, 931, 941.
the various comments and proposals which have been made up to now, both as regard the individual firm and the economy at large.

What has become an almost universal premise supporting the rationale of tax incentives, the spur to foreign investment, may now also profit from reconsideration in light of the new configurations of international trade which are beginning to materialize under the potent influence of the European Common Market. The emphasis and even the direction of American investment policy might well have to change in meeting a possible barrier around Europe and redoubled competition in third markets. The force of new events brings into consideration the current usefulness of present tax saving as incentives. Thus the policy maker will also need a quantitative basis in order to decide on the collective merits of tax saving as a deliberate revenue feature.

I

THE EXPORTER'S SAVINGS

An American manufacturer may expect tax savings from the mere exportation of its products, provided it can arrange the operation properly. First, it must separate the foreign sales from the American market, which involves incorporating this segment of the business abroad.

When it is practical to do this in the buyer's country, the arrangement would appear reasonable to any but the smallest exporter, for it would merely amount to a formalization of its foreign selling activities with perhaps a small initial cost added. If the manufacturer can practically choose to sell in countries which tax their corporations at a rate not far below or above 26%, it may obtain the maximum saving from this adaptation by letting the larger part of the profits accrue to the subsidiary. The method requires sales to the foreign company at little or nothing above cost. When the sales company's profits, taxed locally at, for example,

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3 If the title passes abroad, the profits will not be subject to United States tax. Section 881(a) subjects foreign earnings from sources within the United States to an income tax. The standards for determining the source have developed as to sales under the passage of title doctrine, G.C.M. 25131, 1947-2 Cum. Bull. 85. The doctrine is well founded in sales and property law. Baker & Meek, Tax Problems of Doing Business Abroad: Some Practical Considerations, 1957 Wis. L. Rev. 75, 90-102. The recent decision of United States v. Balanovski, 131 F. Supp. 898 (1955) illustrates the doctrine as well as the necessity for a real corporate entity to be present at the buying end. The case held that a partnership operation was present despite an otherwise valid sale abroad, and as a result, the income from the sale was received by the same entity. Cf. Gibbons, Tax Effects of Basing International Business Abroad, 69 Harv. L. Rev. 1219, n.27 (1956).
30%, come back to the parent as dividends, an error built into the tax credit computation would net profits which, even after the foreign tax was paid, would have been effectively taxed at only 45.4% instead of 52%.

Should the foreign tax law not penalize the accumulation of profits, 70% of them could be kept in the sales company and reinvested; the United States tax (an additional 15.4%) would not be payable until the dividends were returned to the parent. This is the ideal situation. The method is subject to a number of variations dictated by foreign law and tax rates, whose purpose is to achieve the total effective foreign rate paid nearest to 26%, or a deferral of American taxes without foreign penalties for accumulation, or both. The sales company may sell in a

4 The legislative history of the error is commented on by Surrey, Current Issues in the Taxation of Foreign Investment, 56 Colum. L. Rev. 815, 817-19 (1956). Some have blamed American Chicle Co. v. United States, 316 U.S. 450 (1942) for the error, but it is inherent in the statute. The credit allowed under foreign subsidiary operations is the same proportion to foreign tax paid as the dividend is to income. The rule operates as follows:

Income to foreign subsidiary = S
Foreign tax rate = R
Therefore, foreign tax = SR

Assuming the whole remainder is paid as a dividend, the dividend = S−SR or S (1−R)
The regular U.S. tax would be = .52 S (1−R)

Minus the credit = \( \frac{S}{R} (1-R) \times \) SR or SR (1−R)

Therefore the effective tax paid on the income = SR + .52 S (1−R) − SR (1−R)

The squared R term in this equation effectively results in a deduction plus a credit rather than a simple credit.

The error results from the squared R term. It renders this equation for effective tax paid a quadratic; hence subject to maximization. The maximum benefit obtainable is computed by setting the derivative of the effective tax paid equation equal to zero, viz.,

\[ 2 RS - .52 S = 0 \]
\[ R = \frac{.52 S}{2S} = .26 \]

R = 26%

Hence the maximum tax benefit is gained when the foreign tax rate is 26%. Substituting this value in the effective tax equation results in an effective tax rate of 45.25% rather than 52%.

This error may be avoided by "grossing up," that is, by crediting 48% of the foreign tax paid where the whole profit is paid out or 48% of the proportional part of the foreign tax where less than the whole profit is paid out. The effective tax equation then would read:

\[ .52 S (1-R) - .48 SR + SR = .52 S \ (\text{the desired result}) \]
free port to an independent contractor, thus avoiding a large portion of the tax applicable in the buyer's country. But care must be taken not to reduce the total taxes paid by much below 26%, for the saving decreases as much with lower rates as with higher ones. In some cases it may seem desirable for business or other reasons to sell directly to the buyer and pay the subsidiary a commission equivalent to the profit. It should be noted that the tax saving might be lost if the subsidiary does not pay nearly the whole of the aggregate foreign tax, because the computation error responsible therefor occurs in the credit on dividends and not in the one allowed the parent against its own payments abroad.

Sometimes credit saving can be achieved only with the cooperation of other circumstances. A subsidiary in Germany, for instance, would be taxed at 36% on profits which it distributed as against 51% on those accumulated. The credit saving corresponding to the low rate (5.76%) exists only by virtue of the double taxation treaty with that country which provides that Germany may withhold only 15% of dividends paid to an American company rather than the normal 25%. The total tax regularly paid to Germany by parent and subsidiary, 52%, is thus reduced to 45.6%, an amount which preserves the whole credit saving, leaving 0.64% due to the United States after credit for the 15% dividend tax.

While it is quickly concluded that these savings seem to be quite tangible, a number of conditions imposed by the law and cases must be accounted for before such a judgment can be extended to practical financial situations.

The foreign sales company must possess a staff large enough to procure orders to be filled by the parent. Each exporter must therefore evaluate the cost of maintaining a minimally active organization to qualify it as a separate operation. In this connection, the law requires no more than

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5 The idea behind this is that the sale would have occurred outside the buyer's country, thus rendering the profit exempt from its tax as earned abroad while not being taxed at the place of sale since that was a free port. See Gibbons, supra note 3 at 1220.

6 All credits allowed otherwise by the Code result in an effective payment of 52%. See § 901.

7 See Steefel & Gumpel, Taxation of American Income and Business in Germany, 36 Taxes 251 (1958). The new rates used in the text went into effect January 1, 1958. Previously, 49% was paid on accumulated profits, 30% on distributed earnings.

8 Otherwise it may not be recognized as a foreign entity. See Baker & Meek, supra note 3 at 80. But see United States v. Klein, 139 F. Supp. 135 (S.D.N.Y. 1955), where the transactions were held sufficient in themselves. Aff'd. 247 F.2d 908, 911-15 (2d Cir. 1957); the opinion sets out a classic set of facts to illustrate the evils which the law will not tolerate.
a genuine sales operation. If the manufacturer conducts a bona fide activity of sale solicitation and handles the contracts involved, it has nothing to fear from the Code. The cases in which taxpayers have run into difficulty with the Commissioner have lacked either truly foreign buyers or any sales activities whatever by the foreign company. An essentially American transaction may not become a foreign sale by having the title shot through a foreign firm. Nor may a "sales branch" which does not solicit orders abroad expect to be recognized as a separate entity. It is well established, however, that as long as it does do that, the parent itself may ship goods direct to and collect payments from the buyer without incurring suspicion.

Expenses involved in incorporating, paying other than income taxes, and maintaining the operation, must be set off against the tax saving available, which at best was shown to amount to 6.5% more of the profits before taxes; that is, the equivalent of a rate reduction to that extent. This percentage in concrete terms, represents an extra amount of money equal to 0.65% of gross receipts, or 0.722% of costs, assuming a 10% before-tax profit from the sales. Allowing for the investment of the deferred amount which represents the United States tax due upon repatriation of profits, these two figures would be increased by from 0.1% to 0.2% on the basis of a 6% to 10% interest rate. It may be safely said that countries where the expenses involved would remain low enough for a net gain from the operation of the sales outlet are poor markets for any but a very few American goods—perhaps agricultural products only. Germany, on the other hand, which is a good market, would probably not support an operation with a significant credit saving left over after the added costs, and of course because of the greater tax on accumulation, would not offer the benefits of deferral.

In practice, this tax saving is not pursued by many exporters. In those low tax countries which offer relatively the best markets, the Code provided a larger tax saving through the Western Hemisphere Trade Corporation, amounting to a rate reduction of between 9% and 14%.

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11 For the experience of the World Bank on the subject, see Diamond, Economic Problems of Foreign Trade and Investment in Undeveloped Countries, 17 Ohio St. L.J. 254 (1956).
12 See Baker, Foreign Holding Companies and Foreign Tax Credits, 34 Taxes 746 (1956), for a thorough survey of the possible uses.
13 Effective taxes on income returned to United States holders of the WHTC are 43% of earned income, representing a net saving of only 9%. The saving is lowered by the use
Thanks to the passage of title doctrine, this reduction applies to exports, and in this manner effectively covers the area which would otherwise be of interest to exporters because of the credit saving. Exporters look to other implications of the tax law for benefits in better markets and against less favorable foreign tax and corporation laws.

Wherever local taxes are significantly lower than 52%, although not sufficiently so to create large credit saving, the principle of deferral of American tax until repatriation of the profits allows the difference to be kept indefinitely as a free addition to capital. A local tax rate of 45% would provide the exporter with the equivalent of an interest-free loan in the amount of 3.85% of its yearly profits before taxes.

The deferral can be enjoyed at the site of the sales unless the local law penalizes accumulations or makes them undesirable because of its exchange position. In such case the sales company may be incorporated in a tax "haven," a country which taxes neither profits nor dividends received from operations abroad, and allows both to accumulate in a company doing business outside its borders.

The sales company operates as before, through branch or subsidiary as foreign law may dictate. But it must also engage in minimal corporate formalities, such as sporadic meetings in the base country.14 Profits are collected in the company after payment of foreign taxes, and are thus available for an indefinite period of time, not subject to further control of the buyer's country and without being diminished by any United States tax due. Because of the difficulty in finding such a haven which at the same time possesses a double taxation treaty with Germany, the method cannot be employed to avoid that country's tax on undistributed profits. Only the credit advantage, then, is available there.

Whether base company or direct operation, the exporter seeking deferral achieves a saving of a changed character. It no longer depends on an immediate increase in the return of profits, but on the re-investment of those profits. Consequently, the manufacturer interested in pursuing this export operation undoubtedly differs from the one who was attracted by the actual receipt each year of an increase of 13.5% in its normally expected income.15 The deferring exporter must be interested in foreign or at least domestic investments with the profits, or in the possibility of subsidiaries, since their dividends are taxed at 7.8%, after the WHTC has been itself taxed at 38%. See Surrey, supra note 4 at 837.

14 The term "base" is associated with a tax haven, denoting either the country or the company incorporated therein.

15 The added income from a maximum credit saving is $7 for every $48 received after distribution, or 13.5% of the $48.
of using them for miscellaneous purposes, such as financing and loans.

Contrary to a fairly popular conception, the tax saving does not consist primarily of a tax deferral, but rather of the avoidance of taxes on undistributed surplus. The extra money available as a direct result of the deferral itself is fairly inconsequential, especially where the foreign tax paid is high. After a foreign tax of 45%, the benefit of the deferral of the additional American tax of 3.85% is equivalent to being able to invest the profits at a rate 1.08 times higher than that available without deferral. If the normal rate would be 6%, the advantage would correspond to an investment at 6.48%. It should be noted that after taxes the difference is even less absolutely, though of course it remains relatively the same. A simpler way to consider the saving is to regard it as equivalent to the interest on the deferred amount, which would increase profits after taxes by 0.22% in the above case, and 1.02% in the case of the ideal tax of 26%, assuming a 6% interest rate.

The deferral itself, then, provides a sum insignificant in relation to the profits as well as to the uses to which it might be put in the business, such as financing or insurance.

Quite clearly, if the credit computation error were corrected, the deferral would achieve greater relative importance. Against the prospect of paying the whole 52% tax in the United States, the smaller saving through deferral would become paradoxically a more significant benefit for the manufacturer's export operation than the larger credit saving is at present. Thus, even after a 45% foreign tax, in the absence of the present 3.15% saving, deferral would amount to 7% rather than 3.85%.

Today, however, the margin of advantage from deferral increases when the saving becomes one against taxes on unreasonably accumulated surplus. This occurs when a closely-held exporter contemplates a dead-weight surplus above $60,000. All the unreasonably accumulated profits would then be taxed at 27.5%, or 38.5% if they went over $100,000. The advantage gained through the foreign company is measured then by the return on the investment of the excess over $60,000. Its significance depends on the use to be made of the surplus earnings, since the

16 Barlow & Wender, United States Tax Incentives to Direct Private Foreign Investment (Preliminary Report) 10 (1954).
17 For any given term of investment, with respect to the percentage of principal represented by the total profits (simple interest equivalent of compound interest).
18 Thus, twice as large a profit as would appear necessary from the percentage level is required to make the real earnings differ significantly.
19 § 535(c)(2).
20 § 531.
Code only forbids accumulations unconnected with legitimate business purposes within the framework of the operation.\textsuperscript{21}

A significant benefit, therefore, would go to the manufacturer who wishes to invest in activities unconnected with the business. The accumulated profits are available to it not only abroad, but in the United States, since they may be banked here by the foreign unit without incurring liability for the tax on surplus. Further, the foreign company does not thereby qualify as one doing business in the country, and is not even taxed on its bank interest. Any other use of the money in the United States would constitute doing business,\textsuperscript{22} but so long as the proceeds from such use were limited to less than 50\% of total earnings for the year,\textsuperscript{23} they would be taxed only 30\%.\textsuperscript{24}

Commentators generally hold that the earnings may be loaned to the parent, provided that it is done on arm's length terms.\textsuperscript{25} On this basis, the exporter can profit from having a surplus which may save interest on temporary loans beyond allowed reserves.

It should be noted that the foregoing analysis has been predicated on the possibility of collecting the entire profit from exports in the foreign company. Actually, this is an ideal seldom attainable, because of section 482, which allocates earnings between parent and subsidiary. In practice, then, only a portion of the profits will be available to the sales company. On the other hand, the allocation tends to favor the subsidiary because the fair share of the income due the parent is determined by reference to the prevailing American prices at the level of separation (here, wholesale).\textsuperscript{26} Since most exporting firms find that their per unit costs are lower as to exported products because of cheaper advertising and lower retailers' mark-ups abroad,\textsuperscript{27} this extra "export profit" is collected in the base company, where it is earned, thus providing a relatively greater re-investment capital than would be available if the export profit were partly included in the parent's profits, as it would be in the absence of the modified operation.\textsuperscript{28} The relative increase depends on

\begin{itemize}
\item \textsuperscript{21} §§ 532, 533.
\item \textsuperscript{22} Except dealing in stocks and securities, § 871(c). Continental Trading Inc., 16 CCH Tax Ct. Mem. 724 (1957). Profits from these sources, however, are taxed.
\item \textsuperscript{23} See infra p. 101 for additional liabilities possible if income from United States sources exceeds 50\%.
\item \textsuperscript{24} § 881.
\item \textsuperscript{25} Rev. Rul. 15, 1953-1 Cum. Bull. 141; Brainerd, supra note 1 at 265.
\item \textsuperscript{26} § 863(b).
\item \textsuperscript{27} Barlow & Wender, op. cit. supra note 16 at 23. See Diamond supra note 11 at 256.
\item \textsuperscript{28} Barlow & Wender, op. cit. supra note 16 at 23-34, contend that the difficulty of assessing the costs arises from the act of separating the foreign operations. It would
\end{itemize}
the amount of this export profit, for indeed it represents nothing more than that profit deferred from American taxation. In ideal cases, however, it may produce the maximum gains presumed in the preceding samples.

With larger foreign operations, added benefits accrue to the American manufacturer. If a base company sells a small enough portion of its goods to each different country, it may qualify for reduced tax rates in those countries which offer them to foreigners doing only a minor portion of their business therein (as does the United States). And further, another anomaly in the tax credit computation permits the saving of taxes in excess of the American rate paid by a base company, its branches or subsidiaries. While the Code limits the credit in favor of a domestic corporation to the equivalent of the American tax on the income from each separate country, it allows a foreign subsidiary to average such taxes by treating all income and taxes as arising in one place. This advantage, however, is not a tax saving, but rather an extension of the credit, resulting in a broader resolution of the double taxation problem. It cannot be considered as a positive incentive, for it offers no advantages over American operations.

At this point it should be noted that such multiple operations run the risk of losing some of the re-investment gains if they are closely held, directly or indirectly. If a base company does not receive at least 40% of its income from the active conduct of business, as might happen when it holds stock in subsidiaries doing the actual selling in each market, it will be considered as a foreign personal holding company provided five American residents control 50% of its stock. In that event it will be permitted to accumulate only the earnings remaining after all taxes. Practically, however, this would not constitute too great a deterrent if, as was seen to be usually the case, the tax which might have been deferred was not very significant. To avoid even this loss, the company, if it were permitted to do so under the applicable foreign laws, might carry on a sufficient amount of business through branch rather than subsidiary marketing and thus stay out of the foreign holding company category.

30 § 904(a).
32 § 552(a).
33 § 551.
34 Thus, if it could operate one or more branches whose income would account for 40%
II
MANUFACTURING ABROAD

Since the rules applied in the foregoing situations are general ones, depending on the jurisdictional effects of foreign incorporation, a manufacturer may take advantage of them equally well to extend its operations further out of the country, into manufacture abroad rather than mere export. The same monetary results await it, though they may appeal to it somewhat differently according to the nature of the business.

When the manufacturer contemplates extending only part of the production abroad, he is faced with the allocation of earnings, as was the exporter. Again, the "export profit" is an element, and to achieve maximum saving the operation should arrange for this gain, together with as much more of the profits as possible, to be allocated to the foreign segment of the process. The export profit, now really a foreign manufacturing profit, is even larger because savings tend to increase the more the operations are performed abroad.

Apart from this, the maximum tax savings apply on the same principles as in the export situation. But somewhere in between total and minimal processing abroad, the export-governing rule that sales must be made ultimately to foreigners ceases to have effect and the goods may be sold in the United States. Prices in this country may be higher than abroad, in which case the importation would appeal greatly since the saving on the foreign cost of production would return a greater profit. Again, a better American market might attract the goods and support the foreign operation more securely. Whatever the reason, it becomes desirable to know when the tax savings can be preserved. The amount allocated to foreign earnings would be one criterion. No litigation has clarified the borderline at which an addition in value would no longer be treated as a sham to escape taxation of profits. The cases and writers have exposed the obvious; that a total lack of correspondence between the processing and the price charged will not be tolerated. Congressional proposals have elicited comment on the possibility of precise

of the earnings of the operation, the rest of the outlets could be incorporated without danger. For a small operation, the provision could more easily prevent the use of anything but a branch, thus cutting off the savings.

35 Except insofar as they depend on rulings which may easily be changed. Cf. Sugarman, Current Issues in Taxation of Business Investment Abroad, 17 Ohio St. L.J. 277, 287 (1956).
36 § 863(b)(2).
38 Diamond, supra note 11 at 258.
allocation of values among manufacturing stages which suggests that any businesslike rationale will satisfy the Service.\textsuperscript{39}

Here again, the bona fide firm should have nothing to fear in dividing its operations, and it should be able to enjoy a tax saving proportional to the possibilities inherent in the industry by allocating the genuine foreign stage profits to the foreign subsidiaries. The fear that some method will be devised to cut exports out of the privileged treatment of foreign income (whether by shifts in the title passage doctrine or allocation of profits), while it might with some justification plague the pure exporter, will not hold much substance for the manufacturer abroad, at least as to operations carried on there.

Similar considerations govern the tax programming of a company desiring to manufacture entirely abroad. Such an operation, however, is largely free of allocation problems, because all its profits will probably arise from its activities and be deferrable. As a matter of fact, few manufacturing firms produce their goods entirely abroad, and almost always import the basic parts from their parent. But the profits seldom occur at such levels, making any shifting of strictly normal business procedure unnecessary.

The meaning of the savings, which were measured above in relation to exporters, becomes greater in itself to the manufacturer abroad. Re-investment is closer to its normal plans than it is to the exporter’s. On the other hand, the type of investment will tend more to be associated with the business itself, and thus not to be concerned with accumulation taxes. The significant figure, then, is the extra money deferred for the investment. Since a manufacturing concern needs an even more stable market, it is unlikely to operate in or for a country whose rates are low, and consequently the amount deferred is not likely to be high.

But even the full deferred amount cannot fairly be presumed to remain available for expansion. Increased risks abroad must be offset against it. In this connection it should be remembered that the amount risked by the manufacturer is greater by far than that of the exporter. The deferred amount, looked upon as available to balance added losses, must be related to the foreign companies’ total assets. As small as the deferred amount was seen to be when taken in relation to costs of goods sold, it can be imagined that it would be considerably smaller with respect to such assets. The individual company must not forget to assess the benefits from this point of view.

\textsuperscript{39} Barlow & Wender, op. cit. supra note 16 at 26-34.
On the positive side again, a benefit not mentioned before has particular interest for the manufacturer abroad. That is the tax-free transferability of profits among the different investments of one parent abroad. Without a foreign base company, a transfer of funds from one subsidiary of the American parent to another would probably be taxed in the amount of the due American tax on the theory of constructive receipt.\textsuperscript{40} But if a foreign company is the parent, and it is incorporated in an adequate free corporate "haven," it will pay no taxes on shifting the various profits around. Thus they may be used to invest anywhere or to balance out losing operations with the profitable ones. Otherwise, less money would be available for such investment than for expansion of the earning firm itself. This added flexibility, of course, appeals only to the large operator, and is significantly a saving as well only for it. Whether such manipulation is possible by way of loan or only by the full process of dividend distribution depends on the applicable foreign laws.

III

**Extractive Industries**

The most completely foreign operation, totally separated from any export connections and often actually constituting an import industry with respect to the United States, consists of foreign extractive enterprise. While any foreign manufacturing concern may rely on imports to the parent country, few do, and the problems that arise from that trade can more fittingly be considered with the extractive operation. There, the issue often arises whether the foreign company should be a resident or nonresident corporation.\textsuperscript{41}

If the company makes less than 50% of its gross sales in the United States, it will be taxed on these sales at a rate of 30%, which is withheld on payment.\textsuperscript{42} Until it returns dividends, it can earn money on the tax deferred, depending on the foreign taxes it must pay. If the foreign tax due is zero, as it will be if the foreign rate is lower than 30% and a credit provision exists, or if foreign income is exempt there, the company will profit from accumulating its American profits at a rate equivalent to almost one and one-half times the rate of return available.\textsuperscript{43} As the

\textsuperscript{40} Gibbons, supra note 3 at 1217.

\textsuperscript{41} The difference consists in the doing of business through some representative. An integrated operation (the buyer being the parent) can avoid the danger since it needs no sales activities in the United States. The tax difference is in the deferral, a resident company being taxed yearly at 52%.

\textsuperscript{42} § 1442.

\textsuperscript{43} The same effect is obtained as with a foreign tax of 30%.
foreign tax rises above zero, the advantage decreases rapidly. To preserve the advantages, care should be taken lest the company engage in business in the United States by maintaining some operation therein. Otherwise, the corporation will be taxed at a rate of 52%.  

Likewise, to prevent the tax on accumulations from applying to the profits, these should be distributed to a base company and not held by the corporation which earns them. Were this not done, the earnings attributable to the United States would be subject to the prohibitive surplus tax. Doubt exists as to the physical ability of the United States to collect the surplus tax, but any action thereon would nevertheless constitute an avoidance of tax and be clearly unlawful even though perhaps unsanctionable.

Should the foreign extractive company sell more than 50% of its gross within the United States, it will not be able to distribute its American earnings to a base company as above, because such payment would incur a tax of 30%, resulting in a total of 51% being due on the profits. But then the accumulation tax will forbid unused surpluses to gather in the company. This time there is no possible avoidance of the obstacle without paying out dividends or shifting the use of the surplus to a reasonable business purpose, because even the base company would then be liable to the surplus tax. The reason is that any dividends paid by the extractive company are considered to be income from the United States if that company earns over 50% of its income there. As a result, they are taxable at 30% and further subjected to the excess accumulation tax. At this point, it is still profitable to keep the profits in the original company to obtain at least the tax deferral, but this alternative depends on the feasibility of keeping accumulated earnings in the country of operation, in view of its corporate and tax laws.

The simplest solution to this difficulty would be to pass title to the goods sold outside of the United States. The efficacy of this method

44 Supra note 22.
45 Section 532 applies to income from sources in the United States as regards a foreign corporation.
46 This would be impossible if the operation is a closely-held one (five persons holding over 50% of the stock), and the base company received over 80% of its income from securities. Any American earnings would be subject to the Personal Holding Company tax, § 541. Gibbons, supra note 3 at 1228, n.54.
47 Id. at 1234.
48 The dividends would be considered as income from United States sources under § 861. Thus, the 30% tax would apply to them under § 881. 30% of the 70% left after the seller paid 30% amounts to 21% more, a total of 51% altogether.
49 Supra note 45.
again depends on the foreign tax rate and the regulations governing passage of title which the foreign country might follow. Thus, exemption for the income might be lost, although the rate might still be lower than the one payable in the alternative to the United States; or it might be maintained, in which case all the profits would become available for operations. The possible saving would continue to be equivalent to the maximum re-investment potential in all the cases already considered, except in the unusual case where the whole income would be available.

One last solution may be available if the American earnings of the extractive company can be paid out as dividends to a base company which would receive non-American earnings from other operations, and then in turn distributed together with any other amounts to a second base company. The second set of dividends would then not be deemed income from the United States, because it would have come from a company which earned less than 50% of its income from American sources. This would indeed be going far for a small deferral, unless it could be done within normally existing operational schemes.

Despite the various extreme problems presented in this connection, it should be generally possible to obtain all useful benefits by simple operation. Assuming the purpose of accumulations to be for expansion, no surplus tax should enter the picture. By keeping profits at the source, the American tax can still be deferred. The only real benefit lost would be the tax-free transferability of such earnings, and this only to the extent of having them diminished by one 52% or 51% tax. They would still be transferable thereafter without additional taxes, a result not obtainable among American subsidiaries or foreign subsidiaries of one American parent.

The above considerations apply as well to any other foreign manufacturing operation. The extractive industries, however, must offset their possible tax savings by the losses which might result from the unavailability to them of any depletion allowances. On the other hand, since such industries are more likely to operate in low-tax countries, the deferral savings may possibly be closer to maximum for them than for

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50 The standards for evaluating their significances would remain the same except for the added risks assumed in retaining the title abroad.

51 See the rationale, supra note 34.

52 This assumption is justified under the policy of tax relief to encourage investment in foreign industry rather than the accumulation of profits as defined in § 532. See Note, 8 Stan. L. Rev. 77 (1955), for an excellent compilation of policy pronouncements on tax incentives.

53 If the transfer were through further dividends or security transfers. Cf. § 367.
other businesses. But the whole area of tax saving so far covered tends to be less beneficial to this type of industry since it lacks the freedom of most others in that it is so generally regulated by governments. Only small operations may escape thorough accountability, but to them tax saving is largely insignificant anyway, except perhaps in marginal respects. The large operations are seldom free to arrange their form and maneuver their taxes, and their risks are certainly greater than almost any other industry's.\textsuperscript{54}

\section*{IV
PORTFOLIO INVESTMENT}

The tax saving benefits would seem to be most attractive to an operation which concentrated on investment since they consist largely of added re-investment potential.\textsuperscript{55} Also, compared to such a venture's restricted opportunities under American incorporation, the increase in allowable accumulation abroad is much greater than that with respect to other businesses. A company holding foreign securities, if incorporated under American law, must pay out 90\% of its income or pay the corporate tax on the excess retained.\textsuperscript{56}

The foreign operation would consist in this instance of a foreign corporation incorporated in a tax "haven,"\textsuperscript{57} and holding securities of companies foreign to that "haven." Lest this company qualify as a foreign personal holding company, it should be widely held, or, if all its stock is held by one or two parent corporations, they in turn should be widely held. In this connection, the foreign company may sell securities in the United States, thus sharing all advantages open to an American counterpart.

The stockholder may expect no tax saving from any credit provision, for there is none applicable to foreign companies.\textsuperscript{58} The sole benefit obtainable from the operation is the possibility of re-investment. Its attractiveness depends on whether the shareholders rely on the profits for any great amount of their income. Thus, a truly publicly held company would be less free, presumably, to re-invest. But a group of ten investors or more, no five of whom hold more than 50\% of the shares,

\textsuperscript{54} Interestingly, the extractive industry is the largest foreign investor, with 67\% of the total.
\textsuperscript{55} Nevertheless, United States business invests the least in foreign portfolios. Survey of Current Business, May 1954, p. 10.
\textsuperscript{56} \textsuperscript{56} § 852.
\textsuperscript{57} In this case, a country favoring investment companies holding foreign securities. Canada qualifies as a base country in this respect. See Brainerd, supra note 1 at 259.
\textsuperscript{58} § 853.
may invest in this manner without becoming a foreign personal holding company, and could make the maximum of the opportunity to accumulate abroad.

The mere possibility of investing abroad more widely is not an incentive to investment if it must set off any real risks. A more likely incentive would consist of the possibility of investing the profits from abroad in American securities as insurance against the foreign risks. There seems to be no provision to prevent this, except the usual limit of 50% of income to be observed lest such profits be deemed to bring the foreign company under American law and prevent it from accumulating its earnings as was the case above with the manufacturer selling a majority of its goods in America.

V
Savings on Dissolution

A final tax saving applies to all the operations mentioned above. It consists of the possibility of returning foreign profits by way of capital gains rather than dividends. If the foreign or base company is liquidated, the process will convert the profits which it has accumulated into capital gains, taxable at only 25%. This method produces a greater saving than regular dividend distribution to the extent that the total foreign tax paid on receipt of the income was below 27%. In the case of an investment company, it will produce savings up to a foreign tax rate paid of 36%, since the tax credit saving is not available.

Even in such special cases of low foreign rates, the saving represents an investment of the longest duration, since it is highly doubtful that liquidations would be recognized by the Service if repeatedly resorted to in essentially the same venture. While no case ruling has so indicated and no regulation exists, it is very likely that so much life could be found in section 269 as to prevent multiple dissolutions, if not single ones. The liquidation would therefore have to be genuine, which would relegate it to the actual closing of the whole foreign operation.

In the case of a foreign manufacturing company, the process might be ruled to have been part of a collapsible corporation scheme if a sub-

60 Provided the profits are accumulated in another base company. Supra note 46.
61 Gibbons, supra note 3, at 1215 sets out the comparative advantages in table form.
stantial amount of property is disposed of in conjunction with the liquidation.  

There exists no ruling on the applicability of this provision to foreign corporations, but in view of the broad phrasing of the section, this lack is rather an unsettling factor than an assurance. The danger of applicability might be avoided by having the foreign company sell its assets before liquidation, but this might subject it to a foreign tax, cancelling the benefit of the saving.

In any case, the maximum saving realizable under this method is attained only at the end of operations. Assuming foreign taxes of 20%, the lowest likely to have been paid, 10.3% more than would otherwise have been received of the profits is returned. This gain clearly represents a smaller percentage return on the accumulated profits per year the longer it is postponed.  

VI

CONCLUSION

It is perhaps unfair to evaluate the overall effects of the tax savings as incentives, for none of them appears to exist as a deliberate attempt to create a greater flow of capital abroad. Nevertheless, the evidence for their evaluation will be of the same kind as that for planned incentive programs, since those which are today under consideration are largely elaborations upon the present accidental savings. The experience under the Code is still the chief proof summoned for or against the enactment of further aids.

Perhaps the most striking overall feature of the savings is that they apply to exporters as extensively as to others. It cannot be said, then, that if a manufacturer decided to operate abroad, it was induced by the tax savings. It could gain the savings cheaper by exporting. Usually in fact, other considerations dictate the establishment of foreign manufacturing, such as the added profits available or trade barriers raised against imports. This is vividly illustrated by the current fervor of activity among exporters and foreign investors alike to establish themselves within the new European Common Market.

It is with this in mind that Barlow and Wender proposed the Foreign

64 § 341.
65 Thus, in ten years it would represent an additional 1% simple interest per year on the principal.
66 Smith, Problems in the Taxation of Foreign Income, 10 Nat'l Tax J. 38 (1957).
Business Corporation. This plan essentially attempts to eliminate the credit error, which makes some of the savings profitable in themselves, and thus to leave only re-investment as a feature. The effect is admittedly not a positive incentive but rather a negative one, removing obstacles and difficulties of foreign law.

Indeed, re-investment was seen to constitute no inducement, but rather a help to the investor who had decided upon foreign operations. Because of this, and in view of the presently small credit saving, Congress has been examining proposals for an across-the-board reduction of the taxes applicable to foreign income. The same reasoning has prompted Munsche’s suggestion of extending section 931 to all foreign operations, adding changes to reflect and preserve current opportunities in base company operation within an American company.69 The plan, in effect, adds to the Foreign Business Corporation a tax reduction for added incentive. The objection Barlow has made in answer is that this added saving would accrue to exports equally since the provision excluding them cannot be enforced.70

The overall effect of the two approaches would not seem to represent a great improvement over present investment potential. The Barlow plan aims to encourage the re-investment of 200 million dollars collected annually in taxes on foreign investment. The sum will possibly help only a little against the six billion dollar annual trade imbalance, since the investment would itself increase foreign imports from the United States without a likelihood of increasing exports.71 But the glaring fault, appreciated by Barlow, and applicable as well to the Munsche plan, is the lack of any provision to assure re-investment abroad rather than in the United States. Barlow relies on past experience that foreign investors tend to re-invest and on the possibility of tighter regulations over operations incorporated in the United States.

The latter reliance points up an added hazard of the plans; namely that the United States might itself become a tax haven drawing foreign investors to it. This would destroy any benefits to the world’s trade balance and further hinder development abroad.

As to tax reductions, the meaning of such savings was analyzed above in connection with the tax credit saving. It was evident that such sav-

71 Diamond, supra note 11, at 258.
ings, amounting to insignificant percentages of assets, costs and risks would not act as incentives to foreign operations. Even in the maximum case, which returns more than current proposals would, the savings tend to be meaningful to marginal enterprises, where markets are saturated and small money differences control.

The overall policy of tax saving in foreign trade cannot be discussed without either the quantitative refinements of the general concept or the larger picture of the nature of American investment itself. It is submitted that today at least is not the time for tax saving incentives, but for combined plans of risk insurance, capital loans, and development aid.\textsuperscript{72} Europe is already moving toward trade patterns of the sort which will be competitive with, rather than dependent on American capital. The need is for capital to develop the remaining areas of the world to compete with established firms in Europe, and that requires much more saving than tax.

\textbf{"AUTOMATIC RESERVATIONS" AND THE WORLD COURT}

\textbf{EUGENE J. MCDONALD}\textsuperscript{*}

Several nations, in accepting the compulsory jurisdiction of the International Court of Justice, have excluded disputes which the accepting nation determines to be "within its domestic jurisdiction." Judge Lauterpacht of the World Court contends that "automatic reservations" are invalid because (1) they are in irreconcilable conflict with the statute of the Court, and (2) they prevent the existence of a valid legal obligation. Professor McDonald, in opposition to this contention, holds (1) that as long as the Court retains the power to pass on its own jurisdiction in certain cases, it is acting in accordance with its statute, and (2) that private law standards of legal obligation cannot be applied to international agreements.

More than a decade has passed since the United States formally accepted the compulsory jurisdiction of the International Court of Justice,


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and the intervening period has ushered in developments which make appropriate a fresh look at that acceptance. On August 26, 1946, President Truman, after the approval of the Senate and pursuant to article 36, paragraph 2 of the statute of the Court, filed with the Secretary-General of the United Nations the American Declaration of Acceptance.\(^1\) Seldom had a voluntary surrender of sovereignty received such wide acclaim; seldom too had a declaration of acceptance been bathed in such trenchant criticism.\(^2\) Plaudits were to be expected in view of America’s longstanding reluctance to become a party to the Statute of the Permanent Court of International Justice; but to understand the position taken by its critics, a glimpse at the form of the acceptance is essential.

The instrument to which the United States acceded—article 36, paragraph 2 of the Statute of the International Court of Justice\(^3\)—provides in part as follows:

The states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes . . . .\(^4\)

As originally phrased, Senate Resolution 196, sponsored by Senator Morse, was a simple direct concession to the language of article 36, excluding from the authority of the Court only those matters which were "essentially within the domestic jurisdiction of the United States."\(^5\) This

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\(^1\) For the complete text of the American Declaration, see Declaration by the President of the United States, August 14, 1946, 61 Stat. 1218, T.I.A.S. No. 1598.


\(^3\) For the complete text of the statute, see Charter of the United Nations and the Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1031, T.S. No. 993.

\(^4\) 59 Stat. 1060, T.S. No. 993 at 30. The full text of article 36, paragraph 2, of the statute of the Court is as follows:

The states parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the court in all legal disputes concerning:

a. the interpretation of a treaty;

b. any question of international law;

c. the existence of any fact which, if established, would constitute a breach of an international obligation;

d. the nature or extent of the reparation to be made for the breach of an international obligation.

\(^5\) For the full text of the Morse resolution, see S. Res. 196, 79th Cong., 2d Sess., 92 Cong. Rec. 10706 (1946).
reservation was not uncommon, having first been employed by the United Kingdom when that country acceded to the compulsory jurisdiction of the Permanent Court of International Justice in 1929. It was a phrase with an impressive ring but of unknown practical effect, and presumably was included in the Senate resolution to mollify historic apprehensions of encroachment on American sovereignty. But this resolution was not sufficient to placate such fears, and the Morse resolution was amended on the floor of the Senate by a terse but significant addendum to the original reserving clause: "as determined by the United States." In its final form the American Declaration accepted the compulsory jurisdiction of the World Court except as to matters which the United States unilaterally determines to be within its own domestic jurisdiction. The reasoning which engendered this amendment is best illustrated by a remark of its author, Senator Connally, made during the course of the Senate debates: "I do not favor and I shall not vote to make it possible for the International Court of Justice to decide whether a question of immigration to our shores is a domestic question or an international question.

I

BACKGROUND OF THE INVALIDITY CONTENTION

Strong feelings against the Connally amendment abided in many quarters and pleas for its withdrawal were not uncommon. Some authorities feared imitative action by other states with a consequent dilution of the Court's role in international law. As subsequent events have demonstrated, these predictions were accurate, for of the thirty-two states adhering to the compulsory jurisdiction, as of August 1957, five had incorporated reservations similar to that of the United States. A sixth state had reserved an even broader domain for unilateral determination.

6 Letter to the Secretary-General of the League of Nations regarding the position of the United Kingdom in Relation to the Optional Clause of the Statute of the Permanent Court of International Justice, Misc. No. 8 (1929).
7 See the remarks of Senator Vandenburg in 91 Cong. Rec. 6985 (1945).
8 92 Cong. Rec. 10624 (1946).
9 Id. at 10695.
10 The Assembly and House of Delegates of the American Bar Association requested a withdrawal of the resolution. 33 A.B.A.J. 249 (1947); id. at 430 passim.
11 Hudson, supra note 2, at 836.
12 France, Liberia, Mexico, Pakistan and the Union of South Africa. [1956-1957] I.C.J.Y.B. 213-23. India had included a similar reservation but withdrew its acceptance early in 1957. Id. at 207.
13 The United Kingdom in a declaration filed April 18, 1957, excepted from the juris-
Perhaps the most prophetic portent uttered came during the course of the Senate debates with the insistence by Senator Pepper that the Connally amendment would render the whole acceptance invalid.\textsuperscript{14} He reasoned that the reservation by an accepting state of the right to determine unilaterally what matters were essentially within its domestic jurisdiction, and hence, beyond the purview of the Court's authority, violates the spirit of article 36, paragraph 2. Further, and more important, he believed that such a reservation conflicts with the letter of article 36, paragraph 6, which provides: "In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court."\textsuperscript{15} Recent rumblings by some judges in the World Court lend support to the Senator's contentions, and in view of their broad international ramifications, invite scrutiny.

On July 6, 1957, the International Court of Justice delivered a significant decision in the \textit{Case of Certain Norwegian Loans}.\textsuperscript{16} The French Government had espoused the claims of certain French creditors, and was pressing for an interpretation of loan contracts floated by Norway between 1885 and 1909. Continued diplomatic correspondence between 1925 and 1955 had failed to resolve the differences, and in the latter year France filed an application against Norway in the International Court of Justice. This application was based on the optional clause, article 36, paragraph 2. Both countries had accepted the compulsory jurisdiction of the Court. The substantive issues of the dispute, however, were not adjudicated, because the Court sustained a Norwegian jurisdictional objection. To appreciate the rationale of the decision, brief reference to the terms of the French Declaration of Acceptance is essential.\textsuperscript{17}

France in its acceptance of compulsory jurisdiction had incorporated an exception similar to that which the United States expressed in the Connally amendment—conveniently labelled "automatic reservation" by one member of the Court.\textsuperscript{18} This reservation, as is true of all reservations to the compulsory jurisdiction, is a two-edged sword. If France were assailed before the International Court of Justice as a de-

\textsuperscript{14} 92 Cong. Rec. 10692 (1946).
\textsuperscript{15} 59 Stat. 1060, T.S. No. 993 at 30.
\textsuperscript{17} [1956-1957] I.C.J.Y.B. 213.
\textsuperscript{18} Judge Lauterpacht in a separate opinion utilizes this term for what the writer believes to be the first time. [1957] I.C.J. Rep. at 34.
fendant, it could preempt the jurisdiction of the Court if the matter was “essentially within the national jurisdiction as understood by the Government of the French Republic.” But when France is a suitor to the Court, as in this case, the defendant state by virtue of the reciprocity principle explicitly set forth in article 36, paragraph 2, can itself invoke the “automatic reservation,” and oust the jurisdiction of the Court. This is true even though its own acceptance was not so limited.

In the instant case, Norway interposed two preliminary objections to the Court’s jurisdiction. First, Norway contended that by international law criteria the issues were essentially within its domestic jurisdiction. Second, and more important, Norway relied on the automatic reservation in the French Declaration, and “determined” that the matter was essentially within its national jurisdiction. The Court deemed itself competent to proceed directly to the most expeditious solution available, and accordingly sustained the Norwegian contention, based on the automatic reservation reciprocally afforded that state. The majority opinion declined to review the validity of the automatic reservation because the parties themselves had not raised the issue. Indeed, it appears likely that the issue never will be raised until the defendant state invoking the reservation is entitled to rely thereon by virtue of its own acceptance, rather than by reason of reciprocity. Only then would the state raising the issue benefit by a conclusion of invalidity.

The Norwegian Loans case bears several marks of significance. For the first time in its eleven year span of existence, the automatic reservation was invoked to oust the Court of jurisdiction. The very fact that the majority opinion expressly declined to rule on its validity is ample evidence that the Court has not removed the aura of doubt in which the automatic reservation has been shrouded since its inception. More noteworthy, however, are the ominous utterings of the remaining members of the bench, which, if subscribed to by their brethren, may well spell doom for the automatic reservation. The most cogent of these foreboding pronouncements is that of Judge Sir Hersch Lauterpacht, who, in his separate opinion appended to the Norwegian Loans decision, persuasively urges two separate reasons why the automatic reservation should be declared invalid by the Court. This able English jurist first concludes

20 The principle of reciprocity is inherent in the terms of article 36, paragraph 2: “in relation to any other state accepting the same obligation.” See the majority opinion in the Norwegian Loans case for a discussion of its operative effect. [1957] I.C.J. Rep. at 24.
21 Id. at 14-15.
22 Id. at 29.
that there is an irreconcilable conflict between the unilateral right of
determination inherent in the automatic reservation and article 36, para-
graph 6 of the statute of the Court—a conflict in which the statute must
prevail. Secondly, and with equal vigor, he maintains that by its very
nature the automatic reservation prevents the existence of a legal obli-
gation required for a valid acceptance of the compulsory jurisdiction
under article 36, paragraph 2. It is proposed in the remainder of this
Comment to analyze Judge Lauterpacht's position. Before doing so,
however, it may be well to gauge the judicial climate in which the issue
is developing by brief allusion to the expressed opinions of some other
members of this international tribunal.

Judges Guerrero and Read both delivered dissenting opinions in the
Norwegian Loans case, and the attitude of each carries the conviction
that the automatic reservation is repugnant to the provision of article 36,
paragraph 6, which vests the Court with sole authority to decide juris-
dictional disputes. Judge Guerrero stated: "The problem to be solved is,
however, a simple one. It is, in fact, the problem whether the unilateral
will of one State or the common will of the Parties before the Court, can
have priority over the collective will expressed in an instrument as im-
portant as the Statute of the Court."23

Judge Read on the other hand must first surmount a construction prob-
lem before his views can be considered parallel to those of Judge Lauter-
pacht. By concentrating on the particular phraseology of the reservation
in question, Judge Read, in what is probably a unique interpretation
of this reservation, still manages to give the Court a role as final review-
ing authority. The words of the reservation exempt from the compulsory
jurisdiction of the Court all matters which, "as understood by" the gov-
ernment invoking the reservation, are essentially within its domestic
jurisdiction.24 In the view of this Canadian jurisconsult, an actual, ob-
jectively tenable understanding by the government concerned is a con-
dition precedent to a valid invocation of the reservation. Accordingly,
when the defendant state does rely on this escape clause, the Court,
acting as final arbiter, determines whether there are sufficient facts pres-
ent from which the invoking state could reasonably conclude that the
issue is a domestic one.25 But Judge Read hastens to add that the
Court is not thereby reviewing the good faith of the invoking state26—

23 Id. at 69.
26 Ibid.
seemingly a distinction without a difference. If the intention of the states which included these reservations is to be given any effect before the Court, then it appears certain that Judge Read’s interpretation cannot be sustained. The Judge adds that if the reservation is deemed to allow no judicial review, then it is repugnant to article 36, paragraph 6, and must fall.

As is evidenced by the judicial views expressed above, and even more sharply by the writings of esteemed publicists, the validity of the automatic reservation is denied by a substantial array of authority. Moreover, it is perhaps equally significant that no champions of the reservation have come forward with developed arguments supporting its validity. All the protestations and pronouncements of invalidity appear to have one common thread of reasoning, one rationale that aligns them with the position taken by Judge Lauterpacht in his first argument: the automatic reservation is in absolute and irreconcilable conflict with article 36, paragraph 6 of the statute of the Court.

II

Power of the Court to Declare an Acceptance Invalid

The heart of Judge Lauterpacht’s rationale in his first argument revolves about what he deems to be a totally irreconcilable conflict between the automatic reservation and article 36, paragraph 6, of the Court’s statute. From this conflict he concludes that the reservation is invalid. Then, with seemingly unimpeachable logic, he contends that if the reservation itself is declared invalid, the whole declaration of acceptance which incorporates it must also fall. This is so because the reservation

27 At least with regard to the United States’ Acceptance, the Senate debates on the Connally amendment leave little doubt that that body did not envision any review of an American determination that a given issue was essentially within the domestic jurisdiction. 92 Cong. Rec. 10683-97 (1946).
30 While there are numerous avowals of its validity, the writer could find but one reason advanced for such belief, and that was but an aside. Hudson, The World Court: America’s Declaration Accepting Jurisdiction, 32 A.B.A.J. 832, 836 (1946).
32 Id. at 46. See also the interesting views of Professor Roger Pinto of the Paris University law faculty on this point. Pinto, L’Affaire Interhandel, 84 Journal du Droit International 29 (1958).
was considered far too important by the incorporating states, far too much the essence of their obligation, to allow a severance with the balance of the acceptance remaining in force. Consequently, with optional clause membership of more than one-fifth of the declaring states in the balance, the immense proportion assumed by the validity issue is readily apparent.33

Before delving into the actual merits of Judge Lauterpacht’s contentions concerning the conflict of the reservation with article 36, paragraph 6, a brief pause at the conclusion derived from those contentions would not be amiss. The learned jurist appears to say that the Court has no alternative when confronted with an acceptance containing the automatic reservation, but must affirmatively declare such reservation invalid. Presumably this would entail the obliteration and extinction of the acceptance as an international legal instrument. In view of the far-reaching ramifications of such a holding, it is reasonable to question the power of the Court to declare an acceptance invalid. Judge Lauterpacht himself in writing some years ago on the same topic inquired: "[C]ould not the very competence of the Court to overrule this particular objection to its competence be questioned by a government determined to remain judge in its own cause?"34

The Court is a creature of its statute and, according to articles I of the Statute of the International Court of Justice35 and 92 of the United Nations Charter,36 must function in accordance with its statute. But where in either the statute or the charter does one find bestowed upon the Court the power to pass on the validity of acceptances under the optional clause? Such a crucial power of review is certainly not expressed in chapter II of the statute,37 dealing with the competence of the Court.

Judge Lauterpacht’s treatment of this point seems to lack the desirable definition, but it is the writer’s belief that he infers this power of review in the following manner. Article 36, paragraph 6 of the statute provides that any dispute as to the Court’s jurisdiction will be settled

33 At least six of the thirty-two signatories have incorporated such reservations. [1956-1957] I.C.J.Y.B. 207. And arguably the United Kingdom’s reservation concerning matters affecting national security must also be invalidated if the automatic reservation is invalid.
34 Lauterpacht, The British Reservations to the Optional Clause, 10 Economica 137, 154-55 (1930).
36 Id. at 1051, T.S. No. 993 at 21.
37 Id. at 1060, T.S. No. 993 at 30.
by decision of the Court; article 1 of the statute of the Court and article 92 of the United Nations Charter require the Court to function in accordance with its statute, and consequently the Court cannot function in any given case unless it has the power to decide jurisdictional disputes. The presence, however, of an automatic reservation inevitably and invariably denies to the Court the power to decide such disputes, leaving this power solely in the hands of the defendant state. Therefore, the presence of the automatic reservation defies the Court's functioning in accordance with its statute, and necessarily the Court must declare the reservation invalid. In Judge Lauterpacht's words: "If the Court cannot function except in conformity with its Statute then, when confronted with an Acceptance containing a reservation which is contrary to a provision of the Statute, it must consider that reservation as invalid."38

As strong as this reasoning is, it appears open to criticism when viewed in light of other applicable doctrines of international law. It is not uncommon to consider the act of a state in filing a declaration of acceptance under the optional clause as an accession by that state to a multilateral treaty. Indeed, Judge Lauterpacht himself seems satisfied to so consider it when he says: "In fact there is no difficulty in visualizing the Declaration of Acceptance as an accession to a multilateral treaty in the same way as, in the case of various conventions concluded under the auspices of the United Nations, Governments accede to a text established by the General Assembly."39 Presumably, this would include the Genocide Convention, and in that connection interesting reference may be made to certain questions propounded to the Court by the General Assembly of the United Nations on November 16, 1950.40 The questions concerned reservations made by a state in acceding to a multilateral convention, and the Court on May 28, 1951, by seven votes to five, delivered its answers in an extended advisory opinion.41 The Court first stated that the acceding government can be considered "a party to the Convention if the reservation is compatible with the object and purpose of the Convention . . ."42 The Court went on to say:

that if a party to the Convention objects to a reservation which it considers to be

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39 Id. at 49.
42 Id. at 29.
incompatible with the object and purpose of the Convention, it can in fact consider that the reserving State is not a party to the Convention; (b) that if, on the other hand, a party accepts the reservation as being compatible with the object and purpose of the Convention, it can in fact consider that the reserving State is a party to the Convention. 43

Applying the Court's pronouncement to the facts in the instant situation would appear to produce alarming results. The convention in this case is the optional clause and the point in dispute is the automatic reservation. Judge Lauterpacht does not consider the automatic reservation to be "compatible with the object and purpose of the Convention," and he would, therefore, have the Court declare the reservation invalid—an action tantamount to the Court's arrogation of the power to speak as the representative of each of the thirty-one other signatories to the convention. Yet, in its advisory opinion on reservations to the Genocide Convention, the Court stated that the parties were to determine whether the questioned reservation was "compatible with the object and purpose of the Convention." 44 But by a declaration of invalidity with respect to the automatic reservation, the Court arrogates to itself the power to speak not only on behalf of the twenty-five or twenty-six uncommitted signatories who have not objected to the automatic reservation of others, but also, and more shockingly, for the six or seven parties to the optional clause who have already stated that they consider this reservation compatible with the object and purpose of the convention by including similar reservations in their own acceptances. By assuming to speak on the issue of the compatibility of the reservation with the statute, the Court not only undertakes to speak as representative of those states which have not included such a reservation in their acceptance, but it also overrules the decision affirming compatibility already made by the states including the same reservation in their own acceptances. If this is not a usurpation of power by the Court, where does one find its justification? Certainly it is not expressed in the statute to which Judge Lauterpacht insists the Court must tenaciously cling in its every move.

III

The Conflict Between Automatic Reservations and Article 36, Paragraph 6 of the Statute of the Court

Assuming, arguendo, a power in the Court to make a finding of invalidity, it seems clear that the cogency of Judge Lauterpacht's first argu-

43 Id. at 29-30.
44 Supra note 41.
ment is dependent upon a finding that inclusion of the automatic reservation in a declaration of acceptance makes it impossible for the Court to function in accordance with its statute. There must exist such an inherent repugnance between the unilateral right of determination which the automatic reservation allows and the provision of article 36, paragraph 6, requiring the Court to decide jurisdictional disputes, that under no circumstances can the two be reconciled. In a word, if the defendant state invokes the reservation, then that state and not the Court determines the lack of jurisdiction; on the other hand, if the reservation is not invoked and the Court decides the controversy, it does so, not by reason of its own determination that it has jurisdiction, but rather by the consent of the defendant state, on the basis of *forum prorogatum*.\(^{45}\) Indeed, Judge Lauterpacht would seemingly be compelled to concede that if within the operational orbit of the automatic reservation there is any opportunity, however slight, for the Court to decide a jurisdictional question, as opposed to decision by the parties, then no irreconcilable conflict exists and the reservation is sustainable. Just how minimal that opportunity need be can be judged from his following remarks in the *Norwegian Loans* case:

In accepting the jurisdiction of the Court Governments are free to limit its jurisdiction in a drastic manner. As a result there may be little left in the Acceptance which is subject to the jurisdiction of the Court. . . . But the question whether that little that is left is or is not subject to the jurisdiction of the Court must be determined by the Court itself. . . . It has been said that as Governments are free to accept or not to accept the Optional Clause, they are free to accept the very minimum of it. Obviously. But that very minimum must not be in violation of the Statute.\(^ {46}\)

What Judge Lauterpacht demands then is some occasion, however rare, where the Court, acting pursuant to a declaration of acceptance containing an automatic reservation, has the power to determine the existence or nonexistence of its jurisdiction. It is proposed to demonstrate that under some circumstances the Court may, indeed must, still decide jurisdictional questions even though the automatic reservation lurks in the background.

At the outset two different circumstances must be distinguished and accorded separate treatment: first, where the defendant state invokes the reservation and ousts the jurisdiction of the Court; and second, where the defendant state, though entitled to invoke the reservation, does not do so. In the former situation it has been maintained by an

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\(^{45}\) [1957] *I.C.J. Rep.* at 64.

\(^{46}\) *Id.* at 46.
eminent authority that the Court still functions in accordance with paragraph 6 of article 36 when it decides that it has no jurisdiction. Judge Lauterpacht condemns this view as mere verbalism, and contends that when the Court is confined to registering a prior decision of the defendant, it is not really deciding a jurisdictional dispute, and therefore is not functioning in accordance with its statute. While conceding merit in Judge Lauterpacht’s reasoning it must be remembered that the Court’s function is not to shackle paragraph 6 with the strictest interpretation possible. If that paragraph can be interpreted as consistent with the automatic reservation then presumably it is the duty of the Court to so interpret it.

Assuming, arguendo, the validity of Judge Lauterpacht’s objections to the above-mentioned solution, the result would be that when the automatic reservation is actually invoked, the Court could have no further connection with the case, not even to the extent of formally registering the decision of the defendant state which preempts the jurisdiction, because it would not then be functioning in accordance with its statute, particularly paragraph 6 of article 36.

There remains for consideration, however, the situation where the defendant state, though entitled to invoke the reservation, does not do so. This situation may occur for any one of innumerable practical reasons, and in fact provided the backdrop for the Case Concerning Rights of Nationals of the United States in Morocco. Indeed, it does not unduly tax the imagination to conceive of circumstances where a defendant, being loath to employ this escape clause, relies instead on the soundness of its claim that by international law the issue is essentially within the domestic jurisdiction of the particular defendant state. In this connection, it is Judge Lauterpacht’s position that when the defendant state does not invoke the reservation, the jurisdiction which the Court has is based not on the optional clause, but on the basis of ad hoc consent. In speaking of the Morocco case, he says that, “the jurisdiction of the Court was in fact exercised not on the basis of the Optional Clause but on the principle of forum prorogatum, i.e. on what was actually a voluntary submission independent of the source of jurisdiction originally invoked . . . .” But does this not beg the question? Is not Judge Lauterpacht assuming to be true that which is yet to be proven, namely

47 This is the argument for validity put forward by Hudson, supra note 30, at 836.
that a declaration under the optional clause which contains the automatic reservation is invalid because there is no opportunity within its sphere of operation for the Court to function in accordance with its statute by itself deciding jurisdictional disputes? Seemingly this is the fallacy of that jurist’s position, and the writer proposes to prove that co-existent with the automatic reservation is the opportunity, however minimal, for the Court to decide its own jurisdiction.

Preliminarily, it might be noted that if the defendant state were free at any point in the proceedings to assert the automatic reservation, then Judge Lauterpacht’s position would be possessed of considerably more merit. If the defendant could, at any point up to judgment, interject the reservation for the first time and remove the case from the Court’s hands, then, concededly, it would be difficult to maintain a position that the Court determines the existence or nonexistence of its jurisdiction. But is it not entirely within the competence of the Court to rule that by failing to invoke the reservation in its first responsive pleading the defendant has waived its right to rely thereon; or that once the jurisdiction of the Court vests because of the defendant’s failure to employ the reservation initially, that jurisdiction cannot be divested by any act of the defendant? By analogy, the ruling of the Court in the Nottebohm Case⁵¹ would seem applicable. In that case the Court decided that once an application has been filed against a state whose declaration of acceptance allowed termination without any prior period of notice, the jurisdiction of the Court vested at that time, and could not be unseated by any subsequent attempt to terminate. If a similar rule were applied to automatic reservations, then, from the moment the defendant filed its response without mention of the reservation, the Court would be empowered to decide the existence or nonexistence of its jurisdiction. Indeed, by article 38, the Court would be obliged to dismiss if the issue did not allow a decision in accordance with international law.⁵²

Judge Lauterpacht sought some instance, however isolated, where the Court could decide its own jurisdiction in the face of an acceptance containing the automatic reservation. The writer submits that the above discussion delineates that opportunity. The net result would be that if the defendant state invokes the reservation in its first responsive pleading, then the Court could not entertain the case, even to the extent of

₅² Paragraph 1 of article 38 of the Statute of the International Court of Justice, provides in part as follows: “The Court . . . is to decide in accordance with international law such disputes as are submitted to it . . . .” 59 Stat. 1060, T.S. No. 993 at 30.
formally registering the decision of the parties, because any action by
the Court would be contrary to article 36, paragraph 6 of its statute.
But if the reservation was not invoked at that time, then the Court, and
the Court alone, would be empowered to decide its jurisdiction.

IV
THE AUTOMATIC RESERVATION DEFIES THE ESSENCE OF A LEGAL OBLIGATION

In a second argument directed against the validity of automatic reserva-
tions, Judge Lauterpacht takes a position which in many quarters will
be considered novel. In essence he contends that a declaration of accept-
tance incorporating this reservation is not a valid legal instrument be-
cause it is not consistent with the requirements of a "legal obligation.”
He assumes that acceptances of the optional clause must be "legal instru-
ments” in a private law sense of the term; that is to say, such acceptances
must create legal rights and obligations in the same sense that a contract
does in municipal law. He states that:

the Acceptance embodying the “automatic reservation” is invalid as lacking in an
essential condition of validity of a legal instrument. This is so for the reason that
it leaves to the party making the Declaration the right to determine the extent and
the very existence of its obligation. . . . An instrument in which a party is entitled
to determine the existence of its obligation is not a valid and enforceable legal in-
strument of which a court of law can take cognizance. It is not a legal instrument.
It is a declaration of a political principle and purpose.53

Judge Lauterpacht's statement concerning the automatic reservations
and "legal obligation” is but a truism when viewed in the light of pri-
ivate law standards. But assuming that the statute of the Court does
require a declaration of acceptance to bespeak legal obligation, what is
Judge Lauterpacht's justification for measuring the content of that term
by private law standards? Can it not be said that the concepts of "legal
obligation” and "valid legal instrument” have a different meaning for
purposes of international law than they have for purposes of domestic
law? Must not the terms be applied analogically within the framework
of international law? Arguably, the content of international jurispru-
dence is determined by the extent to which the enlightened nations of
the world share a common understanding of rules of conduct inter se
at any given point in time. Conceding this to be true, can it then be
said that the international community today has progressed so far that
it understands no obligation to be a legal obligation, no instrument to

be a legal instrument, except as measured by the rigid standards of municipal law? Granting a tendency in that direction, conceding the increasing stringency of international arbitration conventions, still it appears doubtful that international legal progress is as marked as Judge Lauterpacht implies. Indeed, writing as late as 1930, he observed: "It would be difficult to maintain that either any general principles of present day international law or the history of international arbitration expressly exclude the right of a State to determine unilaterally whether a general reservation is applicable or not."\(^{54}\) In his separate opinion he refers to a number of important arbitration conventions concluded both before and after the First World War which contained similar provisions for unilateral determination; and when driven to comment on these provisions he concludes: "They were devoid of an element of effective legal obligation."\(^{55}\) But would the signatory nations to these treaties, many of whom Judge Lauterpacht represents in his juristic capacity, agree that the treaties did not create legal obligations and were not valid legal instruments? It is at least questionable that they would.

At least two reasons militate against the Court's use of the private law standard suggested by Judge Lauterpacht. First to be considered is the catastrophic effect of such a holding in the international arena generally. What will be the effect on the existing treaties and conventions to which Judge Lauterpacht refers in his opinion? Presumably the Court could not entertain a suit initiated thereunder because no valid legal instrument is involved. And even today the United States has incorporated such a reservation in a number of its treaties by making the obligation to arbitrate subject to the limitations contained in its declaration of acceptance under the optional clause.\(^{56}\) Arguably, the United States could not be considered a party to these treaties because its declaration of acceptance is not a valid legal instrument; and worse yet, the International Court of Justice could not, in the words of Judge Lauterpacht, "take cognizance" of claims arising thereunder for that very reason.\(^{57}\) At best such a ruling by the Court would cause manifold confusion in the international field, and at worst it might be a far-reaching stamp of invalidity.

If the Court were to follow the rationale of Judge Lauterpacht in de-

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54 Lauterpacht, supra note 34, at 152.
nouncing those declarations of acceptance containing the automatic reservation, then logically the Court must declare invalid almost one-half of the present declarations under the optional clause. And why? Precisely because that many of the declarations defy a legal obligation in the sense that Judge Lauterpacht employs that term.

The thesis of Judge Lauterpacht would deny efficacy to all acceptances which do not create “effective legal obligations,” and he uses that phrase in a private law connotation, citing Williston’s Treatise on Contracts to demonstrate that where a party is free to determine the existence of its obligation, it is in fact under no legal obligation. While it must be conceded that the presence of an automatic reservation prevents an acceptance from meeting the legal obligation criteria of private law, still it is strenuously urged that at least six other declarations would fall for the same reasons.

On April 18, 1957, the United Kingdom filed a declaration of acceptance under the optional clause which excepted from the jurisdiction of the Court, “any question which, in the opinion of the Government of the United Kingdom, affects the national security of the United Kingdom or any of its dependent territories.” If the automatic reservation is too subjective to admit of legal obligation, then, a fortiori, does not this United Kingdom Acceptance impugn obligation? The automatic reservation, although invocable upon a subjective determination, can at least be so measured by objective standards as to allow justifiable criticism of misuse.

More significant still are the numerous acceptances of compulsory jurisdiction which allow termination without any prior period of notice. Actually these fall into two categories. Some declarations, like those of Australia, Israel, the Philippines, Portugal and the Union of South Africa, allow abrogation without notice from the moment they are deposited. Others, notably Canada, Liberia and Mexico, while stating an initial period during which no cancellation is allowed, provide that after expiration of such period the acceptance shall remain in force until notice of termination is given. Employing the criterion which Judge Lauter-

58 1 Williston, Contracts § 43 (3d ed. 1957).
61 Cf. the declarations of acceptance filed by Australia, France, Israel, the Philippines and Portugal. Id. at 208-21.
62 At the present time Canada is the only state, other than those whose acceptances already include the automatic reservation, that falls within the purview of this statement. Id. at 210.
pacht has championed, it is submitted that the former group is invalid *ab initio*, while the last described acceptances become invalid immediately upon expiration of the initial period. It should be obvious that by private law standards no "effective legal obligation" arises where the unqualified right to cancel is retained by a party to an agreement. But if further demonstration is required, one need only enlist the same standard to which Judge Lauterpacht himself rallies: Williston, in his *Treatise on Contracts*, states that, "An agreement wherein one party reserves the right to cancel at his pleasure cannot create a contract." It should be evident that these acceptances and those containing the automatic reservation stand in pari delicto, and attempts to denounce the one while justifying the other can only be idle folly.

No mention has been made of the legal status to be accorded those eight acceptances which contain no provision for termination. Arguably, their legality might also be questioned, but an adequate delineation of the probable consequences of Judge Lauterpacht's rationale has, it is believed, been made. No express words of the statute impose upon the Court a duty to measure the validity of declarations under the optional clause by domestic law standards. And use of that criterion may well subvert the very purpose to be accomplished by its employment.

V

Conclusion

As has been amply demonstrated, the nimbus of invalidity which hovers above the automatic reservation today is of far more consequence than the lone senatorial outcry heard in the days of its inception. The automatic reservation has unquestionably weakened the role of the Court and dimmed the prestige of compulsory jurisdiction. Outcries against these escape clauses are becoming increasingly more vocal. But whether one agrees personally with the need for or the aim of such a veto power, incontrovertible arguments must be arrayed against it before it will topple. To say that such a reservation conflicts with the statute is only partly true. There is no absolute repugnance, for the Court still has some vestige of sovereignty, which while slight is sufficient to satisfy the literal terms of the statute. To say that the reservation defies legal obligation is to launch forth a questionable journey into

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64 At present the declarations of at least eight states make no mention of expiration dates. These include Columbia, Dominican Republic, Egypt, Haiti, Nicaragua, Panama, Paraguay and Uruguay. [1956-1957] I.C.J.Y.B. 211-25.
private law standards, a journey where the enormity of the consequences deny justification for the venture. The strength of neither argument is equal to the task confronting it.

Finally, the Court's power to sit in judgment on the actions of its creators can be most seriously questioned. With one-fifth of the membership now employing the reservation, what would be the result if one-half, or even the total membership affirmed its compatibility with the statute? At some point the Court must capitulate to its raison d'être.

All of these factors indicate security and continued vitality for the automatic reservation. If a system of compulsory jurisdiction is a desirable goal, this reservation and others of less aggravating character must be abandoned. But let the responsibility for such action be placed where it properly belongs—with the collective membership of the statute.
NOTES

JOINTLY OWNED COMPANIES OPERATING ABROAD: A PROBLEM IN ANTITRUST POLICY

The use of the joint venture as a method of business operation in the field of international commerce appears to be gaining considerable favor among the larger American corporations operating abroad. As a result of the growth of this device as a business method, it has begun to present some very perplexing problems in foreign policy and in the enforcement of our antitrust laws. From the antitrust standpoint it is particularly difficult to forecast the long-range consequences of the joint venture, and even harder to see how it can be effectively regulated under our present antitrust legislation. In view of the few decisions and the growing number of jointly owned companies operating abroad, this study is presented as a discussion of the problem with some possible solutions.

I

THE JOINT VENTURE

A "joint venture is a contract and more."\(^1\) Generally it is defined as "a special combination of two or more persons, where, in some specific venture, a profit is jointly sought without any actual partnership or corporate designation."\(^2\) In the antitrust sense, the definition of a joint enterprise is further limited to ventures between those corporations which are, or could be, competitors.\(^3\) In foreign commerce the use of this device is especially attractive because several firms are able to combine their available capital and management, thus becoming better able to face the greater risks normally attendant to this field.\(^4\) Further, the circumstances

\(^1\) Taubman, What Constitutes a Joint Venture, 41 Cornell L.Q. 640, 643 (1956).
\(^3\) Brewster, Antitrust and American Business Abroad 200 (1958) (hereinafter cited as Brewster).
of business abroad often make individual corporate activity economically prohibitive, in which case some joint operation is a necessity. And it is an equally relevant consideration that the primary purpose of a venture may be to mitigate or eliminate competition by price-fixing or by division of markets. Whatever its purpose or effect, the joint venture of today is a most effective and flexible business tool which for the moment apparently has caught our antitrust policies by surprise.

As an approach to the problem area, let us consider "Aramco" as an example of a joint venture fact pattern. Since facts alone are often the crucial element in an antitrust discussion, perhaps a brief examination of a specific joint operation will serve to define the device itself and the concomitant problems. Aramco is the alphabet symbol for one of the largest privately held oil enterprises in our history. The letters stand for the Arabian American Oil Co., a Delaware corporation estimated to control twenty-five to thirty percent of the known oil reserves in the Middle East.5 Aramco is jointly owned by Standard Oil Co. (N.J.), which owns thirty percent, Standard Oil Co. (Calif.), owning thirty percent, The Texas Co., owning thirty percent, and Socony Mobil Oil Co., owning the remaining ten percent.6 The four stockholders in the venture are four of the five richest American oil firms.7 By means of Aramco then, its composite oil companies have greater capital, market and managerial strength to carry on foreign operations in the extractive field. But by the same means, these four companies "divide the total production of Saudi Arabian oil, to exclude all others . . . ."8 This control is not ordinarily obtained unless the corporation enters contractual relations with a foreign sovereign—a contract which our federal government is expected to protect.9 In addition it must be remembered that Saudi Arabia's contribution to the free world's oil supply is fifteen to twenty percent, that Aramco is the only oil producer in Saudi Arabia,10 and that the "total output" of Aramco is sold to one or more of its four stock-

6 Id. at 1396, 1405.
7 Id. at 1405.
10 Hearings at 1397.
holders, who in turn control the price. On the board of directors sit thirteen men, ten of whom represent the four stockholding companies. Aramco paid over two hundred and eighty millions of dollars to Saudi Arabia in 1956 in taxes, royalties and rents, but paid no taxes to the United States on its income in Saudi Arabia by reason of the tax credit provision. In contrast, Aramco paid "about $43 million" in United States taxes in 1949, before the Saudi Arabian-Aramco tax agreement. Patently, the tax liability of a corporation is not an "antitrust issue," but perhaps it is relevant here if such tax treatment is a consequence of the joint venture itself.

But Aramco is not the issue here; it is a fact. And as a fact it presents certain problems to the counselor and to the legislator.

II

THE LEGALITY OF JOINT VENTURES

This study is mainly limited to a discussion of legislative problems in the antitrust field with three possible solutions. However, some appreciation of the counselor's position is necessary as a foundation to a more complete understanding. In this respect the first question is whether a joint venture is illegal per se under our antitrust laws. There is some authority for this conclusion in United States v. Minnesota Mining & Mfg. Co., where the court included as dicta some statements which cast doubt on a venture's legality. But this conclusion apparently rests on the assumption that when a joint venture of substantial proportions is discovered in foreign commerce, it will normally be found in circumstances which are tainted with the incidents of per se illegality. That is, the court is not maintaining that conceptually the joint venture is illegal, but rather that as a factual matter, joint ventures are often—if not always—found in situations of restrained competition, either because

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11 Id. at 1400, 1403, 1408; and pt. 3 at 2011.
12 Id. at 1408.
13 Id. at 1409.
14 Id. at 1419-21, 1442. A tax of $282,377.00 was paid by Aramco to the United States but this amount was on income earned by domestic operations.
16 Hearings at 1435.
17 Id. at 1428-29.
there is price-fixing and division of markets or because of the resultant disinclination to compete. This idea is supported by Nitschke: "It would seem that any jointly owned . . . organization inherently involves some division of markets and price-fixing . . . [and is] per se illegal." However, in *United States v. Imperial Chem. Indus., Ltd.*, it was held that "joint manufacturing ventures . . . are not . . . unlawful *per se . . ." Professor Brewster assumes that the issue of legality is "well outside the area of per se violations" and that the issue will "turn on unreason- ableness." It is suggested elsewhere that if a venture is created for a "specific task" or "to exploit a particular product or . . . market," then these circumstances could make the venture "reasonable" and therefore not per se illegal. But a counselor must wade through broad rules to see if more definite guideposts are actually hidden behind notions such as "reasonableness" and "per se illegality." Brewster's contribution to this area is substantial. He notes, for example, certain aids to the determination of "reasonableness": market power, primary purpose and business justification. Thus if a venture could have only a negligible effect on the market, or if there is a high risk element involved, or if the purpose is to increase competition, then each such factor would weigh on the "reasonable" side of the scale. But as the market power becomes greater, less weight is needed to slide the scale to "unreasonable." If the business purpose is not to restrict competition but to stimulate it, then it can be the crucial factor, provided the market power is not excessive. Essentially then, legality is an issue to be determined according to traditional Sherman Act criteria. Business necessity or justification must be balanced against restrictive effects. Of course where the venturer finds himself in an unusually risky market, jointness may be thrust upon him, in which case *United States v. Aluminum Co. of America* may be his guide to legality. This is the counselor's dilemma, but it is also the basis of the legislator's difficulties.

20 Nitschke, supra note 4, at 1068.
23 Hale, supra note 4, at 931.
25 Brewster at 206-23.
26 Id. at 221-22.
27 Id. at 211.
28 Id. at 211-22.
29 148 F.2d 416, 429-30 (2d Cir. 1945).
30 Brewster at 219, 221.
Since there is some authority holding the joint venture illegal per se—albeit the weight of authority is contra—the counselor and the business executive will be most skeptical of any joint enterprise. And even assuming no per se illegality, still the ice of reasonableness is very thin and a slight crack will plunge the unwary into troubled antitrust waters. At this point the legislative problem arises in this sense: our foreign policy and our commerce need certain private investment abroad which might be made possible, or at least more practical, through joint operations. It is a basic element of our foreign economic policy that private investment abroad be encouraged. But how can this be accomplished if joint ventures are such dangerous tools that businessmen are reluctant to use them, and consequently refuse to invest overseas? Furthermore, in those cases where a joint operation is utilized, is the present articulation of our antitrust law in this area sufficient to insure proper compliance? One unsatisfactory answer to this question is the status quo of uncertainty. Few would ever expect absolute certainty in antitrust law, but the situation of absolute uncertainty is also unnecessary. Another solution would be to exempt certain ventures from antitrust legislation. This would be constructive and would diminish the uncertainty. A third possibility is a comprehensive federal regulatory and supervisory statute which would deal solely with the peculiar problem of joint ventures. A fourth consideration is some form of international agreement, which, if not a substitute for the others, could be an additional solution.

Senator Joseph C. O'Mahoney has stated that

these corporation partnerships . . . are commonly called jointly owned companies. They have become a common phenomena both here and abroad as major companies have extended their activities into new fields. Rather than assuming the total risk of a new product, or entry into a new field, companies have invaded other industries by finding existing companies to join together as partners in a new company. In this way they bring about the results of a merger . . . avoiding implications of violation of the Anti-Trust laws.

Before the full development of the joint venture is at hand, then, it would be well to anticipate its maturity. In an attempt to do this, the following discussion will deal with: (1) a proposal of the Association of the Bar of the City of New York which would give the President authority to grant exemptions if warranted by national security; (2) the possible

adaptation of the federal incorporation theory to joint ventures in foreign commerce; and (3) the United Nations' contribution.

III

The Proposal of the Association of the Bar of New York City

Over the signature of the Secretary of State is a letter to Congressman Emanuel Celler concerning the Iranian oil crisis of 1953. In it Mr. Dulles explains the involvements of our national security and foreign policy in that crisis. He also tells how the office of the President in conjunction with the cabinet handled the dispute and partially solved the problem by bringing into the Iranian market a combination of American oil companies—the Iranian Oil Consortium. This move was not made, however, until the Attorney General rendered a favorable opinion on the antitrust position of the proposed combination.33

But times of crisis are not the only periods when antitrust law and national policy are interwoven. The national interest must often be considered during the daily course of business abroad.34 Sometimes it is merely the fact that a private company is so large that it must, by that very fact, have some definite effect on our foreign relations. Thus a corporation, owned by American citizens and chartered by a state, could conceivably be such an instrument in international affairs that its owners, its charterer and its normal regulator must allow the makers of foreign policy to set some of its standards of operation.

The main concern of the Special Committee of the Association of the Bar of the City of New York is with this "mixture of antitrust, national security and foreign relations . . . ."35 Although aimed at antitrust in general, only the proposal's application to joint ventures is considered here. As an approach to the subject, the Committee proposes to begin by separating the legal from the political issues in order that the proper agency of government be given its constitutional responsibility. This distinction is often obscure because "the facts of an antitrust case are complex. It is difficult to determine cause and effect."

34 New York City Bar Ass'n Report at 10-16.
35 Id. at 16.
36 Id. at 10.
it must be done if the Constitution is to be followed and foreign business is to be permitted to grow through competition.

When Congress enters the regulation of commerce "with foreign Nations" it also enters the field of international law where the federal government is not ipso facto supreme. Therefore, while Congress can set a policy which binds those in interstate commerce, it must be careful in foreign commerce to avoid setting a policy which interferes with the law of nations.

Congress also must not invade the power of the President which has been held to be "plenary and exclusive" in international relations. This is so although Professor Corwin points out that:

Congress' legislative power in the same field is also plenary. Except indeed for its inability to require the President to exercise his concurrent powers in the same field, Congress has approximately as broad powers over such matters as has the British Parliament. And of course once Congress has legislated, the President becomes constitutionally obligated to take care that its laws be "faithfully executed." The President's power is derived from the treaty-making provisions of the Constitution, and was elaborated on in Chicago & So. Air Lines, Inc. v. Waterman S.S. Corp.:

The President ... has available intelligence services whose reports are not and ought not to be published to the world. ... [E]ven if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative.

But which political branch of government, if either, should dominate the problem of jointly owned companies in foreign commerce? Professor Corwin reminds us that such constitutional provisions are "an invitation to struggle for the privilege of directing American foreign policy." This apparent struggle or dilemma might be solved by an attempt to recognize two areas in the field of foreign affairs, one for each of the political branches. But as a practical matter, some form of cooperation, formal or informal, would seem to be the only solution.

The Special Committee, referring generally to the problem of which branch of government should dominate in foreign commerce, contends that it is not the judiciary because of Waterman, nor Congress because

41 333 U.S. 103, 111 (1948).
42 Corwin, op. cit. supra note 38, at 208.
in foreign commerce affecting United States foreign relations, the executive is "responsible." The Committee recommended "that Congress should by legislation vest in the President the power to grant exemption from the antitrust laws to any one or more persons, firms or corporations, domestic or foreign, engaged or proposing to engage in any activity that may present a question of violation of the antitrust laws as applied to commerce with foreign nations." It further stated that the standard for the President is the "furtherance of the national security or foreign policy of the United States."

In support of its position, the Special Committee relies on the fact that "final responsibility over our foreign affairs flows from the President . . . ." As the only one who can negotiate for the United States, he is also better able to act promptly and decisively. But considering the problem of jointly owned companies, it is apparent that many of the evils or questions to be solved are not matters of "international affairs" as such, but are common antitrust policy problems. Of course, some foreign activity will be so intermingled with security that only the President can act. But in disregard of these distinctions, the Special Committee suggests that the President be given the power to grant exemptions from antitrust laws, with such power limited only by the standard of "national security."

One immediately foreseeable result of this proposed power is its effect on a person privately injured by what, but for the presidential shelter, is a violation of the antitrust laws. Would he be deprived of damages or other relief? If the answer is no, the exemption concept would be greatly weakened because its avowed purpose is to encourage foreign activity.

If such relief would be denied, then the President's power should be carefully scrutinized to avoid as many unfair effects on private citizens as possible. It has been suggested that the injury could be minimized by limiting the power to what is "strictly necessary in the national interest." And further, that the exemption (1) "not be granted if alternative less restrictive means would achieve the results"; (2) "would be limited in time"; and (3) "would be subject to periodic review." Brewster recognizes another possible limiting factor: exemption of only

43 New York City Bar Ass'n Report at 24.
44 Id. at 25. See Carlton, Antitrust Policy Abroad, 49 Nw. U.L. Rev. 713, 723 (1955); Kronstein & Miller, op. cit. supra note 4, at 284-89.
45 New York City Bar Ass'n Report at 25.
46 Id. at 26.
47 Nitschke, supra note 4, at 1069. (Emphasis added.)
those joint ventures dealing in strategic raw materials. In cases where the basis for the once-valid exemption is found to have disappeared, another immunity period should be allowed to permit a practical readjustment from the joint enterprise back to single operations. Brewster suggests five years.49 In light of these suggestions there appears to be no reason why all presidential exemptions in this area should not conform to some limiting standards. Blanket exemptions require unusual or emergency situations,50 and are normally so restricted.

The question of merger, in this case the formation of a "separate" third company (instead of the traditional merger) by two or more firms, has historically been a matter for the legislature to decide. Mergers generally involve not only federal interests, but also the private interests of the shareholders.51 Because of the large number of citizens directly concerned, and also because of the history of legislative rule over mergers, it would seem that the will of Congress should be clearly and particularly expressed before exemption power is given the President. That is, Congress could provide for subjects or areas where the President can immunize and others where he may not.

The problem of an exemption statute appears to be: "How can there be set standards and yet the necessary flexibility?"52 Under the New York City Bar's proposal the standards are broadest, but if severely defined, might be too restrictive a power to serve adequately the needs of business. Flexibility in the area of national security is essential. Brewster submits for consideration a plan of agency consultation as a solution,53 and favors an exemption power in the President under such a system.54 Because many agencies are involved, complete consultation would be too cumbersome to be an effective plan. Brewster's proposal would thereby amend that of the New York City Bar by requiring approval of the National Security Council and a report to Congress.55 Even this mitigation of the exemption power, however, appears weak. The National Security Council is a purely executive organ and would in all probability be consulted in any case. To find a distinction between a grant to the President of power to exempt, and giving him such power

49 Brewster at 457.
50 Nitschke, supra note 4, at 1060; Att'y Gen. Rep., supra note 4, at 66. See also Report at 69-70; Brewster at 450.
51 Cf. Hearings at 1512.
52 Brewster at 407.
53 Id. at 418-41.
54 Id. at 456.
55 Ibid.
subject to the National Security Council is a difficult task. Providing a substantial check on the proposed exemption power of the President is the second element of the recommendation, and the proposal calls for a "full report" to Congress. This would enable the legislative branch periodically to assert its intentions without depriving the President of his power. In any event, the smaller joint venture is without aid under this solution because it will not affect national security and will, therefore, be left to the uncertainties now existing.

In summary it appears that the area in which the jointly owned company thrives is not actually foreign relations but rather "foreign commerce," with definite and substantial effects on interstate commerce. This is definitely a congressional area of interest. In matters affecting security, the President already has broad powers. If more are to be given, it would appear that they should be in the form of more definite standards and limitations than the "furtherance of national security or foreign policy." 56

At this point we are now ready to consider another proposal—the possible adaptation of the federal incorporation theory. Under this theory both the ventures that affect national security and those that do not can be included. And where national security is found to be a factor, the role of the President can be provided for.

IV

AN ALTERNATE PROPOSAL: FEDERAL INCORPORATION OF JOINT VENTURES OPERATING ABROAD

A well drafted statute allowing the President to exempt certain joint ventures operating abroad might remedy some of the problems posed. It would, nevertheless, leave the smaller ventures which do not have any appreciable effect on the national security or our foreign policy to the present state of the law. This is a distinct and severe limitation to any exemption system. Federal incorporation is more comprehensive by definition and would include both the large and the small businesses. Yet the use of this theory in foreign commerce need not be so broad as that proposed in 1937 by Senator O'Mahoney when he introduced S. 10 with these words: "A bill to regulate interstate and foreign commerce by prescribing the conditions under which corporations may engage or may be formed to engage in such commerce . . . ." 57 The scope of the joint

56 New York City Bar Ass'n Report at 25.
57 81 Cong. Rec. 65 (1937). S. 10 was later merged into S. 3072 in order to include the proposals of Senator Borah. A similar bill, S. 330, was presented in 1939. For a history of
venture problem itself could limit a revision of this bill. Therefore, although there is nothing new in the basic idea, the application of federal incorporation to jointly owned companies and to foreign commerce is novel. Federal incorporation means a federal charter law. That is, if a joint venture desires to do or to continue doing foreign business, it must be chartered for that purpose by the federal government. The constitutional support for such a measure is the "commerce clause."58

[The power of Congress] would be based upon the theory that a corporate organization is but a means of transacting commerce, and that under its power to regulate interstate and international commerce Congress can prohibit the transaction of such commerce by means of any corporate organization which in its opinion is unsafe or otherwise prejudicial to the interstate commerce of the public.59

As Mr. Chief Justice Taft stated in *Stafford v. Wallace*: "If Congress could provide for punishment or restraint of such conspiracies after their formation through the Anti-Trust Law . . . certainly it may provide regulation to prevent their formation."60

The federal charter would have the same effect as an executive exemption except that the former is broader and could solve problems beyond the scope of national security. The actual operation of the proposal would be the same as that now used by the states and the national government in granting charters and licenses. Consider the function of a license. The issuer says in effect, "If you cannot or will not meet the standards which we prescribe, you may not go ahead with your plans."61 A license then could be a supplementary charter.62 Before obtaining its charter or license, a joint venture would submit its pertinent "antitrust facts" as its application for permission to engage in foreign commerce. It has already been formally recommended to Congress that "all companies . . . register with an appropriate agency . . . all contracts or agreements which . . . have restrictive effects upon . . . foreign commerce . . . ."63 Also recom-

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60 258 U.S. 495, 520 (1920). (Emphasis added.)

61 Warp, Licensing As a Device for Federal Regulation, 16 Tul. L. Rev. 111, 112 (1941).

62 Hearings on S. 10 Before a Subcommittee of the Senate Committee on the Judiciary, 75th Cong., 1st Sess., pt. 1, at 77 (1937) (hereinafter cited as Hearings (1937)).

63 Report at 6; see also Report at 42-43.
Mended is the registration of "charters of all subsidiaries and affiliates created under the laws of foreign governments." Federal incorporation (or licensing) would then be but another step in the procedure whereby effective supervision would be better insured. A sanction is also embodied because if a situation of price-fixing or market division appears from the data submitted, federal permission to do business could be denied. The existing governmental agency organization may be sufficient as a means of operating the machinery of such a proposal. Or if something more is needed, the suggested "Federal Free Enterprise Commission" could be given a mission to deal specifically with the problem. This proposed Commission is to deal with "monopolistic tendencies in our economy."

Of course, the mere mention of "registration with an agency" is sufficiently ominous to close the eyes and ears of some. However, the practical alternative to a new agency function may be the stagnation of antitrust enforcement in foreign commerce. Professor Berle, in 1955, told of the broader policy aspect of a corporation's duty to the government. He reasoned that some "large corporations . . . have stopped being private. They have become for practical purposes agencies, entities of a State government or of the United States Government . . . ." Berle's theory is limited to those corporations "on which the community has come to rely" and especially so if the firm is a part of "some national plan." Though this is admittedly an advanced theory, perhaps it has relevancy here when the duty of large jointly owned companies is examined. Their duty to the nation does not now make them "agencies" of the Government, but it might justify the proposed requirements that they submit information and engage in foreign commerce only by express permission of the federal government.

The mechanics of any incorporation or licensing plan is beyond the scope of this note. Instead, the purpose here is to consider the concept as a contrasting solution to the question presented by joint activities abroad. As a concept, it would keep foreign commerce problems in the hands of Congress. Any commercial venture which becomes enmeshed in purely foreign relations would be within the discretionary power of the President as the Constitution ordains. What the incorporation or licens-

64 Id. at 6.
66 Ibid.
67 Id. at 506.
68 Ibid.
ing concept would provide is a policy of true parsimony. That is, legislative powers would not be delegated which need not be. In this way Congress could still effectively express its present intent in the form of minimum standards which a corporation must meet.

The theory of federal incorporation lies mainly in its approach. The standards to be applied are those of the courts, the statutes and public policy as already formulated from the vast body of antitrust law. Referring to federal incorporation, Professor Beard noted: "[I]t begins at the beginning, and in this respect it differs from all the other acts of Congress, touching corporations and interstate commerce, with which I am familiar." Therefore, the conditions are precedent; to be met before the corporation can exist in the world of foreign commerce. Because it adds certainty, this method can aid the prospective businessman. As the Foreign Operations Administration suggested, "there is need for some procedure whereby prospective investors abroad may be advised on a determination under all relevant Government policies that their plans are either approved or disapproved." A federal incorporation or licensing law would do just that.

Congress has traditionally attempted to be preventive in antitrust legislation. Mr. Justice Brennan analyzes the attitude in this manner: "Its aim was primarily to arrest apprehended consequences of intercorporate relationships before those relationships could work their evil . . . ." Yet how preventive have these measures been, or, to put the issue more precisely, can legislation of this type be effectively preventive? The medical profession anticipates disease by various types of inoculations which are the means a doctor uses on his patient to prevent illness. By subjecting himself to the inoculation the patient has made himself comparatively safe to walk about with other people, neither spreading nor receiving the germ. Here, as in medicine, there is no absolute immunity. There is no guarantee under a federal incorporation statute that no antitrust violations will arise. What is suggested is that antitrust violations can always arise in a system of free enterprise and that there must be safe and effective ways of lessening the violations in number and promptly enforcing the law against the violations which do occur. In 1890, Mr. Justice Miller commented on the value of this preventive concept in the criminal field in In Re Neagle:

69 Hearings (1937) at 70.
It has in modern times become apparent that the physical health of the community is more efficiently promoted by hygienic and preventive means, than by skill which is applied to the cure of disease after it has become fully developed. So also the law, which is intended to prevent crime . . . is more efficient than punishment of crimes after they have been committed.  

But our present antitrust legislation imposes no condition which a corporation must meet before it can go into commerce. Thus the charter of a jointly owned company, which is the basic regulatory device of any corporation, is generally granted by a state which is normally disinclined to impose strict conditions, and which is also powerless to regulate in "foreign commerce." As a result, Senator O'Mahoney concludes, "there is no regulation of many commercial empires operating in foreign affairs." Although he speaks of "regulation," the concept may apply as well to antitrust.

Aramco, to return to our example, is the only oil company in Saudi Arabia. Such a large enterprise in such a vital area cannot avoid affecting, in a most concrete sense, the foreign policy of the United States. Yet the United States cannot look to a Delaware charter to see if the best interests of the nation are being protected. Instead the federal government must rely on various antitrust laws to accomplish this goal, and in each case the court will be asked to unravel the latest corporate complexity. If judgment is for the government, the task of formulating an order is not simple. Professor Beard reminds us that "corporations are not natural persons. They are artificial persons. They are creatures of government. Only on the authorization of government can they come into existence. Only with the sanction of government can they perform any acts, good or bad."

Therefore, the government is responsible as a parent is responsible for his child. And this duty is not only to "create" but also to protect the child from others and others from the child. If the government is to protect the people from some business evil, it must have the proper

72 135 U.S. 1, 59 (1890).
74 U.S. Const. art. I, §§ 8, 10; see also Hearings pt. 2 at 1245, 1489-90.
75 Hearings, pt. 2, at 1245.
76 Id. at 1408, pt. 3, at 2011, 2014.
78 Hearings (1937), pt. 1, at 72.
means to do an efficient and complete job, in the same way that a parent must have a right to correct his child promptly and fully. But however advantageous federal incorporation is, its very efficiency makes it needed and feared. Feared because “to vest the unlimited control of this system in the central government of the nation involves dangers perhaps greater than those sought to be avoided; that other effective means to accomplish the desired end should and doubtless can be devised.”

Assuming therefore, that some re-examination and modification of our antitrust law is needed in order to do substantial justice, two different theories have been considered. One, suggested by the Bar Association of New York City, would make the President responsible by placing the power of exemption in his discretion to a large extent. The other, that of federal incorporation, would require jointly owned companies operating abroad to obtain a federal charter or license. This latter proposal is less comprehensive than the federal incorporation proposed in 1937; yet it is more comprehensive than the Presidential exemption statute in that all joint ventures would be subject to it. The striking feature of an exemption statute is prompt and effective release from antitrust when national security warrants. This is the limiting feature of federal incorporation because the machinery would be slower and more involved and possibly be unable to handle the difficult areas of foreign policy. Therefore a synthesis would appear to be both necessary and desirable. Assuming that both proposals are valid, one could be amended as a step in perfecting the solution. It is at this point that federal incorporation appears to be more appropriate than exemption. The exemption feature could be incorporated bodily into the federal charter law so that whenever national security is an issue, the agency which grants the charter could be empowered to grant a limited charter for a specific period of years, upon recommendation of the President. This would, in effect, be an exemption similar to the express exemption proposed by the New York City Bar.

The exemption statute could not be so amended because, as proposed, it is justified only on the grounds of national security. It could not, therefore, be enlarged to include the ordinary antitrust problems of a much smaller scale. Such work is basically legislative. Therefore, it is felt that a federal incorporation statute with an exemption provision would be more effective.

V

AN INTERNATIONAL PROPOSAL: THE UNITED NATIONS’ REPORT

The minority view of Senator Alexander Wiley in the recent Senate Antitrust and Monopoly Subcommittee Report suggests that the solution to the problem of American business operations abroad “might be found in statute, in treaty, or in authorized Presidential action.”\(^80\) We have here considered the latter solution under the New York City Bar proposal; any type of federal incorporation or licensing would be statutory.\(^81\) However, the possible solution presented by a treaty has not been discussed here in order that the contrast between the two most readily available remedies would be accentuated. A brief summary of the United Nations’ proposal would, perhaps, be helpful.

It should be noted that a United Nations’ report formulates many of the standards necessary for international commerce and provides methods for their implementation.\(^82\) The United Nations’ draft articles provide a system for preventing restrictive business practices in general. There is nothing directed at jointly owned companies as such, but of course they would be within the scope of the articles. Each member nation is to cooperate in preventing certain proscribed practices, such as fixing prices, excluding enterprises from, or dividing any, market, or discriminating against particular enterprises. It is also aimed at controlling other practices regarding production and patents.\(^83\) To accomplish these ends, procedures for complaint, consultation, investigation and report are provided. The remedies and sanctions depend essentially on the word of the member nations but this is, of course, the basis for many other more important agreements. In one respect the articles might be more likely to be performed than the average treaty because of the consulta-


tion and report features provided. The publicity concerning violations would be world wide and therefore an incentive to cooperate would exist.

The Department of State has concluded that the proposal is not a "presently feasible solution" apparently because of the "substantial differences... in national policies and practices in this field..." The Attorney General's National Committee considered the United Nations' work outside the scope of its report, but a minority of the Committee differed. In his dissenting report Dean Rostow pointed out that the standards to which the signatories would have to conform are "far less severe than the Sherman Act... [and] could require no change in our law..." As an "instrument of international cooperation," the United Nations report might be a step of leadership toward the elimination of the "substantial differences" referred to by the Department of State.

VI

Conclusion

The jointly owned company doing business abroad is a new element in modern corporate activity. The courts have already developed a small body of law concerning such devices in terms of antitrust. However, full exploitation of this as a business method is still in the future. Legislation at this time would have an opportunity to solve the problem in its incipiency. Several possible answers have been considered and contrasted herein.

At the outset, it is evident that there is a distinct need for the clarification of the status of the joint venture. Brewster has recommended a declaration by the Department of Justice that per se illegality is not necessarily involved, and further, that certain criteria be established as guides to determine "presumptive legality."

It is submitted that the solution of the New York City Bar's Special Committee is a non sequitur. The premises which are discussed in the report support only a conclusion that in some areas of foreign commerce the President should have broad discretionary powers. This still would not justify a grant to the President of a blanket exemption power. Such

84 Hearings before the Antitrust Subcommittee, pt. 2, supra note 64, at 691.
85 Id. at 692. See also Kopper, supra note 81, at 1023-28.
86 Att'y Gen. Rep., supra note 64, at 98.
87 Id. at 99-105.
88 Id. at 102-03.
89 Id. at 103.
90 Brewster at 448.
91 Id. at 453.
a power, limited only by "national security," is virtually and practically limitless. At best, the premises support a restricted exemption power, based on more specific standards and subject to periodic review. If, in fact, the Committee's proposal is limited to certain areas, it should have been expressed in the recommendation. It is further suggested that Congress should retain its constitutional power over foreign commerce in the form of policy standards which must be met by the jointly owned companies. In the area of foreign commerce which overlaps into the foreign relations field, the President should be given the power to administer the standards.

The solution probably could be achieved best by either a limited exemption statute, or by federal incorporation. The former would be complete and effective for the larger firms whose operations affect national security. But for the smaller businesses falling without the scope of national security, no answer is provided by this plan. Federal incorporation would include both types of firms, and where national security is a factor, the President's exemption powers could be provided. Federal incorporation need not be nearly as comprehensive as originally considered. The basis for a charter could be restricted to established antitrust criteria.

The issue, in the words of Senator O'Mahoney, is "whether . . . the antitrust laws shall remain an effective instrument of American public policy to prevent monopolistic combines and concentrated economic power to block the growth, the life, and the activity of free enterprise." 92

GERALD A. MALIA

PASSPORTS: AT THE BRINK OF THE CONSTITUTION

"To repeat, we deal here with a constitutional right of the citizen, a right which we must assume Congress will be faithful to respect."

With the words quoted above from the case of Kent v. Dulles, 1 the Supreme Court of the United States, speaking through Mr. Justice Douglas, has completed another chapter in the history of passport controls. The Court held that the Secretary of State lacked the statutory

92 Hearings, pt. 1, at 649.

1 357 U.S. 116, 130 (1958). On writ of certiorari to the Supreme Court the case of Kent v. Dulles, 248 F.2d 600 (D.C. Cir. 1957), was consolidated with the case of Briehl v. Dulles, 248 F.2d 561 (D.C. Cir. 1957). Dayton v. Dulles, 357 U.S. 144 (1958) is a companion case. These cases will be referred to as the instant cases or the Kent and Dayton cases throughout this Note.
authority to deny the particular applicant a passport. Also by these words, the Court has issued a rather unveiled warning to Congress, and in so doing, has written the preface to the next and possibly final chapter of the passport litigation—one which will deal directly with the constitutionality of passport regulations based on political beliefs and associations.

I

INTRODUCTION AND BACKGROUND

This Note will examine the recent passport decisions of the Supreme Court against their pertinent statutory and judicial background, as well as in the light of the anticipated problems unanswered by the decisions. This Note can be considered an extension of a prior Note appearing in the GEORGETOWN LAW JOURNAL in 1952, in which the historical background of the right to travel was extensively covered from the days of King John and Runnymede to the issuance of the controversial regulations in 1952. Because of our predecessor's treatment of the early history, only the briefest account of the statutory and judicial background prior to 1952 is necessary.

The Constitution contains no express provision relative to the right to travel abroad or the necessity for a passport to leave the country. Recent cases leave little doubt, however, that the right to travel is entitled to certain guarantees under the fifth amendment clause requiring that no person shall "be deprived of life, liberty, or property, without due process of law . . . ."

Three factors bear upon the problems presented in this field: (1) the liberty of the individual, (2) foreign policy considerations, and (3) national security. Necessarily there exists the fundamental problem of balancing the latter two obligations of the Government with the citizen's guarantees under the Constitution.

In 1835, the Supreme Court in the case of Uretiqui v. D'Arbel assumed a passport as a "political document" which entitles the holder to be recognized as an American citizen. This description embodies the classic definition of a passport: that of identity of citizenship. While this definition of a passport remains valid, there has been added a newer

4 357 U.S. at 125; U.S. Const. art. V. (Emphasis added.)
6 34 U.S. (9 Pet.) at 699.
legal incident which has transformed the notion of a passport into a license to travel or control over exit.\(^7\)

The emergence of the "license to travel" and "control over exit" concepts has been mainly the product of four statutes passed in Congress which both directly regulate and give the executive branch of the Government the power to promulgate travel control regulations.

1. Basic Passport Statute

The Secretary of State may grant and issue passports under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue or verify such passports.\(^8\)

2. Persons Specifically Exempted

No passport shall be granted or issued to or verified for any other person than those owing allegiance, whether citizens or not, to the United States.\(^9\)

3. Travel Restrictions During War or National Emergency

After such proclamation as is provided for in subsection (a) of this section has been made and published and while such proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from, or enter . . . the United States unless he bears a valid passport.\(^10\)

4. Denial of Passports as a Security Measure

When a Communist organization . . . is registered . . . it shall be unlawful for any member of such organization, with knowledge or notice that such organization is so registered . . .

(1) to make application for a passport, or the renewal of a passport, to be issued or renewed by or under the authority of the United States; or

(2) to use or attempt to use any such passport.\(^11\)

The necessary executive orders and proclamations effectuating these


\(^8\) 44 Stat. 887 (1926), 22 U.S.C. § 211(a) (1952). In 1856 Congress passed the first statute naming the Secretary of State as the sole authority to issue and grant passports. 11 Stat. 60 (1856). Prior to that date, various federal officers, as well as other state and local officials, had issued certificates of citizenship or other documents in the nature of letters of introduction to foreign officials. U.S. Dept't of State, The American Passport 77 (1898).


statutes are as follows: first, Executive Order No. 7856 containing detailed regulations governing applications for and the issuance of passports;\textsuperscript{12} second, Presidential Proclamation No. 2914 which, while simply declaring a state of emergency because of communist aggression in Korea,\textsuperscript{13} was later invoked to regulate the issuance of passports pursuant to the statute pertaining to travel restrictions during war or national emergency;\textsuperscript{14} third, Presidential Proclamation No. 3004 which actually invoked the statute pertaining to travel restrictions during war or national emergency.\textsuperscript{15} These then form the basis of the claimed statutory authority for the additional and more detailed travel control restrictions imposed by the Secretary of State.

It is important to mention at this point that there is not and never has been a statutory requirement that a law-abiding United States citizen must have a passport to depart from or enter the United States in peacetime.\textsuperscript{16} In recent years, however, because of the unsettled international situation and the prolonged period of national emergency, a passport has acquired the status of a legal exit permit.\textsuperscript{17} In addition it has become a practical necessity because a greater number of foreign countries are now requiring a passport as a condition of entry.\textsuperscript{18}

With the statutory authority previously referred to as a background, the executive branch of the Government urged that the intent of Congress was to place plenary discretion in the field of travel regulations and con-

\textsuperscript{12} Exec. Order No. 7856, 3 Fed. Reg. 799 (1938). Pertinent provisions include § 124 of the order authorizing the Secretary of State: "to make regulations on the subject of issuing, renewing, extending, amending, restricting, or withdrawing passports additional to the rules . . . and not inconsistent therewith." Pursuant to this authority the Secretary of State issued and revised the regulations complained of in later cases.


\textsuperscript{14} Supra note 10.


\textsuperscript{16} Actually the first significant law requiring a passport for travel was enacted during World War I. Act of May 22, 1918, 40 Stat. 559, 22 U.S.C. §§ 223-26(b) (1952) invoked by Presidential Proclamation No. 1473 on Aug. 8, 1918, 40 Stat. 1829 (1918). These controls terminated March 3, 1921, 41 Stat. 252 (1921), 22 U.S.C. § 223 (1952). In 1941 Congress amended the 1918 Act to apply during the proclaimed emergency and on Nov. 14, 1941, the President issued Proclamation No. 2523, 55 Stat. 1696 (1941) restoring travel controls which have remained in effect since then. This amended act was replaced by § 215 of the Immigration and Nationality Act of 1952, 66 Stat. 190, 8 U.S.C. § 1185. The revised statutory authority was invoked by Presidential Proclamation No. 3004, 67 Stat. C31 (1953).

\textsuperscript{17} 357 U.S. at 129.

\textsuperscript{18} Browder v. United States, 312 U.S. 335, 338-39 (1941).
control in the Secretary of State. Until a few years ago the courts acquiesced to this view.

Beginning in 1950, the refusal or revocation of passports by the Secretary of State has been the subject of heated litigation in the lower federal courts, culminating in the Kent and Dayton cases in the Supreme Court. The cases in point subsequent to 1952 are reviewed briefly to show the gradual formulation and re-evaluation that has taken place in the courts on this problem.

Bauer v. Acheson presents the first direct attack upon the discretion of the Secretary of State in passport matters. The plaintiff, a naturalized citizen since 1944, was employed in Paris in 1948 as a journalist with a valid passport. On June 4, 1951, representatives of the State Department seized her passport and declared it had been revoked. The revocation was made without notice or hearing, and the only reason advanced was that her activities were contrary to the best interests of the United States. The plaintiff sued the Secretary of State, petitioning for review under the Administrative Procedure Act, and for an injunction against denial of her right to a passport. She further contended that the Secretary's action in revoking and denying a passport without notice, hearing or anything more than a general statement of his reasons was unconstitutional because it violated the due process clause of the fifth amendment.

The court held that since the statute and regulations in question were capable of affording the party due process of law they should be upheld. In treating the due process clause the court stated, "freedom to travel abroad, like other rights, is subject to reasonable regulations and control in the interests of the public welfare. However, the Constitution requires due process and equal protection of the laws in the exercise of that...

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20 Perkins v. Elg, 307 U.S. 325 (1939); Miller v. Sinjen, 289 Fed. 388 (8th Cir. 1923); 23 Ops. Att'y Gen. 509, 511 (1901); 3 Hackworth, Digest of International Law 498. Such authority, however, must be considered in the manner in which used. In this instance these authorities and judicial decisions were concerned with the discretion to deny a passport on the grounds of citizenship or flight to avoid justice. Nowhere is the matter of denial on the basis of political belief mentioned.

22 Id. at 448.
24 The regulations, 22 C.F.R. 53.8 (1949) provided:

nothing in this part shall be construed to prevent the Secretary of State from exercising the discretion resting in him to refuse a passport, to restrict its use to certain countries, to withdraw or cancel a passport already issued, or to withdraw a passport for the purpose of restricting its validity or use in certain countries.
control." After a discussion of due process requirements and the nature of passport controls, the court concluded:

revocation of the plaintiff's passport without notice and hearing before revocation, as well as refusal to renew such passport without an opportunity to be heard, was without authority of law. It follows that the Secretary of State should be directed to renew or revalidate the plaintiff's passport without the amendment making it valid only for return to the United States, unless a hearing is accorded her within a reasonable time.

Thus while the regulations themselves were capable of affording due process of law, the conventional procedural requirements of a proper hearing and due notice must also be observed to free the proceeding from the taint of unconstitutionality.

As a result of this decision new regulations were promulgated by the Department of State declaring communist supporters ineligible for passports, and establishing a hearing and notice procedure for applicants and revocations.

The case of Shachtman v. Dulles presented the next significant step in questioning the Secretary's "plenary power" over passport regulations. In this case the applicant sued the Secretary of State to enjoin him from denying a passport because of petitioner's alleged subversive associations. The district court declined jurisdiction on the grounds that the denial was a lawful exercise of the Secretary's discretion.

On appeal the issue of a citizen's right to travel was affirmatively raised for the first time. The circuit court pointed out that a passport is now essential for the lawful departure of an American citizen to Europe, and the denial of a passport causes a deprivation of liberty.

The right to travel, to go from place to place as the means of transportation permit, is a natural right subject to the rights of others and to reasonable regulation under law. A restraint imposed by the Government of the United States upon this liberty,

26 Id. at 452-53.
27 22 C.F.R. §§ 51.135-43 (1958). Until these regulations the only substantive passport qualification imposed by statute or regulation was citizenship. Section 6 of the Internal Security Act of 1950, supra note 11, is inoperative until such organization has registered or been ordered to do so.
29 The passport was denied for the reason that the applicant was chairman of the Independent Socialists' League which organization the Secretary of State understood had been classified by the Attorney General as both subversive and communistic. Id. at 291, 225 F.2d at 942.
therefore must conform with the provisions of the Fifth Amendment that "no person shall . . . be deprived of . . . liberty . . . without due process of law."\(^{32}\)

The court thus found the issue to be one of substantive due process in that the case involved the fifth amendment guarantee of liberty. The court restated the precise issue involved in the case in terms of whether the Secretary's action was arbitrary.\(^{33}\) After balancing the individual right to unfettered travel with the responsibility of the Government in the conduct of its foreign affairs, the court concluded that the individual's right of liberty to travel was predominant. The court found that the insufficiency of the Secretary's reasons for withholding the petitioner's passport prevented his action from being a reasonable means to the end of protecting the Government's right to conduct foreign affairs.\(^{34}\) Subsequently the State Department rendered the issue moot by the issuance of a passport to Mr. Shachtman on August 12, 1955.

A similar case in 1955 was that of *Boudin v. Dulles*.\(^{35}\) After an application for a passport was refused, the petitioner instituted an action in the District Court requesting: (1) declaratory judgment that he should be issued a passport, (2) that the passport regulations and rules relied upon to deny him a passport be found invalid and unconstitutional, and (3) an injunction be granted requiring the Secretary to issue him a passport. Judge Youngdahl held that section 51.170\(^{36}\) when used in conjunction with section 51.135\(^{37}\) of the Secretary's regulations, did not

\(^{32}\) Id. at 290, 225 F.2d at 941.

\(^{33}\) Ibid.

\(^{34}\) Id. at 292-93, 225 F.2d at 943-44.


\(^{36}\) In determining whether there is a preponderance of the evidence supporting the denial of a passport, the Board shall consider the entire record, including the transcript of the hearing and such confidential information as it may have in its possession. The Board shall take into consideration the inability of the applicant to meet information of which he has not been advised, specifically or in detail, or to attack the credibility of confidential informants.

\(^{37}\) In order to promote the national interest by assuring that persons who support the world Communist movement . . . may not, through use of United States passports, further the purposes of that movement, no passport, except one limited for direct and immediate return to the United States, shall be issued to:

(a) Persons who are members of the Communist Party or who have recently terminated such membership under such circumstances as to warrant the conclusion . . . that they continue to act in furtherance of the interests and under the discipline of the Communist Party;

(b) Persons, regardless of the formal state of their affiliation with the Communist Party, who engage in activities which support the Communist movement under such circumstances as to warrant the conclusion . . . that they have engaged in such activities as a result of direction, domination, or control exercised over them by the Communist movement;

(c) Persons, regardless of the formal state of their affiliation with the Communist

afford due process because the Government may deny a passport on evidence of which the applicant is unaware and cannot directly refute.\(^\text{38}\)
The court remanded the case to the Passport Office for a hearing, directing that "all evidence upon which the Office may rely for its decision under 51.135 must appear on the record so that the applicant may have the opportunity to review it."\(^\text{39}\) Both parties appealed, and the circuit court affirmed after a thorough analysis of section 51.135.\(^\text{40}\) The court held that before the Secretary may deny a passport under the authority of section 51.135, he must enumerate sufficient facts to place the applicant within one of the categories designated in that section.\(^\text{41}\) The court refused to consider the question of the validity of the regulations and whether the Secretary may rely on confidential information in reaching his decision.\(^\text{42}\) This case was also rendered moot by the subsequent issuance of a passport to Mr. Boudin.

Following these decisions, the entire field of statutory authority claimed by the Secretary was left in doubt. Five main areas remained unclarified: (1) the precise statutory basis of the Secretary's denial of passports; (2) the extent of the Secretary's discretion to deny passports, derived from the President's plenary power in foreign affairs, and to be exercised without judicial interference; (3) the nature of the right to travel, \textit{i.e.}, in what way, if at all, it is protected by the Constitution; (4) the limitations on the right to travel, \textit{i.e.}, what, if anything, constitutes a reasonable standard for denial of a passport, and what procedural safeguards are required in a passport proceeding; and (5) whether the requirement of a non-communist affidavit as a condition precedent to receiving a passport is an abridgement of the constitutional guarantee of freedom of speech in the first amendment.

\textbf{II}

\textbf{THE KENT AND DAYTON CASES}

Recently these problems faced the Supreme Court in the cases of \textit{Kent v. Dulles}\(^\text{43}\) and \textit{Dayton v. Dulles}.\(^\text{44}\) Briefly stated the facts of the

\begin{footnotes}
\footnote{\textit{1958] Notes}}
\footnote{\textit{22} C.F.R. § 51.135 (1958).}
\footnote{\textit{38} 136 F. Supp. at 222.}
\footnote{\textit{39} Ibid.}
\footnote{\textit{40} 98 U.S. App. D.C. 305, 235 F.2d 532 (1956).}
\footnote{\textit{41} Id. at 308, 235 F.2d at 535.}
\footnote{\textit{42} Id. at 308-09, 235 F.2d at 535-36.}
\footnote{\textit{43} 357 U.S. 116 (1958).}
\footnote{\textit{44} 357 U.S. 144 (1958).}
\end{footnotes}
Kent case are that Rockwell Kent desired to visit England, and in his travels to attend a meeting known as the World Council of Peace in Helsinki. His application for a passport was refused on the grounds that issuance to him was precluded by section 51.135\textsuperscript{45} of the Secretary's regulations. Two grounds for refusal were advanced: first, that he was a communist, and second that he had a consistent and prolonged adherence to the Communist Party line. Mr. Kent was advised of his right to an informal hearing, but was told that a necessary prerequisite to any issuance of a passport was an affidavit concerning his past or present communist connections. The petitioner refused and filed a new application. He was then advised that no further consideration of his application could be given until he had complied with the regulation concerning the non-communist affidavit. Thereupon petitioner sued in the district court for declaratory relief. The court granted summary judgment for the Secretary of State.\textsuperscript{46} On appeal the case was heard with that of Dr. Briehl.

Dr. Briehl likewise had applied to the Passport Office for a passport, and was asked to supply the affidavit concerning membership in the Communist Party. Dr. Briehl refused and the Director of the Passport Office disapproved his application. In a subsequent hearing he persisted in his refusal. As a result of this refusal, the Board of Passport Appeals was precluded from hearing the appeal. Upon application to the district court for relief, his case was dismissed on the same grounds as Kent.\textsuperscript{47} These two cases were then affirmed by the circuit court in a sharply divided decision.\textsuperscript{48}

The case of Dayton v. Dulles\textsuperscript{49} is distinguishable on its facts in that Dr. Dayton did submit the requested non-communist affidavit. Subsequently the Secretary refused his application on the grounds that the issuance of a passport to him would be contrary to the national interest. The refusal was based on the presence of confidential information not made available to the petitioner, linking him to the Rosenberg spy ring.\textsuperscript{50} Upon review the district court upheld the Secretary of State,\textsuperscript{51}

\textsuperscript{45} Supra note 37.
\textsuperscript{49} 357 U.S. 144 (1958).
\textsuperscript{50} 357 U.S. at 150, 152.
but on appeal the circuit court remanded the case to the Secretary for further action in line with the decision in *Boudin v. Dulles*. From another adverse ruling by the Secretary the petitioner again appealed; the district court affirmed the Secretary's ruling, and the circuit court affirmed the decision of the district court again in a divided decision.

All three cases came to the Supreme Court on writs of certiorari. Before the Court, the Secretary conceded that the right to travel was protected by the Constitution. He argued, however, that the right was subject to reasonable limitations, and defended the denials to Kent, Briehl and Dayton as reasonable and justified by statutory authority. Thus the issue, as presented to the Court, concerned the statutory authority of the State Department to deny a citizen the right to travel.

In the instant decisions, which incidentally are the first Supreme Court passport rulings since World War II, the State Department found its statutory authority limited to withholding passports from only two classes of applicants: first, those who are not citizens or do not owe allegiance to the United States, and second, those whom the Court described as participating in illegal conduct that would violate the laws of the United States. It is the writers' belief that a conviction or indictment would be required for inclusion in this category.

Except for the above two categories, the Court did not find statutory authority for the State Department regulations prohibiting issuance of passports to communists, alleged communist sympathizers and others whose activities abroad might be prejudicial to the conduct of foreign relations or the best interests of the United States.

The Court never reached the constitutional question, whether denial of the right to travel because of refusal to sign a non-communist affidavit or because of alleged subversive activities is a denial of due process of law. The Court reiterated frequently that it was reading the statutes in the light of the constitutional issue.

Since we start with an exercise by an American citizen of an activity included in the constitutional protection, we will not readily infer Congress gave the Secretary of State unbridled discretion to grant or withhold it. . . . Where activities natural and

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65 254 F.2d 71 (D.C. Cir. 1957).
67 Id. at 26-27; supra notes 8-16.
68 357 U.S. at 127-28.
69 Id. at 128.
often necessary to the well being of an American citizen such as travel are involved, we will construe narrowly all delegated powers that curtail or dilute them.  

In conclusion, the Court added that Congress had not in explicit terms given the Secretary of State authority to withhold passports from citizens because of their beliefs or associations. Thus the Court, at least the narrow majority of five, did not construe the statutes to permit the Secretary to withhold the issuance of a passport to those alleged to have subversive affiliations.

If Congress were to make explicit its intention to withhold passports from those having alleged subversive affiliations by enacting new legislation, the Court at least hinted that it might find such a law raises grave constitutional issues: "To repeat, we deal here with a constitutional right of a citizen, a right which we must assume Congress will be faithful to respect."

Mr. Justice Clark, speaking for himself and the three other dissenters, found statutory authority for the Secretary's refusal to grant the petitioners' applications for passports. This authority was found to exist by a wholly different interpretation of the passport statutes and regulations enumerated above. He concluded that security reasons should not be excluded merely because at the time of the 1926 re-enactment of the basic passport statute, political subversives were not generally held to be included among those to whom passports were denied. The congressional intent at the time of the Immigration and Nationality Act of 1952, he stated, should control.

Finally, the dissent disagrees with the majority's finding that there is today no gravely imminent danger to the public evidenced by congressional and presidential action. "In a wholly realistic sense there is no peace today, and there was no peace in 1952. At both times the state of national emergency declared by the President in 1950 . . . was in full effect."

Earlier in this Note it was stated that five areas of passport regulation were unclarified before the instant decisions. At this point, it might be

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60 Id. at 129.
61 Id. at 130.
62 Ibid.
63 Id. at 131.
64 Id. at 138 n.1.
66 357 U.S. at 138-39.
67 Id. at 141.
helpful to see what the instant cases have done to clarify these questions.

First, the Court has held that the Secretary has no statutory authority from Congress to withhold passports from those individuals, who, in the opinion of the Secretary are communists or communist sympathizers.68 Second, the Court said that the Secretary’s discretion could not be based on the President’s plenary powers in foreign affairs because the political connotations of a passport are secondary to its primary function today; that of exit control. Hence a statute adequately delineating the area of regulation is needed.69 Third, the right to travel is a part of the “liberty” guaranteed by the fifth amendment, and therefore the right to travel may not be infringed without due process of law.70 Fourth, the limitations on the right to travel are still unclarified. Since the Court decided the cases on a construction of the statutes, and not on their constitutionality, the constitutional limitations on the right were not treated. Fifth, the right of the Secretary to require a non-communist affidavit as a condition of receiving a passport or being accorded a hearing has not been clarified. The recent case of Speiser v. Randall,71 which will be discussed more extensively later in this Note, sheds some new light on this much litigated point.

III

PROPOSED LEGISLATION AND CONSTITUTIONAL PROBLEMS

An implied limitation on any constitutional right is the power of the sovereign to curtail that right in order to protect the security of the state and thereby guarantee the future enjoyment of that right. The citizen’s constitutional right to travel freely72 must then be balanced against the Government’s right to preserve its political integrity.

Though the Court in the instant cases found that some regulation of this right had been authorized by statute in the areas of citizenship and illegal conduct, the only implied limitation discussed was that derived from the war powers,73 and it was found inapplicable since the nation was not at war.

The three separate branches of the Government, however, have reached the conclusion that a real threat to national security does exist, and

68 Id. at 128, 130.
69 Id. at 129.
70 Id. at 125.
72 357 U.S. at 130.
73 Id. at 127.
further, that this threat is international communism. This is evidenced by (1) executive action in the form of a presidential proclamation declaring a state of national emergency because of communist aggression in Korea;\(^{74}\) (2) congressional enactments recognizing the danger, illustrated most forcefully by the Internal Security Act of 1950;\(^{75}\) and (3) judicial notice of the communist threat in several decisions in recent years.\(^{76}\) It is only against this background that a fruitful exploration can be made of the proposed legislative restraints on travel, specifically those bills which were introduced in Congress concerning the application for, issuance, denial and revocation of passports.

Shortly after the instant decisions, the President showed his concern over the need for passport control by a special message to Congress\(^{77}\) urging prompt and immediate legislative action giving the executive branch the necessary authority to deny passports when the national security so required. There followed quickly the introduction into Congress of the Administration's passport bill.\(^{78}\) A brief analysis of the bill shows that the grounds for refusal of a passport in the former regulations were essentially retained.\(^{79}\) Geographical "out of bounds" areas, foreign policy considerations and communistic affiliations and associations were still the chief reasons for denial of a passport. The wording used in the regulations of the Secretary of State regarding communism was simplified and a cut-off date or limit was supplied in the following manner: "whether the applicant is a person who, whether or not a member or former member of, or affiliated with, the Communist Party, knowingly engages or has engaged, within ten years prior to filing the passport application, in activities in furtherance of the international Communist movement."\(^{80}\) The requirement of a statement from the applicant concern-

\(^{74}\) "WHEREAS world conquest by communist imperialism is the goal of the forces of aggression that have been loosed on the world . . . ." Proc. No. 2914, 64 Stat. A454 (1950).

\(^{75}\) "Due to the nature and scope of the world Communist movement . . . travel of Communist members, representatives, and agents from country to country facilitates communication and is a prerequisite . . . to further the purposes of the Communist movement." 64 Stat. 988, 50 U.S.C. § 781 (1952); see also Brief for Respondent, pp. 60-68, Kent v. Dulles, 357 U.S. 116 (1958), for instances of passport abuses.


\(^{79}\) See also H.R. 12983, 85th Cong., 2d Sess. (1958).

\(^{80}\) S. 4110 § 104(b); H.R. 13318 § 104(b).
The ten year cut-off date was a new addition. Procedures for notice, hearing before a three man Passport Hearing Board, counsel, cross-examination and judicial review were to be accorded the applicant. The refusal of a passport based on confidential information would be allowed, although a resume of such information was to be given the applicant in proceedings before the Passport Hearing Board. But where the Secretary of State used additional confidential information in his final determination, no resume was required. Judicial review was precluded only in this latter instance. The burden of proof would be on the applicant in the hearing before the Passport Hearing Board once there was evidence to warrant the conclusion that the overseas activities of the applicant would seriously impair our foreign relations, be inimical to national security, or be in violation of any law.

In contradistinction to the Administration's bill was the bill introduced by Senator Humphrey and Representative Celler. Whereas the keynote of the Administration's bill was national security, that of the Humphrey-Celler bill was the right to travel abroad. The main provisions of this bill were: (1) no tests of beliefs or associations in issuing a passport; (2) a passport could be denied only if the applicant is under indictment, information or sentence for a felony, or when war has been declared, or where passports are applied for to enter combat areas where United States armed forces are participating in hostilities without a formal declaration of war; (3) a separation of passports from foreign policy, providing that areas of the world are not to be generally closed to travel. The applicant might only be warned that United States protection cannot be expected in these geographical areas. (4) The proce-

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81 S. 4110 § 104(d); H.R. 13318 § 104(d).
82 S. 4110 §§ 301-04; H.R. 13318 §§ 301-04.
83 S. 4110 § 302(b); H.R. 13318 § 302(b).
84 S. 4110 § 303; H.R. 13318 § 303.
85 S. 4110 § 304; H.R. 13318 § 304.
86 S. 4110 § 104(c); H.R. 13318 § 104(c).
88 S. 4137 § 2; H.R. 13652 § 2.
89 Ibid.
90 S. 4137 § 4; H.R. 13652 § 4.
91 S. 4137 § 5(b); H.R. 13652 § 5(b).
92 S. 4137 § 5(a); H.R. 13652 § 5(a). On the question of the duty owed by the Government to a holder of a passport unjustly deprived of his liberty by a foreign government, see 66 Stat. 273, 8 U.S.C. § 1503 (1952), which places a duty on the President to take measures short of war to secure the release of such American citizen. No cases have arisen
due to be followed in cases of passport denial would be that of the Administrative Procedure Act,93 except for sections 3, 4 and 5 thereof.94

Senator Eastland also introduced a bill.95 This bill elaborated and expanded on the former regulations. Ways in which support of the communist movement might be determined were particularized, detailed and broadened.96 A plane or ship could not leave the United States if the passport statutes were being violated by a passenger.97 Some of the more interesting procedural “safeguards” before the Special Review Officer were: closed hearings, no inspection of Department of State files by the applicant, no appeal from the refusal of a passport unless the applicant was not treated equally with all other applicants, no disclosure of confidential information to the applicant, and no hearing unless a statement was submitted by the applicant regarding his communist associations or membership.98 There were no provisions for cross-examination by the applicant or judicial review of the Department of State’s decision. An applicant was required to give the Department of State a report on countries visited if so requested upon his return from abroad.99 Geographical limitations on travel, foreign policy considerations, and absolute and final discretion by the Secretary of State were also retained.100

Senator Dirksen’s bill was virtually the same as that of Senator Eastland.101 The bill introduced by Senator Cotten and Representative Hillstand102 was similar to the former regulations as to grounds for denial of a passport.103 It contained nothing on procedure, placed non-diplomatic visas under the Department of Justice.104 It had provisions concerning

on this specific enactment, and it is doubtful if the courts would ever order the President to meet its requirements, at least in a situation where to do so would be politically dangerous. See United States ex rel. Keefe v. Dulles, 94 U.S. App. D.C. 381, 384-85, 222 F.2d 390, 393-94 (1954).

94 S. 4137, H.R. 13652 at § 6.
97 S. 4030 § 2(c).
98 S. 4030 § 4.
100 S. 4030 § 3.
103 S. 2416 § 8.
104 S. 2416 § 2.
the denial of admission to aliens, custody, deportation, maintenance of a central index of aliens.\textsuperscript{105} Dual citizenship of United States citizens born abroad was also regulated.\textsuperscript{106}

The only bill reported out of committee in the second session of the eighty-fifth Congress was that of Representative Selden.\textsuperscript{107} Essentially, the bill provided that the Secretary of State, in denying a passport to an applicant, should consider whether the applicant knowingly engaged in activities in furtherance of the communist movement since 1948. The question of actual membership or affiliation with the Communist Party was also a consideration.\textsuperscript{108} The emphasis in this bill, as well as the Administration's bill,\textsuperscript{109} was on national security.\textsuperscript{110} The Secretary also could require a written statement under oath or affirmation by the applicant as to whether he had since 1948 been a protagonist of the Communist Party.\textsuperscript{111} Judicial review was provided for, though procedural safeguards were not mentioned.\textsuperscript{112}

Proposals as diverse as the ones enumerated above defy individual evaluation. In any discussion of passport legislation, however, certain constitutional hurdles should be noted. The first problem is whether Congress has any competency to legislate in the field of travel control. There is little dispute on this point. The Supreme Court itself in the instant cases recognized and impliedly approved legislation restricting travel by aliens and those engaged in criminal activities against the laws of the United States.\textsuperscript{113} There also seems to be little doubt that Congress may enact legislation which rather broadly curbs the right to travel during a time of declared war.\textsuperscript{114} This then limits the area of discussion to legislation restricting travel by citizens on the basis of their political beliefs and associations during a time of peace or a time of armed conflict in which there has been no formal declaration of war. The critical problem is one which is rather vaguely termed a problem of substantive

\textsuperscript{105} S. 2416 §§ 3, 4, 6.
\textsuperscript{106} S. 2416 § 8(e).
\textsuperscript{107} H.R. 13760, 85th Cong., 2d Sess. (1958). This bill was passed by the House of Representatives, on the last legislative day of the second session of the eighty-fifth Congress. 104 Cong. Rec. 17955 (daily ed. Aug. 23, 1958). The bill never reached the floor of the Senate.
\textsuperscript{108} H.R. 13760 § 6.
\textsuperscript{109} Supra note 78.
\textsuperscript{110} H.R. 13760 § 5.
\textsuperscript{111} H.R. 13760 § 7.
\textsuperscript{112} H.R. 13760 § 8.
\textsuperscript{113} 357 U.S. at 127-28.
\textsuperscript{114} Korematsu v. United States, 323 U.S. 214 (1944).
due process; that is, the use of political beliefs and associations as a standard of withholding passports. More precisely stated, the question is whether legislation under which a citizen may be deprived of his right to travel because of his political beliefs and associations is a reasonable means to the declared end of national self-preservation. When a person’s constitutional right is to be limited because of the greater interest of society, that limitation must face the sometimes rigorous test of being a reasonable means to the end to be achieved;\(^{115}\) a test which borders on, though it should not infringe, the constitutional axiom that the Court will not look into the wisdom of the legislature.\(^{116}\)

In determining what is a reasonable means to an end, the Court necessarily moves on a case to case basis, analyzing in each case the relationship between the means and the end. In this line of cases the end is relatively fixed; that of national self-preservation. The means used are as variable as the individuals who appear before the Court. This variation is well illustrated by the facts of the instant cases. Had the Court found that the Secretary had sufficient statutory authority to deny a passport to Mr. Kent and Dr. Dayton, two further questions would have been posed. Is the deprivation of the right to travel to a participant of the World Council of Peace a reasonable means to our declared end? Is the deprivation of the right to travel to an alleged member of the Rosenberg spy ring a reasonable means to the declared end? Quite conceivably the answer to the two questions may be different. The root of the problem is, of course, the magnitude of potential danger to the national security that is represented by the term “communist.” At this point it should be noted that while legislation may make “communist” or “communist sympathizer” merely a relevant factor in determining whether a passport should be denied, the Secretary is not precluded under such legislation from denying a passport solely because one is a communist or has communist affiliations. It would appear that a constitutionally safer form of legislation would make advocacy of the violent overthrow of the United States Government by force a test of withholding passports.

In speaking of tests, however, a certain amount of caution is necessary. To come to an assessment of the reasonableness of the means to the end to be achieved, all manner of subjective evaluations, rooted deeply in one’s personal philosophy and environment must be made. The right involved, in this case the right to travel, must be evaluated, and against that right must be assessed the danger to the national security presented


by the issuance of the passport. This delicate balancing process involves the "intangibles" necessarily implicit in our law which confound the formulaters of legal tests and make judicial predictions a rather naive and frustrating activity.

Once past the constitutional hurdle of "substantive due process," any passport legislation must conform to what is termed with equal vagueness, procedural due process. In general this means that any proceeding which deals with a person's right to travel must be surrounded by procedural safeguards which will accord the participant "fair play."\textsuperscript{117} Specifically, it involves the necessity or lack of necessity for a hearing, ability to cross-examine witnesses, confrontation of witnesses, use of confidential information, right of appeal, and a host of other administrative procedures. An extended discussion of the procedural guarantees necessary in a passport proceeding is beyond the scope of this Note. In general, however, it would seem that the Court's high regard for the right to travel\textsuperscript{118} would require the best possible procedural safeguards in any proceeding limiting that right.

One procedure, however, does deserve consideration at this time. That is the requirement of the non-communist affidavit or loyalty oath which in certain cases is made a condition precedent to the issuance of a passport or even to obtaining a hearing before the review board. This squarely raises a constitutional issue under the first amendment guarantee of freedom of speech and political beliefs. The Court has upheld this oath or affirmation in past cases on the grounds that if the criterion of membership in the Communist Party is valid and reasonable for the denial of a right or privilege, then an applicant for such a right or privilege can be required to state whether the criterion is applicable to him.\textsuperscript{119} It would seem therefore that there is judicial authority holding that an applicant does not have an absolute immunity from inquiry into Communist Party membership, and may be required to answer a non-communist affidavit before determining the merits of an application.

An important distinction, however, was recently made in the case of


\textsuperscript{118} 357 U.S. at 125-27.

\textsuperscript{119} American Communication Ass'n, CIO v. Douds, 339 U.S. 382 (1950). In Wieman v. Updegraff, 344 U.S. 183 (1952), the Court struck down a "loyalty oath" for state employees, not because it was an "oath" but because the content of the oath referred to activity which was not a valid basis for excluding persons from public employment. See also Speiser v. Randall, 357 U.S. 513 (1958); Gerende v. Board of Supervisors, 341 U.S. 56 (1951); Garner v. Board of Public Works, 341 U.S. 716 (1951).
Speiser v. Randall.\textsuperscript{120} In this case certain veterans had refused to sign a loyalty oath required by the California constitution and laws as a condition precedent to the enjoyment of a veteran's property-tax exemption. The Court assumed arguendo that the state could deny tax exemptions on the basis of a person's political beliefs.\textsuperscript{121} Nevertheless it was held that the statute violated the due process clause of the fourteenth amendment because the requirement of the oath put the burden of proof on the applicant to prove his loyalty before he could partake in the tax benefits. The Court distinguished the cases in which it had upheld the constitutionality of the loyalty or non-communist oaths by stating:

The evil at which Congress had attempted to strike in that case [American Communications Ass'n, C.I.O. v. Douds, 339 U.S. 382 (1950)] was thought sufficiently grave to justify limited infringement of political rights. Similar considerations governed the other cases. Each case concerned a limited class of persons in or aspiring to public positions by virtue of which they could, if evilly motivated, create serious danger to the public safety. The principal aim of these statutes was not to penalize political beliefs but to deny positions to persons supposed to be dangerous because the position might be misused to the detriment of the public. The present legislation, however, can have no such justification. It purports to deal directly with speech and the expression of political ideas.\textsuperscript{122}

Thus, the loyalty oath used as a condition precedent to the issuance of a passport will be scrutinized to see whether its main purpose is to penalize speech and political belief or to deny a public position to an allegedly dangerous person because of potential harm to the public.

In holding that the California statute placed an unconstitutional burden of proof on the applicant, the Court further distinguished the line of loyalty oath cases, saying:

Moreover, the oaths required in those cases performed a very different function from the declaration in issue here. In the earlier cases it appears that the loyalty oath, once signed, became conclusive evidence of the facts attested so far as the right to office was concerned. If the person took the oath he retained his position. The oath was not part of a device to shift to the officeholder the burden of proving his right to retain his position. . . . In the present case, however, it is clear that the declaration may be accepted or rejected on the basis of incompetent information or no information at all.\textsuperscript{123}

If this case is an indication of a trend, it bodes no good for the requirement of a non-communist affidavit in passport cases.

\textsuperscript{120} Supra note 119.
\textsuperscript{121} Id. at 529.
\textsuperscript{122} Id. at 527.
\textsuperscript{123} Ibid. (Emphasis added.)
The Court in the instant cases expressly held that the Secretary of State did not have the statutory authority to withhold a passport from individuals whom he determined to be communists or communist sympathizers. Legislation proposed in the eighty-fifth Congress to fill this void in passport controls, with one exception, failed to progress beyond committee hearings. That exception was the bill introduced by Representative Selden which was reported out of committee and passed the House of Representatives on the final day of the second session. This bill, however, like the others failed to be reported out by the Senate Committee on the Judiciary.

The constitutional problem has crystallized. The Court in the Kent and Dayton cases has issued a clear warning to the Congress concerning any attempt it might make to curtail travel by American citizens. In line with this warning any travel control legislation must tread the delicate balance between affording the maximum safeguards for the rights of the citizens and providing for the security and political integrity of the United States.

EDWARD J. REILLY
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A SURVEY OF THE THREE JUDGE REQUIREMENT

Fifty years ago the decision handed down in Ex parte Young\(^1\) raised a storm of controversy which led Congress to provide that all applications for interlocutory injunctions challenging the constitutionality of state statutes or administrative orders should be heard by three judges, with the right of direct appeal to the Supreme Court.\(^2\) This requirement has been extended to other situations in the intervening years, and attempts have been made to clarify certain aspects of the procedure. There remain, however, several areas in which the procedures involved have not been clarified. These relate to the powers of a single judge before the convening of a three judge court and to the proper appeal procedures to be followed. The latter are so complex that they impose an unreasonable burden on the appellant, and new legislation would appear to be appropriate to clarify the present confusing situation.

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1 209 U.S. 123 (1908).
I

HISTORICAL BACKGROUND

During the period of triumphant nationalism which followed the Civil War, original jurisdiction was conferred for the first time on federal courts in cases arising under the Constitution, laws and treaties of the United States. Single federal judges thus held great power over state laws when such state laws were challenged in federal courts. While this apparently did not present any significant problems in the years immediately following the granting of this power to the federal courts, a conflict developed as the states began to develop new social and economic programs to meet the changing conditions brought about by the Industrial Revolution. Many people became disturbed by the possibility that the legislative acts of the states and the efforts of state officials to enforce them could be halted by the interlocutory decree of a single judge. The discretion of the issuing judge was the only practical limitation on his power. The opposition to such great power being held by a single judge became extremely vocal and powerful following the decision of the Supreme Court in the Young case. In that case a federal circuit court, upon the suit of railroad stockholders, issued a preliminary injunction restraining the railroads from complying with a Minnesota statute which reduced their rates in violation, allegedly, of the Constitution. The court also enjoined Young, the attorney general of the state, from instituting any proceeding to enforce the penalties or remedies provided by the statute or to compel obedience to it. Despite this injunction, Young filed a petition for mandamus in a state court directing the railroads to obey the statute. Young was then judged to be in contempt by the federal court, and he made an application to the Supreme Court for leave to file a petition for writs of habeas corpus and certiorari.

In discussing Young's claim that the suit was in effect a suit against the State of Minnesota, the Court said:

The answer to all this is the same as made in every case where an official claims to be acting under the authority of the State. The act to be enforced is alleged to be unconstitutional, and if it be so, the use of the name of the State to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of and one which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act on the part of a state official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional. If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such

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3 Act of March 3, 1875, ch. 137, § 1, 18 Stat. 470.
4 209 U.S. at 129.
enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.6

In the controversy aroused by the Young case, the attack was centered on the power vested in a single judge rather than in the power of a lower federal court to enjoin enforcement of the legislative acts of the states. The burden of the Senate debates in 19086 and 19107 was that the procedure was lacking in dignity, and that allowing a single federal judge to wield such power was an affront to the pride of the states. To remedy this situation Congress had a model which had been designed to deal with a similar problem. The Expediting Act8 required that upon certification by the Attorney General that a case was of general public importance, a court of three judges should be convened to hear any action brought under the Sherman Antitrust Act9 or the Act to Regulate Commerce.10 It also provided for direct appeal from the final judgment to the Supreme Court.11 The opinion of the Congress was that this procedure had been successful, and the convening of such a court in cases challenging the constitutionality of state laws or administrative orders would provide the proper method for dealing with the problem.12

Thus Congress provided that no interlocutory injunction restraining the enforcement of a state statute or administrative order be issued except after a hearing before three judges, one of whom had to be a Justice of the Supreme Court or a circuit judge.13 Despite the opposition to the

5 Id. at 159.
6 42 Cong. Rec. 4846 (1908).
7 45 Cong. Rec. 7252 (1910).
12 42 Cong. Rec. 4847 (1908).

The act provided:

No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute, shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, of whom at least one shall be a justice of the Supreme Court, or a circuit judge, and the other two may be either circuit or district judges, and
powers of a single judge before the enactment of this statute, Congress recognized the necessity of providing a means to prevent a party from suffering irreparable loss and permitted single judges to issue temporary restraining orders which would remain in force until the three judge court ruled on the request for an interlocutory injunction.\(^\text{14}\)

In 1913 an amendment to the three judge statute was passed which represented an attempt to allow state courts to assume a more important role in litigation challenging the constitutionality of state laws and administrative orders. This amendment provided that:

if before the final hearing of such application a suit shall have been brought in a court of the State having jurisdiction thereof under the laws of such State to enforce such statute or order, accompanied by a stay in such State court, of proceedings under such statute or order pending the determination of such suit by such State court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State.\(^\text{15}\)

This amendment has had little practical effect because of the assumptions on which it was based. It assumes the existence of legislation permitting a suit by the state to enforce the order as well as assuming that state officials are willing and able to ask a state court to stay the proceedings under such a statute pending determination of an action to enforce the statute. These assumptions have not often proved realistic in practice.

To avoid the situation in which a single judge reviewed the interlocutory decree of a three judge court, the Judiciary Act of 1925 required three judges to hear the application for a final injunction and authorized unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges: Provided, however, That one of such three judges shall be a judge of the Supreme Court, or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney general of the State, and to such other persons as may be defendants in the suit: Provided, That if of the opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any justice of the Supreme Court, or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall remain in force only until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case.

\(^\text{14}\) Ibid.

\(^\text{15}\) Act of March 4, 1913, ch. 160, 37 Stat. 1013 (now 28 U.S.C. § 2284(S) (1952)).
a direct appeal to the Supreme Court from the final decree.\textsuperscript{16} In 1937 Congress extended the three judge requirement to injunctions restraining the enforcement of an act of Congress as repugnant to the Constitution.\textsuperscript{17} Two differences between the requirement as applied to federal and state laws should be noted. While it was not until the Judiciary Act of 1948 that the three judge requirement applied to a complainant seeking a permanent injunction restraining enforcement of a state law or administrative order,\textsuperscript{18} the requirement has applied to one seeking a permanent injunction restraining enforcement of a federal law since 1937.\textsuperscript{19} A more important distinction is that the three judge requirement does not apply when a party is seeking to restrain the enforcement of a federal administrative order.\textsuperscript{20}

In order for an action to come within the requirement for a three judge bench it must satisfy certain qualifications. The Supreme Court has held in Phillips v. United States\textsuperscript{21} that the three judge requirement is not "a measure of broad social policy to be construed with great liberality, but as an enactment technical in the strict sense of the term and to be applied as such."\textsuperscript{22} Thus the requirement does not apply where an act of Congress is challenged on the ground that it is repugnant to the Constitution unless an injunction restraining the enforcement of the act is requested.\textsuperscript{23} The statute in question must be one of general application.\textsuperscript{24} Three judges are not required when an injunction is applied for on the charge that there has been a lawless exercise of authority without, however, there being any charge that the statute itself is unconstitutional.\textsuperscript{25}

\textsuperscript{16} 43 Stat. 938 (1925) (now 28 U.S.C. §§ 1253, 2281 (1952)). The Supreme Court held that this amendment applied only when an application for a preliminary injunction was pressed to a hearing. Smith v. Wilson, 273 U.S. 388, 391 (1927). This point caused a certain amount of confusion, however, and it was not until the Judiciary Act of 1948 that this was clarified by making the three judge requirement applicable on hearings for permanent as well as interlocutory injunctions. 28 U.S.C. § 2281 (1952). It did so only, however, by departing from the original intent of Congress of preventing single judges from granting interlocutory decrees.

\textsuperscript{17} Act of August 24, 1937, ch. 754, § 3, 50 Stat. 752 (now 28 U.S.C. § 2282 (1952)).


\textsuperscript{19} See note 17 supra.

\textsuperscript{20} Ibid.

\textsuperscript{21} 312 U.S. 246 (1941).

\textsuperscript{22} Id. at 251.

\textsuperscript{23} International Ladies' Garment Workers' Union v. Donnelly Garment Co., 304 U.S. 243, 248 (1938).

\textsuperscript{24} Rorick v. Everglades Drainage Dist., 307 U.S. 208, 212 (1939).

\textsuperscript{25} Phillips v. United States, 312 U.S. 246, 252 (1941); Ex parte Bransford, 310 U.S. 354, 361 (1940).
II
POWERS OF A SINGLE JUDGE

Many district judges originally read the statute in its most literal sense, and held that while it affected their power to grant interlocutory injunctions, it did not affect their power to deny such relief. The Supreme Court has consistently rejected such a reading of the statute. In several early cases the Supreme Court held that a single judge could not dismiss a complaint on the merits, but must call a three judge court to hear the complaint in accordance with the purpose of the statute. Prior to the decision in *Ex parte Poresky*, however, there was no ruling concerning the power of a single judge to dismiss a complaint for lack of jurisdiction. In that case petitioner brought suit in a federal district court against several state officials to enjoin them from enforcing a Massachusetts law relating to compulsory automobile liability insurance, claiming that the statute violated the fourteenth amendment of the Constitution. The district judge dismissed the complaint on the ground that, lacking diversity of citizenship, there was no substantial federal question. The Supreme Court denied permission to file a petition for mandamus and ruled that the single judge must examine the complaint and decide whether the jurisdictional requirements were met. Following this rule, the Court in the *California Water Serv. Co. v. City of Redding* said:

we have held that § 266 of the Judicial Code does not apply unless there is a substantial claim of the unconstitutionality of a state statute or administrative order as there described. It is therefore the duty of a district judge, to whom an application for an injunction restraining the enforcement of a state statute or order is made, to scrutinize the bill of complaint to ascertain whether a substantial federal question is presented, as otherwise the provision for the convening of a court of three judges is not applicable. *Ex parte Buder*, 271 U.S. 461, 467; *Ex parte Poresky*, 290 U.S. 30. We think that a similar rule governs proceedings under § 3 of the Act of August 24, 1937, as to the participation of three judges in passing upon applications for injunctions restraining the enforcement of federal statutes upon the ground of constitutional invalidity. . . . The lack of substantiality in a federal question may appear either because it is so obviously without merit or because its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject.

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27 280 U.S. at 144; 220 U.S. at 545.
28 290 U.S. 30 (1933).
29 304 U.S. 252 (1938).
30 Id. at 254-55.
In so ruling, the Court was obviously attempting to carry out the basic intent of Congress that complaints challenging the constitutionality of federal and state laws and state administrative orders be heard by a court of greater dignity than a single judge court, without, however, interpreting the law in such a manner as to impose what it regarded as an unduly heavy burden on the judiciary. Mr. Justice Frankfurter in Phillips v. United States31 stated:

while Congress thus sought to assure more weight and greater deliberation by not leaving the fate of such litigation to a single judge, it was no less mindful that the requirement of three judges, of whom one must be a Justice of this Court or a circuit judge, entails a serious drain upon the federal judicial system particularly in regions where, despite modern facilities, distance still plays an important part in the effective administration of justice. And all but a few great metropolitan areas are such regions. Moreover, inasmuch as this procedure also brings direct review of a district court to this Court, any loose construction of the requirements of § 266 would defeat the purposes of Congress, as expressed by the Jurisdictional Act of February 13, 1925, to keep within narrow confines our appellate docket.32

The Court’s attempt to distinguish between those situations in which a single judge passes on the merits of a complaint and those in which he passes on jurisdictional matters only is not without serious difficulties. The Court has provided a rule by which such a determination is to be made: the lack of substantiality may appear either because a question is obviously without merit or because its unsoundness so clearly results from previous decisions as to foreclose the subject. While the problem of whether a complaint is obviously without merit may not be difficult in some cases, it hardly needs to be pointed out that what is obvious to one court will not necessarily be obvious to another in the more difficult cases. It appears likely that a single judge will in practice turn to previous decisions of the Supreme Court as guides to what is obvious as well as to determine whether a question raised by a complaint is unsound because the issue has been foreclosed by previous decisions of the Court. Yet the Court has reversed itself on a sufficient number of questions of law that were thought to be settled to indicate that such a test cannot always be relied upon with great confidence. The distinction between decisions on the merits and decisions based on jurisdictional matters is often more verbal than real, and the Poresky case would appear to make it possible for single judges to justify rulings on the merits by claiming that the rulings were made on jurisdictional issues.

Congress amended the three judge statute in 1942 in order to spell

31 312 U.S. 246 (1941).
32 Id. at 250.
out more clearly the powers of a single judge. In addition to clarifying his procedural powers, the amendment also provides that a single judge shall not dismiss an action or enter a summary or final judgment. It is not clear whether this provision overrules the decision in the Poresky case or is to be read as meaning that despite the powers specified in the amendment, no single judge of a three judge court may dismiss an action. The legislative history of the act suggests that Congress intended to overrule Poresky, and legal commentators at the time were of the view that the amendment precluded the result reached in Poresky. The recommendations of the Committee on Federal Legislation of the Association of the Bar of the City of New York were influential in securing the passage of this amendment. It explained its understanding of the amendment in the following statement:

In providing that the single judge may not dismiss the action, the bill would overrule decisions holding that a single judge may dismiss an action determinable by a three judge court when the complaint shows on its face that the court lacks jurisdiction (Ex parte Poresky, 290 U.S. 30; 3 Moore, Federal Procedure, p. 3566). In this, too, the bill is desirable since in many instances the determination whether on its face a complaint shows that the court has jurisdiction involves a preliminary determination of the constitutionality of the statute or ruling under attack.

The statute uses the phrase "any one of such three judges" when defining the powers of a single judge, and the provision relating to the lack of power to dismiss an action specifies that this step shall not be taken by "such single judge." Thus whatever the intent of Congress, the language does not clearly prohibit a single judge from dismissing a complaint on jurisdictional grounds before the convening of a three judge court. The courts have continued to follow the rule in the Poresky case


The amendment provided:

In any action in a district court wherein the action of three judges is required for the hearing and determination of and application for interlocutory injunction and for the final hearing by reason of the provisions of section 266 of the Judicial Code, the Act of October 22, 1913, chapter 32, or the Act of August 24, 1937, chapter 754, section 3 ... anyone of such three judges may perform all functions, conduct all proceedings, except the trial of such action, and enter all orders required or permitted by the Rules of Civil Procedure for the District Courts of the United States in effect at the time, provided such single judge shall not appoint, or order a reference to a master, or hear and determine any application for, or vacation of, an interlocutory injunction, or dismiss the action, or enter a summary or final judgment on all or any part of the action; Provided, however, That any action of a single judge hereby permitted shall be subject to review at any time prior to final hearing by the court as constituted for final hearing, on application of any party or by order of such court on its own motion.

34 See Note, 15 Rocky Mt. L. Rev. 64 (1942); 28 Minn. L. Rev. 131 (1944).

by holding that a single district judge can dismiss a complaint if it presents no substantial federal question. None of the decisions, however, mention the 1942 amendment regarding the powers of a single judge. It is not clear, therefore, whether they would reach the same result if careful consideration were given to the amendment.

III

PROBLEMS OF REVIEW

Probably the most confusing aspect of the three judge court procedures is that dealing with review. The statute itself provides only that appeals from the decisions of three judge courts shall be made directly to the Supreme Court. The reason for this procedure is twofold. Since a three judge court is comparable in dignity to a circuit court of appeals, direct appeal to the Supreme Court follows logically in the hierarchy of appellate review. In addition, cases in which invocation of either state statutes or administrative orders or federal statutes were enjoined on the ground of their unconstitutionality are considered to be of such importance that a speedy determination of the matter by the highest court of the land is considered desirable.

While this provision presents no problem when a three judge court is properly convened, in the situation where the single judge erroneously refuses to convene a three judge court, there is considerable confusion concerning the next step to be taken. The Supreme Court has stated in a number of cases that in this situation the complainant should seek a writ of mandamus from the Court directing the single judge to convene a three judge court.

In Ex parte Metropolitan Water Co., the Court said:

It follows, therefore, that in hearing and determining the application for the temporary injunction the single judge acted without jurisdiction, and that the order entered by him on March 6, 1911, vacating the restraining order theretofore issued and denying the application for an injunction was void. This being the case, it necessarily follows that mandamus is the proper remedy, since the section made no provision for an appeal from an order made by a single judge denying an interlocutory injunction, and a right of appeal is not otherwise given by statute.

38 See cases cited supra note 25.
39 220 U.S. 539 (1911).
40 Id. at 545.
The same reliance on mandamus was stressed in *Stratton v. St. Louis Southwestern Ry.*\(^{41}\) as well:

If a single judge, thus acting without jurisdiction, undertakes to enter an order granting an interlocutory injunction or a final decree, either dismissing the bill on the merits or granting a permanent injunction, no appeal lies from such an order or decree to this Court, as the statute plainly contemplates such a direct appeal only in the case of an order or decree entered by a court composed of three judges in accordance with the statutory requirement. Nor does an appeal lie to the Circuit Court of Appeals from an order or decree thus entered by a District Judge without authority, for to sustain a review upon such an appeal would defeat the purpose of the statute by substituting a decree by a single judge and an appeal to the Circuit Court of Appeals for a decree by three judges and a direct appeal to this Court.

Accordingly, where a court of three judges should have been convened, and was not, this Court may issue a writ of mandamus to vacate the order or decree entered by the District Judge and directing him, or such other judge as may entertain the proceeding, to call to his aid two other judges for the hearing and determination of the application for the interlocutory injunction. . . . This remedy would not be available if there were a remedy by appeal.\(^{42}\)

In a mandamus proceeding, however, the Court does not determine the merits of the complaint but merely grants or denies the order requiring the convening of a three judge court. It is only after the three judge court has rendered a decision that an appeal on the merits is permitted. This procedure is clearly time-consuming and expensive and would appear to offset, at least to some extent, the saving in judicial resources gained by allowing a single judge to dismiss a complaint on the ground that it presented no substantial federal question. Both proceedings involve the same question in the Supreme Court, although initially the argument would be directed to the substantiality of the question, whereas on appeal the merits of the question would be examined. As was pointed out earlier, however, the distinction between these two points is often only a verbal one.

Despite the *Stratton* and *Metropolitan* cases, however, there are a number of cases in which complainants have appealed the refusal of a single judge to convene a three judge bench to the circuit courts of appeal, and the circuit courts have upheld the refusal of the single judge.\(^{43}\) The only one of these cases which discusses the question of the right of a circuit court of appeals to review the decision of a single judge regarding the convening of a three judge court is the case of *Wicks v. Southern Pac. Co.*\(^{44}\) In that case the court said:

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\(^{41}\) 282 U.S. 10 (1930).

\(^{42}\) Id. at 15-16.

\(^{43}\) See cases cited supra note 36.

\(^{44}\) 231 F.2d 130 (9th Cir. 1956).
In reliance on the Stratton case, supra, appellants now urge that the appropriate procedure following such action by the lower court was for them not to appeal to this Court (since it would lack jurisdiction in such an appeal) but rather to directly petition the Supreme Court for mandamus directing the district court judge to convene a three judge court.

We have found no case which adequately discusses and disposes of the precise issue thus tendered here, that is to say, the power of this Court to entertain an appeal from the refusal by the lower court to convene a three-judge court, and the granting of summary judgments and dismissals by the district judge. But we conclude that the cases called to our attention fail to sustain the jurisdictional contentions of appellants.45

The language of this decision would appear to indicate that if a single judge refuses to convene a three judge court, the complainant can proceed either by mandamus to the Supreme Court or by appeal to a circuit court of appeals. Yet it would be unusual if this were the case, for in the absence of a statute to the contrary, it is generally held that mandamus will not issue when there is an adequate remedy at law, although the court does have discretion in the matter.46

There appears to be one possible explanation of the various rulings on these points. The cases in which the Supreme Court has granted mandamus involve situations in which the single judge has decided the case on its merits. The cases in which the circuit courts of appeal have heard appeals from the refusal of a single judge to convene a three judge court, however, all have held that the judge was correct in so refusing since there was no substantial federal question involved. If this provides an explanation of the reasoning of the courts on this matter, it would appear to do so only by imposing an unduly heavy burden on the complainant. Suppose the complainant believes that the single judge should have convened a three judge court and seeks mandamus from the Supreme Court to compel the judge to do so. If the Court decides that the single judge had properly refused to convene a three judge court, the period of appeal may have passed. If, on the other hand, he appeals to the circuit court of appeals from the refusal of the single judge to call a three

45 Id. at 134.
46 Ex parte Republic of Peru, 318 U.S. 578, 584 (1943); Ex parte United States, 287 U.S. 241, 248 (1932). In the latter case the Court stated:

The rule deducible from the later decisions, and which we now affirm, is, that this Court has full power in its discretion to issue the writ of mandamus to a federal district court, although the case be one in respect of which direct appellate jurisdiction is vested in the circuit court of appeals—this court having ultimate discretionary jurisdiction by certiorari—but that such power will be exercised only where a question of public importance is involved, or where the question is of such nature that it is peculiarly appropriate that such action by this Court should be taken. In other words, application for the writ ordinarily must be made to the intermediate appellate court, and made to this court only in such exceptional cases.
judge court, the circuit court would be without power to aid him if it decided that the single judge was in error because it would be a case for a three judge court and appeal from such a case lies only to the Supreme Court.

A similar problem arises when a three judge court is erroneously convened, and an appeal from its decision is taken to the Supreme Court as provided for in the statute. In such a case the Supreme Court has no jurisdiction to review the decision since it was not a case that should have been heard by three judges.\(^47\) In a number of cases the Court has recognized the problem faced by counsel in such a situation and has directed the lower court to enter a new decree from which a proper appeal could be taken.\(^48\) The Court has not been consistent on this matter, however, and has also refused to direct the entering of such a decree in some cases.\(^49\) Faced with this situation, the only safe course would appear to be for counsel to appeal both to the Supreme Court and the circuit court of appeals. This procedure, however, is hardly satisfactory in view of the expense involved and would also impose a heavy burden on the judiciary.

**IV**

**Conclusion**

It is clear that the present confused and complex procedures involved in the three judge requirement are far from satisfactory. While no procedure is likely to be wholly satisfactory, given the policy that cases challenging the constitutionality of federal and state statutes and state administrative orders be heard by courts of three judges, it would appear that an improvement is possible. A better procedure might be to require that a single judge immediately convene a three judge court regardless of whether he believes that a substantial federal question is involved. The three judge court could decide the question of jurisdiction at once and disband if it decided that the single judge had jurisdiction. This would, of course, involve the burden of convening a three judge court whenever the three judge requirement is invoked. However, this burden might be eased by allowing all three of the judges to be district judges.

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The suggested procedure would also slightly increase the burden on the Supreme Court, although it may be questioned whether the elimination of the present procedure, under which the Court may hear essentially the same issue argued twice, would not balance the additional burden which would result from this proposal. The ending of the present unduly heavy burden on appellants would appear to make this procedure worth the slight additional burden it would involve.

WILLIAM J. BARNDS
DECISIONS


McGee, a resident of California, sued in a California state court to recover as beneficiary the proceeds of an insurance policy. The contract of insurance had been entered into and the premium payments made entirely by mail with the respondent, a Texas corporation not licensed to do business in California. A California statute provides for the appointment of the state insurance commissioner as the insurer's agent to receive process where the non-licensed or "non-admitted" insurance company does business by mail in the state. Cal. Ins. Code §§ 1610-13. Process was served in compliance with this provision, and the commissioner notified the respondent in Texas by registered mail.

Respondent failed to appear. A default judgment was entered, and upon this judgment suit was instituted in a Texas court. That court held that the California court had no jurisdiction over respondent's person because the service of process was violative of due process. McGee v. International Life Ins. Co., 288 S.W.2d 579 (Tex. Civ. App. 1956). The Supreme Court granted certiorari, 352 U.S. 924 (1956). Held, a series of transactions carried on through the mails between a foreign insurance company and a state resident, comprising the making of an insurance contract and premium payments provides the substantial connection with the state necessary to form the basis for the state's exercise of in personam jurisdiction over the foreign corporation. McGee v. International Ins. Co., 355 U.S. 220 (1957).

In an effort to do substantial justice for individuals who have a cause of action against a foreign corporation, the quantum of activity in the forum state which is necessary to comply with the due process clause has been consistently diminished. This trend has resulted in a chain of standards for measuring the extent of state judicial power. The basic issue to be resolved in this line of cases is: absent the more conventional jurisdictional standards of presence, consent, nationality, or doing business, what activities in the forum state are necessary to subject a foreign corporation to the jurisdiction of that state?

The current test of jurisdiction was adopted in International Shoe Co. v. Washington, 326 U.S. 310 (1945). The Court declared that a nonresident corporation must have "certain minimum contacts" with the state before it will be subject to an in personam action. The minimum contacts requirement is designed to satisfy the due process clause. But the International Shoe doctrine must be interpreted in the light of its own facts. The "minimum contacts"
consisted of activity by several agents within the state "systematic and continuous throughout the years in question." 326 U.S. at 320. The annual commissions, moreover, amounted to over thirty-one thousand dollars. Therefore, International Shoe is not authority for the holding in the instant case because in McGee no agent actually entered California and only one contract was made. Yet despite the factual difference between the two cases the so-called "qualitative test" first established in International Shoe is still the guiding principle of the Court. "[T]he criteria . . . cannot be simply mechanical or quantitative. . . . [D]ue process . . . must depend rather upon the quality and nature of the activity . . . ." 326 U. S. at 319.

Prior to this time the Court had decided in Hess v. Pawloski, 274 U.S. 352, 356 (1927), that a state could subject a nonresident to suit for a single act within the state if the cause of action arose out of the act. In Hess the act in question resulted in a cause of action in tort, not in contract. But the requirement that the cause of action arise out of the act done within the state was most recently reiterated by the Court in Hanson v. Denckla, 357 U.S. 235 (1958). There the Court held that in order for the acts to be "minimal contacts," the cause of action must arise out of those acts. 357 U.S. at 251-52.

The second point in issue concerns the applicability of the mails as a means of making the necessary "minimum contacts." Entry into the state by mail was held sufficient to obtain personal jurisdiction over a nonresident corporation in Travelers Health Ass'n v. Virginia ex rel. State Corp. Comm'n, 339 U.S. 643, 649 (1950). The suit, however, was brought by Virginia under a statute regulating insurance practices and not by an individual on a contract. The effect of the holding is further blunted by Mr. Justice Douglas' concurring opinion which found that the insurance company had actual agents, in effect, in Virginia. Since there were four dissenters, there was no clear majority holding that business contacts made solely through the mails were minimum contacts of sufficient quality to satisfy the due process clause of the fourteenth amendment. Therefore, the Court did not alter Minnesota Commercial Men's Ass'n v. Benn, 261 U.S. 140, 145 (1923), which denied the policyholder the right to sue, in his own state, a foreign corporation on contracts delivered through the mail. Since Travelers did not modify Minnesota there is no sound precedent for the instant holding. Travelers was subsequently held inapplicable to an individual insured. Employers' Liab. Assur. Corp. v. Lejeune, 189 F.2d 521, 524 (5th Cir.), cert. denied, 342 U.S. 869 (1951). But see Parmalee v. Iowa State Traveling Men's Ass'n, 206 F.2d 518, 522-23 (5th Cir.), cert. denied, 346 U.S. 877 (1953).

In addition to having "minimum contacts" with California, it must be noted that the contract in the instant case is one for insurance, traditionally a concern of the states under their police power. California has manifested its concern in the business of insurance by a comprehensive regulatory statute, a part of which is the law in question here. Although not specifically adverted to by the Court
in McGee, one of the more cogent reasons for the finding of "substantial connection" would seem to be the state's interest in the insurance field as clearly manifested by its statute. Subsequently in Hanson, the Court, faced with a different fact pattern, distinguished McGee partially on the grounds that there was a comprehensive regulatory statute in that case.

One additional provision of the International Shoe doctrine is that the "minimum contacts" result in "fair play." 326 U.S. at 316. Judge Learned Hand in Hutchinson v. Chase & Gilbert, Inc., 45 F.2d 139, 141 (2d Cir. 1930), stated that the "loss and inconvenience to ordinary companies from being sued wherever they may chance to have any dealings whatever, cannot properly be ignored ..." The Court in McGee resolves this issue of fairness by emphasizing that interstate business has notably increased over the years, and simultaneously "modern transportation and communication have made it much less burdensome for a party sued to defend himself." 355 U.S. at 223. The inconvenience to the insurer in defending, and to the insured in suing in a foreign jurisdiction, while stressed in the instant case, is a consideration that properly arises only after the defendant's minimum contacts with the forum state have been established. Where they have been so established, unreasonable inconvenience to the defendant may result in lack of "fair play," and thus a denial of due process. But plainly the plea of inconvenience to the defendant is on the wane.

The determining factor still appears to be the substantiality of the connection with the state. Substantial is a word not easily applied with precision. Is "substantial connection" to be decided by whether the necessary minimum contacts in the forum state are the acts giving rise to the cause of actions? The more recent case of Hanson v. Denckla, supra, gives an affirmative answer. The first and main distinction the Court in Hanson draws in referring to McGee is that "the cause of action in this case [Hanson] is not one that arises out of an act done or transaction consummated in the forum State. In that respect, it differs from McGee ..." 357 U.S. at 251.

The total impression gained is that the test of quality is in general whether the act or acts comprising the "contact" have a substantial connection with the forum state. Substantial connection rests in turn on whether the act or acts are those which give rise to the cause of action. Those acts are more likely to give rise to a cause of action which involve an area where the interest of the state is manifested by a regulatory statute. It would appear, therefore, that states may continue to enlarge by statute the scope of their jurisdiction in the areas of greatest inconvenience to their residents in the hope that McGee will be a shelter.

THOMAS M. HADERLEIN

The petitioner was a citizen of the United States by reason of his birth in Texas in 1909. His parents were Mexican nationals. At the age of twelve petitioner left the jurisdiction of the United States with his parents to take up residence in Mexico. His application for a declaration of citizenship was denied in 1954 on the grounds that petitioner had expatriated himself under the Nationality Act of 1940, 54 Stat. 1168, as amended, 8 U.S.C. § 1481 (1952), by (a) voting in a political election in Mexico in 1946, and (b) remaining outside the United States during World War II to avoid military service. The district court affirmed the decision of the Board of Immigration Appeals in Civil No. 33292, N.D. Cal., April 9, 1954. This decision was affirmed on appeal. Perez v. Brownell, 235 F.2d 364 (9th Cir. 1956). Certiorari was then granted, and the Supreme Court affirmed the Board's decision. 352 U.S. 908 (1956). The majority of the Court, limiting itself to the statutory provision concerning voting in a foreign election held that Congress has the constitutional power to take away citizenship under its power to deal with foreign affairs, and the mere act of voluntarily voting in a foreign election is reasonable grounds for exercising this power, regardless of whether the citizen intended to be expatriated by this act. Perez v. Brownell, 356 U.S. 44 (1958).

The Nationality Act of 1940, provides in section 401 that:

A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:

. . . .

(e) Voting in a political election in a foreign state or participating in an election or plebiscite to determine the sovereignty over foreign territory; or

. . . .

(j) Departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the land or naval forces of the United States.


The right of self-expatriation was first recognized as a natural and inherent right of an individual in the Act of July 27, 1868, 15 Stat. 223 (now 8 U.S.C. §§ 1482, 1483 (Supp. V, 1958)). Prior to this time citizenship was considered to be immutable. The only way a person could divest himself of it and throw off his allegiance was by consent of his government. Mackenzie v. Hare, 239 U.S. 299 (1915). In the Expatriation Act of 1907, two methods of expatriation
were recognized *inter alia.* One was the taking of an oath of allegiance to a foreign state or being naturalized in that state. 34 Stat. 1228 (now 8 U.S.C. § 1481 (1952)). Another was by the marriage of an American woman to a foreign national. By the provisions of the act her citizenship was lost during coverture, but could be resumed at the termination of the marriage. 34 Stat. 1228.

The next important legislation concerning expatriation was the Act of 1940 which encompassed an expanded area of grounds for expatriation. Among these were foreign military service, foreign civil service, voting in a foreign political election, renunciation of citizenship before a consul abroad, and treason and desertion after conviction. These were automatic grounds for loss of citizenship, and were incorporated into the Immigration and Nationality Act of 1952, 66 Stat. 267, 8 U.S.C. § 1481 (1952).

The decision in the instant case revolves around the constitutional right of Congress to take away an individual's citizenship, with the majority and the minority of the Court holding diametrically opposed views. The fourteenth amendment of the Constitution guarantees to all persons born in the United States the privilege of being citizens of the United States. There is no specific provision which allows Congress to take away this citizenship. However, article II, section 2 gives the executive branch of the Government the power to deal in foreign affairs through the general treaty making provisions. By reason of the necessary and proper clause, Congress is allowed to make laws that will effectuate the powers granted to any branch of the Government. See *Williams v. Suffolk Ins. Co.*, 38 U.S. (13 Pet.) 415 (1839). It is urged that the meddling of Americans in the political affairs of foreign countries will involve the United States in very delicate and dangerous situations, rendering it essential to the effectual regulation of foreign affairs that Congress be allowed to impose expatriation as a consequence. Expatriation is thus considered a valid means of preventing United States citizens from voting in foreign political elections. It is apparent that the majority of the Court is willing to place citizens like the petitioner in the category of aliens for the benefit of the common good.

The dissenting opinion of Mr. Chief Justice Warren and Justices Black and Douglas opposes this view of the ability of Congress to take away citizenship. This dissent reiterates the position taken by Chief Justice John Marshall who stated that a naturalized person "becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the constitution, on the footing of a native. The constitution does not authorize Congress to enlarge or abridge those rights." *Osborn v. United States Bank*, 6 U.S. (9 Wheat.) 251, 260 (1824); accord, *United States v. Wong Kim Ark*, 169 U.S. 649, 703 (1898). This view recognizes a certain inability of Congress to take away the basic right of the people to their status as citizens of the United States. The philosophy underlying this point of view would appear to be that the authority which the Government exercises flows from the people, i.e., from
the consent of the governed. The dissenters are saying, in fact, that Congress cannot take away a power greater than itself.

In support of the power to take away citizenship, the question of sovereignty is necessarily involved. In the case of Mackenzie v. Hare, supra, Mrs. Mackenzie was denied the right to vote in a California election by reason of her marriage to an English national. This decision was rendered under the Expatriation Act of 1907, supra. The Court stated that although the power of expatriation is not specifically provided by the Constitution, it is a necessary and proper means for Congress to assist in the regulation of foreign affairs. The Government of the United States is sovereign, and, "as it has the character of nationality it has the powers of nationality, especially those which concern its relations and intercourse with other countries." The Court concluded that these powers should not be limited in the absence of serious cause. 239 U.S. at 311. Accord, United States v. Curtiss-Wright Corp., 299 U.S. 304 (1936). It is argued that Congress should have the power to use the necessary and proper means to assist in the regulation of foreign affairs, and in certain circumstances it may expatriate a citizen for his acts when these acts are utterly inconsistent with his citizenship and allegiance to the United States.

The difficulty arises when one reflects upon the further holding of the Court that the simple act of voting in a foreign election results in an automatic loss of citizenship. This statement presents two problems: (1) does expatriation, to be constitutional, demand a voluntary act of renouncing citizenship, and (2) does the act of voting in a foreign election have a reasonable connection with expatriation.

It is an age old maxim that Congress may not act arbitrarily; that the means Congress adopts must have a reasonable relation to the end to be achieved. In Mackenzie v. Hare, supra, the Court, after discussing the aspect of sovereignty, went on to say: "It may be conceded that a change of citizenship cannot be arbitrarily imposed, that is, impaired without the concurrence of the citizen." 299 U.S. at 311. In Perkins v. Elg, 307 U.S. 325, 334 (1939), the Court defined expatriation as the "voluntary renunciation or abandonment of nationality and allegiance." The statements in these two cases are directly at odds with the holding in the instant case on this point, since the Court in the instant case held that the mere voluntary act of voting results in loss of citizenship. The intent of the party is not an issue, except to the extent that the act of voting be voluntary. The dissent declares such an interpretation unconstitutional. See Savorgnan v. United States, 338 U.S. 491 (1950). It is a well recognized principle that if there is no reasonable connection between the act done and the remedy imposed, then Congress has acted arbitrarily. See Tot v. United States, 319 U.S. 463 (1943); Manley v. Georgia, 279 U.S. 1 (1928). If this "connection" is not found in a particular case, the logical result would be a denial of the due process clause of the fifth amendment, and section 401(e) of the Act of 1940 would be unconstitutional. The majority in the present case states that Congress did not act arbitrarily since a con-
nection is deemed to exist between the power to take away citizenship and the reason for the exercise of this power. This connection is found in the fact that it is the possession of American citizenship which renders the act of voting in foreign elections potentially dangerous to our foreign relations. However, the remedy would appear to be a severe one to apply in all situations.

In the instant case petitioner in his brief makes reference to the elections in Denmark and Norway where all possible votes were needed to turn away the Nazis, and in the Italian elections of 1946 and 1948 where the votes of Italian-Americans helped to defeat Communism. Brief for Petitioner, p. 21. It appears that voting in a foreign political election can be a most equivocal act, but the Americans who voted in the above elections lost their citizenship. Voting in a foreign political election, however, is considered to be per se inconsistent with United States citizenship. In the case of Acheson v. Maenza, 92 U.S. App. D.C. 85, 202 F.2d 453 (1953), when confronted with the problem of taking away an individual's citizenship, the court stated, "it is by no means certain that Congress would have the power to deprive a natural-born citizen of his American nationality if the citizen himself does not voluntarily renounce his citizenship by some act utterly inconsistent with his American allegiance ..." 92 U.S. App. D.C. at 89, 202 F.2d at 457.

The answer to this problem may lie in the separate memorandum dissent of Mr. Justice Whittaker. He concluded that Congress does have the power to divest a person of his citizenship, but section 401(e) of the Act of 1940 is too broad to be sustained. The mere act of voting in a foreign political election is not so inconsistent with United States citizenship, nor so "fraught with danger" to foreign policy as to automatically result in loss of that citizenship. 356 U.S. at 84.

It is interesting to note that on the same day the instant case was decided, the Court handed down its decision in the case of Trop v. Dulles, 356 U.S. 86 (1958). The question considered was the conviction and dishonorable discharge for wartime desertion by an American soldier in French Morocco, which was an expatriating act under section 401(g) of the Act of 1940. The Court held this section of the act to be unconstitutional. The reason given was that expatriation as punishment for the crime of desertion during wartime was a cruel and unusual punishment prohibited by the eighth amendment of the Constitution. It is difficult to understand how expatriation for desertion during wartime can be cruel and unusual punishment while it is not considered to be so in the case of voting in a foreign election. The Court distinguished the Trop case from the Perez case on the point that expatriation for desertion was a punishment for a crime, while expatriation for voting in a foreign election has a nonpenal purpose, i.e., the regulation of foreign affairs.

It has been held that the consequences for violation of a statute may be nonpenal if the disability imposed is intended not to punish, but to accomplish some other legitimate purpose. In the case of Mahler v. Eby, 264 U.S. 32 (1924), deportation was held not to be punishment for crimes of aliens, but
for the protection of the people. Thus, the provisions of the eighth amendment against cruel and unusual punishment did not apply. But in United States v. Lovett, 328 U.S. 303 (1946), punishment had been meted out by operation of an act which disallowed payment of salaries to individuals found guilty of disloyalty. The Court viewed the statute as having a penal effect and stated that non-payment of salaries for acts of disloyalty was "no less galling or effective than if it had been done by an Act which designated the conduct as criminal." 328 U.S. at 316.

It appears that section 401(e) of the Act of 1940 has both a penal and non-penal effect. In form, it is for the regulation of foreign affairs, but in substance it is to punish those citizens who would involve the United States in international difficulties by interfering in the affairs of foreign states through the ballot box.

It would seem that here, as in the Trop case, there are other available forms of punishment such as fines or imprisonment. Consequently, it would appear that section 401(e) of the Act of 1940 should be examined in view of the provision of the eighth amendment.

It is suggested that although Congress may have the power to take away citizenship for an act utterly inconsistent with allegiance to the United States, it should not be allowed to do so for the mere act of voting in a political election in a foreign country. To fulfill the requirements of due process, consideration should be directed to the attendant circumstances surrounding the particular election. As it stands, section 401(e) of the Act of 1940, appears too broad to be sustained. An act may be so utterly inconsistent with allegiance to the United States as to infer voluntary renunciation of citizenship, but the act of voting per se as grounds for expatriation would seem to be a denial of due process.

WILLIAM D. MADDUX


Plaintiff insurance brokers offered in 1926 to place certain reinsurance contracts with defendant insurance company in exchange for a five per cent commission on all premiums collected on the policies. Defendant’s agent accepted the offer by telephone after obtaining authority to do so from defendant. In 1953, defendant notified plaintiff that it no longer felt bound by the contract. The defendant contended that its agent telephoned the plaintiff from New York, and that the New York Statute of Frauds made unenforceable oral contracts not to be performed within one year. Plaintiff argued that the contract was made in Pennsylvania, where the acceptance was heard, and that the
New York Statute was, therefore, not applicable. *Held*, where a contract is entered into by telephone, it is deemed to be made at the place where the acceptor speaks his acceptance, and not where the offeror hears the acceptance. *Linn v. Employers Reinsurance Corp.*, 392 Pa. 58, 139 A.2d 638 (1958). Since the court found that there was no evidence in the record indicating where the insurance company's agent was when he made the telephone call, it reversed and remanded the case for a finding on this question.

In deciding the *Linn* case, the court ruled with the majority of the American courts solely for the purpose of maintaining uniformity in the law and thus discouraging "forum shopping." But the court rejected the basic theory underlying its ruling, which admits of many inconsistencies, and instead agreed with the cases and authorities holding that it is not enough that the telephone acceptance must be spoken; it must also be communicated to the offeror. Thus, the contract is made not where the acceptance is spoken, for something more remains to be done. Rather, the contract is made where the last act necessary for the contract—the communication of the acceptance to the offeror—is carried out; that is, where the acceptance is heard.

The common law principle that an offeree must accept the offer before a bilateral contract is formed was further enlarged upon by Judge Lindley in *Carlill v. Carbolic Smoke Ball Co.*, [1893] 1 Q.B. 256, 262: "Unquestionably, as a general proposition, when an offer is made, it is necessary, in order to make a binding contract, not only that it should be accepted, but that the acceptance be notified."

In England, since the famous case of *Adams v. Lindsell*, 1 B. & Ald. 681, 106 Eng. Rep. 250 (K.B. 1818), it has been held that where an offer is made by mail, it is sufficient for a binding contract to be formed that the acceptance be deposited in the post, and the place where the acceptance is deposited is the place of the making of the contract. So too, by analogy, in *Cowan v. O'Connor*, [1888] 20 Q.B.D. 640, it was held that when the acceptance is communicated by telegraph, the place of the making of the contract is where the acceptance is given to the telegraph office to relay to the offeror. Various explanations have been given for this doctrine, but the one most often advanced is that of business expediency. If no contract resulted until receipt by the offeror, an "acceptor would never be entirely safe in acting upon his acceptance until he had received notice that it had reached its destination." *Household Fire & Carriage Acc. Ins. Co. v. Grant*, [1879] 4 Ex. D. 216. And thus the postal and telegraph companies might be held to be the offeror's agents for the purpose of receiving the acceptance. However, for this theory to hold true, the channel of communication used by the acceptor must have been authorized expressly or impliedly by the offeror. 1 Williston, Contracts §§ 81-83 (3d ed. Jaeger 1957).

The American courts have had little difficulty in following the place of acceptance is the place of the contract rule. *Burton v. United States*, 202 U.S. 344, 385 (1906) (mail); *Dick v. Vogt*, 196 Okla. 66, 162 P.2d 325 (1945).
(telegraph). In fact, the American courts follow it even further, applying the same rule to telephone contracts. *United States v. Bushwick Mills*, 165 F.2d 198 (2d Cir. 1947); *Bank of Yolo v. Sperry Flour Co.*, 141 Cal. 314, 74 P. 855 (1933). It is at this point in the law of contracts that the English and American courts part ways. The question of the place of making of a contract entered into by telephone has caused this disharmony. In *Entores, Ltd. v. Miles Far East Corp.*, [1955] 2 All E.R. 493 (A.C.), the court was presented with a contract entered into between plaintiffs (counter-offerors) in London and defendants (counter-offerees) in Amsterdam by means of Telex, a teleprinter system whereby an offer typed by one company's clerk was automatically and simultaneously typed out on paper by the other company's machine. An acceptance was received via the same channel. The defendant argued that the acceptance was sent from Amsterdam and that by reference to the post and telegraph rule, the contract was made where the acceptance was typed on the machine. The plaintiffs, on the other hand, pointed out to the court that the reason behind the post and telegraph rule failed in the case of instantaneous communication, stating that business expediency would not suffer if the general rule relating to acceptance in bilateral contracts was applied. The time lapse would be almost non-existent. Rather, the plaintiffs contended, a teleprinter contract should be compared to the case where the parties stood in each other's presence. In that case, the offeror is not bound until the acceptance has been communicated to him, and thus the place of making is the place where the acceptance is heard by the offeror. The court agreed with the plaintiff, and held that the contract was made in London, Judge Parker stating:

Where . . . the parties are in each other's presence or, though separated in space, communication between them is in effect instantaneous, there is no need for any such rule of convenience [business expediency]. To hold otherwise would leave no room for the operation of the general rule that notification of the acceptance must be received.

2 All E.R. at 498. In the same case Judge Dening, reasoning that a telephone contract is even more comparable to the *in praesentes* theory than a Telex contract, stated that "the rule about instantaneous communications between parties is different from the rule about the post. The contract is only complete when the acceptance is received by the offeror: and the contract is made where the acceptance is received." Id. at 495. He cites Williston, 1 Contracts § 82A (3d ed. Jaeger 1957), as supporting this view.


In the *Linn* case, the court, presented with a novel question, reviewed Williston and the Restatement, and while agreeing "that [their] analysis represents a sound theoretical view," nevertheless decided the case in the light
of cases which it felt represented the greater weight of authority. However, contrary to the court’s inference, Williston in section 82A admits that American case law, in the comparatively few instances where the question has arisen, favors the rule that the place of acceptance is the place of making. He cites Entores and Mullinix v. Hubbard, 6 F.2d 109 (8th Cir. 1925), however, as support for the telephone in praesentes theory of the place of making of a contract. That the majority of American decisions support Linn is not disputed. See United States v. Bushwick Mills, supra; Joseph v. Krull Wholesale Drug Co., 147 F. Supp. 250, 253 (E.D. Pa. 1956).

The lower court in Linn ruled that the place of making of the contract was New York, where the acceptance was allegedly spoken, and that therefore, as to the formality of the contract, New York law applies. There is thus created a legal paradox in that the court on one hand rejects theoretical soundness in contract law because of its desire for uniformity, and yet on the other hand clings to a minority conflict of laws rule that the place of the making of the contract is the place whose law is to apply to the contract. If adherence to the majority rule promotes uniformity in the law and discourages “forum shopping,” one wonders why the court does not apply either of the plurality conflict of laws rules—that the law of the place of the performance of the contract governs or that the law of the place intended by the parties governs. The conflict rule applied by the court in the instant case does not even enjoy the claim for theoretical soundness. Stumberg, Conflict of Laws 226 (2d ed. 1951).

The reasoning employed by Williston and the Restatement, as well as by Entores, appears much less strained and far more convincing than that used by the American courts. Certainly there can be little analogy between channels of communication which involve the agency of a message carrier or sender (post office, telegraph office) and are far from instantaneous, and a channel (telephone) through which the parties are speaking to each other as they would if they were both in the same room. The act of acceptance, transmittal and receipt of acceptance by telephone or in praesentes are for all practical purposes one and the same act. But under the rule of the instant case, an offeror by telephone is bound by the law of the place where the acceptor is—a law he is not presumed to know. Under the rule advocated by the authorities on the other hand, an offeror in praesentes, doing the same act, is bound only by the law of the place where he is at the time he hears the acceptance—a law he is presumed to know.

The courts are in the anomalous position of applying different theories of law to the same essential facts. The admission of this inconsistency by the Linn court may prove to be a step toward a more rational rule of contract law.

CHARLES EMMET LUCEY

John Henry Harmon III was inducted into the Army in October 1952. A year and a half later he was given an undesirable discharge because of his preinduction associations with reportedly subversive organizations, even though his service record carried an "excellent" rating. He appealed this discharge unsuccessfully through the Army Discharge Review Board, the Army Board for the Correction of Military Records, and the Secretary of the Army. Failing to obtain administrative relief, he initiated this action in the United States District Court for the District of Columbia, which granted summary judgment for the Secretary of the Army on the theory that it had no jurisdiction to hear the case. Harmon v. Brucker, 137 F. Supp. 475 (D.D.C. 1956). While his appeal was pending, Harmon was notified by the Adjutant General that his discharge had been changed to general under honorable conditions. The court of appeals, refusing to rule that the case had now become moot, affirmed, placing great emphasis on its lack of authority to intervene in matters of military administrative discretion. Harmon v. Brucker, 100 U.S. App. D.C. 190, 243 F.2d 613 (1957). The Supreme Court granted certiorari. 353 U.S. 956 (1957).

Howard Abramowitz was inducted into the Army in October 1951. He was honorably separated from active duty and was transferred to the inactive reserves in June 1953. Some two years later he received an undesirable discharge from the reserves because the Army felt that his preinduction activities made him a security risk. His efforts to obtain an honorable discharge through administrative channels followed the same pattern as Harmon's. He was also denied judicial review by the United States District Court for the District of Columbia. The court of appeals affirmed, per curiam, on the basis of Harmon. Abramowitz v. Brucker, 100 U.S. App. D.C. 256, 243 F.2d 834 (1957). Certiorari was granted in June 1957. 354 U.S. 920.

The Supreme Court consolidated the cases, and found that both petitioners were entitled to honorable discharges. Held, the district court had jurisdiction to determine whether the Secretary had acted in excess of his powers. Moreover, under the applicable statutes, as construed, preinduction activities may not influence the character or type of discharge granted, and therefore the Secretary was clearly acting beyond the scope of his authority. Harmon v. Brucker, 355 U.S. 579 (1958).

The most significant aspect of this holding is the Court's assertion of jurisdiction over the controversy. The lower courts, as indicated, felt that in spite of the merits of petitioners' claims they were without authority to review. 137 F. Supp. at 478. The Solicitor General even conceded to the Supreme
Court that the Army was undoubtedly wrong in its action, but argued that nevertheless, the courts were powerless to interfere. In defense of this position, it does seem clear that Congress has never expressly given the courts a power of review over military discharges. The governing statutes in effect at the time provided: "[N]o enlisted person shall be discharged from said service before his term of service has expired, except in the manner prescribed by the Secretary of the Department of the Army, or by sentence of a general or special court-martial." 41 Stat. 809 (1920), as amended, 10 U.S.C. § 652a (1952) (now codified as 10 U.S.C. § 3811 (Supp. V, 1958)). The findings of the Army Review Board are to be "final subject only to review by the Secretary of the Army ...." 58 Stat. 287 (1944), as amended, 38 U.S.C. § 693h (Supp. V, 1958).

Until 1946, however, recourse to Congress was available to those who felt that their discharges were issued arbitrarily and unfairly. See, e.g., Priv. L. No. 266, Ch. 171, 58 Stat. 976 (1944); Priv. L., Ch. 59, 19 Stat. 421 (1876). The Legislative Reorganization Act abolished this recourse by providing that such private bills could no longer be introduced in Congress. 60 Stat. 831 (1946), as amended, 2 U.S.C. § 190g (Supp. V, 1958). It was obvious from this action that Congress intended to surrender its power of legislative review over military discharges. The question facing the Court in the instant cases was whether Congress had ever intended, or even contemplated, a denial of judicial review in these matters. The Court apparently felt that no such denial could be implied, although the point is not discussed in the opinion.

There was also strong support in case law for a reluctance on the part of the courts to interfere with military decisions regarding discharges. Davis v. Woodring, 72 App. D.C. 83, 111 F.2d 523 (1940), presented the case of an underweight inductee who was given other than an honorable discharge after just a few weeks in the service. It was later determined that he was suffering from tuberculosis. "Congress having failed to prescribe the form of discharge and having left it to the discretion of the President acting through the Secretary, we are wholly without any effective power of review.... That this must result in the denial of veteran hospitalization to petitioner is regrettable, but beyond our control." 72 App. D.C. at 85, 111 F.2d at 525. (Emphasis added.) In Reid v. United States, 161 Fed. 469 (D.S.D.N.Y. 1908), a soldier was given a discharge "without honor" for alleged participation in, or knowledge concerning, riots at Brownsville, Texas, and the Court said:

The exact method of this soldier's discharge and the quantum or kind of character that should be given him, not being regulated by statute, must necessarily be left in the discretion of the executive officer having power to grant some kind of discharge. That it is beyond the power of the judicial branch to coerce or review the discretion of the executive is familiar doctrine ....

161 Fed. at 472. (Emphasis added.) Indeed the Supreme Court itself has made very strong statements regarding the sanctity of military decisions in general
and the refusal of the Court to interfere. See Orloff v. Willoughby, 345 U.S. 83, 93-94 (1953); Reaves v. Ainsworth, 219 U.S. 296, 304 (1911).

While there was justification for the belief of the lower courts that judicial review did not extend to the Harmon and Abramowitz cases, the Supreme Court in deciding otherwise did not depart radically from precedent, if indeed it departed at all. The instant decisions merely re-emphasize that in a tripartite form of government the principal advantage of separating the powers is to provide a balance, one for the other. It should be noted that in many prior decisions of the Court where review of military decisions was refused, a qualifying element was added. Decrees of the Secretary of War are binding only when he acts "within the sphere of his legal and constitutional authority." United States v. Eliason, 41 U.S. (16 Pet.) 291, 302 (1842). Action by military tribunals must be "within the scope of the power with which they are invested by law." United States ex rel. French v. Weeks, 259 U.S. 326, 335 (1922). Action cannot be reviewed where a military tribunal acts "within the scope of its lawful powers . . . ." Reaves v. Ainsworth, 219 U.S. 296, 304 (1911). The allegation in the Harmon case that a member of the executive had exceeded the powers conferred upon him by the legislature demanded attention from the judiciary, and set this case apart from those cited supra in support of nonintervention in military discretion.

Although the Court based its power of review principally on the allegation that the Secretary had acted in excess of his powers, it also took cognizance of the injuries which gave petitioners standing to bring the action. The claim of injury was not directed against the right of the Secretary to issue discharges to petitioners, but against his right to issue them discharges of a less-than-honorable character. Loss of honor among family and friends, loss of property in the form of state veteran benefits, denial of job preference for veterans, and punishment for the exercise of free speech were among the actual and potential injuries claimed. But the most cogent and comprehensive argument of petitioners was simply that one whose military conduct merited an honorable discharge was entitled to such a discharge, and any denial thereof, no matter to what degree, was either a deprivation of a right, or a punishment for constitutionally protected activity, or a defamation, and as such was a "judicially cognizable" injury.

Having firmly asserted its jurisdiction, the Court resolved the merits of petitioners' claims by means of statutory construction. The act of Congress which authorized the establishment of a board to review Army discharges stated that the board should base its decisions "upon all available records of the service department relating to the person requesting such review . . . ." 58 Stat. 286 (1944), as amended, 38 U.S.C. § 693h (Supp. V, 1958). The Court interpreted the word "records" as "records of military service," and found that "the statute, properly construed, means that the type of discharge to be issued is to be determined solely by the soldier's military record in the Army." 355 U.S. at 583. Therefore, any administrative regulation to the

Violations of both fifth and sixth amendment rights were alleged by petitioners. The Court, exercising its traditional restraint, avoided the constitutional question by use of statutory construction. See, e.g., Rescue Army v. Municipal Court, 331 U.S. 549, 569 (1957); Siler v. Louisville & Nash. R.R., 213 U.S. 175, 193 (1909).

Mr. Justice Clark, the lone dissenter, took serious issue with the resolution of the merits of the case by a “transparently artificial construction of a statute.” He felt that when Congress stipulated that determinations should be based upon all available records of the Army, this did not mean just certain records. He also objected strenuously to the Court’s assumption of jurisdiction in the matter. “At no time until today have the courts interfered in the exercise of this military function.” 355 U.S. at 584. It would seem that Mr. Justice Clark failed to distinguish between the exercise of lawful military discretion and the exercise of discretion in an area beyond that authorized by Congress.

There are two problems posed by the holding in these cases which merit consideration. The first question is whether, in litigation of a like nature, this allegation of action beyond the scope of authority granted by Congress will automatically be joined with the usual charge that a military board is in error. Such an attempt would seem probable since the latter charge alone is insufficient to justify judicial review. See Gentila v. Pace, 90 U.S. App. D.C. 75, 193 F.2d 924 (1951). It seems unlikely that it would succeed, however, unless the litigant can show that the limits of discretion have been clearly defined and limited by a statute.

Second, can the Harmon and Abramowitz cases be extended to a member of the armed forces who, during his term of service, engages in activity held to be inconsistent with the interests of national security? If the conduct in question takes place while the person is on an inactive reserve status, after separation from active duty, it would seem a fair extension of the present decision to require that he be issued an honorable discharge, provided that the record of his active service so warrants. This conclusion does not necessarily follow where the activity takes place during a term of reserve status which occasionally involves active participation in military exercises. It is difficult to predict what application Harmon and Abramowitz would have in such a case. One thing, however, does seem certain. If such a person engages in this questionable conduct during the term of his active duty, the Army must have sole discretion as to the character of his discharge. It would be a definite encroachment upon the powers of the executive for the courts, in this situation, to insist on judicial review.

MARY CATHARINE OSTMANN

In the Gonzales case, a superior court in California assumed jurisdiction in an action brought by a member of a union against that union for restoration of his membership right and an award of damages for loss of wages and suffering resulting from wrongful expulsion. The claim was sustained under a California law providing that the breach of a union membership contract (implied at law) through wrongful expulsion might be remedied through mandatory reinstatement and damages. The judgment was affirmed by the first district court of appeal, Gonzales v. International Ass’n of Machinists, 142 Cal. App. 2d 207, 298 P.2d 92 (1956), and the Supreme Court of California denied a petition for hearing. The Supreme Court granted certiorari, 352 U.S. 966 (1957), since the case presented an important question concerning the extent to which the Labor Management Relations Act (Taft-Hartley Act), 61 Stat. 136 (1947), as amended, 29 U.S.C. §§ 141-97 (1952) (hereinafter cited as the act), has excluded the exercise of state power. Held, where a set of facts gives rise to both a state cause of action and constitutes conduct cognizable by the National Labor Relations Board (hereinafter referred to as the Board), state jurisdiction is not pre-empted when the possibility of conflict with the federal labor policy is remote. International Ass’n of Machinists v. Gonzales, 356 U.S. 617, petition for rehearing denied, 357 U.S. 944 (1958).

In the Russell case, a non-union employee who worked in an industry affecting interstate commerce instituted a tort action in a circuit court of Alabama against defendant union for malicious interference with his lawful occupation through its misconduct of picket lines. The Supreme Court of Alabama reversed the trial court’s ruling which had sustained a plea to the juris-diction, and upheld the jurisdiction of that court, even though the amended complaint charged a violation of section 8(b)(1)(A) of the act. Russell v. International Union, UAW-CIO, 258 Ala. 615, 64 So. 2d 384 (1953). On remand, the case resulted in a judgment for Russell. On appeal, the Supreme Court of Alabama reaffirmed the circuit court’s jurisdiction. International Union, UAW-CIO v. Russell, 264 Ala. 456, 88 So. 2d 175 (1956). Because of the importance of the jurisdictional issue, the Supreme Court granted certiorari. 352 U.S. 915 (1956). Held, the Board’s discretionary power to provide such compensatory relief to victims of unfair labor practices as it should deem necessary to effectuate the purposes of the act, does not deprive victims of tortious conduct of their common law rights of action for all damages suffered. International Union, UAW-CIO v. Russell, 356 U.S. 634, petition for re-hearing denied, 357 U.S. 944 (1958).
Determination of congressional intent with respect to the pre-emption of labor disputes by the Board has been an issue frequently facing the Supreme Court throughout the past two decades. Although partisans are quick to argue the point, no intent of Congress concerning the delineation of state jurisdiction over disputes arising out of labor relations is anywhere expressly stated in federal law or pertinent hearings and reports. Consequently, in construing federal labor legislation, the Court has had recourse to various tests in an effort to divine that intent. Note, 43 Georgetown L.J. 437 (1955). The test most consistently found voiced in the opinions, either alone or in conjunction with others, is that of conflict.

In Hill v. Florida, 325 U.S. 538 (1945), a case which stands as a landmark in this area, Mr. Justice Frankfurter, in a dissenting opinion, took issue with the majority's concept of conflict, which was that any attempt by a state to enter the scope of the labor field occupied by the act was invalid. Mr. Justice Frankfurter contended that "both the State law and the federal statute must be allowed to prevail if they may prevail together—that is, if they do not, as a matter of language or practical enforcement, collide, or if Congress has not manifested an unambiguous purpose that there be no regulation, either State or federal, as to matters for which it has not prescribed." 325 U.S. at 548-49 (dissenting opinion). In the instant cases this direct conflict test advocated by Mr. Justice Frankfurter has apparently been adopted by the majority of the Court in sustaining state jurisdiction over causes arising out of activity within the scope of the labor field occupied by federal legislation.

In the Gonzales case, petitioner relied in part on Garner v. Teamsters Union, 346 U.S. 485 (1953), in which case the Court upheld the action of a state court in dismissing a bill to enjoin picketing on the grounds that the state was without jurisdiction to hear the controversy since it fell within the cognizance of the Board. Petitioner contended that the employer's discrimination against Gonzales resulting from union conduct and the consequent conflict of remedies existing with respect to reinstatement and award of back pay to respondent should necessarily result in the Board's pre-empting the consideration of petitioner's conduct. Brief for Petitioner, pp. 12-16. Mr. Justice Frankfurter, speaking for the majority of the Court, recognized that in the instant case there may be embedded circumstances that could constitute an unfair labor practice under section 8(b)(2) of the act, but then stated:

[T]o preclude a state court from exercising its traditional jurisdiction to determine and enforce the rights of union membership would in many cases leave an unjustly ousted member without remedy for the restoration of his important union rights. Such a drastic result, on the remote possibility of some entanglement with the Board's enforcement of the national policy, would require a more compelling indication of congressional will than can be found in the interstices of the Taft-Hartley Act.

356 U.S. at 620. Mr. Justice Frankfurter then compared the instant case with United Constr. Workers v. Laburnum Constr. Corp., 347 U.S. 656 (1954), a case which allowed state court jurisdiction over an action brought by an em-
ployer for damages resulting when plaintiff was forced to discontinue business by reason of defendant unions' tortious conduct of picket lines at plaintiff's place of business. The Court noted that in both cases "the potential conflict is too contingent, too remotely related to the public interest expressed in the Taft-Hartley Act, to justify depriving state courts of jurisdiction to vindicate . . . personal rights . . ." 356 U.S. at 621.

In the Russell case, the Court assumed, for the purposes of the case, that the threatening or violent conduct of the union's picket line which prevented Russell from entering his place of employment did violate section 8(b)(1)(A) of the act. Upholding the jurisdiction of the state court, the Court again relied on the Laburnum doctrine that Congress had not "given the National Labor Relations Board such exclusive jurisdiction over the subject matter of a common-law tort action for damages as to preclude an appropriate state court from hearing and determining its issues where such conduct constitutes an unfair labor practice" . . . 347 U.S. at 657.

The importance of the Laburnum decision lay in the Court's recognition for the first time that a party injured as a result of an act amounting to an unfair labor practice should not be precluded from attaining redress under the state's common law solely because the act of the wrongdoer happened to be within the scope of the labor field occupied by the act. Citing the Laburnum case in Weber v. Anheuser-Busch, 348 U.S. 468, 477 (1955), in which state power to grant an injunction was denied, Mr. Justice Frankfurter, speaking for the Court, stated that in Laburnum "this Court sustained the state judgment on the theory that there was no compensatory relief under the federal Act and no federal administrative relief with which the state remedy conflicted." 348 U.S. at 477. Mr. Chief Justice Warren, voicing a dissent in Gonzales, noted the above quotation in support of his contention that the issue of reinstatement and award of back pay was pre-empted. 356 U.S. at 625. The Chief Justice's concept of conflict is apparently that of the Hill case majority, a definition requiring no directness of conflict, but rather the dual existence of remedy. Mr. Justice Frankfurter, however, distinguishes a state remedy as for breach of contract in Gonzales from the injunctive relief sought in Weber v. Anheuser-Busch, supra, and like cases in which conflict was found to exist. 356 U.S. at 621.

The Gonzales and Russell cases, by their clear adoption of the concept of direct conflict as the test of congressional intent with respect to pre-emption, are important coincidentally for having clarified two questions, which, because of the specific facts in Laburnum, remained unanswered by the otherwise clear and concise doctrine therein set forth. These questionable areas involved the necessity of violence as an element in a tort which would be actionable under state jurisdiction and the effect of the availability of partial compensation before the Board.

In Weber, a case in which the Court made an attempt to delineate existing bounds of pre-emption, the violent tortious conduct in Laburnum was em-
phasized. Accordingly, in the Russell case, the principal contention of the respondent’s brief was that the plenary power of the states to deal with force and violence was not impaired by the act. Brief for Respondent, p. 38. In Gonzales, where there was an absence of violence, respondent argued that the activity of an unincorporated association in ousting a member is a field in which the Board is powerless to act. Respondent also noted that the state court did not deal at all with any act of the union which caused employers to discriminate against Gonzales; conduct which would fall under the cognizance of the Board. Brief for Respondent, p. 15. The court, however, deemed it appropriate to rest the decisions on broader grounds than those pertaining to violent unfair labor practices, and peaceful conduct not within the scope of the act. The Court’s analysis of the Russell case conspicuously ignored the issue of violence, while in Gonzales the Court conceded the possibility that expulsion from a union might in itself constitute an unfair labor practice.

The second question left unanswered by Laburnum was whether the rights of an employee before a state court were to be distinguished from those of an injured employer for whom the act provides no compensation. Fearing that the possibility of reinstatement and award of back pay by the Board would stand to defeat an employee, Russell argued in his brief that, with the possible exception of wrongfully discharged employees, the act provides no compensatory procedure, and the Board is not empowered to require a union to pay back wages in cases involving forceful and violent interference with the right of ingress to the place of work. Brief for Respondent, p. 48. But the Court, assuming that the Board would have had authority to award back wages to Russell, held that “Congress has not . . . deprived a victim of the kind of conduct here involved of common-law rights of action for all damages suffered. . . . [It] did not establish a general scheme authorizing the Board to award full compensatory damages for injuries caused by wrongful conduct.” 356 U.S. at 641-43.

These decisions have brought the pre-emption doctrine within the bounds of direct conflict. Litigation directed toward activity protected by the act remains an area within the pre-empted field. But conflict is absent in cases where the infringement of federal labor legislation is incidental to the violation of the common law or statutory law of the state. Only if the remedy sought in the state courts were similar to that available before the Board would conflict exist. As a result of the instant cases, similarity of remedy apparently amounts to injunctive relief. In the near future, the issue likely to face the Court concerns situations where the gravamen of a damage suit lies squarely within the framework of federal legislation and the area designedly controlled by federal policy, as opposed to a situation as in Gonzales where the breach of federal legislation could be considered incidental to the established state cause of action arising out of breach of contract. See Selles v. Local 174, Teamsters Union, 50 Wash. 2d 660, 314 P.2d 456 (1957), cert. denied, 356 U.S. 975 (1958), petition for rehearing filed, No. 649, U.S., June 27, 1958.
(state assumed jurisdiction in case involving discrimination in regard to hire through hiring hall device); Garmon v. San Diego Council, 49 A.C. 605, 320 P.2d 473 (Cal.), cert. granted, 357 U.S. 925 (1958) (damages awarded employer against union conducting peaceful picket lines in violation of section 8(b)(2) of the act).

One important concept of the pre-emption doctrine has been the Board's exclusive power and responsibility to make the original determination as to whether disputes arising on the labor scene fall within its cognizance. The reason for this is the furtherance of the policy favoring uniformity and equality in labor relations. This right apparently still obtains with respect to petitions for injunctive relief. But where labor activity occasions an action for damages based on state law, the state courts will henceforth be forced to decide, in the first instance, whether such activity is protected under the act. In the future, unions which dare to tread beyond federal rights firmly recognized as protected must brace themselves against harassing litigation founded on local law, possibly resulting in the final award of ruinous punitive damages.

RICHARD E. RANSOM
BOOK REVIEWS


"The powerful orator hulking his way slowly, thoughtfully, extemporizing . . . hands in pocket, head down and eyes up, wondering what it is all about, to the inevitable conclusion which he throws off with a toss of his shrugging shoulders: 'I don't know . . . We don't know . . . Not enough to kill or even to judge one another.'”

These words of Lincoln Steffens introduce a book which is probably the most valuable single addition to the wealth of current material dealing with the life of Clarence Darrow. The book is valuable because it is Darrow himself, with only the editor’s chapter notes, in a collection of his most famous speeches taken verbatim and but sparingly edited. They are for the most part summations to juries.

It was also Lincoln Steffens who first used the term “attorney for the damned” to designate the man identified with unpopular causes and defendants in a series of spectacular trials spanning the first quarter of the twentieth century. Of these, the causes are probably less well known than the defendants, but this volume deals with the most important of each.

The famous summation to the court in the Leopold and Loeb case is here, as are Darrow’s closing argument in the Massie case in Honolulu and the legal argument and cross-examination of William Jennings Bryan in the Scopes “Monkey Trial” at Dayton, Tennessee. Equally compelling to any reader, and probably of more lasting significance are the argument on freedom of speech in the Communist Labor Party trial in Chicago in 1920 and the powerful indictment of racial prejudice with which Darrow closed the Sweet case in Detroit in 1926. His summation for the United Mine Workers before the President’s Anthracite Miners Commission in 1903 has long served as a classic statement of labor’s right to organize.

Aside from the ever-increasing number of Darrowphiles, this book will interest any student of the issues which continue to stir America today as they have over the past fifty years. The constitutional issue which Darrow argued in the Communist Labor Party case in 1920 is essentially the same issue which courts have wrestled with in the Smith Act prosecutions of the last few years. Regrettably, the racial tension which erupted in violence when the colored Sweet family moved into

1 Weinberg, Attorney for the Damned (1957).
a white neighborhood in Detroit thirty-three years ago continues to pro-
voke similar incidents at the present time. Only in the field of labor has
there occurred the progress which Darrow predicted would resolve the
conflicts in which he strove.

But in addition to those who are primarily interested in the man or
in the causes he served, this book has great value for those who care
about neither. Clarence Darrow's work was the product of a marked tal-
ent, as well as idealism. Even if Darrow had never defended a man
charged with crime, argued the cause of labor, or spoken out against
capital punishment, it seems likely that this talent would have led to
accomplishment in another field because it was essentially the ability
to persuade other men. As he employed it, it was the ability to per-
suade twelve other men, usually against great odds, to think as he did
on a specific question of fact. Darrow was a master of the art of per-
suasion, essential to every lawyer, and of such basic importance that it
interests nearly everyone.

It is as case studies in the art of persuasion that the arguments con-
tained in this book may provide their greatest value. They are master-
pieces of effective oral presentation, so interesting that they compel the
attention of a reader completely lacking familiarity with the subject
matter, so simple that they can be understood by anyone who can under-
stand the Reader's Digest.

Several characteristics of Darrow's arguments may be noted. Al-
though always rational and inherently logical, they are plainly addressed
to the feelings of his listeners. It is as though he kept constantly in
mind the truism that there are many things that move men to action,
but logic is not one of them. The jury or court is never restricted to
the narrow confines of the case immediately before them; they are shown
how it relates to the greater struggle of mankind. Thus the jury trying
Big Bill Haywood is told that the defendant is not Darrow's greatest
concern. Darrow is speaking as well "for the poor, for the weak, for
the weary, for that long line of men, who, in darkness and despair,
have borne the labors of the human race."2 In the trial of twenty de-
fendants in the Communist Labor Party case, Darrow told the jury: "I
ask no consideration on behalf of any one of them. . . . They are no better
than any other twenty men; they are no better than the millions . . .
who have been prosecuted—yes, and convicted in cases like this."3 In
the Leopold and Loeb case he was "not pleading so much for these boys

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2 Id. at 486.
3 Id. at 123.
as . . . for the infinite number of others to follow."4 It was of these others that he was thinking and for them that he was begging the court "not to turn back into the barbarous and cruel past."5

Another characteristic is Darrow's ability to hammer away at a few simple basic themes which recur again and again in different form throughout each presentation. He apparently found skillful repetition as important in persuading a jury as it has been found in education generally.

Throughout these selections there are flashes of the moving eloquence for which Darrow was renowned. There are some descriptive passages, some quotations of poetry. Nowhere is there the slightest trace of pretext or even formality. The jury presentations particularly have the ring of a man talking to his friends and neighbors about an important subject of mutual interest.

Mr. Weinberg, who served as Executive Chairman of the Clarence Darrow Centennial Celebration held in Chicago last year, teaches a course on Darrow at the University of Chicago. His notes at the beginning and end of each selection are adequate to place Darrow's words in their proper perspective. His editing appears to have been both fair and restrained. The rest is pure Darrow, a man who "commanded the confidence of all who believe with him, and the respect of the great majority who do not."6

JOHN E. NOLAN, JR.*


Professor William J. Bowe's latest work, Estate Planning and Taxation, in two volumes, will be useful to practicing lawyers throughout the country, in both common law and community property jurisdictions. Of particular interest and help to the legal practitioner will be the forms of wills, trusts, contracts, and business purchase agreements, together with the model plans of varying type estates involving use of many estate planning techniques. For example, among the forms of wills are found sample forms for a widow, for a married man, several suggested forms with marital and non-marital trust clauses, dispositive arrangements for farms and business interests, and forms covering separate and

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4 Id. at 53.
5 Ibid.
6 Id. at 268.
* Member of the Bar of the District of Columbia.
community property interests for residents of the latter type jurisdictions.\(^1\) The forms of trust agreements, in addition to the customary revocable and marital deduction trust forms, also set forth sprinkling trust provisions, several types of short term trusts, and the relatively new type trusts to effect gifts to minors under Section 2503 of the Internal Revenue Code of 1954.\(^2\) The writer of this review has already had occasion to help an attorney draftsman accomplish an urgent assignment by referring him to the revocable insurance trust agreement form with marital deduction fractional share division, and knows from personal experience that the forms can be extremely helpful. Included among contractual forms, in addition to the usual business purchase, stock redemption, and buy and sell agreements, are deferred compensation contracts, a statement of conversion for joint tenancies into tenancies in common, and a charter of incorporation for a charitable foundation with proposed by-laws.\(^3\)

The books will also be a valuable reference for accountants, life underwriters, trust officers, investment brokers, and others interested in the estate planning field. They are prepared for pocket part supplements. A student edition of the work is available, which will have appeal for use in the law schools. For example, it would not be illogical for an estate planning professor to have his students use the student edition while he employed the larger two volume set to furnish model cases for class discussion as well as for the illustrative forms.

Volume I is divided into three parts, the first dealing with transfers at death, the second transfers during life, and the third devoted to a discussion of business purchase agreements. This division lends itself to a good general treatment under the first part of the federal estate tax as well as to a careful discussion of marital deduction bequests, residuary bequests of income and principal, other bequests and will provisions, and will substitutes. This writer thought the discussion on survivorship problems incident to the marital deduction under sections 2.7 and 2.19 were of particular interest. The subject of will substitutes is covered by chapter VI, and considers the field of jointly owned property, revocable trusts, distribution of life insurance proceeds, deferred compensation designations, and pour-over wills. This first division of Volume I is a logical entry into the entire subject, since it is most appropriate for the prospective learned estate planner to discover first what happens in a

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\(^1\) Bowe, Estate Planning And Taxation xxi-xl (1957).
\(^2\) Id. at xl-xlviii.
\(^3\) Id. at xlviii-li.
decedent's federal estate tax return so that he may attempt to prescribe measures which will carry out his client's objectives with the least possible tax impact.

The second division of Volume I deals with federal gift tax problems, including a full discussion of types of taxable transfers, gifts in contemplation of death, and sales within a family. The chapter dealing with the latter subject is of particular interest, and touches upon some of the capital gain and basis problems of the federal income tax law which must be considered. Full chapters are directed to the important subjects of trusts and life insurance. The third division of the first volume considers the closely held business interest and its valuation for estate planning purposes, as well as problems of the proprietorship, partnership and corporation forms of business entity and possible solutions. The key problem of valuation for estate and inheritance tax purposes receives careful treatment in the first chapter of this division. The forms mentioned earlier are set forth at the end of each of the three parts of Volume I, and a helpful summary index of these forms is located at the beginning of the book.

Volume II opens with a summary of state inheritance, estate and gift taxes, prepared by a contributor. Quite often the subject of state inheritance, estate and gift taxes is ignored in a work of this nature, and although it receives only sketchy treatment in this work, there is at least some attempt to recognize and consider the problems. Five separate model estate plans with forms follow, including two community property plans of Texas and California origin. The model plans were prepared and submitted by lawyers, trust officers, accountants, life underwriters and law professors from different areas of the country, and each contains its own special and significant features. For example, attention is given to the relatively modest estate, the substantial estate, jointly owned property and oil interests, the charitable foundation, farm properties, close corporation and partnership interests, and community property. The second volume closes with a section containing sample completed estate, gift and income tax returns, again for both common law and community property jurisdictions.

In summary, Professor Bowe brings to the field a freshness, a lucidity and a keen understanding of the problems of the everyday practitioner in this complex area. One might wish for a more detailed explanation of the Code and Regulations in several isolated instances, and it is hoped that when another edition appears there will be more references to cases

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4 Id. at 201-33, 467-90, 560-90.
and rulings. The second volume does not measure up to Bowe's own work in the first volume, and could stand improvement in the area of deferred compensation and jointly owned property problems. With all this, Professor Bowe's book makes a distinct and eminently practical contribution to the field of estate planning.

JOSEPH L. WHYTE*


This is a very unusual book because in it the authors have endeavored to cover the full sweep of the antitrust laws in both domestic and foreign commerce in the short space of about 300 pages. Quite obviously, only the highest of high spots can be considered in any detail and many important and controversial topics receive only passing treatment. Generally, however, the authors have chosen well the areas and topics for emphasis and extended discussion.

In form, the book is also somewhat unique in that throughout the book there are lengthy quotations from decided cases, reports and statements of congressional committees, and reports and statements of public officials, and thus may be considered a combined case and textbook. The lengthy extracts of opinions detract somewhat from the readability of the book, but in another respect they present authoritative statements rather than editorial comment and conclusion.

The book opens with a discussion of trade and commerce subject to the antitrust laws with particular emphasis on those fringe areas such as professional sports, theaters and insurance where the interstate aspects of the trade have, for one reason or another, sometimes been in doubt. There is an excellent analysis of the cases in this fringe area with extensive quotations from the leading cases.1

The authors next discuss monopoly and oligopoly with particular reference to recent cases on "relevant markets," and follow this discussion logically with a chapter on mergers and acquisitions. The impact and possible consequences of such leading cases as the Dupont-General Motors case2 with respect to vertical acquisition is ably discussed with extensive quotations from the opinion. An able comparison of "relevant

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market” as determined in the Cellophane and Dupont-General Motors cases is also included.3

The authors next consider the question of exclusive dealing from both the tying aspect and exclusive dealing aspect. One particularly interesting phase of this discussion is the explanation of the highly specialized problems peculiar to gasoline and automobile dealers.4 Since these topics have not yet been subjected to sufficient litigation to clarify the entire picture, the authors have been most helpful in searching the law review articles and public statements bearing on the topic. Perhaps the topic is overemphasized in so short a book directed toward the coverage of the antitrust laws as a whole; but the problems of the gasoline and automobile dealers are so widespread and have such an effect on the national and local economy that the overemphasis may be justified.

At this point it seems as though space could have been given to restraints of trade short of monopoly and other than tying and exclusive dealing, but the authors proceeded to the discussion of the more specialized topics of price discrimination and resale price maintenance.

The question of price discrimination has always been a highly controversial and uncertain area of law, and the authors have brought out the most recent publications and official pronouncements in order to bring the controversial points up to date. The price discrimination chapter contains copious quotations from the leading recent cases.

The chapter on resale price maintenance discusses the development of resale price maintenance from the old Dr. Miles case5 through the various statutory changes and constitutional vicissitudes of these laws. In addition to the strictly legal problems of resale price maintenance the authors have an interesting and illuminating discussion of the practical effectiveness of the fair trade laws.

The next two chapters relate to procedural and enforcement matters; one chapter discusses the Federal Trade Commission, its organization, operation and procedure, and the other discusses equity, criminal and damage suits brought by the Attorney General or private parties. The Federal Trade Commission chapter brings up to date the procedures and practices of the Federal Trade Commission with lengthy quotations from the most recent leading cases, and the chapter on equity, criminal and damage suits discusses the extent of permissible equity relief and consent decrees. The authors quote a statement by the Assistant Attorney General in charge of the Antitrust Division giving guide posts for deter-

3 Kronstein, op. cit. supra note 1, at 37.
4 Id. at 89-102.
5 Dr. Miles Medical Co. v. John D. Park and Sons Co., 220 U.S. 373 (1911).
mining whether criminal action will be brought, together with a discussion of the possible penalties and the effects of *nolo contendere* pleas. With respect to private damage suits, there is an illuminating discussion concerning the limitations on the type of injury for which damages may be sought and a discussion of the effects of the 1955 amendment to the Clayton Act permitting the United States to sue for triple damages for antitrust violations.6

The authors’ discussion of regulated industries and the antitrust laws seems somewhat overemphasized in a book of this scope because in many instances the application of the antitrust laws to regulated industries is so highly specialized as to constitute almost a separate and distinct phase of law out of the main current of antitrust.

The authors discuss three regulated industries: commercial banking, the oil and gas industry, and atomic energy. Most of the quoted materials are from public pronouncements rather than decided cases because in many of these fields the problems have not matured sufficiently for definitive litigation. The authors point out and discuss the interesting difference between the banking and oil businesses on one hand, which started out as completely competitive and which the public interest finally brought under regulation. On the other hand there is the atomic energy industry which started out as a tight Government monopoly and only now are controls being relaxed to permit the industry to move into competitive fields.

The final chapter, and the longest in the book, is an excellent discussion of restraints in international trade. The historical developments of the application of the antitrust laws to international trade and the effects and limitations brought about by the Webb Export Act are explained. The authors also explain the difficulties and problems which arise when international arrangements are made with foreign governments or branches of foreign governments or where the arrangements are required by foreign law.7

Within the limitations mentioned at the outset, this book should be of substantial help to the antitrust practitioner who wishes a quick and reasonably comprehensive rundown of the most recent developments, and should also be of interest to the law student or general practitioner who wishes a general survey of present antitrust law.

**BARTHOLOMEW A. Diggins***

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7 Id. at 284.

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